

**RESPONSE TO CONSULTATION ON HORIZONTAL CO-OPERATION
GUIDELINES AND RELATED BLOCK EXEMPTIONS**

1. GENERAL

- 1.1 Baker & McKenzie is grateful for the opportunity to provide views on the R&D and specialisation block exemptions and complementary horizontal co-operation guidelines ("Guidelines").
- 1.2 In general, we have found the block exemptions and Guidelines to be very helpful. Accordingly, we believe they should be updated and improved as opposed to 'repealed'. We also believe that they should be extended (as explained further below in section 8).
- 1.3 Our first general observation relates to transparency. While we acknowledge the challenge of providing guidance on the multiplicity of competitor arrangements, one relatively simple way of providing genuinely useful guidance would be to refer to illustrative Commission decisions and Court jurisprudence in the Guidelines. This would also be consistent with the approach adopted in more recent Commission Notices such as the Consolidated ECMR Jurisdictional Notice and the Communication on Article 82 enforcement priorities. Adopting this approach would mean that the often abstract - and in some cases - overly simplistic examples included in the current Guidelines would not be necessary.
- 1.4 On a related point, we also believe that, even if the Commission were to take the view that a particular area was outside the scope of the Guidelines, the Notice should nonetheless refer to the existence of relevant cases to make it clear that the Guidelines are not an exhaustive statement on what is either outside Article 81(1) or exemptible under Article 81(3). This point is developed further in section 6 below.

2. BASIC PRINCIPLES

Notion of a "competitor" in the Guidelines

- 2.1 First, it would be extremely useful to clarify in the Guidelines that a joint venture which is solely controlled by Company A (within the meaning of the EC Merger Regulation) will not be regarded as a competitor of Company A. This clarification could be given at paragraph 2.4 of the Guidelines.
- 2.2 Secondly, paragraph 2.4 (second indent) clarifies, helpfully, that co-operation between competing companies that could not carry out a project independently will not normally fall within the scope of Article 81(1). This paragraph should clarify that even a project between competitors where only one of the companies would otherwise be unable to enter the market may not fall within Article 81(1). This clarification should be tied to a reference to the CFI judgment in *O2/T-Mobile* where it was held that an objective assessment of the market must be undertaken including the competitive position which would have prevailed without the agreement/co-operation in question.
- 2.3 In terms of other general points, we would be grateful for further guidance on how the Commission will characterise an agreement according to its "centre of gravity". For example, we wonder whether an assessment of the costs/revenues generated in connection with a project which combines multiple stages of cooperation might be added as a relevant factor.

3. R&D BLOCK EXEMPTION

- 3.1 We have had very positive experience of relying on the R&D block exemption in respect of R&D projects. However, we query why the safe harbour market share threshold is as low as 25 per cent. In our view, this is unduly low - especially when one takes into consideration the statement in the Commission's Guidelines on horizontal mergers which indicates that even full integration of activities is unlikely to be problematic when the resultant market share is below 25 per cent. We do not see why the Commission takes a similarly conservative approach to market share where the parties are only cooperating in terms of R&D (and not merging sales activities etc). We think an increase of this threshold is particularly important given that R&D is increasingly important for business.
- 3.2 We also recommend that extra guidance is given on when there can genuinely be said to be competition in innovation (see paragraph 50-52 of the Guidelines). This would be particularly useful for those sectors where significant risks (including unpredictable costs) often mean that, in real terms, potential competition is much weaker. Indeed, the Guidance should take into consideration the particular risk profile for a competitor when assessing whether there would remain a competing pole of innovation.
- 3.3 We also query whether the Guidelines give sufficient consideration to the benefits of a faster launch of a new product. Indeed the example in paragraph 75 may be too simplistic to be genuinely helpful in practice. For example, the Commission assumes in that example that the loss of the innovation pole will translate inevitably into less of an incentive to bring the product to market. However, in some markets there will be a natural incentive to bring the new product to the market as soon as possible - e.g. in dynamic markets such as IT where time is of the essence.

