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Prepared by the ICC Commission on  
**Competition**

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# Comments on European Commission's review of rules applicable to horizontal cooperation agreements

## Highlights

- Analysis of the effects of the rules on information exchange
- Discussion on the various issues related to standardization

# Comments on European Commission's review of rules applicable to horizontal cooperation agreements

Prepared by the Commission on Competition<sup>1</sup>

## Introduction

ICC is pleased to comment on the Commission's draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (the "Draft Guidelines" or "Draft") and the Commission's proposed revised block exemption regulations regarding Research and Development and Specialisation. The Commission published its current guidelines on horizontal cooperation in January 2001 and the current block exemptions expire at the end of 2010 so the Commission's revised documents are a necessary as well as a useful and timely clarification of its view on a key area of competition policy.

On the whole ICC warmly welcomes the Commission's proposals which, for the most part, provide increased insight into the Commission's enforcement policies and much needed additional guidance for companies. In particular, ICC welcomes the inclusion of a dedicated section relating to information exchange and the efforts to clarify the rules on standard setting. While these two sections are the main focus of ICC's comments, we will also comment on some other proposed changes notably regarding R&D.

Our main comments on changes that might be incorporated in the final versions of the regulations and guidelines concern the need for more and better focused examples that would enable companies to carry out the necessary self-assessment of their agreements' compatibility with Article 101 of the Treaty on the Functioning of the European Union with greater confidence. In this context, it is regrettable that DG COMP has not in appropriate circumstances been more open to providing informal individual guidance to companies to help them carry out this self-assessment. While the publication of better guidelines is of considerable assistance to companies, activation of the possibility to provide guidance on novel questions in individual cases would also be very helpful.

## I. Information exchange

The Draft's section on information exchange is the Commission's first comprehensive distillation of its decisional practice and the European courts' case-law in this area. Until now the only relevant Commission guidance concerned maritime transport services.

### Generally

For the most part the Draft reflects existing case-law. ICC welcomes the clear statement in paragraph 55 that "Information exchange can only be addressed under Article 101 of the Treaty on the Functioning of the European Union if it establishes or is part of an agreement, a concerted practice or a decision of an association of undertakings". Likewise, ICC welcomes the recognition, in paragraph

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<sup>1</sup> The members of the ICC Task Force on the European Commission's Consultation on the Horizontal Guidelines are: Jacques Bourgeois (WilmerHale) (Chairman); François Brunet (Cleary Gottlieb Steen & Hamilton); Frédérique Chaput (Racine); Mark Clough (Addleshaw Goddard); Tim Cowen (BT); Frédéric Dupas (BT); Charlene Flick (U.S. Council for International Business); Damien Geradin (Howrey); Alan Hoffman (Alcatel Lucent); Patrick Hubert (Clifford Chance); James Killick (White & Case); Cormac O'Daly (WilmerHale); Mark Powell (White & Case); Anne Riley (Shell); Philippe Rincazaux (Orrick); Greg S. Slater (Intel); Jean-Yves Trochon (Lafarge); David Turetsky (Dewey & LeBoeuf); Hill Wellford (Bingham McCutchen); Marc Wiesner (VDMA); and Jeffrey Zuckerman (Curtis, Mallet-Prevost, Colt & Mosle).

58, of the pro-competitive aspects of information exchange; increased transparency can intensify competition and enable firms to realise efficiencies. On the whole the Draft Guidelines strike a good balance between these pro-competitive effects of information exchange and the possibility of restrictive effects under certain market conditions.

ICC considers that paragraphs 61 to 66 provide useful further detail on the Commission's main concerns, namely (i) the possibility that information exchange can enable agreement on terms of coordination leading to a collusive market outcome, (ii) the ability of an information exchange to increase internal stability of a collusive outcome by enabling deviations to be monitored and (iii) the ability, through increased market transparency, to monitor the reactions of third parties, such as new entrants who can then be targeted. These paragraphs also discuss the risk of anti-competitive foreclosure when competitors who are not involved in the information exchange are "placed at a significant disadvantage as compared to the companies affiliated within the exchange system". ICC notes the clarification that for this to occur, the information should be "very strategic for competition and cover a significant part of the relevant market".

### **Restrictions of competition by object**

As in the Draft's other sections, restrictions on competition are divided into restrictions by object and restrictions by effect. In line with existing case-law and the Commission's decisional practice, the Draft Guidelines categorise few information exchanges as restrictions of competition by object. Those that are – exchanging individualised information on future prices and quantities (sales, market shares, territories, or customer lists) and when information exchange is part of a cartel – are in the main uncontroversial.

