

## Review of the current regime for the assessment of horizontal cooperation agreements under EU antitrust rules

HT.1407

### Comments Submitted by Reed Smith

#### 1. INTRODUCTION

- 1.1 The following comments are submitted on behalf of Reed Smith. With global capabilities and a multidisciplinary approach, our Antitrust, Competition, and EU Law Group represents clients with operations in the United States, Europe, and many other parts of the world. We regularly advise clients on the application of Article 81 to horizontal arrangements and activities such as cooperation agreements, consortia arrangements and joint ventures which are not full functional.
- 1.2 We therefore welcome the opportunity to submit comments on the EU's current regime for the assessment of horizontal cooperation.
- 1.3 Since Regulation 1/2003 came into effect on 1 May 2004, we have undertaken a number of Article 81(3) assessments on behalf of clients. In undertaking these assessments, we have regularly referred to the European Commission's (the Commission) Guidelines on the application of Article 81(3)<sup>1</sup> ('Article 81(3) Guidelines') as well as the Commission's Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (Horizontal Guidelines).<sup>2</sup> Indeed we consider that the Horizontal Guidelines form part of an overall package of tools that companies and their advisers can use to determine whether or not their arrangements and agreements are compatible with Article 81. This package of tools consists not only of these two sets of Guidelines, but also block exemption regulations including those for specialisation and research and development agreements, as well as Commission decisions on arrangements that were notified and exempted under the former Regulation 17/62.<sup>3</sup>
- 1.4 We consider however that, given the "self assessment regime" has been in place for nearly five years and the Horizontal Guidelines were adopted in 2000, this is an appropriate time to review the effectiveness of the Horizontal Guidelines, especially

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<sup>1</sup> Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty, [2004] O J C101

<sup>2</sup> Commission Notice – Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements [2001] OJ C3

<sup>3</sup> [1962] OJ L13

as the Specialisation and Research and Development Block Exemptions are due to expire in 2010.

- 1.5 We however limit our comments to the application of the Horizontal Guidelines and in particular those areas where we consider additional guidance should be incorporated or existing guidance should be clarified.

## **2. HORIZONTAL GUIDELINES – GENERAL COMMENTS**

- 2.1 In general we consider that the Horizontal Guidelines have worked well, especially as they were published in 2000, well before the adoption of Regulation 1/2003 and the introduction of the “self assessment” regime. For legal advisers advising companies on whether their activities are compatible with Article 81 and in particular Article 81(3), the Horizontal Guidelines are a useful starting point from which to analyse all forms of joint cooperation.
- 2.2 However we note that the Horizontal Guidelines were drawn up before modernisation under Regulation 1/2003. This perhaps explains why they do not discuss more fully the general principals applicable to assessing horizontal cooperation agreements. As a result they start with an immediate review of different types of horizontal cooperation without explaining why such an analysis is necessary. This said, with the adoption of Regulation 1/2003, the framework for analysing such agreements under Article 81 was set out in the Article 81(3) Guidelines. These Guidelines set out the context within which Article 81 and in particular Article 81(3) should be applied. We would therefore suggest that the Horizontal Guidelines are updated to refer to the Article 81(3) Guidelines. This would then put the Horizontal Guidelines in context and create a more coherent package of measures that companies and their advisers can use to undertake Article 81(3) assessments.
- 2.3 The actual examples given in the Horizontal Guidelines on how Article 81 can be applied to agreements are helpful, as they provide a starting point from which to analyse different types of agreements. We do however consider that some of the examples are too simplistic, covering straight forward arrangements where parties have low market shares. We would therefore suggest that the examples are expanded or amended to cover more slightly more complex and realistic arrangements. However these amendments should not result in the Guidelines themselves becoming over complex, as this could limit their effectiveness as initial points of reference when assessing cooperation agreements and arrangements.
- 2.4 The Horizontal Guidelines are important for all sectors of industry and as a result none of the examples cited are industry specific. However we suggest that in reviewing the Horizontal Guidelines, account should be taken of the recent changes that have taken place with regard to the application of the competition rules to liner shipping. Until October 2008, horizontal cooperation between shipping lines in the form of liner conferences had been subject to a special competition regime under the provisions of Regulation 4056/86<sup>4</sup> which allowed shipping lines to exchange certain types of confidential information in certain circumstances. This special regime for

