

Joint Working Party of the Bars and Law Societies of the United Kingdom on Competition Law (the ‘JWP’)¹

Response to the European Commission's public consultation on the current regime for the assessment of horizontal cooperation agreements under EU antitrust rules

Introduction

1. The UK Joint Working Party welcomes the opportunity to comment on the current regime for the assessment of horizontal cooperation agreements under the EU antitrust rules. The Commission’s current review is timely, not simply because of the impending expiry of the block exemptions on R&D and specialisation, but more particularly because of the need to update the guidelines on the applicability of Article 81 to horizontal agreements (the **EC Horizontal Guidelines**) in light of subsequent developments – just as the Commission's approach to enforcement of Article 82 has been updated, and just as the vertical guidelines are similarly under review.
2. We have a number of general comments and some specific comments.

General comments

3. At the general level our comments relate to (i) the need to modernise and deepen the guidelines – and in particular to dovetail them with the Article 81(3) guidelines and adjust the balance between Article 81(1) and Article 81(3); and (ii) some limited suggestions on broadening the scope.

(i) *Modernising the guidelines*

4. The EC Horizontal Guidelines were, along with the vertical guidelines of 1999, part of a major overhaul of the approach to the application of Article 81 by the European Commission ten years ago. These developments followed the 1998 judgment of the Court of First Instance in *European Night Services*² where the CFI clearly confirmed the requirement for there to be an appreciable (likely) effect on competition in order for the "effect" limb of Article 81(1) to be engaged at all. They also came at a time when the Commission still had sole competence for the application of Article 81(3). Consequently, the focus of the guidelines was on Article 81(1) rather than Article 81(3), and was particularly on giving undertakings and national courts and authorities

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² Case T-374/94 *European Night Services v Commission* [1998] ECR II - 3141

(many of whose national regimes had replicated Articles 81 and 82) the underlying principles as to when it most likely would not be engaged, when it may be engaged and when it likely would be engaged.

5. That was a sensible aim at the time, and looking back at the guidelines now, we believe the Commission appropriately executed that aim at the time. Further, we think the overall architecture of the guidelines remains sound and we would not wish to seek any radical departure from it. In particular, the twin approach of a safe harbour "screen" below which Article 81(1) is unlikely to be engaged (through a combination of *de minimis* thresholds and the application of basic principles); and a sophisticated economic approach above the screen is one that has been adopted in all Commission guidelines since, and which in our view is fundamentally sound.
6. The guidelines, do, however, in our view, now need to be adjusted to reflect (a) developments in the sophistication of the Commission's approach in light of experience in the last nine or ten years; and (b) the new procedural regime introduced by Regulation 1/2003, together with the Article 81(3) guidelines; and (c) certain other points which we group under sub-head (c) below.
 - (a) *Developments in the sophistication of the Commission's (and other agencies / courts') approach*
7. We deal with the first of these principally in the "specific points" section below, but at a global level we would encourage the Commission to review carefully the language of the guidelines to consider whether in places the tone may be a bit too dogmatic and could benefit from a greater recognition that – even for arrangements which may have the *appearance* of containing hard-core restrictions, the Commission will approach the matter carefully based on the factual evidence and economic context to consider whether that is indeed what is going on. Allied to this is the need, underlined by the CFI in Case T-328/03 *O2 v Commission*, to examine the counterfactual situation of competition in the absence of the agreement. These points are particularly relevant in respect of the section on commercialisation agreements.
8. In this respect we would refer the Commission to two sources. First, the US joint *FTC/DoJ Antitrust Guidelines for Collaborations Among Competitors (the US Guidelines)*. We recognise that the Commission sought to be measured in drafting the EC Horizontal Guidelines, But there is in our view a marked difference in this respect between the US Guidelines and the EC Horizontal Guidelines. The US Guidelines are infused with a recognition of the need to be practical and flexible in this area, for example: "*the Guidelines cannot remove judgment and discretion in antitrust law enforcement*"; the framework must be applied "*reasonably and flexibly*" (both p2); and