Paragraph 68 also states, however, that some information exchanges on current conduct may reveal intentions on future behaviour and constitute restrictions by object. ICC submits that while this undoubtedly could be true and while it is difficult to provide concrete guidance on when this might happen, there is a danger in treating information exchanges regarding current conduct as a restriction of Article 101 of the Treaty on the Functioning of the European Union by object. ICC would like to see the final Guidelines incorporate a detailed and helpful example of when information regarding current conduct may reveal sufficient intentions regarding future behaviour. Example 1 of the Draft usefully instances an exchange of intended future prices but the more difficult situation for companies wanting to self-assess their compatibility with Article 101 of the Treaty on the Functioning of the European Union will be when a trade association or third party wants to collect information on current prices or output. There is real need for clarification on when this may infringe Article 101 of the Treaty on the Functioning of the European Union particularly if this is to constitute an infringement by object. The need for clarification is compounded as the applicability of sections of several Commission Guidelines and Block Exemptions relies on (potential) competitors adding up their respective market shares.

### **Restrictions by effect: generally**

Turning to how information exchanges may be restrictions of competition and infringe Article 101 of the Treaty on the Functioning of the European Union because of their effect, the Draft proposes comparing the likely effects of the exchange with the counterfactual situation that would have prevailed in the absence of the exchange. Paragraph 69 specifies that the effect must be an "appreciable adverse impact on one (or several) of the parameters of competition such as price, output, product quality, product variety or innovation". The following paragraph introduces the market contexts that are more apt to make coordination easier to reach and sustain. ICC notes and welcomes the emphasis on how the information exchange may change the market context and render it more transparent and suitable for collusion; the analysis must not be an entirely static one focused on prior market conditions.

The Draft contains relatively detailed discussion on the three principal factors that the Commission and companies carrying out self-assessment must take into account. These are said to be (i) market coverage; (ii) the market's characteristics and how the exchange of information modifies these characteristics; and (iii) the type of information exchanged.

## **Market coverage**

ICC regrets the Commission's reluctance to provide a clearer safe harbour on a degree of market coverage that would not infringe Article 101 of the Treaty on the Functioning of the European Union. While ICC appreciates the sentiment that this degree will depend on the specific facts, it would have welcomed a clearer statement on a possible threshold below which, absent unusual circumstance, Article 101 of the Treaty on the Functioning of the European Union would not normally be infringed. In this context, the pro-competitive aspects of information exchange in the form of greater ability to realise efficiencies and benchmarking should dictate that this threshold be higher than what the Commission suggests in the *De Minimis* Notice and other sections of the Draft Guidelines.

## **Market characteristics**

In contrast, ICC welcomes the discussion in paragraphs 73 onwards on market characteristics and, in particular, the emphasis on how these characteristics may be fundamentally altered by an information exchange. As paragraph 73 states, "the competitive outcome of an information exchange depends not only on the initial characteristics of the market in which it takes place (such as concentration, transparency, stability, complexity etc.), but also on how the type of the information exchanged may change those characteristics".

## **Type of information exchanged: ICC suggests a number of improvements to the Draft**

As for the type of information exchanged, the Draft gives guidance on what is commercially sensitive or strategically useful information and considers a number of other relevant factors, some of which are developed in the examples at the end of the section. Overall, ICC recommends that this section could be substantially improved by use of more detailed and borderline examples. For example, while exchanging turnover attributable to sales of one product may be commercially sensitive, the same may not be true for turnover for a wider range of products.

One of the more controversial aspects is undoubtedly going to be the discussion on public/non-public data. The Draft states that "in general, exchanges of genuinely public information are unlikely to constitute an infringement of Article 101" and defines genuinely public information as "information that is equally easy (*i.e.* costless) to access for everyone". Thus, not all information in the "public domain" is genuinely public information if "the costs involved in collecting the data discourage to a sufficient degree other companies and buyers from doing so". ICC submits that determining whether the costs involved will deter companies from collecting data is a very difficult assessment to make and that more clarification, perhaps by use of examples, is required. While it is unquestionably true that the ability to access information in the market, for example by means of a customer survey, does not make information genuinely public, it is less clear to ICC that for information to be genuinely public, it ought not be less costly for buyers (including consumers?) to obtain it. While the reasons behind this part of the Draft have some logic, they may be setting a somewhat unrealistic standard as there will practically always be greater cost for a buyer or consumer to obtain even publicly available information than for those in the industry. This is particularly true if by "cost" one is to consider not just monetary costs but also time and effort.

