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THE GUIDELINES ON THE APPLICATION OF  
ARTICLE 81(3) EC:

A CRITICAL REVIEW

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# A CRITICAL REVIEW OF THE GUIDELINES ON THE APPLICATION OF ARTICLE 81(3) EC

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## INTRODUCTION

To date, the European Commission (“the Commission”) has not yet made use of the novel guidance instruments established under Regulation 1/2003 (Article 10 inapplicability decisions, guidance letters, etc.),<sup>1</sup> or taken any exemption decision pursuant to Article 81(3). The “*brave new world*” of Regulation 1/2003 is thus a competition enforcement system devoid of individual guidance and positive decisions.<sup>2</sup>

That is not to say, however, that firms have been left without formal guidance. In early 2004, the Commission issued Guidelines on Article 81(3), which set out the methodological and substantive framework for the self-assessment of agreements under Article 81(3).<sup>3</sup>

For a few years now, a debate has arisen in relation to the degree of guidance provided by the Guidelines on Article 81(3). On the one hand, the Commission believes that the Guidelines promote an optimal and manageable self-assessment framework, which firms are thus “*well-advised*” to follow.<sup>4</sup> On the other hand, firms (and their counsels) have repeatedly argued that the Guidelines on Article 81(3) are unpractical and thus of little, if

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<sup>1</sup> See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4 January 2003, p.1-25

<sup>2</sup> This expression was coined by J. VENIT, “Brave New World: The Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty”, *CML Rev.* Vol 40, 545 (2003).

<sup>3</sup> See Guidelines on Article 81(3) *supra* note 9.

<sup>4</sup> Firms are “*well-advised*” to rely on the Guidelines adopted by the Commission on 30 May 2004. The Guidelines arguably enshrine a methodology for the application of Article 81 EC which is “*more elaborate*” than previous instruments. See L. KJOLBYE, “The New Commission Guidelines on the Application of Article 81(3): An Economic Approach to Article 81 EC”, (2004) 9 *European Competition Law Review*, 566.

any, use in the evaluation of potentially unlawful agreements.<sup>5</sup> As a result, most firms are reluctant to rely on the Guidelines when assessing their purported agreements.

Against this background, this paper submits that the Guidelines on Article 81(3) do not provide an adequate degree of guidance for firms seeking to self-assess their agreements, in particular in the light of Article 81(3). This situation is problematic since the threshold for establishing a violation of Article 81(1) is still relatively low. As a result, it is not uncommon that firms seeking to enter into a specific agreement have to assess this agreement through the lenses of Article 81(3) and are confronted with the very complex and restrictive assessment principles of the Article 81(3) Guidelines. As a result, firms might abandon proposed business transactions for fear of failing to meet the standards enshrined in the Guidelines on Article 81(3), thereby giving rise to an “*over-fixing*” issue (or type I error).

The present paper is divided into three sections. Section A demonstrates that the self-assessment standards devised by the Guidelines on Article 81(3) entail overly complex economic assessments, which most firms cannot realistically, and do not, undertake in practice. Section B shows that many of the Guidelines on Article 81(3) self-assessment standards are more restrictive, and thus inconsistent, with the case-law of the Community Courts. Section C argues that the Guidelines on Article 81(3) exhibit a logical flaw, in so far as the fourth condition of Article 81(3) is concerned.

## **I. The Guidelines on Article 81(3) entail overly complex economic assessments**

Within the ecology of EC competition rules, the Guidelines on Article 81(3) constitute a striking piece of stylized, economic, conceptualization. Their abstract wording – as well as the sophisticated standards they promote – heavily draw on economic theory and, in particular, on industrial organization theory.<sup>6</sup> Whilst this is not, in and of itself, a cause of concern, this paper submits that the Guidelines strong economic flavour is not without – negative – consequences on the degree of guidance offered to firms.<sup>7</sup>

For obvious reasons, firms generally appreciate rules demarcating clearly what constitutes lawful from unlawful conduct (*e.g.* rules of thumb, lists of illicit business activities, practical illustrations, etc.).<sup>8</sup> It therefore comes as no surprise that firms are generally reluctant to rely on the Guidelines on Article 81(3) for the purposes of self-

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<sup>5</sup> See, amongst others, M. PIERGIOVANNI and P. D’ELIA, “Self-Assessment of Agreements under Article 81 EC: Is There a Need for More Commission Guidance”, *Global Competition Policy*, October 2008, Release 2.