"[o]rdinarily no one factor is dispositive in the analysis" (p4).³

9. The second source is the CFI judgment in *GlaxoSmithkline v Commission*⁴ (the Spanish dual pricing case). That judgment makes clear that even where a provision *appears* to have the object of restricting competition, the analysis does not stop there. It was not sufficient, in that case, for the Commission to point to a clause in GSK's general sales conditions establishing a system of differentiated price intended to limit parallel trade. The Commission is required to conduct an analysis – which may in certain circumstances be "abridged" but should in all circumstances be a genuine analysis, having regard to the factual context – as to whether the clause does indeed have the object of restricting competition. We believe exactly the same approach applies, as a matter of law, to commercialisation agreements. There is no principled basis for taking a different approach in relation to some apparently hard core restrictions than is taken with others. We also believe recent EC and UK case law supports this view, as more particularly described in the specific comments section below. While the Commission is appealing the GSK case (and this point) to the ECJ, it remains the law and needs to be addressed in the revised Horizontal Guidelines which will in all likelihood precede the ECJ Judgment.⁵
10. Finally, and more generally, the case law and decisional practice of the Commission and relevant national competition authorities and courts has considerably developed since modernisation and since the current version of the Guidelines was written. Increasingly the Commission has been prepared to recognise that in the application of Article 81 to a particular agreement (both at the stage of determining whether Article 81(1) applies in the first place, or at the stage of determining if the agreement meets the conditions for application of Article 81(3)), the analysis must attempt to compare the competitive situation as it is or would be under the agreement with the situation as it is or was likely to be in the absence of the agreement (identifying the appropriate counterfactual against which the restrictive effects of the agreement must be measured). These trends need to be reflected in the redraft.

(b) Regulation 1/2003 and the Article 81(3) Guidelines

11. The significance of modernisation (in the Regulation 1/2003 sense) for the present exercise is that it means that the EC Horizontal Guidelines need to be adjusted somewhat to even out the attention given to Article 81(1) on the one hand and Article 81(3) on the other. We recognise that it may be considered duplicative to add in large amounts of text on Article 81(3) but that is not what we propose. We propose that the

³ The US guidelines also recognise that, whilst the legality of an agreement can change over time as the market changes, the antitrust assessment needs to be "*sensitive to the reasonable expectations of participants whose significant sunk cost investments in reliance on the relevant agreement were made before it became anticompetitive*" (top p7). On this particular point the Article 81(3) Guidelines are in fact clearer than the US guidelines because they prescribe a specific period within which the original analysis will stand – namely the period required to recoup the investment (para 44).

⁴ Case T-168/01 *Glaxosmithkline v Commission*, 27 September 2006; on appeal cases C-501/06, 513/06, 515/06, 519/06

⁵ The Oral Hearing is scheduled for 18 March 2009.

Article 81(3) Guidelines are referred to throughout the document and that the Commission's current approach to Article 81(3) is restated in more succinct form in the EC Horizontal Guidelines.

12. Related to this is the question of whether the Article 81(3) Guidelines themselves strike the right balance. This question cannot be ignored for the purposes of the present exercise since it is intimately linked with the application of the guidelines to horizontal and vertical agreements.
13. We believe that the Article 81(3) Guidelines essentially adopt the right approach, but require some adjustments to show greater recognition of the inevitable difficulties of obtaining detailed data to verify propositions and the consequent need for regulators and courts to be realistic in applying it. The Article 81(3) Guidelines commendably introduced a forensic approach to Article 81(3) in the new world of parallel competence. Five years on, in revising its approach to horizontal agreements (and, we suggest, the same is true of verticals) the Commission now needs to signal a recognition of the flexibility required in this part of the analysis. Again the US guidelines - which deal with efficiencies succinctly over two pages (pp 23 – 25) – provide a good template.⁶

(c) Various additional general points

14. We have five further general comments:
 - A. So far as overall length is concerned, we note that in the Article 82 context the Commission has commendably distilled the DG Competition discussion paper of 2005 down to a document one third of the length in its Article 82 guidelines. The horizontal guidelines are, in our view, of an appropriate length, but the structure of organising it into separate sections for each type of agreement inevitably leads to repetition. We see no need to change that structure, but we would invite the Commission to consider creating space by greater use of cross-references back to previous sections etc. – thus making room for the greater depth (and, to a limited extent, increased scope) which we propose.
 - B. The US guidelines usefully cross-refer to the horizontal merger guidelines – for example on analysis of market shares / concentration (section 3.3.3, pp17-18) and the approach to entry (section 3.3.5, pp 21-22). The EC horizontal guidelines should do likewise with respect to the EC horizontal merger guidelines, to ensure a joined-up approach.
 - C. There is one point as to scope where we recommend no change, but it is useful to make the point since it is a differentiator between the EC and US guidelines. The US guidelines only address collusive effects; exclusionary effects are specifically excluded from their

⁶ We wish to emphasise that we recognise that the Commission's approach, like the US approach, is already balanced and sensible on the issue of indispensability – see para 73, Article 81(3) Guidelines which makes clear the touchstone is "reasonable" necessity and para 75, the comparison is with "reasonably practicable" alternatives and there is no second guessing of business judgment. But looking at the approach to Article 81(3) *in toto*, and comparing it with the US guidelines on the efficiencies aspect, we believe that this flexibility and realism is not currently sufficiently extended more generally across the Article 81(3) piece – and that it should be extended in this way.

ambit (footnote 5). The EC horizontal guidelines are not so limited (for example, they deal with exclusionary effects arising from standardisation) – in our view, rightly so.

