

**THE CITY OF LONDON LAW SOCIETY COMPETITION
LAW COMMITTEE**

**COMMENTS ON THE DRAFT EU GUIDELINES ON HORIZONTAL CO-OPERATION
AGREEMENTS AND RELATED BLOCK EXEMPTIONS**

1. INTRODUCTION

- 1.1 This paper is submitted on behalf of the City of London Law Society Competition Committee ("the Committee") to provide comments on the EU Commission's draft guidelines on the assessment of horizontal co-operation agreements and the related block exemptions.
- 1.2 The City of London Law Society is one of the largest local Law Societies in the United Kingdom. There are 17,000 solicitors practising in the "Square Mile", who account for 15% of the profession in England and Wales. The CLLS represents over 13,000 of these solicitors through individual and corporate membership. The CLLS was originally part of the City of London Solicitors' Company which was founded in 1908, but in 1969 a separate Committee structure was set up to deal with all professional business and since 1986 this has been known as the City of London Law Society.
- 1.3 The Competition Law Committee is a specialist grouping of Competition Law advisers who are members of the City of London Law Society. Our members frequently advise on EU Competition Law issues and are at the "cutting edge" of antitrust developments in the UK and Europe. The revision of the horizontal co-operation guidelines is a development which impacts upon our work and the advice we provide to our clients. Our members frequently advise clients of all sizes on such matters as joint ventures, bidding agreements, research and development agreements and specialisation agreements.
- 1.4 The Committee generally welcomes the extra guidance and clarity set out in the Guidelines but has set out some detailed points as to how that guidance can be improved in the interests of legal certainty. It is essential to provide these clarifications in the light of the direct application of Article 101(3) which inevitably means that national authorities/judges will rely heavily on the Commission's Guidelines. Clarity is key in order to ensure the consistent application of EU competition law throughout the EU.
- 1.5 We have set out our comments under the following headings:
- Introduction and Basic Principles of Assessment;
 - Information Exchange
 - Research and Development Agreements
 - Production Agreements;
 - Purchasing Agreements;
 - Commercialisation Agreements;
 - Standardisation Agreements.

2. INTRODUCTION AND BASIC PRINCIPLES OF ASSESSMENT

- 2.1 The Committee welcomes the Commission's emphasis on assessing each individual case in its relevant economic context. It believes this will enable the Commission to focus on those cases which pose a greater threat to competition and are harmful to consumers.
- 2.2 It also applauds the Commission's desire to provide the business community with detailed guidance on the extent to which types of business action between competitors is acceptable in

the interest of legal certainty. However, in several places the guidelines fall short in relation to that aim.

- 2.3 For example, with the enactment of the new Insurance Block Exemption Commission Regulation No 267/2010, this removes from the insurance sector certain safe harbours in relation to standard setting and information exchange. Nevertheless, little guidance is provided by way of hypothetical examples for this sector now facing the challenges of competition enforcement in these areas for the first time. Whilst it is appreciated that the draft guidelines cannot ever provide specific examples in every possible scenario, the Committee considers that in the view of the removal of the previously enjoyed exemptions from the insurance sector more could be done to assist insurance undertakings.
- 2.4 The Committee gives a cautious welcome to the explicit guidance given as to when a joint venture and its parent companies form a part of one undertaking within the meaning of Article 101. This is an area of fundamental importance to business, particularly in those sectors with economies in which joint ventures are common (e.g. construction). The freedom of companies to organise commercial relationships with their joint venture has not been previously clarified in this way. However care needs to be taken in the way this guidance is structured and we have set out in the section on Joint Ventures below where we foresee some of the problems.