Regarding the public or non-public nature of the exchange, the Draft considers that a genuinely public exchange should make the exchanged data "equally accessible to all competitors and buyers". This begs a number of questions that ICC considers the Commission should clarify in its final version of the Guidelines. First, is publication in a well-known trade magazine sufficient to make an exchange public? Second, what about publication on a trade association's or other publicly accessible website? Third, while these two forms of publication may be enough to make information publicly available to competitors, it may not be as available to consumers but should this necessarily matter? ICC notes that publication on a freely accessible website is one of the factors on which Example 2 seems to turn but would welcome a more clear statement to this effect. Such publication should make the underlying data genuinely public.

ICC submits that the example and section related to aggregated/individualised data is unsatisfactory. The example concerns exchange of individualised data, which is more difficult to reconcile with Article 101 of the Treaty on the Functioning of the European Union. The consideration of aggregated data in

paragraph 85 concentrates on it being used as a device to monitor a collusive outcome. The more vexed and practical question on exchange of aggregated data concerns aggregation of data by a third party and when companies might be able to disaggregate this data and identify competitively sensitive information pertaining to their competitors. Some rules of thumb on when data can be considered "aggregated" (e.g. minimum number of participants) and on when it is safe to publish aggregate data would be useful and could be developed in well-worked examples. ICC regrets that the Commission has not sought to do this in the Draft and would encourage that this be rectified in the final Guidelines.

Likewise, the treatment of historic versus non-historic data is not as helpful as it might be. In particular, Example 5, which discusses exchange of three year old data when prices are renegotiated every three months, is not very useful. Companies will be far more interested in considering whether exchange of much more recent data is permissible; they frankly are not interested in data that is years' old when contracts and prices are negotiated frequently. The Commission should therefore strive to provide some more borderline examples on this subject. It would also be salutary if the Commission could make clearer whether it still accepts the "one year rule" noted in the Draft's footnote 57.

### **Article 101(3) of the Treaty on the Functioning of the European Union assessment**

ICC welcomes the paragraphs relating to analysis of information exchanges under Article 101(3) of the Treaty on the Functioning of the European Union. In particular, the discussion on efficiencies notes both the efficiencies that may result from cost savings for suppliers and the reduction in costs, such as search costs, for consumers. The creation of efficiencies for consumers is obviously part of the test under Article 101(3) of the Treaty on the Functioning of the European Union as efficiencies must be passed on to consumers but the ability of consumers to benefit from efficiencies should also be remembered in appropriate cases when determining whether exchange of particular data is indispensable.

## **II. Standardisation**

### **Generally**

The revised and lengthened section on standardisation is probably the Draft's most awaited and controversial element. It builds on the Commission's practice in investigations such as Rambus and Qualcomm and re-emphasises what has already become clear in speeches by DG COMP officials namely that this is a key policy area for the Commission.

ICC recognises that this is a complex area and commends the Commission for providing much more detailed and sophisticated guidance than is present in the current guidelines on horizontal agreements. The Draft discusses the benefits of standardisation in paragraphs 258 and the paragraphs devoted to efficiencies. Echoing the point in paragraphs 168 and 169 of the existing guidelines, draft paragraph 290 states that high market shares will not necessarily give rise to competition concerns as a standard's effectiveness is often proportionate to the share of the industry involved in establishing and implementing the standard. The Draft also outlines the Commission's principal general concerns over standard setting in paragraphs 259 to 262 and 275. In contrast to the existing guidelines, the Draft proposes to examine the effects of standardisation on four markets. The upstream technology market is now included alongside the markets for the product or service to which the standard relates, the service market for standard setting, and the market for testing and certification.

### **Restrictions of competition by object**

Given the substantial benefits of standardisation, it is hardly surprising that the discussion of restrictions of competition by object is short. The Commission's main focus, quite correctly, is on when standard setting is used as part of a broader restrictive agreement or a cover for a cartel.

The reference in paragraph 267 to a restriction by object when intellectual property rights ("IPR") holders agree "on the licensing terms they will disclose" before adopting the relevant standard is more confusing and troubling. In particular, it appears difficult to square this with paragraph 287 welcoming disclosure of most restrictive licensing terms, including individual disclosure of maximum royalty rates. ICC considers that the precise ambit of the phrase in paragraph 267 needs to be clarified in the final

version of the guidelines. Does the phrase simply mean, as again reflected in paragraph 287, that companies should not have joint negotiation/discussion of royalty rates?

