

# **Joint Working Party of the Bars and Law Societies of the United Kingdom on Competition Law**

## **Response to the European Commission's public consultation on revised Guidelines for the assessment of horizontal co-operations agreements**

### **INTRODUCTION**

1. This Paper is submitted on behalf of the Joint Working Party of the Bars and Law Societies of the United Kingdom on Competition Law ("JWP")<sup>1</sup>. The JWP welcomes the opportunity to comment on the draft revised Guidelines on horizontal co-operation agreements (the "draft revised Guidelines"). The JWP particularly welcomes:
  - (a) the inclusion for the first time of a generalised set of guidelines on information exchange; and
  - (b) the restructuring of each chapter of the guidelines into sections on restrictions of competition by object / restrictions by effect: this allows for a more mature analysis than the previous categorisation by restrictions that do not /may/ always fall under Article 101.

We also welcome the fact that some of the comments we made in February 2009 as part of the Commission's more general consultation on the review have been taken on board.

2. Given our earlier submission, we confine ourselves here to providing comments under a number of general headings. We do not propose to provide a detailed commentary on the draft Guidelines.

### **ROLE OF GENERAL AND SPECIFIC GUIDANCE**

3. The JWP notes the lack of jurisprudence since modernisation on Article 101 TFEU and, in particular, on Article 101(3). This is not unexpected, but the JWP is concerned that it is resulting in different approaches being taken to Article 101(3) in different Member States. The horizontal guidelines provide an opportunity to ameliorate the problems created by this lack of jurisprudence. However, the JWP is concerned that the broad approach taken in the draft revised Guidelines may not provide sufficient clarity and certainty for business, focusing as it does on high level issues of economic principle with a number of examples some of which may be viewed as overly simplistic and/or unrealistic.
4. We would invite the Commission to reflect on this and also to give consideration as to whether the Guidelines might be supplemented with informal guidance in individual cases or making use of the possibility to give declarations of inapplicability under Article 10 of Regulation 1/2003. In this regard we note by way of example that in the UK the Office of Fair Trading has instituted an informal guidance process specifically for horizontal co-operation agreements which it used recently to publish a decision on joint purchasing.<sup>2</sup>

### **AREAS WHERE FURTHER CLARITY OR EXPLANATION IS REQUIRED**

5. There are a number of areas in which the JWP believes the draft revised Guidelines could be clearer or could elaborate further to explain the point the Commission is trying to get across.

---

<sup>1</sup> The members of the Joint Working Party of the Bars and Law Societies of the United Kingdom on Competition Law comprises barristers, advocates and solicitors from all three UK jurisdictions; the membership includes both those in private practice and in-house. Its secretary is Louise Speke of the Law Society, 113 Chancery Lane, London WC2A 1PL (telephone: 00 44 20 7242 1222).

<sup>2</sup> P&H Makro Joint Purchasing Agreement, 27 April 2010

(i) **Article 101(3)**

6. The first area is in relation to Article 101(3) itself. The JWP recognises that the Commission has issued separate Guidelines on the application of Article 101(3). The Commission also continues to deal with the application of Article 101(3) to the specific types of agreements in each chapter of the draft revised Guidelines. Equally, however, it would be helpful if the horizontal guidelines could draw together the most important elements of the way the Commission interprets Article 101(3) in the specific context of horizontal cooperation agreements. In this respect the very short space accorded to the application of Article 101(3) in the introductory section of the draft revised Guidelines – effectively just four paragraphs at paragraphs 48-51 – is insufficient in our view. The Commission essentially makes one core point, namely that the identification of complementary skills and assets is key to efficiencies under Article 101(3) in a co-operative agreement context. However, there is clearly far more to Article 101(3) in this context than this. We note, for example, the move to tighten the application of the Article 101(3) criteria from the current Guidelines to the consultation draft.
7. This can be seen, in particular, by comparing Example 5 on environmental standards (at paragraph 319) with the equivalent example at paragraph 198 of the current horizontal Guidelines. This is the washing machine collaboration. The two examples are essentially the same with the main exception that in the existing Guidelines the "*net contribution to the improvement of the environmental situation overall*" (emphasis added) is seen as an efficiency, whereas the draft revised Guidelines appear to confine the allowable efficiencies to improvements in product quality ("*more washing machine programmes which can be used by consumers*") and lower running costs.<sup>3</sup> The distinction in the two examples is rather subtle, and we are concerned that the distinction may be lost on non-specialists who look to the Guidelines for clarification and assistance or that it may (conveniently) be ignored by a national competition authority which wishes to take a different view.
8. A more tangible manifestation of the tightening of the application of Article 101(3) to co-operation agreements since the current horizontal Guidelines were adopted is the Commission's decision to drop the heading "Environmental Agreements" in the current draft. This seems reasonable to us – horizontal co-operation agreements in the Environmental area are indeed likely to be agreements on some form of standard, so standardisation seems the logical place for them to be dealt with. But it seems clear to us that this is part of the Commission focusing more narrowly on economic benefits under Article 101(3) in accordance with the Article 101(3) Guidelines which were adopted subsequent to the existing horizontal Guidelines. The Commission should be more explicit in this respect.
9. It seems to the JWP that the best way to deal with this would be to expand paragraphs 48-51 to make a few more general points about the way Article 101(3) should be applied to horizontal co-operation agreements – rather than simply referring the reader to the Article 101(3) Guidelines.