Joint ventures

- 2.5 The Committee has a number of observations in relation to the Commission's comments on joint ventures, in particular, those set out at paragraphs 11 – 19 of the Guidelines.
- 2.6 This section of the Guidelines makes no distinction between incorporated and unincorporated joint ventures. It should be recalled that joint ventures may be unincorporated and take the form of a collaboration or consortium agreement. The Guidelines should clarify whether this section is applicable to unincorporated ventures. We assume that this is not the case, but this section ought to be clarified.
- 2.7 Caution should be exercised when seeking to extrapolate principles applicable to the correct treatment of joint ventures from some of the authorities which the Commission has cited. We note the Commission's reliance upon the *Avebe* case¹. It is worth also recalling that this case did not involve the facts specifically discussed in paragraph 11.
- 2.8 Similarly, *Viho*² did not deal with joint ventures, but with a network of corporate subsidiaries, through which Parker Pen distributed its products. It would have been senseless for the Court to have applied Article 101(1) to the internal allocation of tasks within a corporate group which had one ultimate parent.
- 2.9 Joint ventures often differ from this structure insofar as they will usually come under the control of two separate corporate groups. They are, after all, usually established to promote a dual interest of two separate corporate entities or groups. In many cases, they will function on a day-to-day basis independently of their parents, who may jointly recruit managers or sales teams specifically to carry out those functions specifically on the joint venture's behalf.
- 2.10 We think that the Guidelines could be clearer on the fact that ownership of a corporate entity creates only a *presumption* that there is a single economic entity. In some cases, it may be

¹ Case T-314/01, ECR II-3085.

² Case C-73/95, *Viho*, [1996], ECR I-5457.

appropriate to rebut that presumption³. Paragraph 11 implies that a parent will always exercise decisive influence over a subsidiary.

- 2.11 The Guidelines should also clarify further that the critical question relates to control, and on whether or not the joint venture and its parents have “real autonomy” in determining their actions on the market. The current draft appears, on its face, to provide a benefit in the form of exemption from Article 101(1) to agreements between the joint venture and its parents, however the Committee queries whether this in fact the case given first, the exemption provided in relation to non-competes and similar arrangements between a parent and a joint venture as a matter of ancillary treatment⁴ and secondly given the concluding words of paragraph 11 of the draft Guidelines which permits clawback of the exemption in relation to “agreements between the parents outside the scope of the joint venture”.
- 2.12 Clarity on what incremental coverage the Commission intends and the test which the Commission intends to apply is needed given that in its previous practice, the Commission has taken a position in direct contradiction of paragraph 11 and concluded that a jointly controlled joint venture can be presumed to be autonomous from its parent companies⁵
- 2.13 Finally, the Committee suggests that the concluding words of paragraph 11 be amended to make clear that Article 101 would only apply with regard to agreement between the parents to create a **non-full function** joint venture.

Compulsion

- 2.14 The Committee notes from paragraph 21 of the Guidelines the position taken by the Commission in relation to Government compulsion of undertakings to infringe Article 101 TFEU. Whereas we are aware of cases involving compulsion exercised by EU Governments, we consider it would be useful if the Commission further clarifies whether the same principles apply if an undertaking is required to infringe Article 101 TFEU by a non-EU Government.

3. INFORMATION EXCHANGE

- 3.1 The Committee welcomes the proposal to include a separate chapter on information exchanges. However, in a number of respects, the Guidelines fail to provide the guidance that industry needs to be able to distinguish legitimate from illegitimate forms of information exchanging. In particular, the insurance and re-insurance industries were promised a set of guidelines to fill some of the gaps left by the revision of their sector-specific block exemption regulation earlier this year, but will look in vain for any specific assistance in analysing the types of exchange previously exempted (apart from a brief reference to mortality tables in para. 57). There is also no guidance on the limits on the exchange of information between bidders and subcontractors in the context of a competitive tender.
- 3.2 Information exchange is stated (at paragraph 54) to take various forms such as direct sharing of data between competitors, and various indirect forms such as “through a common agency (e.g., trade association), a third party, or by means of publishing.” The examples all appear to be examples of different forms of indirect information sharing between competitors. Paragraph 54 should, however, make clear that the chapter aims to distinguish information exchanges that have the object of restricting competition and thus amount to, or are ancillary

³ Case 8/97 *Akzo Nobel NV v. Commission*, paragraph 54 – 66, *Imperial Chemical Industries v Commission*, paragraphs 132 and 133; *Geigy v Commission*, paragraph 44; Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215, paragraph 15; and *Stora*, paragraph 26

⁴ (2005/C56/03).

