
WilmerHale Comments on the EU Commission's Draft Horizontal Cooperation Guidelines

JULY 6, 2010

The European Commission recently published draft guidelines on the applicability of Article 101 TFEU (formerly Article 81 EC) to horizontal cooperation agreements concluded between competitors.

The relevant Commission documents, including the draft guidelines and revised block exemptions on R&D and Specialisation, are available at ec.europa.eu/competition/consultations/2010_horizontals/index.html.

The most noteworthy changes compared to the current Guidelines on horizontal cooperation are the inclusion of a new section focusing on information exchange and a revised section on standardisation.

WilmerHale has submitted comments in response to the Commission's public consultation on these documents. The full text of our submission is available [here](#). Many of our comments reflect reaction to the presentation made at WilmerHale's *Senior Expert Forum* in Brussels by DG COMP's Dr. Henning Leupold on 19 May 2010. Dr. Leupold is one of the principal drafters of the proposed guidelines.

Our main recommendations are as follows:

- The Guidelines should not contain any general presumption regarding parent company control of joint ventures.
- On information exchange, the Guidelines should emphasise further the distinction between unilateral publication to customers and reaching an agreement/concerted practice through publishing.
- The circumstances in which an information exchange constitutes a restriction of Article 101(1) by object should be narrowed, because the rules may be difficult to apply in some situations and the conduct concerned may therefore not be patently unlawful.
- It would be useful if the section on information exchange would contain a safe harbour and rules of thumb which would apply, absent unusual circumstances.
- The Guidelines should better define "genuinely public information". As currently drafted, too

many issues remain open. We also question the relevance of the criterion that to be "genuinely public", information should be "costless".

- On R&D, we regret that proposed changes to the block exemption (including the relevant IP disclosure obligation) would narrow its scope when, if anything, we think it should be broadened to better support the varied "research as business" structures which often arise in practice.
- On standardisation, the Guidelines should explain the meaning of "good faith disclosure" and the "reasonable efforts" that a company must use to identify potentially essential IPR.
- The Guidelines should elaborate on the meaning of FRAND licensing including, considering the availability of injunctive relief, the impact of innovation outside the standard, and the non-discriminatory aspect of FRAND.
- *Ex ante* joint negotiation or discussion of licensing terms should be examined under Article 101(1) and 101(3) and not be considered an infringement by object.
- Greater recognition should be given to the mandatory nature of environmental standards—more, not less, guidance is needed in this (highly topical) area.

The European Commission should adopt the new Guidelines and new block exemptions before the end of the year.

Authors



Cormac O'Daly

PARTNER

✉ cormac.o'daly@wilmerhale.com

☎ +44 (0)20 7872 1534