(ii) **Joint ventures**

10. We recognise the point the Commission is seeking to make in paragraph 11 of the draft revised Guidelines, however, it could benefit from some unpacking and editing to some of the language.

---

<sup>3</sup> The draft revised Guidelines do allow the taking into account of related market efficiencies in this particular case, but that is a separate matter.

11. The key part from the case law concerns the exercise of decisive influence being the touchstone as to whether a joint venture is regarded as part of the same undertaking of each of its parents respectively for the purposes of whether an agreement or arrangement between the JV and a parent can be said to fall within Article 101. It is true, as the Commission recites, that in paragraphs 138 and 139 of *Avebe* the Court found that the combination of a 50:50 equity JV and the actual exercise of joint management power in permanent close collaboration in all matters pertaining to the JV by the relevant parent-appointed directors, taken together, was sufficient evidence for the presumption of the exercise of decisive influence. The touchstone remains, however, the exercise of decisive influence. It follows that, in the JWP's view, the addition of the words "and effective control" in paragraph 11 are unnecessary and somewhat confusing. Indeed, more generally it would be helpful if this paragraph were to spell out more clearly than it does at present the manner in which the concepts of "control" and "decisive influence" under the ECMR are to be used in determining the circumstances in which a joint venture is part of one undertaking with each of its parent companies for the purposes of Article 101.
12. The JWP also considers that the last sentence of paragraph 11 is confusing. The JWP submits that it would be clearer if it were to read simply: "Article 101 could, however, apply to an agreement between parents to create a joint venture to the extent that the agreement related to coordination of their competitive behaviour outside the scope of the joint venture." If this is not the meaning intended by this sentence, the JWP submits that the language needs to be clarified.

**(iii) Public policy objectives**

13. The JWP notes and welcomes paragraph 21 on public policy objectives. The JWP would invite the Commission to consider expanding what is a somewhat short passage on a topic which arises quite frequently in practice.

**(iv) Exchanges of information in public**

14. We would welcome an expanded discussion of the point made in paragraph 84 that an exchange of information that takes place in public "*may decrease the likelihood of a collusive outcome...to the extent that competitors unaffiliated to the information exchange, potential entrants, and buyers may be able to constrain potential restrictive effect on competition*". There are many pressures on companies to explain their commercial strategy to investors and potential investors, and it would be helpful to have the Commission's thinking as to whether, and if so when, such explanations could give rise to an anti-competitive concerted practice.

**(v) Article 102**

15. In paras 284 and 285 the Commission comments on the analysis of behaviour concerning IPRs in a standard under Article 102 TFEU. The JWP notes that this is an exploitative abuse and has therefore not been covered in any Commission guidelines to date. Although this particular topic may raise Article 102 issues in addition to Article 101 issues the horizontal Guidelines are not the place for a proper discussion of them. We would suggest any reference to Article 102 is confined to noting that there may be an Article 102 issue.

**THE USE OF EXAMPLES**

16. The JWP welcomes the greater use of examples in the draft revised Guidelines. The JWP also recognises the limitations of examples: the Commission cannot be expected to give

guidance as to genuinely hard cases by means of short examples. (Indeed, that is why we support the introduction of individual guidance – see paras 3 and 4 above).