- D. Finally, the examples given in the guidelines are useful but we would urge the Commission to look at making some of them more useful or perhaps adding others. As is the case with the US guidelines, the examples fall into two types: examples where a clear steer as to likely treatment is given and examples where the principles for assessment are given. As a general matter, we prefer the latter type of example. Where facts that can be expressed in the single paragraph of a worked example give rise to a clear "answer" that answer is probably fairly clear to most informed readers now in 2009. It is more useful to provide "hard case" examples and to set out the avenues of inquiry which the Commission believes may inform the assessment.
- E. The two block exemptions, on specialisation and R&D, are useful and should be retained. In reality, our members find that most agreements they deal with fall outside the block exemptions because of the low market share caps; consequently, the sections in the guidelines dealing with those types of agreement are even more important.

(ii) Extending the scope of the guidelines

- 15. We note the reference in para. 10 to the issuing of separate guidance on information exchanges and minority shareholdings. We note also that the Commission Questionnaire specifically asks whether respondents would be in favour of the Horizontal Guidelines including a section on information exchanges.
- 16. Regarding information exchanges, we believe that some specific guidance on this would be useful. We note that the Commission has included a whole section summarising and applying the law governing information exchanges in its Maritime Guidelines⁷ and suggest that this might usefully be adapted for other sectors. However in doing so, the Commission should consider whether the approach taken in those guidelines to the concept of 'historic' information is too narrow. As the Commission points out in the guidelines, the historic or recent nature of information needs to be assessed flexibly having regard to the market in question. In our experience, information a week old or even more recent may be historic in some industries.
- 17. Apart from information exchanges, as mentioned above, we believe refinements as to depth and sophistication are more important than extending the scope. Given the likely aim of not increasing the overall length of the document, and given the need to focus on those points of depth/sophistication, we do not recommend increasing the scope to cover non-competes but we do believe that in the current economic climate that it might be useful if the guidelines were to cover, though briefly, minority shareholdings.

⁷ Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, OJC 245/2 of 26.9.2008, at para 38 et seq.

Specific comments

18. We have the following more specific comments:

- A. In terms of presentation at the outset of the document the EC guidelines come across as somewhat negative in comparison with the US guidelines. This can be readily solved by reversing the order of paras 2 and 3.
- B. Some specific instances of repetition could usefully be avoided; *e.g.* para. 1 declares that "A cooperation is of a 'horizontal nature' if an agreement or concerted practice is entered into between companies operating at the same level(s) in the market." That is effectively a definition of "horizontal cooperation agreements". Paragraph 9 duplicates a large part of that definition, with some further refinements. It would be easier to have one definition at the start (note that the US Guidelines start with Purpose and Definitions).
- C. We feel the use of more paragraph sub-headings would help navigating to the appropriate section. For instance, in section 1.3 the guidelines seek to make a key distinction between agreements that are anti-competitive by object (paras. 18 and 25) and those that infringe the basic prohibition merely because they produce anti-competitive effects (paras. 19-23, 26-30). To that one could add a first category, agreements that are not likely to infringe the basic prohibition (para. 24). The sub-headings in the current text ("Nature of the agreement" and "Market power and market structure") are given too much prominence given that they are really sub-sub-headings of the third category (infringements by effect). Some editing would help.
- D. The critical distinction (at least in terms of its procedural effects) between horizontal agreements requiring analysis under Article 81 and those falling under the definition of full-function joint ventures and so subject to the procedural regime of the EC Merger Regulation needs to be given far more prominence. Para. 13 makes it clear that "[o]perations that come under the Merger Regulation are ... not the subject of the present guidelines." However, at the very least there should be a reference to the Jurisdictional Guidelines and ideally a brief summary of the principal features of full-function joint ventures (*cf.* US Guidelines which devote a whole section to "Competitor Collaborations Distinguished from Mergers"). There is, moreover, a tantalising reference to the distinction between fully integrated joint production ventures and full-function joint ventures in note 41 ("A production joint venture which also carries out joint distribution is ... in most of the cases a full-function joint venture"). Furthermore, the Horizontal Guidelines still are relevant in analysing the cooperative links between controlling shareholders in a full-function joint venture *inter se*, between controlling and non-controlling shareholders and between controlling shareholders and the joint venture.
- E. One example of the need to modernise the EC Horizontal Guidelines is in relation to their statement that "Where an undertaking is dominant or becoming dominant as a consequence of a [horizontal/R&D etc] agreement, an agreement which produces anticompetitive effects in the meaning of Article 81 can in principle not be exempted."