⁵ For example, COMP/F/38.443, *Rubber Chemicals*, Commission Decision of 21 December 2005, OJ 2006 L353/50, para. 263.

to, a cartel, from those that are not and that infringe Article 101(1) only if they have appreciable restrictive effects on competition. This is explained later in the introduction (contrast e.g. paragraphs 58 and 59), but could be better highlighted. There should be a much clearer statement that information exchanges that are ancillary to pro-competitive transactions or arrangements and do not amount to cartels should be presumed to fall outside the scope of the Article 101(1) prohibition in the absence of such effects: see for instance paragraph 57 that mentions information exchange as a part of a production agreement without specifying what the implication is. There should at least be a cross-reference to paragraphs 174-5.

- 3.3 The Committee approves of the fact that at paragraphs 55-56, the Commission clearly spells out that the existence of an agreement, decision of an association or concerted practice is a condition precedent to the application of the prohibition in Article 101(1) to any form of information exchange. The reference at footnote 41 to the *T-Mobile*⁶ case is, however, slightly confusing as it concerned a cartel, in other words, a concerted practice (falling short of an agreement) that was held to be restrictive by object because the parties had "knowingly" substituted practical cooperation for the risks of competition. That implies that a concerted practice can only arise where the parties realised and/or intended their behaviour to have restrictive effects by being acted on by others. Concerted practices should therefore be mentioned in the context of cartels at paragraph 59.
- 3.4 The Committee notes that the assessment under Article 101(1) is heavily influenced by the Commission's Guidelines on Horizontal Mergers. Unfortunately, this risks giving the impression to the lay businessman seeking guidance that almost all forms of information exchange between competitors is likely to be prohibited as the Commission uses very broad language. For instance, paragraph 62 gives the misleading impression that it could be deemed to be collusive merely to put price displays in the shop window or on the garage forecourt or on a website, which competitors are likely to react to. As we have said below at paragraph 3.7, the availability of such information is vital if customers are to be able to assess the competitive situation and make rational choices. It is true that this section is prefaced by the condition there should at least be a concerted practice, which requires more than a unilateral indication of a price rise, but the practical effect of this requirement is not spelled out clearly. The real message should be that an exchange of commercially sensitive information, in particular future price strategy or current price strategies revealing intentions on future behaviour can have, in certain circumstances, the same collusive effects as an actual agreement to fix prices.
- 3.5 The Commission's broad language about impermissible information exchanges creates business uncertainty and practical guidance would be very useful - in particular, to (a) due diligence and implementation planning in the context of M&A; (b) benchmarking exercises; and (c) exchanges for industry lobbying purposes. This is the case, in particular, as the examples provided by the Commission all seem to concern straightforward rather than borderline scenarios (where it would be useful for the Commission to indicate what factors would tip the outcome one way or the other such as measures reducing restrictive effects: use of third parties, information barriers and clean teams etc).
- 3.6 The language at paragraph 58 is convoluted: "is liable to enable undertakings to be aware of" surely could be simplified to "makes competitors aware of each other's".
- 3.7 At various points, including at paragraph 61, the claim is made that transparency tends to raise the risk of a collusive outcome. However, that problem arises only if the transparency is one-sided or asymmetrical between sellers and buyers/consumers. If the transparency extends market-wide and enables buyers and consumers (and clients in a tendering context) to be well informed about the competitive situation and to make more rational choices, that surely is

⁶ Case C-8/08 *T-Mobile Netherlands and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, judgment of 4 June 2009.

better for competition (as implicitly recognised in paragraph 84). The problem identified at paragraph 63, for instance, is that there is a cartel (which is more easy to monitor through the price information exchanges), not one of transparency. The same applies to paragraph 64.

