Competitor collaborations: new EU guidelines and US law compared

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On 14 December 2010 the European Commission (Commission) published its revised Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (OJ 2011 C11/01) (EU Guidelines). This is the first revision of these guidelines since they were introduced ten years ago. New sections have been introduced on information exchange and the section on standardisation has been altered, and there have been notable changes to a number of other chapters. A comparison between EU and US anti-trust law on the subject shows increasing convergence but also marked differences in approach and outcome.

This chapter covers:
- The underlying approach.
- Focus area A: information exchange.
- Focus area B: co-marketing and co-selling.
- Other areas of interest:
  - joint ventures (JVs): agreement or merger, and information flows;
  - joint purchasing, joint research and development (R&D), and joint production;
  - standardisation agreements.
- Key areas of convergence and divergence.

In relation to each topic, the chapter addresses:
- The EU approach (focusing on the new guidelines as the most recent statement of enforcement approach).
- The US approach (looking at the Antitrust Guidelines For Collaborations Among Competitors jointly issued by the US Department of Justice, Antitrust Division (DOJ) and the Federal Trade Commission (FTC) (US Guidelines)).
- Applicable case law.

THE UNDERLYING APPROACH

Horizontal collaborations are agreements between competitors that have an efficiency or pro-competitive rationale, typically to achieve something together that neither party could achieve alone (or as fast or economically). This covers co-operation across any business functions, from upstream activities such as R&D to customer facing activities such as marketing and selling. It excludes agreements whose essential function is anti-competitive, that is, to fix prices or share markets, or customers, with a view to protecting activities from competition.

EU law

Article 101 of the TFEU provides the general framework for analysing the competitiveness of an agreement, that is, both:
- Whether the agreement has the object (“object restrictions”) or effect (“effect restrictions”) of restricting competition within the meaning of Article 101(1).
- If so, whether the parties to the agreement can show that the conditions of Article 101(3) are met (see below).

While most restrictive horizontal collaborations are analysed as effect restrictions, recent Court of Justice of the European Union cases (C-501/06 GlaxoSmithKline, C-209/07 BIDS, C-8/08 T-Mobile) underline that object restriction cases are not confined to price fixing and market sharing.

In relation to whether an agreement has the effect of restricting competition, the EU Guidelines contain the following overriding points:
- The test is whether it can be expected with a reasonable degree of probability that, due to the agreement, the parties would be able to profitably raise prices or reduce output, product quality, product variety or innovation (§ 28, EU Guidelines).
- Relevant to the test is whether the agreement makes co-ordination easier, for example by increasing commonality of costs (that is, the extent to which cost structures of the parties and their competitors are similar) or through disclosure of strategic information, or sometimes whether the agreement is likely to lead to anti-competitive foreclosure.
- The analysis is contextual, taking account of closeness of competition, level of combined market shares, actual/likely parameters of competition and so on (§§s 26 to 39, EU Guidelines).

There are specific pre-existing guidelines on Article 101(3). The essence is to exclude agreements from Article 101 where both:
- They generate efficiencies a substantial proportion of which can be expected to accrue to consumers.
- The anti-competitive effects are not overwhelming and are the minimum price to be paid for the efficiencies.
US law

The US Guidelines recognise that while there are often important pro-competitive reasons for collaborations among competitors, these collaborations must not be used to facilitate anti-competitive agreements that would violate section 1 of the Sherman Act (15 U.S.C. § 1). The analysis focuses on the state of competition with, as opposed to without, the relevant agreement.

Key question. The key question is whether the collaborative arrangement would likely harm competition by increasing the ability or incentive to (§§ 1.2 and 3.1 to 3.3, US Guidelines):

- Profitably raise prices above what would likely prevail in the absence of the relevant agreement.
- Reduce output, quality, service or innovation below what would likely prevail in the absence of the relevant agreement.