Still on the subject of the proposal in paragraph 287 that during the standardisation process IPR holders may individually disclose their most restrictive licensing terms, ICC suggests that the Commission add a sentence similar to the statement made by the United States antitrust agencies in 2007 when they softened their policy toward *ex ante* disclosures: "The Commission does not suggest that standard-setting organizations must require such disclosures, and takes no position as to whether they should or should not do so."

### **Restrictions of competition by effect: generally**

Like the current guidelines, the Draft emphasises that the nature of the standard and the markets concerned are central to determining whether its effects restrict competition. ICC particularly welcomes the discussion of the different motivations of upstream-only, downstream-only and vertically-integrated companies in paragraphs 270 to 274 as a background to this analysis.

### **Introduction of a safe harbour**

ICC supports the concept of the safe harbour provided in paragraphs 276, 277 *et seq.* It is worth quoting paragraph 277 in full:

*Where participation in standard-setting, as well as the procedure for adopting the standard in question, is unrestricted and transparent, standardisation agreements which set no obligation to comply with the standard and provide access to the standard on fair, reasonable and non-discriminatory terms do not restrict competition within the meaning of Article 101(1).*

ICC understands that whether or not an agreement falls within the safe harbour is only part of the analysis of its compatibility under Article 101 of the Treaty on the Functioning of the European Union. If all of the conditions in paragraph 277 are not fulfilled, individual assessment is required and it by no means follows that the standard setting infringes Article 101(1) of the Treaty on the Functioning of the European Union. It may, moreover, also be possible that the standard setting falls under the exception in Article 101(3) of the Treaty on the Functioning of the European Union. This is just as well as many standard setting agreements do not fulfil all the conditions of the proposed safe harbour. In particular, not all standards are voluntary (a fact discussed below in relation to environmental agreements) and the rules regarding what constitutes access to the standard on fair, reasonable and non-discriminatory ("FRAND") terms are nearly always open to discussion. The Draft's provisions on disclosure of IPRs and FRAND terms will unquestionably be the subject of numerous comments and ICC focuses on those below.

ICC would meanwhile observe that more guidance on what constitutes unrestricted and transparent procedures could be useful. While paragraphs 278, 301 and 307 are helpful in this regard, the Commission has considered this question in more depth in the ICT sector in the past.

### **Disclosure of essential IPR**

The Draft expresses a clear preference for standard setting organisations that encourage or require *ex ante* disclosure of potentially essential IPR including patent applications. Thus the Draft stipulates that IPR policies must require companies to "make reasonable efforts" to identify such IPR.

ICC would welcome some guidance on what reasonable efforts might constitute in this context. In particular, it should expressly be stated that a company need not go as far as to carry out patent searches for all potentially essential IPR. It could also perhaps be specified that a statement by a company representative with expert knowledge in the relevant field on whether the company has IPR or pending IPR would be sufficient.

Given the Draft's understandable, but clear, preference in favour of *ex ante* disclosure, uncertainty on the extent of the efforts required in this area risks discouraging companies from participating in legitimate standard setting. This is all the more so as it may not always be easy to identify IPRs that might prove essential to a standard.

## **FRAND commitments**

The Draft also strongly encourages making irrevocable written commitments to license essential IPR on FRAND terms. Moreover, it considers that when companies transfer IPRs, the transferor must take all necessary measures to ensure that the transferee is bound by the FRAND commitment.

This is welcome and the main area of contention in this section is the discussion on the meaning of FRAND terms. The Commission is to be commended on tackling this often vexed issue. Requiring mandatory upfront written commitments to FRAND terms is essential to a balanced standardization process. But this must not discourage companies, from both an economic and innovation perspective, from participating in legitimate standard setting. It is important that the legitimate commercial interests of IPR holders and their right to expect a fair return on their investment and innovation not be forgotten.

