

**Response prepared by:**

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## **Public consultation on revised rules for the assessment of horizontal cooperation agreements under EU competition law**

### **1. INTRODUCTION**

The following comments are submitted on behalf of Reed Smith LLP. With global capabilities and a multidisciplinary approach, our Competition and EU law group represents clients with operations in the United States, Europe and many other parts of the world. We regularly act for clients seeking advice on a range of horizontal cooperation agreements including, increasingly frequently, issues relating to information exchange.

We welcome the opportunity to respond to the Commission's consultation on proposed revisions to its Guidelines on the applicability of Article 81 to horizontal co-operation agreements (the 'Horizontal Guidelines').

### **2. GENERAL COMMENTS**

Overall, we consider the draft revised Horizontal Guidelines (the 'draft guidelines') to be a useful document which helpfully sets out the economic arguments. We particularly welcome the inclusion by the Commission of a dedicated section on information exchange. However, we do think that there is scope for providing some further clarification in this area, as set out below.

We note that the draft guidelines do not include any consideration of the issues relating to cross-directorships, cross-shareholdings and minority shareholdings, which give rise to potential concerns of information spillover. We would add our voice to the existing calls for clarity in this area given the unclear current position of the law. These are issues that are increasingly being raised by clients.

One means of obtaining guidance on certain areas of the law that are unclear is to obtain informal guidance from the Commission on issues that present novel or unresolved questions.

However, to date, we believe the Commission has taken a narrow view of what may be regarded as “novel”. We note that in the UK, the OFT announced in its Annual Plan for 2010-2011, a trial Short-form Opinion procedure, under which it would provide guidance on novel or unresolved issues of a wider interest. The OFT has recently issued its first short form opinion relating to the legality of a joint purchasing agreement. In so doing, the OFT seems to be taking a much less narrow view of what may be regarded as a novel or unresolved issue. We would therefore take this opportunity to invite the Commission to be more open to similar requests for guidance; perhaps more complicated issues relating to information exchange might prove a candidate for such guidance.

### **3. COMMENTS ON SPECIFIC SECTIONS OF THE GUIDANCE**

#### **Restrictions by object**

Paragraph 23 only very briefly describes what is meant by a restriction by object, before referring the reader to the 2004 Guidelines on the application of Article 101(3) TFEU (formerly 81(3) EC) (the ‘101(3) Guidelines’) for further guidance. We feel that it would be helpful to take this opportunity to include an update on such object restrictions in light of recent case law.

#### **Information exchange**

The final sentence of paragraph 62 states that “information on current conduct that reveals intentions on future behaviour can also be very useful in this context”. This statement is ambiguous. We presume this means that exchanging such information is potentially unlawful?

Paragraph 82 deals with the concept of “genuinely public information”, stating that information is only genuinely public if it is no more costly for companies unaffiliated to the exchange system than for the companies exchanging the information. We regard this as an over simplification and that there may be circumstances in which it would be reasonable to charge companies not affiliated to the exchange for access to the information collected. For example where the companies involved in the exchange have put considerable time and effort, not to mention resources, into collecting and collating information. In these circumstances it seems to us that it may be justified to make access to the information conditional upon payment of a fee (provided that it is set at a reasonable level, so that it is not disproportionately difficult for third parties to access the information).

Paragraph 86 and Example 5 consider the age of the data being exchanged. Whilst paragraph 86 recognises that whether data is regarded as historic will depend on the specific characteristics of the relevant market, we would like to see express recognition that “historic” will mean different ages in different sectors, and that in some sectors this may be less than a year. The current Maritime Guidelines<sup>1</sup>, which provide the only existing general guidance on information exchange, refer to a period of one year as an appropriate guide for information to be considered sufficiently historic. This has been taken by some as a general statement meaning that any information under 1 year old is likely to be problematic. However, we

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<sup>1</sup> Guidelines on the application of Article 81 of the EC Treaty to maritime transport services [2008] OJ C 245/2.

believe that in some sectors information is likely to become outdated within a much shorter time frame and in those cases the exchange of information less than one year old is unlikely to give rise to competition problems. We would like to see this point recognised in the final guidelines.

We also believe it would be helpful to expand on the issue of benchmarking. Paragraph 88 discusses the potential benefits of benchmarking against competitors' costs. However, it is not clear what type of information this is referring to or the manner of the exchange. Is this referring to current costs information? Does it make any difference whether this information is provided directly by the competitor or via a third party?

Finally, in relation to information exchange, we would like to see the final guidelines provide more detailed consideration of the final exemption criteria under Article 101(3), namely that the parties are not afforded the possibility of eliminating competition. At the very least, we would recommend that a cross reference to the 101(3) Guidelines is included, but ideally we would like to see the document itself include further consideration of the application of this criterion, in the particular context of information exchange.

### **Joint production/Commercialisation agreements**

We would welcome the inclusion of an example of co-operation in the shipping industry to be included in the examples in either the section on joint production agreements or commercialisation agreements. Shipping is an industry in which cooperation agreements between competitors have historically been commonplace. Given the huge resources required to run a shipping transportation service, shipping lines have often joined together in order to be able to provide regular reliable and efficient services to shippers. Given the particular characteristics of the sector, tramp shipping had until 2006 benefited from a block exemption. Now that this has been removed, many shipping companies are faced for the first time with having to conduct their own assessments of any such horizontal cooperation arrangements. Given the lack of experience and past cases to rely on in this area, we believe it would be helpful to include at least one example from the tramp shipping sector.

Example 3 at paragraph 249 is curious and probably of limited application. We would suggest that it may be ok in the context of homogenous goods but in the case of differentiated products it would be harder to justify price fixing. In the latter case we would have thought that the site would need to operate as more of a farmers' market.

We hope that these comments are useful and we would be happy to discuss further if you would like us to expand on any of the issues outlined above.

**Reed Smith**

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