Rule of reason and the per se rule. Under the rule of reason, the analysis involves balancing the extent to which the collaboration diminishes competition and the extent to which it enhances competition. The rule of reason does not govern all restraints. Some types (horizontal price fixing, market or customer allocation and bid rigging) are deemed unlawful per se. The per se rule eliminates the need to study the reasonableness of an individual restraint in light of the real market forces and is applied only to a restraint that both:

- Has manifest anti-competitive effects.
- Lacks any redeeming virtue.

To avoid liability under the rule of reason, firms must show all of the following:

- That the arrangement involves an efficiency-enhancing integration of economic activity.
- That the agreement at issue is reasonably related to the integration.
- That it is reasonably necessary to achieve its pro-competitive benefits.

Factors in analysing competitive effects. The following factors are relevant to analysing the competitive effects of a collaboration (§§ 3.3, 3.31(a), 3.34(a), 3.34(b) to 3.34(f), 3.36, 3.31(b), and 3.34(e) to (f), US Guidelines):

- Market power.
- Limits on collaborators’ independent decisions on price, output or other competitively sensitive variables.
- Exclusionary nature of agreements.
- The extent of integration of assets and financial interests.
- Whether the collaboration is reasonably necessary to achieve the claimed efficiencies and whether there are less restrictive ways of doing so.
- The extent to which competitively sensitive information is shared.
- The duration of the collaboration.

Safe harbour. The US Guidelines also establish a safe harbour, at least from agency intervention. Agencies generally will not challenge collaborations involving parties with a combined market share of less than 20% (including all JV parents and the JV itself) (§§ 4.1 to 4.2, US Guidelines).

US Guidelines not binding on courts. Although the US Guidelines are not binding on the US courts, the Supreme Court’s analysis in American Needle, Inc. v National Football League 130 S. Ct. 2201 (2010) and Texaco, Inc. v Dagher 547 U.S. 1 (2006) was not inconsistent with the US Guidelines.

Key similarities and differences in approach

The broad frameworks for analysis are similar in the EU and the US. Both:

- Are concerned with the likelihood of adverse impact on prices or quality.
- Have safe harbours (see box, Summary of safe harbour thresholds under EU and US law).

The key difference is that if a collaboration is analysed under the rule of reason in the US, the balancing of pro- and anti-competitive effects is central to the analysis, whereas in the EU it is the second limb of a two-staged test. However, more specific differences between the two regimes are found in the way individual types of horizontal restraints are treated.

FOCUS AREA A: INFORMATION EXCHANGE

EU law

The EU Guidelines include a new chapter codifying case law and providing general EU guidelines on information exchange.

The key points are:

- The focus is on reducing strategic uncertainty. Therefore, information relating to future strategic behaviour is most sensitive (§61, EU Guidelines) and exchanges of individualised data regarding prices, future sales, market shares, territories and sales to particular groups of consumers are usually regarded as object restrictions (§§ 72 to 73, EU Guidelines).
- Generally, the more concentrated, symmetrical/stable, transparent the market is, or the greater the increase in transparency as a result of the exchange, the greater the likelihood of EU anti-trust concern (§§ 78 to 82, EU Guidelines).
- Unilateral disclosures can trigger liability of both parties unless the recipient publicly distances itself (§ 62, EU Guidelines and AG Kokott in T-Mobile and Cases T-25/95 Cimentieries).
- Exchanging genuinely public information is generally unobjectionable, but “genuinely public” is interpreted narrowly (§§ 92 to 94, EU Guidelines). For example, systematically exchanging prices already available on petrol forecourts could be regarded as saving expense and facilitating collusion.
- Relevant factors relating to the data itself include the:
  - extent of market coverage (§ 87, EU Guidelines);
  - extent to which it is aggregated in a way that cannot be reverse engineered (§ 89, EU Guidelines);
SUMMARY OF SAFE HARBOUR THRESHOLDS UNDER EU AND US LAW