The Draft considers effectively that a non-FRAND royalty is an excessive royalty in the meaning of the case-law and Commission practice on Article 102 of Treaty on the Functioning of the European Union, namely it is a charge that bears no reasonable relationship to the economic value provided<sup>2</sup>. Rather, however, than using cost-based models, the Draft indicates a preference for measuring a proposed royalty's reasonableness by comparing it to fees charged before the IPR became part of the adopted standard. While the Draft appears to recognise the possible limits of this approach (paragraph 284's assumption that this "comparison can be made in a consistent and reliable"), it is surely not excluded that a company could charge some reasonable increment for use of its IPRs when they are embodied in a standard, which will allow the licensee to make more use of the licensed IPR. ICC would also submit that *ex ante* disclosure of royalty rates will not work well in all industries – for example in complex dynamic standard setting the extent and ownership of patents may not even be known or stable *ex ante*.

The Draft also refers to use of independent expert assessment to value the IPR portfolio's objective quality and centrality to relevant standard and reference to a company's *ex ante* disclosure of most restrictive licensing terms, including maximum royalties. The final Guidelines should specify that third party experts should also take account of IPR holders' legitimate commercial interests and their right to a reasonable commercial return.

As noted above, individual disclosure of maximum royalties is expressly welcomed in the Draft.

The Draft does not, however, consider a number of aspects of FRAND and inclusion of some guidance on these may avoid future disputes in this area. It would be good to see some discussion on how to assess both what royalty levels individually, and in the aggregate, are compatible with FRAND commitments. In addition, the Draft has no guidance on the non-discriminatory aspects of FRAND. The need to preserve IPR holders' incentives to invest in innovation should also be given more recognition.

## **Inclusion of substitute technologies in a standard**

The section on the potentially restrictive effects of standardization also contains a paragraph (288) on substitute technologies, which ICC would like to address. The paragraph seems to suggest that the inclusion of substitute technologies limits inter-technology competition and will likely infringe Article 101 of Treaty on the Functioning of the European Union. ICC would submit that this is an overly broad statement and disagrees, in particular, with the statement that the inclusion of substitute technologies

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<sup>2</sup> *Even though these are Article 101 TFEU Guidelines, the Commission should clarify the language in paragraphs 262 and 284, which appears to assume that any party that holds IPR essential to a standard automatically has obtained a dominant position within the meaning of Article 102 TFEU. That would be an unwarranted assumption. For example, standardised technology may compete with other standardised and non-standardised technology. In such a case it cannot without further assessment be presumed that a holder of an essential patent also attains a dominant market position. The Commission should have to make a careful market analysis in each case, not just gloss over the establishing dominance.*

may prevent a potentially competing alternative technology from being included in a different standard. The Commission needs to explain this better; for ICC it is far from clear why this would necessarily be the case.

It would appear that this paragraph is inspired by statements in the patent pools section of the Commission's Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements. The relevant sections in that document distinguish between complementary and substitute technologies. Whatever the merits of such statements in the technology transfer guidelines, ICC would submit that paragraph 288 is out of place in a discussion on standardization. Paragraph 306, which states that not all specifications or technologies should be included in a standard, paragraph 308, which states that standards agreements should cover no more than what is necessary to ensure their aims, and a meaningful FRAND commitment already are sufficient to alleviate any concerns the Commission may have about over-inclusion of technology in standards.

### **Applicability of standardisation section to environmental agreements**

The Draft's paragraph 252 states that agreements "setting out standards on the environmental performance of products or production processes" are covered by the general section on standardization. This contrasts with the current guidelines, which have a dedicated section analyzing the compatibility of environmental agreements with Article 101 of the Treaty on the Functioning of the European Union.

ICC has the following observations. First, while the Draft favours voluntary standards, most environmental standards set mandatory rules. This sits awkwardly with statements in paragraphs 269 and 309. The compulsory nature of environmental standards is not, moreover, addressed in Example 5, which states that the involvement of the public authority is irrelevant. Second, ICC questions the ongoing relevance, if any, of the current guidelines' separate section on environmental agreements. Can companies rely on it to any extent after introduction of the new guidelines? If not, the Commission should expressly state this. Third, ICC would have thought that more, not less, guidance is needed on environmental agreements.

For the avoidance of doubt, ICC does not believe that the new guidelines must necessarily include a separate section on environmental agreements. But ICC would submit that more examples concerning environmental agreements be provided and that appropriate provisos be inserted in relevant places acknowledging their mandatory nature. In a similar vein, the Commission could also provide examples analyzing standards in other areas such as, for example, health and safety and consumer protection.

### **Discussion on standard terms**

Finally, the standardization section also discusses the use of industry standard terms. This was formerly contained in the standard policy conditions provisions of the insurance block exemption. While ICC considers it more coherent to include such material in the general horizontal guidelines, consideration could be given to having standard terms in either a separate section or else at the end of the standardization section. The current interspersing of standard terms and standardization makes reading the Draft Guidelines somewhat more difficult.