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<sup>4</sup> Council Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 [now 81 and 82] of the Treaty to maritime transport (Liner shipping conferences) – [1986] OJ L378

liner shipping conferences was removed in October 2008 and shipping lines must now operate within the normal competition rules. We therefore consider that it would be of benefit, not only to the shipping sector, but all industry sectors if the Horizontal Guidelines addressed information exchanges between competitors.

### **3. INFORMATION EXCHANGE**

3.1 The European Commission has addressed the general principles of information exchange in the Maritime Guidelines<sup>5</sup> which were published in July 2008. These give a general overview of the relevant EU case law and principles to be followed when applying Article 81 to information exchanges. In summary the Maritime Guidelines note that:

- An information exchange system is an arrangement whereby undertakings exchange information amongst themselves or supply the data to a common agency responsible for centralising, compiling and processing it before returning it to the participants in the form and at the frequency agreed;
- Where a market is highly concentrated, there is a higher risk that information exchange will reduce the level of competition between the relevant parties and strengthen the parties dependence on each other;
- Exchange of commercially sensitive information relating to price, capacity and costs which is not in the public domain is likely to breach Article 81(1);
- Aggregated information in principle does not fall within Article 81(1) while exchange of individual information between competitors is likely to be caught by Article 81(1).
- Exchange of historic information is generally not regarded as falling within Article 81(1) because it does not have any impact on the parties' future behaviour. In this instance the Commission confirms that it has in the past considered information of more than one year old as historic and information of less than one year old as recent.
- Exchange of future data is considered to be problematic;
- More frequent exchange of information can reduce the incentives to compete effectively on the market;
- How data is released on the market also needs to be assessed as information that is shared with customers is less likely to raise competition concerns.

3.2 While these principles reflect the EU case law relating to information exchanges, we query whether they are sufficient to help parties determine whether or not their information exchange is legal. Many people are currently referring to the Maritime

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<sup>5</sup> Guidelines on the application of Article 81 of the EC Treaty to maritime transport services - SEC(2008) 2151 final – 1 July 2008

Guidelines to seek guidance on information exchange in a range of sectors. However it should be noted that the Maritime Guidelines were specifically drawn up to address how shipping lines could exchange information outside the liner shipping conference regime. Consequently they are focussed on dealing with the specific needs of the shipping sector and are therefore relatively limited in their scope. We therefore suggest that the Horizontal Guidelines are amended to deal with information exchange away from the context of the liner shipping sector.

- 3.3 Some degree of information exchange between parties to cooperation agreements and arrangements is necessary if the benefits of the arrangement are to be ultimately passed on to the consumers. As has been noted “*competitors cannot compete in a statistical vacuum*”.<sup>6</sup> The Horizontal Guidelines should therefore highlight the benefits of information exchange. Such benefits include increased market transparency enabling companies to make efficient investments and cost reductions and ultimately lower the prices being charged to customers. This transparency can ultimately encourage new entrants onto the market and so increase competition. Companies can also benefit from exchanging information for benchmarking purposes so enabling them to measure their performance against their industry’s best practice. Information exchange can also encourage the spread of know how and technological developments.
- 3.4 The Guidelines however need to acknowledge that while there are benefits arising from the exchange of information between competitors, that same information can be used for anticompetitive purposes such as price fixing, customer allocation and market division. If exchange of information results in the parties to the horizontal agreement aligning their commercial strategies or has as its purpose the implementation of an anti-competitive practice, then it will be in breach of Article 81(1). Parties to agreements and their advisers however need guidance and examples of when information exchange complies with Article 81 and when it is in breach of Article 81.
- 3.5 In addition to addressing the benefits and dangers of information exchange, the Horizontal Guidelines should also address how the principles set out at paragraph 3.1 can be applied in practice. For example it is particularly problematic to determine whether information is sufficiently historic to allow it to be exchange in a non-aggregated way. The Maritime Guidelines state that information which is more than a year old is definitely historic. We query whether this is approach is perhaps too cautious
- 3.6 Further guidance in the Horizontal Guidelines on how such an analysis can be undertaken would be helpful. For example in some industries, information that is a day old may be historic. In the absence of more general guidance on information exchange, the one year benchmark that is contained in the Maritime Guidelines can leave business feeling unnecessarily exposed.
- 3.7 We therefore suggest that the Horizontal Guidelines are amended to include guidance on how information exchange should be addressed when assessing cooperation