<table>
<thead>
<tr>
<th>Collaboration type</th>
<th>EU</th>
<th>US</th>
</tr>
</thead>
<tbody>
<tr>
<td>Information exchange</td>
<td>No specific safe harbour.</td>
<td>Independently managed. Where there are five or more participants, each participant has a 25% or less MS, based on aggregated data that is less than three months old.</td>
</tr>
<tr>
<td>Joint selling and marketing</td>
<td>15% or less combined market share (MS) and no price fixing.</td>
<td>20% or less combined MS and no price fixing.</td>
</tr>
<tr>
<td>Joint purchasing</td>
<td>15% or less combined MS on each relevant (purchasing and selling) market.</td>
<td>35% or less purchasing MS and input cost, and 20% or less in sales revenue for each participant.</td>
</tr>
<tr>
<td>Joint production and specialisation</td>
<td>20% or less combined MS (in the production and, where relevant, downstream, markets), provided block exemption conditions met.</td>
<td>20% or less combined MS and no price fixing.</td>
</tr>
<tr>
<td>Joint R&amp;D improvement and replacement of existing products</td>
<td>25% or less combined MS (in the current product market or technology market), provided block exemption conditions met.</td>
<td>Three other independent firms doing R&amp;D on close substitutes, provided there are no per se restrictions.</td>
</tr>
<tr>
<td>Standardisation</td>
<td>Participation in SSO and its procedures are unrestricted, transparent and voluntary.</td>
<td>20% or less combined MS and no price fixing.</td>
</tr>
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- frequency of exchange (greater frequency allowing closer monitoring) (§ 91, EU Guidelines);
- age of the data (the more historical, the less problematic) (§90, EU Guidelines).

These concepts are not new. The Commission have provided six examples of their application, but these are of limited use as they do not deal with complex cases. Case law provides some additional assistance (see box, Case studies on EU information exchange), but ultimately companies and their advisers must make individual case by case assessments.

US law

Rule of reason and the per se rule. In general, information exchanges among competitors are assessed under the rule of reason (United States v United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978)). Per se treatment is typically reserved for hard-core market allocation, bid-rigging and price fixing. However, courts also apply the per se rule where competitors use an information exchange with the purpose or necessary effect of stabilising prices or output in the relevant market (Todd v Exxon Corp., 275 F.3d 191, 198 (2d Cir. 2001)). Courts consider certain factors to determine whether the pro-competitive justifications outweigh any anti-competitive effects, in particular the structure of the industry involved and the nature of the information exchanged (Todd).

The structure of the industry is assessed to determine whether the relevant market, once defined, is susceptible to collusion (for example, it is concentrated, there are a small number of firms, there are homogeneous or fungible products or services, and inelastic demand) (Todd and DOJ Business Review Letter 01-3).

Even if the market is deemed susceptible to collusion, an information exchange should not violate section 1 of the Sherman Act if the nature of the information exchanged will not lead to anti-competitive effects. Courts discourage the exchange of current or future price information, as it greatly increases the possibility of price fixing, but generally find the exchange of non-price and historical price data acceptable (U.S. Gypsum Co., 438 U.S. at 441 and Todd, 275 F.3d at 211). Participants in information exchange programmes also should not be able to identify prices or other data as belonging to a particular participant (Todd, 275 F.3d at 212).

Safety zone. The DOJ and FTC have established a safety zone that shields proper information exchanges from agency enforcement actions if they meet all of the following requirements (Statement 6A, DOJ and FTC Enforcement Policy on Provider Participation in Exchanges of Price and Cost Information (1996)):

- An independent third party manages information exchange.
- Information provided by participants is based on data at least three months old.
- All of the following apply:
  - at least five participants report data for each statistic;
  - no individual firm’s data represents more than 25% of any statistic;
  - the disseminated information is sufficiently aggregated to prevent parties from identifying the prices charged by any specific firm.

Although specifically announced in the healthcare context, the safety zone is more widely applied.

