

CPI Antitrust Journal

February 2011 (1)

Escaping Effects Analysis: The Commission's New Approach to Restrictions by Object

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I. INTRODUCTION

The Commission must be commended for having issued new Guidelines on horizontal cooperation agreements that, in terms of the analytical framework, in many ways is a clear improvement over the previous version of the Guidelines.² The Commission makes clear in the new Guidelines that the analysis of horizontal cooperation agreements cannot be limited to considering cost commonalities. It is necessary to consider also the express or implicit restrictions contained in the agreement and how the agreement affects the parties' incentives. Cost commonalities form part of this latter analysis, but are only part of the picture. It is likely that users will find the new Guidelines more useful than their predecessor when engaging in self-assessment.

However, the Commission has also used the revision of the Guidelines to expand the notion of restrictions by object and reduce the number of cases in which it is required to prove likely adverse effects on competition before the parties are required to invoke the efficiency defense and provide evidence that the four conditions of Article 101(3) TFEU are satisfied. In the case of restrictions by object adverse effects on competition are presumed.³ A more inclusive approach to restrictions by object means that in many more cases it falls on the parties to make a credible efficiency defense before the Commission is required to show likely effects on competition.⁴

It is submitted that this change in policy is unjustified as a matter of law and economics and that it risks creating uncertainty for a whole range of agreements that for good reason have never attracted much antitrust scrutiny. This is illustrated by the approach in the new Guidelines to joint production agreements.

II. THE NEW APPROACH

In the new Guidelines and the accompanying block exemption regulation,⁵ the Commission distinguishes three categories of agreements, namely agreements that have restrictive effects on competition, agreements that have as their object to restrict competition, and, finally, a subset of the latter agreements containing so-called hardcore restrictions. The novelty is that the Commission defines a significant category of agreements that are not hardcore

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² Guidelines on the application of Article 101 TFEU to Horizontal co-operation agreements, OJ [2011] C 11/1, hereinafter "Guidelines."

³ See e.g. Case C-49/92 P *Anic Partecipazioni* [1999] ECR I-4125, ¶99.

⁴ See in this respect Guidelines on Vertical Restraints, OJ [2010] C 130/1, ¶47.

⁵ See Commission Regulation 1217/2010 on the application of Article 101(3) TFEU to certain categories of research and development agreements, Article 4, OJ [2010] L 335/36; and Commission Regulation 1218/2010 on the application of Article 101(3) to certain categories of specialization agreements, Article 4, OJ [2010] L 35/43.

restrictions but nevertheless are considered to have as their object to restrict competition. This category includes (subject to narrow exceptions) agreements involving the joint setting of prices, output, and where and to whom the products covered by the cooperation are sold—even when the restraints form part of a broader integration of economic activity engaged in between the parties. Hence, price-fixing is a restriction by object even when it occurs in the context of a production joint venture that extends into joint distribution.

Previously, the Commission confined restrictions by object to hardcore restrictions. In the Article 101(3) Guidelines the Commission took the view that “restrictions that are black-listed in block exemptions or identified as hardcore restrictions in guidelines and notices are generally considered to constitute restrictions by object. In the case of horizontal agreements restrictions of competition by object included price fixing, output limitation and sharing of markets and customers.”⁶ According to the Commission such restrictions are almost always prohibited,⁷ which confirms that, at the time, it equated restrictions by object with hardcore restriction.⁸

By expanding the category of agreements that are considered to have as their object to restrict competition the Commission shifts the balance of 101 in the direction of more interventionism. In the case of by object restrictions the Commission’s burden of proof under Article 101(1)⁹ is very significantly reduced since anticompetitive effects are presumed to exist.¹⁰ There is no need to establish likely adverse effects on competition in order to apply Article 101(1).

The expansion of the by object category has also led the Commission to abandon the previously applied presumption that the conditions for applying Article 101(3) were unlikely to be satisfied in the case of restrictions by object.¹¹ The Commission is prepared to consider efficiencies. If the parties put forward a credible efficiency defense,¹² the Commission is obliged to substantiate the likely anticompetitive effects such that it can be assessed whether the pro-competitive effects outweigh the anticompetitive effects as required by Article 101(3).