Generally ICC welcomes the material on standard terms. Quite correctly the Draft notes their positive effect in industries and only expresses concern where the standard terms affect the scope of the product sold to the customer (in which case they may limit product choice and innovation), or where they affect the products' actual sale price or other limited parameters of competition, or where the standard terms entrench a widespread practice and may lead to establishment of a *de facto* standard, which might constitute an entry barrier.

## **III. ICC's other main comments**

ICC supports much of the Draft's efforts to clarify and update other parts of the existing guidelines. The following comments are not exhaustive but concentrate rather on some of the potentially more

significant changes proposed.

### **The introductory section and general approach**

In line with more recent case-law and practice, the Draft attaches greater importance to the distinction between restrictions of competition by object and restrictions by effect. This is to be welcomed.

The Draft also clarifies the analysis of joint ventures: parent companies with decisive influence will be treated as a single economic entity. While this clarification is useful, it should not follow that parent companies should automatically be liable for fines imposed on a joint venture for participating in a cartel. The parents may have no knowledge of the cartel activities and the judgments of the European courts regarding parent/subsidiary liability should not mechanically be transposed to parent/joint venture scenarios.

The Draft replaces the current guidelines' focus on an agreement's "centre of gravity" to determine which section of the guidelines is most relevant by focussing on the agreement's "most upstream indispensable building block of [the] integrated cooperation". The expression is more cumbersome, but this probably facilitates analysis.

### **Research & development**

ICC is disappointed that the Commission did not act on the proposal, made during the initial consultation in 2008-09, that the horizontal guidelines be redrafted to include a detailed explanation of the Commission's reasoning in drafting the provisions of the R&D block exemption, and how they are to be interpreted and applied. Such an explanation is included in both the Guidelines on Vertical Restraints and the Technology Transfer Guidelines.

The revised block exemption also contains some amendments, which ICC feels unnecessarily narrow the parties' choices of possible arrangements for production or distribution of the product resulting from the R&D, or which add to, or fail to clarify, ambiguous language.

There are new definitions for "specialisation in research and development" and "specialisation in exploitation", both of which appear to limit further the parties' options while introducing new uncertainty.

Draft Article 1(12) amends the definition of "specialisation in research and development" by specifying that "This does not include a scenario where one party carries out all the research and development and the other party merely finances these activities or exploits the results." It is not clear to ICC why the proposed new policy that funding is not sufficient "specialization" is justified. Often R&D which could contribute to society's welfare will not take place unless third-party funding is made available, for example in the case of a start-up willing to develop a new technology but lacking the funds to do so. Unless the Commission extends legal security to such arrangements, the potential investor may well hesitate to commit the funds.

The definition of "specialisation in research and development" states that "each of the parties [must carry] out some of the research and development activities". Guidance on the meaning of what is sufficient to constitute "some" R&D would be helpful. The contribution of specifications or know-how should meet this definition: there has never been a requirement in the block exemption that an R&D programme be allocated "equally" among the parties because it is almost impossible for the Commission or any third party to value each party's contribution. Without the formulation of specifications by one of the parties, the programme might never get started. At first glance a party's contribution might appear minimal but it could be critical. Therefore, the scope of "some" should be interpreted broadly.

The definition of "specialisation in exploitation" in Article 1(13) is troubling. The first sentence states that "each of the parties must carry out some of the exploitation of the results in the internal market." Moreover, "each party must carry out in the internal market some distribution activities regarding the contract products". In addition, it is said that "this does not include a scenario where only one party produces and distributes the contract products on the basis of an exclusive licence granted by the

other parties.”

ICC is aware that the current R&D block exemption has been interpreted by legal advisors as permitting one of the parties to be the sole manufacturer and the sole distributor of the product resulting from the R&D within the EEA, subject to “passive sales” into the EEA by the other party(ies). Such an arrangement is particularly appropriate when only one party is based in Europe and is already familiar with the EEA market. European companies would have less incentives to invest in a joint R&D program if European competition law would require the active entry of a new competitor from outside the EEA as the price for obtaining legal security. Moreover, a supplier based in another region of the world may not necessarily want to be compelled to undertake the expense of entering the European market. Therefore, ICC respectfully submits that the proposed requirements that each party carry out some exploitation in the EEA, and in particular carry out some distribution activities within the EEA, be deleted. Further, an arrangement in which only one party manufactures and distributes the product should not be arbitrarily excluded from the coverage of the block exemption.