Failure to meet the safety zone requirements does not necessarily subject an information exchange programme to enforcement action. For example, an information exchange distributing current retail prices from grocery stores to the grocery store industry was not subjected to agency enforcement because, among other reasons (Business Review Letter 97-1):

- The programme prevented the exchange of future price information.
Much of the data was already publicly available.

The third party operating the information exchange had no incentive to promote a price fixing scheme.

Information exchanges consisting of only four members have also been found to be compliant with anti-trust laws (Business Review Letter 96-4). Additionally, an information exchange programme sharing current costs of independent television stations for ratings information was found to be consistent with anti-trust laws because the information was sufficiently aggregated and submitted on a blind basis (Business Review Letter 95-3).

Key similarities and differences in approach

There are three main factors:

- The principles under which information exchange is analysed are broadly similar across the US and EU regimes. One difference in emphasis is that the EU tends to be more cautious and casts the net of presumed anti-competitive effect wider, while the US approach is more directly focused on the likelihood or otherwise of the practice leading to price fixing.

- US jurisprudence and practice on the topic is more practical than in the EU. A significant part of this is the system of Business Review Letters, which provides a body of individual guidance decisions approving particular information exchange arrangements. EU precedent on information exchange, by contrast, tends to consist of negative cartel cases, and the EU Guidelines provide a set of general principles. A sign of convergence is that the UK Office of Fair Trading (OFT) has recently instituted a system of Short-form Opinions, specifically for competitor collaborations. This is as a response to concerns that pro-competitive horizontal arrangements were not going ahead due to excessive anti-trust caution (see below, Joint purchasing, joint R&D and joint production: Joint Purchasing).

- The US guidelines provide clear safe harbour rules, while the EU guidelines contain a more general set of principles with no safe harbour.

In practice the approach to enforcement is likely to differ depending on the particular authority or court reviewing the case. In Europe, despite the supposed harmonised approach post-modernisation, there are marked differences of approach among national regulatory authorities and courts, and between those bodies and the European Commission. These are likely to be particularly accentuated in a still-developing area such as information exchange.

**FOCUS AREA B: CO-MARKETING AND CO-SELLING**

The most challenging kinds of competitor collaboration from an anti-trust perspective are those that involve joint price setting or joint customer-facing activity.

**EU law**

**Object restrictions.** Price fixing is likely to be an object restriction (EU Guidelines) (see above, The underlying approach: EU Law). Joint selling or reciprocal distribution may also be object restrictions as they may facilitate output limitation or market and customer partitioning. The EU Guidelines make it clear that these agreements can be treated as object restrictions even if they are below the safe harbour (that is, the undertakings involved have a combined market share of 15%).

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**CASE STUDIES ON EU INFORMATION EXCHANGE**

**T-Mobile Netherlands (ECJ 2009)**

The five mobile telecommunications network operators in The Netherlands met on a single occasion to discuss the reduction of standard dealer remunerations. The court held that a single meeting was sufficient to trigger the presumption of a causal connection between a concerted practice and conduct on the market, provided the relevant company remained active on the market.

**RBS and Barclays (UK OFT 2010)**

RBS unilaterally disclosed confidential information to Barclays regarding the pricing of loan products to large professional services firms. The information related to general and specific future pricing. The disclosures happened in or around social industry events or through telephone conversations. Barclays took this information into account in its own pricing.

Subsequently, Barclays reported the incident to the UK Office of Fair Trading (OFT). As the whistleblower, Barclays received immunity from fines, but RBS was fined GB£28.6 million for its illegal anti-competitive conduct in March 2010 (after a reduction for co-operating with the OFT) (as at 1 November 2010, US$1 was about GB£0.6).

The OFT Senior Director of Cartels and Criminal Enforcement said:

“We must robustly fight cases of this kind to deter further abuse.”

**Commercialisation.** There are some important changes to the EU Guidelines relating to commercialisation. The 2001 guidelines provided that price fixing or joint selling almost always infringes Article 101(1). There is now a more sophisticated recognition of the importance of the counterfactual (that is, recognising the need to assess the situation that would prevail without the agreement or restriction). If the agreement is necessary to allow the parties to enter a new market or to enter each other’s markets (for example because the costs are prohibitive to do so alone), then the Commission will not view it as raising horizontal issues (§§ 237-8, EU Guidelines and § 30, EU Guidelines).

