



RESPONSE TO DG COMPETITION'S REVIEW OF THE CURRENT REGIME FOR THE ASSESSMENT OF HORIZONTAL AGREEMENTS

Introduction

Ashurst LLP welcomes the opportunity to submit its comments to DG Competition on the current regime for the assessment of horizontal agreements. Ashurst regularly advises clients on all aspects of EU and national competition law but this response is made on our own behalf, based on our experience of advising clients on these issues. We are not responding on behalf of any particular client or group of clients.

The contents of this response are not confidential.

Responses to consultation questions

The R&D and Specialisation Block Exemption Regulations deal with joint R&D agreements and specialisation as well as joint production agreements respectively. The Horizontal Guidelines cover the following forms of cooperation between competitors: (i) R&D agreements; (ii) production and specialisation agreements; (iii) purchasing agreements; (iv) commercialisation agreements; (v) agreements on standards; and (vi) environmental agreements.

1. **For each of the topics referred to above, please report any major problems raised by the application of the Specialisation and R&D Block Exemption Regulations and the Horizontal Guidelines. Please indicate also the sector in which such problems were encountered and the type of solution found, if any, to address the problems and results obtained.**
- 1.1 Following the abolition of notifications with the 2004 modernisation of the Article 81/82 enforcement regime, businesses are no longer able to obtain any degree of comfort from the European Commission about arrangements which they are considering entering into. Horizontal agreements, by their very nature, carry higher potential risks than other types of agreement, because liaison between competitors generates competition compliance risks which need to be carefully assessed and managed. Moreover, the Commission's approach in setting fines generally and in punishing repeat offenders in particular,¹ has become increasingly severe. The combination of the lack of certainty and extremely onerous sanctions means that compared, for example, to the situation with vertical agreements, clients are much more cautious as regards horizontal agreements, irrespective of the individual benefits of a particular co-operation arrangement. In our experience, this chilling effect has resulted in the "false positive" of potentially useful, pro-competitive horizontal agreements being abandoned because the parties are not prepared to accept the degree of legal uncertainty which is involved. We have seen situations where clients have abandoned potentially efficiency-enhancing horizontal agreements because the restrictive clauses in the agreement were too central to the arrangements to carry the degree of risk of unenforceability which is inevitable in a pure self-assessment system with no possibility of comfort from the competition authority.

¹ We note that the Commission appears to be developing a policy of increasing cartel fines by 30 per cent for each past infringement.

- 1.2 The lack of any form of formal or informal consultation process with the Commission in order to gain comfort that proposals will be unobjectionable, or that a self assessment is correct, is, of course, not an issue which is limited to horizontal agreements, but is a more systemic problem with the post-modernisation enforcement regime. That said, the problem is brought into focus as regards horizontal agreements, because of the very heavy sanctions which are typically imposed on infringing horizontal agreements.
- 1.3 A second problem which we have encountered in relation to the horizontal guidance concerns collaborative arrangements between non-competitors. If two business which are not currently competitors, agree to create a new product in collaboration, that should in principle be unobjectionable, particularly where they would not have been able to create the new product independently. However, if the decision is made to commercialise the new product separately and not through a joint venture, competition problems emerge, particularly where a joint venture vehicle has not been created because it would be disproportionately costly to do so. By remaining independent and selling the new product separately, the business have become competitors as regards the sale of the newly developed product. As such, they cannot liaise over the pricing of the product, cannot agree to divide customers between them and cannot take other similar joint decisions to control the basis for the sales and marketing of the new product. On the other hand, if they had created a joint venture vehicle, the horizontal guidance indicates that joint decisions on price, customers etc would have been permissible. It seems unreasonable and commercially illogical to restrict businesses from dealing jointly with the commercialisation of their common product unless they invest in the creation of a joint venture vehicle. If, as in the example set out above, there is no commercial need for a distinct joint venture, the competition rules would seem to be adding unnecessary cost into the collaboration project, counter-productively reducing its efficiency.
2. **For each of the topics referred to above, please report the competition issues in relation to which you found that the application of the Specialisation and R&D Block Exemption Regulations and the Horizontal Guidelines have proven to be very useful in order to protect competition.**
- 2.1 In our experience, the guidelines are very useful where the facts of the client's proposed arrangement fit very closely with the facts in the guidance, but less so as regards situations which are not directly considered.
3. **According to your experience, do you consider that some of the provisions in the current Specialisation and R&D Block Exemption Regulations and/or parts of the text of the Horizontal Guidelines have become unsatisfactory in order to address issues inherent to the economic developments that have taken place at the national and European level? Please provide reasons for your response.**
- 3.1 We note that the majority of the discussion and examples concern product markets. Service industries are at least as important in some Member State economies (for example, in the UK) and it would be useful to have more specific examples and discussion of service markets.
4. **In light of the changes that you deem likely to occur in the European economies, do you believe that there are any specific horizontal competition "issues" not currently addressed by the current Specialisation and R&D Block Exemption Regulations or Horizontal Guidelines and that should be considered in the review (e.g., information exchange)? Please provide reasons for your response.**
- 4.1 We agree that greater clarity and explanation is required on the subject of information exchanges. In particular, it would be useful to have guidance on whether the horizontal exchange of information is regarded by the Commission as in itself an object infringement (effectively per se illegal), or whether adverse consumer effects must be shown.

- 4.2 In light of current economic conditions, we would welcome guidance on horizontal arrangements such as:
- (a) rationalisation/capacity reduction agreements – the **Irish Beef**² judgment has ruled that a production capacity reduction agreement is an object infringement, but guidance on the circumstances in which such arrangements might be capable of falling within the Article 81(3) legal exemption would be welcome; and
 - (b) crisis cartels – in some situations, extreme economic circumstances or public interest considerations may make normally illegal horizontal arrangements acceptable. There has been an example in the UK as regards the supply of oil fuels to essential users in times of national fuel shortages³ but other examples and a discussion of guiding principles would be helpful.
- 4.3 Guidelines on the work of trade associations would also be helpful. It is well established that much of the work of trade associations is perfectly legitimate and useful, such that clear guidelines should be straightforward to produce.
- 4.4 We would also welcome further guidance on joint tendering situations. In particular, we would welcome clearer guidance regarding the economic efficiencies that can take joint tendering by competitors either outside the ambit of Article 81(1) or will allow the conditions of Article 81(3) to be fulfilled. In a similar vein, we would welcome clearer statements regarding the position where joint tenderers are not direct competitors but their activities overlap marginally or occasionally but there is no overlap in respect of the main focus of the parties' businesses.
5. **Other issues**
- 5.1 Finally, we note that the clear market share "safe harbour" thresholds in the specialisation block exemption (20%), the R+D block exemption (25%), the guidelines on joint purchasing (15%), and on commercialisation (15%) etc all give a clear indication of the relative levels of competition risk associated with such arrangements. This sliding scale of risk is useful. An indication of where other types of horizontal agreement might be positioned on the risk scale would be very helpful.

Ashurst LLP
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² Case C-209/07, **Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd** (judgment of 20 November 2008, not yet reported)

³ Decision of the Director General of Fair Trading No. CA98/8/2001 **Memorandum of Understanding on the supply of oil fuels in an emergency** (25 October 2001).