This necessary corollary to the expansion of the scope of Article 101(1) is helpful, but does not change the fact that the burden on the parties has been increased significantly. Since anticompetitive effects are presumed for a number of agreements that previously were assessed under the effects standard, the parties have to consider whether they are able to substantiate their

⁶See Guidelines on the application of Article 101(3) TFEU, OJ [2004] C 101/97, ¶23.

⁷See the 2001 Guidelines on horizontal co-operation agreements (OJ [2001] C 3/5) to which the Article 101(3) guidelines refer.

⁸¶46 of the Article 101(3) guidelines provide as follows: “Severe restrictions of competition are unlikely to fulfill the conditions of Article 101(3). Such restrictions are usually black-listed in block exemption regulations or identified as hardcore restrictions in Commission guidelines and notices. Agreements of this nature generally fail (at least) the two first conditions of Article 81(3). They neither create objective economic benefits nor do they benefit consumers. For example, a horizontal agreement to fix prices limits output leading to misallocation of resources. It also transfers value from consumers to producers, since it leads to higher prices without producing any countervailing value to consumers within the relevant market. Moreover, these types of agreements generally also fail the indispensability test under the third condition.”

⁹See Article 2 of Regulation 1/2003.

¹⁰See Guidelines, *supra* note 2, ¶24.

¹¹See 2001 Guidelines on horizontal co-operation agreements, ¶25.

¹²The Guidelines, *supra* note 2, at ¶48, provide that “the factual arguments and the evidence provided by the undertaking(s) must enable the Commission to arrive at the conviction that the agreement in question is sufficiently likely to give rise to pro-competitive effects or that it is not.”

efficiency claims to an extent that is sufficient to overcome the presumption and force the Commission to consider the effects of the agreement. Previously, efficiency analysis was relevant only where the agreement was likely to adversely affect competition within the meaning of Article 101(1).

Moreover, there is a risk that once an agreement has been deemed to have as its object to restrict competition, it will affect any subsequent analysis of likely effects. Effects analysis is not an exact science and it may well be that competition authorities and courts will continue to be influenced by the presumption that restrictions by object adversely affect competition and thus be less inclined to conduct a rigorous analysis of effects.

III. THE NEW APPROACH APPLIED TO JOINT PRODUCTION AGREEMENTS

The new Guidelines on horizontal cooperation agreements provide that agreements which involve price-fixing, limiting output, or sharing markets or customers restrict competition by object.¹³ This general rule is subject to only the following exceptions:

- The parties agree on the output directly concerned by the production agreement (for example, the capacity and production volume of a joint venture or the agreed amount of outsourced products), provided that the other parameters of competition are not eliminated; or
- A production agreement that also provides for the joint distribution of the jointly manufactured products envisages the joint setting of the sales prices for those products, and only those products, provided that that restriction is necessary for producing jointly, meaning that the parties would not otherwise have an incentive to enter into the production agreement in the first place.¹⁴

These exceptions are very narrow. They apply only where, absent the restriction, the agreement would not have been concluded. This condition is easily satisfied in the case of agreements that are limited to joint production since it is inherent in such agreements that the parties jointly determine the output from the facility that they jointly own and operate. However, the narrow scope of the exceptions becomes clear in the case of agreements that extend to joint distribution. Such agreements are deemed to have as their object to restrict competition unless the parties would not have an incentive to enter in to the agreement if they could not extend their cooperation into joint distribution. Hence, the exception does not apply in all the cases where the parties extend their cooperation into joint distribution because it is more efficient.

This new approach can be illustrated by the Commission's recent Article 9 decision in *BA/AA/IB* concerning three airlines (British Airways, American Airlines, and Iberia) belonging to the Oneworld Alliance.¹⁵ An airline alliance is a joint production agreement extending into joint distribution. The cooperation agreements provided for extensive cooperation in relation to key parameters of airline competition. In particular, the parties agreed to jointly establish fares, regulate capacity, coordinate their respective schedules, and cooperate with respect to sales and marketing. They also shared overall revenues and sold each other's products and services without

¹³*Id.*, ¶160.