This is a very marked change in emphasis. It reflects a number of judgments and decisions since the first guidelines were adopted, in particular the O2 Germany CFI case (T-328/03) and the UK racecourse broadcast rights judgment (see box, EU commercialisation cases featuring the counterfactual).

However, this recognition of the need to assess the counterfactual is confined to effects restrictions. Object restrictions remain strictly applied. Recent EU case law tends to reject the need for contextualised analysis of the purpose or effect of arrangements to establish an object restriction (GSK and BIDS). Whether the objective intention or necessary effect of a joint selling arrangement is to restrict competition will remain a point of contention in certain cases (for example, see AMRAC).
Integration. In relation to Article 101(3) of the TFEU, the emphasis on integration in the 2001 guidelines is retained. Increased efficiency due to the collaboration must relate to the integration of functions not just the elimination of costs on which the parties previously competed (§ 247, EU Guidelines). The Commission is effectively suggesting that agreements similar to mergers are candidates for being saved under Article 101(3).

In addition, the examples provided in the commercialisation chapter are more sophisticated than those in the information exchange chapter and than the commercialisation examples in the 2001 guidelines, and are therefore of greater practical assistance.

US law

Prohibited arrangements. The courts prohibit joint selling or marketing arrangements if they are not a true efficiency enhancing collaboration. For example, in United States v American Smelting & Refining Co., 182 F. Supp. 834 (1960), the DOJ challenged an agreement between the two largest US lead mining companies, that provided for one of the firms to act as the exclusive selling agent for the other firm in a particular geographic area. The court found that the venture was an illegal scheme to fix prices and allocate markets, and condemned it as per se unlawful. In addition, in Virginia Excelsior Mills, Inc. v FTC, 256 F.2d 438 (5th Cir. 1958), a court found to be illegal an arrangement in which the producers of certain wood packing materials:

- Formed an association to market and sell their combined output on an exclusive basis.
- Agreed to limit production capacity to current or agreed on levels.

Avoiding liability. To avoid liability, co-marketing collaborators must show all of the following:

- That their joint activity involves an efficiency enhancing integration of economic activity.
- That the collaboration at issue is reasonably related to the integration.
- That it is reasonably necessary to achieve its pro-competitive benefits.

If this is the case, the collaboration is only considered illegal if it unreasonably restrains trade by raising prices, restricting output or reducing product quality (that is, it is illegal under the rule of reason) (§§1.2, and 3.1 to 3.3, US Guidelines). In addition:

- A joint selling arrangement involving a true sharing of economic risk is more likely to be permitted under the rule of reason. For example, in Association of Independent Television Stations, Inc. v College Football Association, 637 F. Supp. 1289 (W.D. Okla. 1986), an intercollegiate football association acted as a selling agent for the television rights of members’ football games. The court found that the agreement was not illegal per se, partly because the co-operation among the members could foster production and efficiency.
- Ventures that facilitate participants to offer a product that none could sell individually are more likely to be evaluated under the rule of reason (for example, Broadcast Music, Inc. v Columbia Broadcasting System, Inc., 441 U.S. 1 (1979) and NCAA v Board of Regents, 468 U.S. 85 (1984)).

Joint selling arrangements are particularly vulnerable to leakage of competitively sensitive information, because the collaboration involves market-facing functions. This is one of the main concerns expressed in §§3.31(b) and 3.34(e) of the US Guidelines. Evidence that competitors exchanged confidential information about prices and customers has been found to be important circumstantial evidence of price fixing (In re Flat Glass Antitrust Litig., 385 F.3d 350, 368-369 (3d Cir. 2004) and In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 906 F.2d 432, 445-450 (9th Cir. 1990)). Controls are therefore needed, such as firewalls, to confine the:

- Disclosure of sensitive information among competing collaboration participants.
- Collaboration to the minimum necessary to fulfill functions essential to the collaboration.