This appears in paragraphs 36, 71, 105, 134 and 155. In contrast, the Article 81(3) Guidelines, rightly, make it clear that Article 81(3) applies to all agreements that fulfil the four conditions whether or not they are concluded by dominant companies. While agreements concluded by dominant companies are less likely to fulfil all the conditions, they are entitled to a proper assessment.

Production agreements (including specialisation agreements)

19. We also have some specific comments on the section on production agreements. In general the analysis in this section is helpful.
20. We nevertheless find the explanation of how Article 81 applies to production joint ventures confusingly set out. The principles are set out twice, once as an exception to the general presumption against hardcore restrictions in note 18 to paragraph 25 and then, but in more expanded form, in the section on production agreements (in Section 3.3 dealing with assessment under Article 81(1) at para. 90) subject to the important caveat in note 41.
21. Paragraph 90 repeats the core presumption that hardcore restrictions are always deemed to fall within the basic prohibition but introduces an express exception to the rule for production joint ventures setting the capacity and production volumes of their joint venture or the agreed amount of outsourced products and – for joint production agreements where the joint entity is also responsible for bringing the jointly produced goods or services to the market – setting prices of the jointly produced products so long as it results from the integration of the various functions. Note 41 nevertheless provides the gloss that such agreements will usually be treated as full-function joint ventures and will not therefore directly fall within these Guidelines.
22. There is no cross-reference back to any of these statements in the section on commercialisation agreements, an omission that in our view needs to be corrected.⁸

⁸ The section is sprinkled with references to the core presumption that hardcore restrictions always infringe the core prohibition, *cf.* paras. 144, 145, 148, though there are slight variations in the wording, *viz.* "cooperation agreements that have the object to restrict competition by means of price fixing, output limitation or sharing of markets or customers [normally fall under Article 81(1)]"; "[a]greements which fix the prices for market supplies of the parties, limit output or share markets or customer groups have the object of restricting competition and *almost always* fall under Article 81(1)"; "[a]greements *limited to* joint selling have *as a rule* the object and effect of coordinating the pricing policy of competing manufacturers."; "agreements *that involve* price fixing will *always* fall under Article 81(1) irrespective of market power of the parties" (emphasis added). Contrast the guidance given at para. 62 of the Maritime Guidelines, in relation to the assessment of a pooling agreement in the tramp shipping industry, which "must be analysed on a case-by-case basis to determine, by reference to its centre of gravity, whether it is caught by Article 81(1) and, in the affirmative, if it fulfils the four cumulative conditions of Article 81(3)."

*Commercialisation agreements*⁹

23. The section on commercialisation agreements, more than any other section in the guidelines, needs, in our view, very careful substantive rethinking in light of subsequent developments.
 24. The section is simply too dogmatic, in a way that does not accord with the modern understanding of EC competition law. See our comments on the GSK Spanish case at para 9 above. The Commission should consider also a series of subsequent cases at both EC and UK level where commercialisation agreements have been treated with far greater sophistication than the commercialisation section of the guidelines would suggest: namely, the credit card interchange fee cases, the football media rights cases (UEFA etc.) and the UK racecourse media rights cases. So far as the latter is concerned, we would particularly commend to the Commission the very lucid analysis provided by Mr Justice Morgan in the UK *AMRAC* case¹⁰ in August 2008.
 25. Finally, the section helpfully contains guidance on how to analyse bidding and construction consortia (para. 141) but neither the heading nor the definition in para. 139 mention them as a category covered. This makes it hard to find the relevant passage.
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⁹ Whilst we are more concerned to comment on the substance of the guidelines it should also be noted that in choosing the term "commercialisation agreements" to convey the French term "accords de commercialisation" the Commission has adopted language that has a different connotation in English - usually being used in a disparaging sense to describe with pushy selling methods or venal behaviour as in "my father considered the commercialisation of Christmas to be a sacrilege". The Commission might want to consider instead calling it "Marketing, sales and other downstream activities" or "Bringing goods or service to the market".

¹⁰ Case No: HC07C02416 *Bookmakers Afternoon Greyhound Services Ltd and others vs Amalgamated Racing Ltd and others*, 8.8.2008, High Court (Chancery Division).