- 3.8 Paragraph 63, last sentence, implies that the transparency created by a price/output monitoring system can be caught by Article 101(1) even without being a cartel, but in the Committee's view that is not the correct analysis. There should be a binary choice between a monitoring mechanism that is part of a cartel and so within the Article 101(1) prohibition, and one that is not and therefore outside the scope of Article 101 altogether. That cartel may either be an explicit agreement of decision of an association, or a concerted practice as defined by the Court in *T-Mobile*.
- 3.9 At paragraph 69 we note that the list of "parameters of competition" does not include costs (which are regarded as having lesser importance at paragraph 81), unlike paragraph 50 of the Maritime Guidelines⁷. We believe that the Maritime Guidelines reflect a better economic approach.
- 3.10 The useful list of factors which the Commission expects parties to take into account in determining whether an exchange has restrictive effects, given at the end of at paragraph 70, would be better presented in list form.
- 3.11 At paragraph 71 the Commission appears to be redefining the appreciability test by importing a new test dependent on whether the parties have "to cover a sufficiently large part of the relevant market". However, this is not adequately defined or explained in paragraph 72. We would request the Commission either to omit or clarify paragraphs 71 to 72.
- 3.12 The Committee has already expressed its disappointment that the draft Guidelines do not contain any assistance for the insurance and re-insurance industries, which one would expect to see at paragraphs 73-80.
- 3.13 One of the key issues in the liner shipping industry, addressed in paragraph 57 of the Maritime Guidelines, is that of aggregate price freight rates or indices. However, the issue of indices is relevant to many industries and one would expect more guidance here. In the context of paragraph 84 published price indices could be mentioned as illustrations of a form of price exchange that is unlikely to have a collusive outcome if genuinely made available to the public.
- 3.14 The Committee finds the treatment of age of data at paragraph 86 unhelpful. There is no reason for requiring data to be "several times older" than the average contract length in order to count as historic. No reason is given for this as the relevant criterion. The real issue is whether it serves a commercial or strategic competitive purpose at the time of its disclosure.
- 3.15 In volatile trading markets (for securities, commodities, etc.) the time lag between information that has a commercial function and information whose commercial value is spent can be very short. This is especially true for markets operating on an electronic trading basis.
- 3.16 The Committee notes that paragraph 54 of the Maritime Guidelines suggests that the period is shorter for aggregated data but the Commission has not repeated this presumption here. However, the Committee feels that it should be made clear that aggregation does have an impact on the age at which information can be considered sufficiently historic. Example 5 is particularly unhelpful as it is an extreme case which is clearly not likely to create collusive effects.

⁷ *Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, OJ C 245, 26.9.2008, p. 2-14.*

- 3.17 The Commission has after all indicated in the Maritime Guidelines that according to the case law even one-year old information can generally be deemed historic, so an example of three-year old information is of little additional value as a guide.
- 3.18 One issue which the Guidelines (specifically paragraph 85) fail to address is the aggregation of data by a third party and when companies might be able to disaggregate this data and identify competitively sensitive information pertaining to their competitors. Some examples dealing with when data can be considered “aggregated” would be useful.

4. R&D AGREEMENTS

Upfront disclosure of IPRs

- 4.1 The draft R&D block exemption inserts a new condition for the application of the block exemption. The parties are required – prior to starting joint research - to agree to disclose any existing and pending IPRs which may affect the exploitation of the results of the R&D results by the other parties.
- 4.2 The Committee appreciates that the Commission is keen to prevent one party ambushing joint-exploitation by subsequently disclosing IP rights of which the other party/parties were previously unaware.
- 4.3 However, this change is unhelpful and should be removed as it introduces unnecessary costs and uncertainty into the applicability of the block exemption. This is likely to place a significant administrative burden on firms with large IP portfolios (particularly where unregistered IP, e.g. copyright, is concerned). It is also not always clear what IP will be relevant to exploitation at the outset of the R&D. The disclosure of all IPRs which may possibly prove relevant will impose a significant – and unwarranted - burden on large portfolio holders.
- 4.4 A more proportionate approach - which would avoid imposing an ex ante burden on the parties - would be to include an obligation for the parties to license any necessary IP for the R&D project/agreed field.

5. PRODUCTION AGREEMENTS

- 5.1 Although specialisation block exemption and related guidance has been improved significantly, there remain a number of areas where further clarification is needed.
- 5.2 Article 1, paragraph 15 defines when distribution is carried out “jointly”. However, it is still not clear what is meant by “distribution”. In particular, it is still not clear whether the block exemption would cover 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. There is no economic rationale for treating such method differently to joint selling by the joint venture entity itself. The definition in Article 1, paragraph 15 should be amended to clarify that the specialisation block exemption will continue to apply when such alternative methods are employed.
- 5.3 Article 1, paragraph 16 should clarify that distribution also includes the setting of prices – i.e., it goes beyond logistics.
- 5.4 The reference in Article 2, paragraph 3(b) to “products which are the object of the specialisation agreement” continues to be ambiguous. 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).