In general, the shorter the collaboration, the less likely it is that it will raise concerns (§3.34(f), US Guidelines). It is generally preferable to make the agreement non-exclusive (§3.34(a), US Guidelines).

Key similarities and differences in approach

There are four main factors:

- Both regimes recognise that collaboration in selling and marketing has greater potential to raise significant competition issues than collaboration in other business functions.
Both regimes recognise that some ventures which look like collaboration will endure for ten years or more. The parties do not have market power on the selling market. There is joint control (including negative control over strategic issues). Firms participating in the joint venture are competitors. Purchasers are active on different selling markets. The parties do not share a large proportion of their variable costs in the downstream market or, if they do, the arrangement accounts for only a small proportion of the total volume of a purchasing market.

Joint purchasing arrangements are unlikely to generate object restrictions (see above, The underlying approach: EU law) unless the arrangement is effectively a disguised cartel. Collective agreement between purchasers on the purchasing prices that can be paid to suppliers under a joint supply contract is more likely to be analysed as an effects restriction (see above, The underlying approach: EU law).

In P&H/Makro (the first Short-form Opinion issued by the UK OFT under its new procedure in April 2010) the OFT indicated its view that cost commonality among a purchasing group is not likely to be an issue if the group has no downstream market power.

US law. The US Guidelines, Business Review Letters and case law recognise the risks as well as the potential pro-competitive benefits of joint purchasing arrangements. The key factors in analysis a joint purchasing group include the:

- Structure of the market.
- Structure of the purchasing group itself.
- Rules under which the collaboration operates and the scope of its activities.

Three key factors are apparent from the US Guidelines, Business Review Letters and case law:

- A purchasing collaboration is less likely to raise anti-trust concerns if it includes members who both:
  - require some or all of the same inputs;
  - do not completely overlap as competitors in their selling markets.

The DoJ decided not to challenge a purchasing group which comprised all the competing firms in a regional health care market, but which limited itself to purchases from national sellers:

- whose products were distributed nationally;
- who had no plans to designate local suppliers.

The parties made the commitment that if local sellers were later used, their purchases would account for less than 35% of the sellers’ regional sales in the relevant market (Business Review Letter 09-1).

Joint purchasing can create more effective competition downstream. In a market where purchasing power is concentrated, joint purchasing can permit smaller companies to achieve economies of scale and cost savings. This allows those smaller companies to compete more effectively with the larger ones in the downstream selling market.
Compared with the EU, the US applies:
- a higher safe harbour to the market share of purchases;
- a low cap on the share of the downstream selling price that the pooled costs represent (which is not quantified in the EU).

Specifically, the US requires that (Statement 7, the DOJ and FTC Statements of Antitrust Enforcement Policy in Health Care):
- purchases account for less than 35% of total sales of purchased product or service in the relevant market;
- the cost of products and services purchased jointly accounts for less than 20% of total revenues from all products or services sold by each competing participant which incorporate the jointly purchased input.

The joint purchasing group is less likely to be viewed as intended to facilitate anti-competitive goals if it has independent employees who are not also employees of any of the members, and who both:
- Conduct the negotiations with suppliers on behalf of the co-operative.
- Do not share confidential information about a member’s activities with other members.

This last point is emphasised more in the US than in the EU.

**Joint R&D and specialisation**

**EU law.** The EU block exemptions under Regulation (EU) 1217/2010 on the application of Article 101(3) of the TFEU to certain categories of research and development agreements, and Regulation 1218/2010 on the application of Article 101(3) of the TFEU to certain categories of specialisation agreements have been revised along with the guidelines:
- **The R&D exemption.** This provides a safe harbour where combined shares are below 25% on the current product market or technology market (depending on type of R&D). If the agreement includes joint exploitation, the exemption applies for up to seven years, provided the product market share remains below 25%. This is subject to certain conditions, including:
  - broader disclosure obligations for indispensable knowledge;
  - increased access to final results of the R&D.
- **The specialisation exemption.** This provides a safe harbour for joint production or unilateral/reciprocal specialisation where combined shares are below 20% on both the upstream and (for intermediary products) downstream markets (subject to conditions).