4. JOINT PRODUCTION

- 4.1 We regularly advise companies on the application of the specialisation block exemption and Guidelines in relation to joint production. Our main issue relates to the wording of the block exemption in so far as it covers the selling activities of a production joint venture.
- 4.2 First, we note a source of confusion in relation to definitions. Article 1 of the specialisation block exemption defines "specialisation" as including unilateral specialisation, reciprocal specialisation and joint production. However, Article 3(b) appears to draw a distinction between "specialisation" agreements and "joint production" agreements. Our view is that the word "specialisation" in Article 3(b) is intended to cover both specialisation and joint production (even though joint production agreements are subsequently referred to separately in the same Article). Accordingly, following the wording of Article 3(b), the joint production joint venture can engage in distribution where the parents do not sell the products which are the object of the agreement independently. However, this should be clarified.
- 4.3 There is also some ambiguity as a result of the reference in Article 3 to "products which are the object of the agreement". It is unclear whether the protection of the block exemption would be lost if the parents were to sell products which competed with the products (but were not identical to the products being produced by the joint venture).
- 4.4 The Guidelines should also clarify what is meant by "distribution" in Article 3. Presumably this covers the joint setting of prices and not the mere logistics of physical distribution.
- 4.5 Guidance on this latter point is certainly needed as Article 5(1)(b) and Article 5(2)(b) lead to further confusion by, respectively, outlawing price-setting and then allowing it in respect of products sold by the joint venture to its immediate customers. These conflicting and ambiguous provisions result in uncertainty over precisely what the block exception covers. Even assuming that distribution (going further than mere logistics) is meant by "distribution" in Article 3, it appears to be the case that the block exemption would not cover any price setting where the production joint venture entrusted the selling to its parent companies or to

only one of them. There are numerous ways in which the product of the joint venture can be distributed - e.g. by "offtake" agreement; through distribution by one of the parents (e.g. with revenue sharing); or simply the joint venture selling the products but with varying levels of assistance from one of its parent companies. While the vertical block exemption will apply to vertical arrangements, the current wording of the Guidelines appears to preclude the specialisation block exemption when there is a potentially minor variation in the method of distribution. We fail to see the economic rationale for this.

- 4.6 The final confusing element is contained in paragraph 90 of the guidelines which implies that some integration is needed for the setting of prices by a production joint venture to be permitted. The footnote refers to full function joint ventures - but this is of limited guidance since the degree of integration involved in such cases is clearly very significant (to the point of being covered by different EC legislation).
- 4.7 Our comment is that it is apparent (or at least implicit) from the Guidelines that some form of cooperation and price-setting by a less than full-function joint venture (within the meaning of the ECMR) would be permissible. However, there is no guidance on what kind of joint venture the Commission has in mind. The Guidelines should indicate what the Commission means by "integration". For example, does this require an actual combination of facilities etc such that there are identifiable efficiencies or does this merely mean something other than a negotiation over selling terms by distinct marketing arms of the parent companies?

Horizontal agreements and tacit collusion

- 4.8 On a separate point, paragraph 97 of the Guidelines mentions that "network effects" may tip the balance and "make collusion more likely". We query whether "network effects" (more commonly referring to positive externalities) is the appropriate way to describe this issue.
- 4.9 Also, the wording of this paragraph seems to suggest that the 'additional' agreement would only make it likely that some subsequent concerted practice or agreement would fall within Article 81. In other words, it is unclear whether this paragraph implies that an additional agreement in an already concentrated market could infringe Article 81 (because of the structural link it adds) or merely implies that some subsequent act is now more likely to infringe Article 81.
- 4.10 In any event we think the emphasis of this paragraph is incorrect. Many markets will be characterised by "network effects" (to use the wording of paragraph 97) and the Commission will no doubt be reluctant to dissuade unduly a new entrant from benefiting from risk-sharing practices which may be characteristic of an industry sector. We therefore think that, instead of pointing out the "pitfalls" of these arrangements, the Guidelines should explain what a company must do to avoid the negative "network effects". Indeed, this may be an area where the Guidelines could offer specific tailored guidance on information exchange (see our comments in section 8 on this more generally). For example, the Commission could indicate how firewalls etc should be designed and implemented to ensure that the agreement does not "tip the balance".

5. JOINT PURCHASING

- 5.1 In our view, paragraphs 115-138 of the Guidelines seem simplistic when compared with the remainder of the Guidelines. We also think it appropriate for the Commission to develop its guidance in this area given recent comments made by the Commission about anticompetitive "buying alliances" .¹ In the light of this, we would make the following suggestions:

¹ See for example COM (2008) 821/4.