- 5.5 Paragraphs 161 and 163 of the Guidelines explain that setting sales prices may not restrict competition provided the price-fixing by the joint venture is necessary for “integrating” the production and commercialisation functions of the cooperation agreement. However, we query what is meant by integration (which we assume can arise without a joint venture being 'full function'). 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? The Guidelines should also clarify why the relevant degree of integration is thought necessary by the Commission in order for it to be legitimate for the joint venture to set sales prices. In other words, the underlying economic theory needs to be explained in the Guidelines.
- 5.6 Significantly, we note that integration is not a pre-requisite to the setting of sales prices when the joint exploitation of R&D includes the joint distribution of the contract products (see Article 5(c) of the draft R&D block exemption). The Guidelines should therefore explain why a different position is justified in relation to joint production.

Additional market share requirement re intermediate products

- 5.7 Recital 10 of the block exemption introduces a new market share requirement where the joint production concerns an intermediate product, stating that "... in case the products which are the subject matter of a specialisation agreement are intermediary products which one or more of the parties fully or partly use captively for the production of downstream products which are sold by these parties on the merchant market, in addition, the parties' share on the relevant merchant market for these downstream products should not exceed 20% either in order to avoid the risk of input foreclosure."
- 5.8 The Guidelines introduces this extra requirement without explaining the economic rationale. We assume that the extra criterion (looking at the parties' combined market share on the downstream market) has been added on the basis that the smaller the downstream share, the less likely input foreclosure is to be profitable because the less likely a higher input price for third parties would cause diversion from those third parties to the downstream operations of the integrated firms. However this needs to be explained fully. A rationale should also be provided as to why the market share threshold here (20%) is lower than the 30% threshold set out in the Vertical Restraints Block Exemption⁸.

6. PURCHASING AGREEMENTS

- 6.1 The Guidelines do not recognise the very often efficiency-enhancing and pro-competitive benefits of buying groups when there is downstream competition. By way of contrast, the Committee refers to the recent OFT short-form opinion on joint purchasing⁹ which notes that joint purchasing is generally acknowledged to generate the following benefits where there is downstream competition:
- lower consumer prices through negotiating better terms of supply or creating efficiencies that are passed on to final consumers
 - upstream pro-competitive effects, as the increased ability of purchasers to switch supplier - or sponsor a new entrant - can intensify rivalry among suppliers

⁸ Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices. Official Journal L 102, 23.4.2010, p.1-7.

⁹ <http://www.of.gov.uk/OFTwork/competition-act-and-cartels/short-form-opinions/>

- downstream pro-competitive effects, as smaller businesses joining a purchasing group might compete more effectively with their rivals, and
- innovation or investment - since cooperation between purchasers can solve purchaser coordination problems which result in underinvestment or reduced innovation; or suppliers' incentives to innovate could increase as they seek to improve their bargaining position when faced with a purchasing group.