Above these safe harbours, assessment under Article 101(1) of the TFEU focuses on:
- For R&D: innovation and risk of co-ordination spillover effects (§ 127, EU Guidelines).
- For production: alignment of output levels, quality or price, and input foreclosure (§§ 157 to 159, EU Guidelines).

**US law.** The same general principles or underlying approach as under EU law are applicable to R&D collaborations. There are also certain statutory protections established only in relation to R&D joint ventures:
- **Statutory protection.** Under the National Cooperative Research and Production Act, an R&D collaboration:
  - is not per se illegal if it falls within the National Cooperative Research and Production Act’s definition of joint venture (that is, two or more firms engaged in experimentation or theoretical analysis, development or testing of engineering, scientific or technical investigative findings, production, exchange of research or production information, or testing of products);
  - involves production of new product or technology;
  - can only be liable to actual damages in anti-trust damages claims (rather than treble damages).

To claim this protection, collaborations must file notifications with the DOJ and FTC.
- **Under the US Guidelines.** These establish a separate safe harbour for R&D collaborations having effects on competition in an innovation market. To qualify, there must be at least three other independent controlled research efforts that both:
  - possess the necessary assets;
  - are doing R&D on close substitutes for products or procedures that are the subject of joint venture.

In determining whether independently controlled R&D efforts are close substitutes, courts and agencies consider, among other things:
- the nature, scope and magnitude of the efforts;
- their access to financial support;
- their access to intellectual property, skilled personnel or other specialised assets;
- their timing;
- their ability, either acting alone or through others, to successfully commercialise innovations.

The safe harbour does not apply to agreements that are illegal per se (§4.3, US Guidelines).

**STANDARDISATION AGREEMENTS**

**EU law**

**Scope.** One of the most significant changes to the EU Guidelines is the extensive revision of the chapter on standardisation. The primary objective of standardisation agreements is to define technical or quality requirements with which current or future products, production processes, services or methods must comply. Examples of the types of agreements covered include:
- Commonly agreed standard terms and conditions of sale (for example, in the banking and insurance sector).
Standardisation of products’ grades or sizes.

Technical specifications for products and services markets to ensure compatibility or interoperability (that is, a product’s ability to work with other products without special effort on the part of the customer).

Access to a quality mark or approval system.

Environmental performance or production standards.

These can be developed through private arrangements or through a standards body or a trade association.

Standardisation and intellectual property rights (IPRs). The most controversial issue relates to holders of essential IPRs both:

- Failing to disclose those IPRs during the period of adoption of the standard.
- Subsequently demanding excessive royalties when participants are effectively “locked in” to the standard.

The Commission has carried out a number of investigations into this, notably in the Rambus and Qualcomm cases. These cases were under Article 102 of the TFEU (abuse of dominance), but the issues are likely to overlap with those under Article 101 of the TFEU. The main function of the EU Guidelines is to provide terms under which standard setting organisations (SSOs) can benefit from a safe harbour. SSOs benefit if all of the following apply:

- Participation in the procedure is not restricted.
- The procedure for adopting the standard is transparent (including good faith disclosure of IPRs necessary for its implementation).
- There is no restriction on developing alternative standards or products.
- Access to the standard is on fair, reasonable and non-discriminatory (FRAND) terms.

The key practical question is how to assess whether fees for access to IPR are FRAND. The EU Guidelines suggest ways of resolving disputes over the value of IPRs, including examining licensing fees charged for the IPR at the outset or obtaining a valuation from an independent expert.