- Paragraph 123 refers to the risk that buyer power may result in a supplier attempting to recoup its 'costs' by charging higher prices to other purchasers. This paragraph should acknowledge that supplier buyer power is a prerequisite for this.
- Paragraphs 130 and 131 refer to a market share threshold of 15 per cent. It seems to us that the Guidelines are overly restrictive in this regard². In particular, paragraph 131 should refer to a significantly higher market share than 15 per cent - and also the fact that the supplier's market power will be a very important factor in the analysis.
- Paragraph 124 refers to the fact that joint buying may in fact conceal a "disguised cartel". However, the Guidelines do not elaborate on where the line should be drawn between a 'buyer's cartel' and an exemptible buying arrangement between competitors. For example, it is not clear whether the Commission takes the view that the determining factor is the market share attributable to the buying group or whether other 'hardcore' elements are needed - such as a restriction on buying outside the buying group etc. More guidance on this area would be very welcome.
- In paragraph 132, the Commission appears to dismiss any 'savings' due to market power. This seems to assume that the price was previously at the competitive level. In fact, the joint purchasing may enable purchasers to have a 'corrective' effect on an upstream price - although there may be no synergies as such.

6. JOINT COMMERCIALISATION

- 6.1 Paragraph 89 of the Guidelines deals with purchases from competitors - and indicates that subcontracting arrangements between competitors will not fall within Article 81(1) provided they are limited to individual sales and purchases on the merchant market without any further obligations and "without forming part of a wider commercial relationship between the parties". The Commission has informed Baker & McKenzie in the past that framework agreements agreed between competitors which contemplate the need to make 'spot' sales in the future would not benefit from the 'safe harbour' represented by paragraph 89.
- 6.2 We query whether this approach is justifiable. A framework agreement and individual sales on the merchant market do not seem to us to be mutually exclusive. It is natural for companies to address risk by contemplating the need to make spot sales (albeit in the future) and the framework agreement, setting out the terms and conditions under which spot sales will be made, is merely a way of doing that. It should not therefore be characterised as a wider commercial relationship with a competitor which would always need to be considered under Article 81. The Guidance should make this clear.
- 6.3 Further, paragraph 89 does not make any attempt to address other types of (often benign) dealings between competitors. The Guidelines should cover the numerous other common ways in which competitors may purchase from each other - include short-term swaps; exchanges etc.
- 6.4 Although the Commission may take the view that the joint selling of sports and media rights is beyond the scope of the Guidelines, we think the Guidelines should nonetheless refer to these sectors (and the key cases within them) and other sectors where joint selling has been regarded as benign or exemptible under Article 81(3).

² We query also whether this approach is consistent with the ruling of the Court of Justice in *Gøttrup-Klim e.a. Grovvarforeninger v Dansk Landbrugs Grovvarereselskab AmbA* - Case C-250/92

7. ENVIRONMENTAL AGREEMENTS

- 7.1 The Guidelines need to be updated to reflect issues raised by environmental legislation which has been adopted since the Guidelines were adopted.
- 7.2 For example, the Guidelines now need to explain how competitors should design and implement the type of consortium which is contemplated by REACH. While the Regulation expressly recommends the setting up of consortia, there is no guidance available for companies on how to design a consortium that falls outside Article 81(1).
- 7.3 The Guidelines need to cover the issues that arise for consortia members in practice, e.g. how to decide which company should lead the consortium; how to approach cost-sharing etc; how to address the fact that the consortia run the risk of sharing information on sensitive matters e.g., customer perceptions of the products.
- 7.4 Indeed, this is another area where a section on information exchange should be added, tailored to the issues arising in the context of cooperation for environmental reasons.

8. OTHER AREAS

Information exchange

- 8.1 The Guidelines should contain a whole chapter dedicated to the issues raised by the exchange between competitors of information (covering price and non-price information). Although there is some guidance in the maritime sector - which is useful - there is a real need for guidance of more general application. This guidance should reflect the ECJ's ruling in *Asnef-Equifax* - perhaps also going into more detail on when a market will not be seen as concentrated such that the *Asnef-Equifax* principles can be applied with confidence.³
- 8.2 In addition to a chapter dedicated to information exchange, each of the other chapters in the Guidelines should address information exchange issues in so far as they arise in respect of the type of cooperation covered in that chapter, e.g. the section on joint production etc should have a supporting section in the particular risk or scope for anticompetitive (or indeed pro competitive) information exchange.

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February 2009 (GXM)

³ We note that paragraph 10 of the Guidelines explains that the Guidelines only cover horizontal cooperation that could give rise to efficiencies. However, the ECJ ruling in *Asnef-Equifax* confirms that information exchange can give rise to efficiencies.