- 6.2 The Guidelines should also acknowledge these benefits. The current drafting risks giving the mistaken impression that joint purchasing is likely to give rise to Article 101 issues (as it involves cooperation between competitors), meaning that business and its adviser should concentrate on whether there are offsetting efficiencies under Article 101(3).
- 6.3 It is also the view of the Committee that the 'safe harbour' market share thresholds of 15 per cent in the upstream and downstream markets are unnecessarily low. The OFT opinion sensibly draws an analogy between the economic effects of a merger and the economic effects of a purchasing agreement (noting that mergers and purchasing groups require an assessment of unilateral and coordinated effects). Although the OFT acknowledges that the analogy is imperfect - because, on the one hand, a purchasing group involves less coordination than a full blown merger and, on the other hand, involves less benefits than a merger (due to a lower likelihood of efficiencies), the OFT logically concludes that "...the first point implies that if no anti-competitive effects would arise from a full merger (even absent any off-setting benefits), it is unlikely that they would arise under a purchasing agreement".
- 6.4 It follows that there is a 'disconnect' between the 25% safe harbour for EU merger control (in paragraph 18 of the EU horizontal merger guidelines and recital 32 of the ECMR) and the lesser safe harbour thresholds for joint purchasing contained in the horizontal cooperation guidelines.
- 6.5 The Commission should therefore increase the safe harbour employed for the share on the downstream market to 25% on the basis that the buying group agreement can be no worse for competition than a merger of its members. (Indeed, typically a buyer group will be far less effective than a merger at harming competition due to the difficulties of coordinating the behaviour of each member.)
- 6.6 Finally, the Guidelines fail to make it clear that issues of commonality of cost etc are subsidiary to the issue of market power - i.e. if the parties do not have a combined share of 25 per cent in the downstream market - such that the benefits of the joint purchasing can be assumed to be passed on to consumers - then a high degree of costs in common should not affect this conclusion.

7. COMMERCIALISATION AGREEMENTS

- 7.1 We generally welcome the direction of the guidance provided by the Commission on commercialisation agreements. In particular, we agree with the Commission's view that commercialisation agreements which have the effect of increasing competition and consumer choice should be regarded as falling outside of Article 101(1). We agree with the principle that where parties wish to engage jointly in a *project* which neither of them could carry out alone, it would frustrate the goals of competition policy for it to be prohibited..
- 7.2 However, on this point, we think the Commission could provide some additional clarity. The Commission gives the example of a *project* which was too big for either competing party. However, would the same logic apply if the parties were not to engage in a *project*, but simply to service a large customer, whose high-volume and multi-location requirements may be too diverse for either of them to satisfy alone. In our view, the same logic would apply,

particularly if the customer were aware of the collaboration and had alternative suppliers from which it could purchase.

- 7.3 Secondly, we would welcome greater guidance on the question of ancillary restraints. For example, in the context of a joint bidding agreement, it is not uncommon for one party to wish to insert a provision which prevents the other party from participating in a rival consortium. The reasons given for this requirement are to ensure, firstly, that one party is not wasting its time by getting involved with that bidding partner and, secondly, that there will be no dissemination of trade secrets, commercially sensitive information or bid sensitive information to other parties. A party often feels uncomfortable with relying upon confidentiality agreements, given the practical and legal difficulties of enforcing these. There is an argument for allowing such restraints on the basis that without them, a party may be unwilling to enter into the project at all.
- 7.4 In this specific example, such a restriction may be *pro*-competitive in another sense. Preventing bidders from becoming involved in more than one consortium may prevent collusion between rival bids and a possible loss of price competition.

8. STANDARDISATION AGREEMENTS

- 8.1 In broad terms, the Committee believes that the section on standardisation improves significantly on the corresponding section in the current Guidelines by setting out a useful methodology to be followed. We make the following comments however.

Nature of standard-setting

- 8.2 There is some ambiguity in relation to the form/nature of the standard-setting contemplated by the Guidelines. For example, footnote 87 indicates that standardisation can take many forms "...ranging from standard setting organisations through to agreements between individual companies...". However, the Guidelines appears to concern itself almost exclusively with SSOs.¹⁰
- 8.3 In the Committee's opinion, the Commission should be clearer about the methodology it will apply when a subset of an industry discusses a standard which could, for example, become a *de facto* standard - especially as many standard-setting processes involve ideas emanating from a group of companies with a similar vision which develops specifications to a certain level of completeness before being transferred into a more 'open' SSO environment.
- 8.4 The Guidelines should therefore clarify the extent to which an SSO must be inclusive/transparent in order for its processes to remain outside the scope of Article 101(1) or to benefit from 101(3). For example, although the Commission refers in paragraph 278 to the need for "unrestricted participation" in a standard-setting process, the Guidelines also acknowledges the appropriateness/efficiencies of standardisation by a narrower group of actors – e.g. involvement of "all relevant actors" (paragraph 278) or an "appreciable proportion of the industry [in the process]".
- 8.5 The Guidelines should also contain greater commentary on when a narrower group of industry participants will lead to efficiencies (the possibility of which is expressly acknowledged in paragraph 307 of the Guidelines) and how the parties would be expected to demonstrate this (in so far as the Commission believes this to be necessary under Art 101(3)). Absent this clarification, the Commission's approach towards standardisation in the light of 'agreements between independent companies' (to use the wording in footnote 87) remains unnecessarily unclear. The Guidelines should also clarify what types of procedures the

¹⁰ For example, paragraphs 269-270 refer to SSOs and their "members".