US law

Standard setting is equally controversial in the US. It is evaluated on the basis of:

- The Antitrust Guidelines for Collaborations Among Competitors.
- The Antitrust Guidelines for the Licensing of Intellectual Property.
- Case law.

The DOJ analyses the competitive effects of standard-setting activities under the rule of reason, unless the standard-setting process is being used as a sham for price fixing or bid-rigging. In addition, the rule of reason applies to SSOs that have filed proper notification with the FTC and DOJ, and are engaged in standards development activities (Standards Development Organization Advancement Act of 2004).

The Standards Development Organization Advancement Act provides an opportunity to limit anti-trust damages to actual damages (rather than treble damages). It excludes from permissible activities information exchanges related to cost, sales, profitability, prices, marketing, or distribution where the information:

- “is not reasonably required for the purpose of developing or promulgating a voluntary consensus standard or using such standard in conformity assessment activities.”

The DOJ has stated that it would not challenge an SSO’s patent policy that did not permit participant firms to discuss the prices at which standardised products would be sold. This applies even when a policy allows participating patent holders to commit to restrictive licensing terms for their necessary (and disclosed) patents before a standard is set. Advance commitments to licensing terms could be pro-competitive as they allow participants to better assess costs of including particular patents (Business Review Letter 07-2). The DOJ’s approach to standards is consistent with the approach in the EU Guidelines.

Broadcom Corp. v Qualcomm, Inc. and Rambus v FTC, among other cases, examined SSOs and the anti-competitive effects of alleged deception by owners of patents. In Broadcom, the patent owner’s deception regarding its willingness to grant FRAND licences was found to be a proper basis for a monopolisation claim. However, in Rambus, deception regarding whether technology in the standard was patented was found not necessarily to have an anti-competitive effect, because it might not lead to higher prices or exclude rivals. In addition to patent owner deception in the standard-setting process and FRAND, the focus of concerns in the US case law is the potential for improper co-ordination, including price fixing and information leakage.

KEY AREAS OF CONVERGENCE AND DIVERGENCE

The US and EU regimes for competition review of collaborative arrangements converge to a substantial degree. For example, both regimes:

- Operate under a series of principles aimed at avoiding collusion and minimising the risk that the venture is exclusionary.
- Have safe harbours under which a regulatory challenge is unlikely, although these differ (see box, Summary of safe harbour thresholds under EU and US law).

There are some procedural differences, notably the role of Business Review Letters in the US and the more central role of efficiencies under the US rule of reason analysis (compared with the EU two-staged approach). However, the real key to any case in both the EU and the US is contextualised analysis of the individual facts of the collaboration.
Qualified. England and Wales, 1995

Areas of practice. Merger control and joint ventures; distribution and dominance; competition inquiries; state aid; public procurement; free movement litigation; sectoral regulation; anti-corruption law.

Recent transactions
- Representing GlaxoSmithKline in OFT merger control proceedings in respect of its acquisition of Maxinutrition.
- Acting for Oracle in UK grey market litigation.
- Acted for a bank in the OFT underwriting fees inquiry.
- Advised Ryanair as the Intervener in BAA’s appeal of the airports market inquiry decision.
- Advised Sea Fish Industry Authority in UK litigation on customs duties/discriminatory taxation.
- Acted for Thomson in EUMR phase 2 proceedings in respect of its merger with Reuters (clearance with limited remedies).
- Advised LCH.Clearnet on several transactions, interventions and contentious matters.

Qualified. United States

Areas of practice. Anti-trust and distribution; government investigations; private litigation.

Recent transactions
- Focused on anti-trust and distribution-related litigation covering a wide variety of competition-related claims under federal and state laws or regulations.
- Routinely handles a wide-variety of anti-trust counselling, merger and compliance projects for domestic and international companies.
- Defending Pilkington Holdings, Inc. in US and parallel Canadian litigation alleging price fixing.
- Defending Franke Consumer Products in US litigation challenging a minimum advertised price policy.
- Formation of international chemical production joint venture.
- Designing and enforcing minimum resale price programmes.