¹⁴*Id.*

¹⁵*See* Commission Decision of 14.07.2010, Case COMP/39.596 – *BA/AA/IB*.

regard to which airline operated the aircraft. Thus, the agreement provided for a far-reaching integration of economic activity akin to a merger.

The Commission took the preliminary view that these arrangements by their very nature aimed at, and had the potential of, restricting competition. The extensive level of cooperation agreed between British Airways, American Airlines, and Iberia would eliminate competition among them on prices, capacity, and other key parameters. Therefore, the Commission provisionally considered that the agreements restricted competition by object on several relevant routes and markets covered by the Commission's investigation. This restriction was considered appreciable due to the significance of the parties' operations on the markets concerned.

The Commission also took the preliminary view that the parties' cooperation had actual or potential appreciable anticompetitive effects on these routes due to the parties' strong market position and high barriers to entry or expansion, as a result of which the parties faced low competitive constraints. The Commission finally took the view that, absent the commitments, the parties had not produced sufficient evidence demonstrating that their agreements met all the conditions for application of Article 101(3). The Commission does not explain why it considered it necessary to assess the effects of the agreements, but presumably it did so in order to counter the efficiency defense invoked by the parties and also to assist it in assessing whether the commitments offered by the parties were sufficient to address its concerns.¹⁶

The case clearly illustrates the new approach. Despite very extensive integration of economic activity, which is a clear source of efficiencies,¹⁷ the agreement was considered to have as its object to restrict competition. However, had the arrangement been considered a merger, the Commission would have been required to show significant adverse effects on competition. This illustrates a key concern regarding the Commission's new approach. Agreements that provide for significant integration of economic activity are deemed to have a restrictive object. This makes little sense. It is submitted that many co-operation agreements have greater efficiency potential than mergers because they are limited to a particular activity as opposed to a concentration of all the parties' various activities. Hence, there is no reason to apply a stricter standard to such cooperation arrangements than that applied in the field of merger control.

The Commission almost admits this when it states in the new Guidelines that "joint distribution agreements for products which have been jointly produced are generally less likely to restrict competition than stand-alone joint distribution agreements."¹⁸ The statement that such agreements are "less likely to restrict competition" sits uneasily with the Commission's presumption that they restrict competition. This presumption should be confined to agreements that, in the Commission's experience, are likely to produce negative effects on the market and to jeopardize the objectives pursued by the Community competition rules.¹⁹ The best evidence that no such experience exists is the fact that, in the past, the Commission has intervened against joint production and distribution arrangements only in very few cases.

¹⁶ The commitments must address the Commission's competition concerns and the extent of these concerns depends on the agreement's likely effect on competition taking efficiencies into account.

¹⁷ See Guidelines, ¶¶50-52.

¹⁸ *Id.*, ¶167.

¹⁹ See Article 101(3) guidelines, ¶21.

IV. CONCLUSION

The approach to restrictions by object in the new Guidelines on horizontal co-operation agreements represents a general trend in recent years. The Commission does not want to tie its hands.

In the past, guidelines served not only to assist companies in engaging in self-assessment under Article 101, they also served to cause a shift in the Commission's own application of the EU competition rules in the direction of a more effects-based analysis. The scope of Article 101 was narrowed to catch only agreements that were likely to have significant adverse effects on competition. The Commission thereby raised the bar from finding infringements of Article 101(1), tying its own hands. The Guidelines on the application of Article 101(3) reflect this aim.

In the new Guidelines on horizontal cooperation agreement this aim has been replaced by a new aim, namely to make it easier for the Commission to bring the cases that it wants to bring. The Commission no longer wants to tie its hands to the same extent that it did in the past. The expansion of the by object category makes life easier for the Commission since it reduces the number of cases in which it must engage in difficult analyses of effects before it can find an infringement of Article 101(1).

This does not necessarily mean that the Commission will challenge many more horizontal cooperation agreements than it did in the past. However, it does create increased uncertainty with regard to a whole category of agreements that in the past have not attracted much enforcement attention. This creates the risk that risk-adverse companies will either choose a sub-optimal form of co-operation or once again try to tailor their arrangements to fit the merger regulation. Neither is an attractive outcome.