In stating that “it is sufficient if only one party is in charge of the production of the contract products”, the draft begs the question whether it is acceptable to specialise in distribution if there is no specialisation in manufacture, *i.e.*, each party manufactures separately. This question has been debated but apparently left unresolved since the time of the predecessor to the current R&D block exemption, with most scholars concluding that specialisation in manufacture is not a prerequisite of specialisation in distribution.<sup>3</sup> Now would be a good opportunity for the Commission finally to confirm that the parties may specialise in distribution only.

The draft block exemption defines a potential competitor as one that on realistic grounds would enter the market within three years absent the agreement. ICC finds the selection of this time limit puzzling. Why has a limit of three years been chosen for this block exemption, while for the vertical agreements block exemption regulation the limit that has been established is only one year? (See Guidelines on Vertical Restraints, paragraph 27.) Moreover, a three-year limit seems particularly inappropriate to technology-based industries: in many such sectors, after three years a new generation of technology is often already being rolled out. A three-year limit can only create additional confusion in the application of the regulation; ICC therefore proposes a one-year limit, which is more realistic and also consistent with the vertical agreements block exemption.

A striking proposed change is the introduction of a new condition for the block exemption's application. Under proposed Article 3(2), the parties must disclose all their existing and pending IPR “in so far as they are relevant for the exploitation of the results [of the R&D] by the other parties”. ICC recognises that this provision is designed to prevent future hold-up issues. ICC's above comments on the extent of the efforts that must be made to identify existing and pending IPR in standard setting apply similarly here.

In proposed Article 3(4), the Commission has deleted the following sentence, which appears in the current block exemption: “Such right to exploitation may be limited to one or more technical fields of application, where the parties are not competing undertakings at the time the research and development agreement is entered into.” Is it the intention to exclude this possibility of limiting exploitation rights of non-competitors by field of use? If so, ICC does not see an obvious justification for the change.

Turning to the revised list of “hardcore” (blacklisted) restrictions, the Draft misses the opportunity to clear up another ambiguity that has persisted in earlier versions of the regulation: Draft Article 5(a) maintains the rule that the parties must be free “to carry out research and development independently or in cooperation with third parties ... after [the joint programme's] completion, in the field to which it relates or in a connected field.” Does this preclude the parties agreeing not to sell products that

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<sup>3</sup> See, e.g., V. Korah, *Research and Development and the E.E.C. Competition Rules: Regulation 418/85 (1986)*, §3.1.7; S. Poillot-Peruzzeto, *L'application du règlement 418/85 de la Commission relatif aux accords de recherche et de développement*, RTDE n°23, juill.-sept 1987, p. 481, 491; Ritter and Braun, *European Competition Law: a Practitioner's Guide* (3d ed. 2004), p.218.

compete with the product resulting from the joint R&D until the end of the period of exemption? Exempting such a non-compete clause is consistent with the exemption of "sales targets" in Article 5(b).

Article 5(c) continues the policy of exempting "the fixing of prices charged to immediate customers." Does this mean that a limited form of resale price maintenance is exempted? For example, may the party that manufactures the product set the resale price applied by the entity(ies) distributing the product?

ICC is meanwhile pleased that the Commission has extended, in Articles 5(d) and 5(e), the right to maintain exclusive distribution territories, exempted by the current regulation, to include exclusive customer groups. This amendment is consistent with the vertical agreements block exemption regulation.

### **Production agreements**

ICC welcomes two important clarifications regarding the treatment of production agreements. First, it is now specified that the guidelines apply to all forms of joint production including horizontal sub-contracting agreements. Second, it is recognized that unilateral specialization agreements include the situation where one party *partly* ceases production of a product.

Regarding the parties' ability to fix prices for jointly distributed products, ICC welcomes the deletion from draft paragraph 155 of the requirement to have a "production joint venture" (paragraph 90, second indent of the existing guidelines); this expression was vague and it should be sufficient that joint setting of sales prices be necessary for integrating the production and distribution functions of the agreement.

Paragraphs 169 to 173 discuss commonality of costs. ICC refers to its comments in relation to this subject under commercialization agreements below.