Commission would regard as a “recognised procedure[s] for the collective representation of interests” (paragraph 307).

SSOs and Article 102

- 8.6 The Guidelines are obviously intended to preclude the abuse of dominance (e.g. through excessive pricing once a standard has been set) as well as counsel on how to comply with Article 101.
- 8.7 In the absence of case law ‘collectivising’ responsibility for a subsequent unilateral abuse of market power, the Commission should explain why the rules of an SSO which, for example, do not mandate ex ante disclosure of IPRs, may fall within Article 101. The Guidelines (or FAQs) should also explain why Article 102 is not sufficient to address the issue. In the absence of clarification, it seems to us, that the safe harbour described in paragraphs 278 and 279 is drawn too narrowly.

Upfront disclosure of IPRs

- 8.8 The requirement put forward in paragraph 281 that there should be a good faith disclosure by companies participating in standards setting of essential patent rights gives rise to a number of practical difficulties, e.g. patent applications may remain confidential for a period of time during their filing and IPRs may include trade secrets which do not form part of a publicly available standard.
- 8.9 The Guidelines should be restricted to requiring a good faith disclosure of IPR which can be determined from publicly available filings. This will cover patents, patent applications which have reached the disclosure stage and design rights. In any event the obligation to license on FRAND principles will also serve to address the same concern (provided it is expressed to apply to undisclosed IPRs).
- 8.10 On a related point, we note that example 2 on page 77 of the Guidelines indicates that SSO rules which fail to mandate upfront disclosure of IPRs are “likely” to give rise to restrictive effects on competition. This example is difficult to reconcile with paragraph 276 of the Guidelines which states that it is not necessary for standard-setting agreements to fulfil the conditions of the safe harbour - i.e. an individual assessment is always required. In contrast to paragraph 276, example 2 effectively shows that there will be a presumption that Article 101 is infringed when the safe-harbour is not met. Instead, the example should state that restrictive effects are possible and then explain why (providing the clarification requested above).

FRAND

- 8.11 The disadvantages of attempting to address Article 102 violations via Article 101 guidelines is illustrated by the difficulties of establishing when a licence fee is excessive. In our view, the attempt to be pragmatic over-simplifies the situation:
- the reference to *United Brands* risks overlooking the fact that it may also be appropriate to approach the issue of excessive pricing/the notion of “economic value” by examining the demand-side of the market – i.e. by taking into consideration the revenue-earning potential of the product for customers. This should be acknowledged in the Guidelines.
 - the suggestion that, in order to test for fair/reasonable prices, the prices should be compared before and after the standard-setting may also be too simplistic. Companies may well lack the information (pre standard-setting) to know how to value their IPR (e.g. because they may not be aware of all the commercial

applications of the technology). Equally, companies may wish to drive demand prior to the standard-setting process by pricing at lower levels. Companies may find that they are penalised for this normal commercial behaviour if regulators rely overly on the 'comparator' approach.

- The Commission also appears to be advocating a counterfactual which is the price charged in "a competitive environment" before the standard-setting. We assume that the Commission is not proposing to attempt to construct a price based on a particular competitive hypothetical model before the standard setting process. The aim of the comparator approach should be to flush out any market power conferred by the standard setting process and not to impugn any pre-existing market power. The competition policy objective should not be to force low or "reasonable" licensing fees, but rather to prevent IP owners from receiving more by using an ambush strategy than they would have received if they had not used that strategy.

8.12 Overall, the Guidelines should recognise that its approach is not without complication.

CLLS (June 2010)

If you would like to discuss any aspect of the Committee's comments and/or recommendations please contact:

Robert Bell of Speechlys email: robert.bell@speechlys.com tel: + 44 (0)20 7427 6625