17. Certain of the examples appear, however, somewhat unrealistic or fanciful, and the JWP is concerned that their inclusion might send the wrong signal about the thresholds for the application of Article 101. For example:
- (a) In the information exchange section, at para 86 and in Example 5 the point is made that "*data can be considered historic if it is several times older than the average length of contracts*". This, with respect, is stating the obvious, in the JWP's submission. The JWP submits that in most cases parties can be fairly confident that data of a significantly younger age than that is no longer competitively sensitive. Of course, each case needs to be examined on its facts, but the example is unhelpful because it might lead a national court unfamiliar with EU competition law to believe that the law is stricter than it actually is. We suggest the last sentence of para 86 is deleted, along with Example 5.
  - (b) At para 188 the Commission gives an example entitled "*Market power with low market shares*", where it is suggested that the Specialisation Block Exemption might be withdrawn in a situation of an 18% combined market share, with high common costs and competitors at less than 5%. The JWP appreciates the legal possibility for withdrawal but questions whether the example (in particular the notion that there would be nothing to defeat a price increase at such low shares) might be somewhat contrived. The JWP would invite the Commission to reconsider this example.

#### MARKET SHARE THRESHOLDS

18. The JWP notes the use of a variety of different safe harbour thresholds in the draft revised Guidelines. The block exemptions for R&D and Specialisation respectively have thresholds of 25% and 20%. Joint purchasing and commercialisation sections refer to a safe harbour threshold of 15%. While these differing thresholds are not new in the draft revised Guidelines, we would suggest that the review of the horizontal Guidelines is an appropriate point at which to reconsider them, and certainly to make clear the reasons behind the distinctions which are retained.
19. There are a number of points here:
- (a) The current horizontal guidelines were published in 2001. Since then, the Commission has issued its horizontal merger guidelines (in 2004). These indicate at para 18 that a market share of no more than 25% provides an indication that the merger is not liable to impede effective competition. Putting genuine price fixing, market sharing and other "object" restrictions to one side, and recognising the different legal tests under the ECMR versus Article 101, the JWP wonders why as a policy matter a safe harbour threshold should differ between agreements and mergers. This is in a context where we have seen significant convergence in substantive analysis between mergers and agreements since the current horizontal Guidelines were drafted.
  - (b) The JWP also wonders why in principle safe harbour market share thresholds should differ as between agreement types. The JWP recognises that there may be a case for a slightly higher threshold in respect of block exemptions, because they apply only where the terms of the relevant agreement comply with certain specified conditions.

- (c) The JWP points out that, as a practical point, it is often not possible to predict market share with the kind of accuracy suggested by these different thresholds.

For these reasons the JWP suggests that it would be appropriate for the Commission to reconsider the rationale for the differing thresholds; and if the Commission is satisfied that such differences continue to be justified, the JWP invites the Commission to make clear the reasons for them.

### COMMERCIALISATION AGREEMENTS

20. The discussion of commercialisation under Article 101(1) has been revised and is a more mature description of the law than that in the current Guidelines – for example by including at para 232 (in the "restrictions by effect" section) a recognition that a commercialisation agreement that facilitates entry which would not otherwise have occurred does not generally restrict competition. The JWP welcomes this - it is a point we had particularly argued for in our February 2009 submission, referring to the UK *AMRAC* case on horseracing rights (in which the core principles on sponsored entry have subsequently been upheld by the UK Court of Appeal, in a judgment we would again commend to the Commission).<sup>4</sup> However, we would like to see this more sophisticated approach carried through, with a reference in the objects section to the fact that what appears at first sight to be joint price setting may not actually be best analysed as such. That is key to the whole point – that in this particular context of entry an agreement which superficially might appear to involve a restriction by object does not, when properly characterised, do so. Without this, we see a conflict between paras 229 and 232.
21. In this regard we would also refer to 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.
22. There is also some internal confusion as to the application of the safe harbour to commercialisation agreements. Para 235 of the draft revised Guidelines on its face suggests that the safe harbour applies even where price fixing is involved, as against para 148 of the current Guidelines which suggests price fixing always falls under Article 101(1), but then example 4 at para 150 suggests this is not the case.

**Joint Working Party**  
**June 2010**

---

<sup>4</sup> Bookmakers Afternoon Greyhound Services Ltd. et al. v Amalgamated Racing Ltd. et al., Case No. 2008/2874, Court of Appeal (Civil Division), 28 July 2009, [2009] EWCA Civ 750. See especially paras 85 to 87, 94, 109 and 123 of Lord Justice Lloyd's judgment.