As for the somewhat revised block exemption regulation, ICC refers to its comments above on the introduction of a new definition of potential competitor. ICC also notes the apparent introduction, in draft recital 10, of a second market share threshold of 20% on the merchant market where the agreement concerns intermediary products used captively in the production of downstream products. While ICC understands the Commission's concern over input foreclosure, the introduction of a dual market share threshold complicates the block exemption and may lead to greater uncertainty regarding its application.

### **Purchasing agreements**

Paragraph 201 posits a fundamental distinction between fixing purchase prices, which is an infringement of Article 101 of the Treaty on the Functioning of the European Union by object, and where "in the context of purchasing agreements ... the parties to a joint purchasing arrangement agree on the purchasing prices the joint purchasing arrangement may pay to its suppliers for the products subject to the supply contract". The latter situation is at most a restriction of competition by effect. ICC questions whether more guidance could not be provided on this central distinction.

ICC believes that in the context of joint purchasing the 15% market share "safe harbour" in paragraph 203 is too low. ICC suggests that the Commission substitute a 20% threshold, which would be consistent with the policies of competition law agencies elsewhere, such as those in the United States.

When assessing if the parties to a purchasing agreement have market power, paragraphs 206 and 207 appear to require the parties to undertake a significant effort in detecting the "number and intensity" of networks of agreements between them and their competitors. This may prove difficult where several parties are involved. It may also be risky as it entails certain information sharing, especially on the "intensity" of any such links.

Paragraphs 208 and 209 contain new discussion on commonality of costs. Again ICC refers to its comments in relation to this subject under commercialization agreements below.

Also, as in other sections in the Draft, there is increased emphasis on the need to pass on benefits to consumers in the analysis under Article 101(3) of the Treaty on the Functioning of the European Union, which the ICC supports.

### **Commercialisation agreements**

The most significant change to the Draft's section on commercialisation agreements is the proposed new section on commonality of costs in paragraphs 237 and 238. While this factor is mentioned in paragraph 146 of the existing guidelines, it appears that it will assume far greater importance.

The Draft considers that a commercialisation agreement may restrict competition if it increases commonality of variable costs "to a level which is likely to lead to a collusive outcome". It adds that this will be the case if before the agreement the parties already had a high proportion of variable costs in common as the additional increment could "tip the balance towards a collusive outcome". Similarly, if the increment is high, the risk of collusion may be high even if the initial level of common costs is low. Paragraph 238 specifies that commonality of costs only increases the risk of a collusive outcome if the parties have market power and if the commercialisation costs are a large proportion of the products' variable costs.

Economically this would all appear to make sense. ICC submits, however, that some benchmarks or at least further guidance should be provided. For example, what is the level at which existing common costs are likely to give rise to concern? Could the Commission specify a percentage increment that will not generally give rise to a risk of tipping towards a collusive outcome? Finally, what joint market share could be regarded as a safe harbour under paragraph 238? Is this higher than the 15% joint market share used elsewhere in this section? Such questions apply similarly in the other sections of the Draft that refer to commonality of costs.

# The International Chamber of Commerce (ICC)

ICC is the world business organization, a representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world.

The fundamental mission of ICC is to promote trade and investment across frontiers and help business corporations meet the challenges and opportunities of globalization. Its conviction that trade is a powerful force for peace and prosperity dates from the organization's origins early in the last century. The small group of far-sighted business leaders who founded ICC called themselves "the merchants of peace".

ICC has three main activities: rules-setting, dispute resolution and policy. Because its member companies and associations are themselves engaged in international business, ICC has unrivalled authority in making rules that govern the conduct of business across borders. Although these rules are voluntary, they are observed in countless thousands of transactions every day and have become part of the fabric of international trade.

ICC also provides essential services, foremost among them the ICC International Court of Arbitration, the world's leading arbitral institution. Another service is the World Chambers Federation, ICC's worldwide network of chambers of commerce, fostering interaction and exchange of chamber best practice.

Business leaders and experts drawn from the ICC membership establish the business stance on broad issues of trade and investment policy as well as on vital technical and sectoral subjects. These include financial services, information technologies, telecommunications, marketing ethics, the environment, transportation, competition law and intellectual property, among others.

ICC enjoys a close working relationship with the United Nations and other intergovernmental organizations, including the World Trade Organization and the G8.

ICC was founded in 1919. Today it groups hundreds of thousands of member companies and associations from over 120 countries. National committees work with their members to address the concerns of business in their countries and convey to their governments the business views formulated by ICC.



**International Chamber of Commerce**

*The world business organization*

**Policy and Business Practices**

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