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<sup>6</sup> Swedish Competition Authority- The Pro and Cons of Information Sharing, Chapter 2 Information Agreements – Richard Whish, at paragraph 2.1.

agreements. This guidance should address the benefits and risks of information exchange. In particular the Guidelines should address how the principles of information exchange as outlined in the Maritime Guidelines can be applied in practice.

#### **4. JOINT PURCHASING THRESHOLDS**

- 4.1 In relation to joint purchasing agreements the Horizontal Guidelines indicate that in most cases where the market share of the parties is below 15% on the purchasing market, the parties to the agreement are unlikely to have market power. As a result the Horizontal Guidelines create a threshold of 15% above which parties to a joint purchase arrangement will have to ensure that their arrangements are compatible with the conditions contained in Article 81(3).
- 4.2 We query why this threshold is set at this low level. As the threshold is aimed at identifying market power, 15% seems a very low for that purpose, especially when seen against e.g. the mergers regime, Article 82 or Vertical Agreements Block Exemption Regulation<sup>7</sup> which has a market share threshold of 30%. In addition under the Specialisation Block Exemption Regulation the parties to an agreement can accept an exclusive purchase obligation in the context of a unilateral or reciprocal specialisation or joint purchase agreement if they have a market share of under 20%.
- 4.3 In the US the FTC and DOJ Antitrust Guidelines for Collaborations among Competitors<sup>8</sup> states that unless there are extraordinary circumstances, the US authorities will not “challenge a competitor collaboration when the market shares of the collaboration and its participants collectively account for no more than 20% of the each relevant market in which competition may be affected.”<sup>9</sup> This suggests that US authorities will not review joint purchasing arrangements where the market share of the parties is less than 20%.
- 4.4 We therefore consider that the threshold for joint purchasing agreements under the Horizontal Guidelines should be increased.

#### **5. CONCLUSION**

- 5.1 The Horizontal Guidelines have worked well to date and have been helpful as acting as a starting point when applying Article 81 to cooperation agreements.
- 5.2 However in order to put the Horizontal Guidelines more firmly in the context of the overall post notification “self” assessment regime we suggest that the Horizontal Guidelines are amended to refer to the Article 81(3) guidelines and the regime that has been put in place by Regulation 1/2003.

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<sup>7</sup> Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices – [1999] OJ L336

<sup>8</sup> Antitrust Guidelines for Collaborations among Competitors - Issued by the Federal Trade Commission and the US Department of Justice – April 2000

<sup>9</sup> *ibid*– para 4.2

- 5.3 We consider that information exchange should be addressed as a separate topic in the Horizontal Guidelines. In addressing information exchange, the Horizontal Guidelines should build on the relevant guidance set out in the Maritime Guidelines and should identify the benefits and risk of information exchange and provide practical guidance on how the principles relating to information exchange contained in the Maritime Guidelines can be applied in practice.
- 5.4 We consider that the 15% threshold for joint purchasing agreements be reviewed and that consideration be given to increasing it.

**Reed Smith**

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