Revised EU Rules on Co-operation Between Competitors: A missed opportunity for reform?

Ian S. Forrester Q.C. 12 January 2011

The CLA was very grateful to Ian for speaking about the new Horizontal Restraints Guidelines and R&D Block Exemption Regulation that were published and adopted in mid-December.

Ian began by setting the latest guidelines into their historical context. He traced the development of the 2003 regulations from the 1962 decision of the Commission to interpret Article 85(1) as broadly as possible and the practice in the 1980s of viewing the obtaining of an exemption as being so highly desirable as to be almost legally compulsory. He then emphasised that the 2003 regulations marked a profound change to the earlier regime – not only did they mark the end to the notification system, but they were also symptomatic of a policy shift at the Commission. The earlier preoccupation with the building of the common market (for example with its focus on parallel trade) had been broadened into more conventional anti-trust regulation with a corresponding focus on mergers and cartels.

Turning to the horizontal restraints rules in general, Ian contended that the Block Exemption Regulations ('BERs') and guidelines should not be read prescriptively. An agreement that is not covered by a BER is not automatically illegal, it only needs to be assessed under Art 101 TFEU. Conversely, if a case is controversial, the Commission may still intervene, even if the agreement appears to be covered by the terms of a BER. The BERs and Guidelines are nevertheless a useful indication of the Commission's current thinking and enforcement priorities.

2010 saw the revision of the substantive rules on the application of Article 101 TFEU. In April 2010 the Commission published and adopted revised Vertical Restraints Guidelines and a corresponding Block Exemption. In December revised Horizontal Restraints Guidelines and R&D and Specialisation block exemption regulations were published.

Taking the R&D Block Exemption Regulation, Ian's view was that it was to be seen as a policy indication rather than being a rigid framework in which every deal must be structured. Ian highlighted the major changes from the previous BER (which are set out in his PowerPoint slides) and focussed in particular on the increased focus on information exchanges.

He emphasised that information exchanges are important not only in the context of broader anti-competitive behaviour such as activity in a cartel but can also constitute standalone infringements. Ian explained that this is an area in which the law from Luxembourg and Brussels is difficult to reconcile. Information exchanges can either make the work less risky for competitors, or be the means by which competitors collude. However, these are two quite different approaches. It is not always clear how mere information sharing between competitors results in anti-competitive behaviour. Nevertheless, Ian's view was that it is generally imprudent to exchange strategic information (as opposed to benchmarked data) given the approach that the Commission had adopted and the very conservative approach in the BER. It was wise to be cautious, while being ready to be robust on occasion.

Finally Ian discussed the recent standards setting cases (Rambus and Qualcomm) and raised the interesting question of whether the company must be dominant at the moment of the controversial conduct, or whether it was an abuse to use when dominant an advantage that had been obtained when not dominant. This, he explained, was an issue which the Commission had avoided addressing in the Rambus settlement.