<sup>6</sup> See para 5 of the Guidelines on Article 81(3), *supra*, which states that the methodology is based on the so-called “*economic approach*” that has already been introduced in other fields of EC competition law, and which finds its conceptual foundations into industrial organization theory.

<sup>7</sup> See para 4 of the Guidelines on Article 81(3), *supra*.

<sup>8</sup> In this respect, the success of instruments like the block exemption regulations (*e.g.* for vertical and horizontal agreements) primarily owes to the introduction, in the late 1990s, of market share thresholds and black-lists of unlawful clauses.

assessing agreements. Unlike other EC competition law instruments, the Guidelines contain no safe-harbours or single bright-line rule for assessing of agreements under Article 81(3).<sup>9</sup> Rather, the Guidelines on Article 81(3) devise a new set of vague self-assessment standards which must be applied on a case-by-case basis. In this context, the self-assessment of agreements primarily hinges on a “*balancing test*”, which requires the parties to an agreement to examine whether its pro-competitive benefits “*outweigh*” its anti-competitive effects.<sup>10</sup> In turn, this assessment must follow a “*sliding-scale approach*”, whereby the greater the restriction of competition under Article 81(1), the greater must be the efficiencies and the pass-on to consumers under Article 81(3).<sup>11</sup>

In our view, those standards are far from appropriate. Both the “*balancing test*” and the “*sliding scale approach*” are based on the fictitious assumption that, in practice, firms could – and would – quantify the anti and pro-competitive effects of their agreements. In reality, firms are almost certainly unable to quantify the effects of their agreements.<sup>12</sup> First, the quantification of the various welfare losses arising from an anticompetitive agreement is a notoriously daunting task. Even in the most straightforward collusion cases – *i.e.* price-fixing conspiracies, where harm to competition is undisputed – experts are divided over how to measure the “*cartel overcharge*”. Likewise, the quantification of other types of anti-competitive effects (such as foreclosure effects) appears particularly complicated.<sup>13</sup>

Second, this difficulty is further compounded by the fact that firms are generally ill-equipped to gather and analyse the data necessary to quantify the anti-competitive effects

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<sup>9</sup> For instance, the Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ C 3, 6.1.2001, pp.2-30, devise a number of market share thresholds which salvage certain agreements from the application of Article 81.

<sup>10</sup> See para 11 of the Guidelines on Article 81(3), *supra*. This balancing test originates in a number of judgments handed down by the Community Courts. See, in particular, CFI, T-112/99, *Métropole Télévision (M6) and other vs. Commission* ECR [2001] II-2459, at para 74 (explaining that “*pro and anti-competitive aspects of a restriction may be weighed*”). Those judgments date back to a time where the self-assessment of agreements by firms was less burdensome than it is today, because a specialized institution, the Commission, was ultimately in charge of reviewing agreements pursuant to the compulsory notification procedure.

<sup>11</sup> See para 90 of the Guidelines on Article 81(3), *supra*. This sliding-scale applies in the context of the assessment of the third condition of Article 81(3), which relates to the passing-on of efficiencies to consumers.

<sup>12</sup> This section shall not be read as conveying the message that quantitative analysis shall, as a matter of principle, be abandoned under Article 81, but rather that the practical feasibility, and the merits, of such analysis are doubtful in the context of the *ex ante* self-assessment of agreements that firms are supposed to carry out. This, however, is not necessarily true in the context of *ex post* enforcement proceedings, before expert, and well-informed, specialized administrative agencies.

<sup>13</sup> The Commission has implicitly acknowledged this in its recent Guidance Notice on the application of Article 82 to exclusionary abuses. See Guidance Communication on the Commission’s enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, C(2009) 864 final which provides at para 19 that: “[t]he identification of likely consumer harm can rely on qualitative and, where possible and appropriate, quantitative evidence”.

of their agreements.<sup>14</sup> Whilst some firms with large financial resources may seek the advice of expert economic consultants, the self-assessment of agreements is either carried “in-house” by lawyers with limited expertise into quantitative techniques, or with the assistance of external legal counsels who, as the case may be, do not have full access to meaningful business data.

Third, it is often impossible to apply the Guidelines quantitative standards. This is because many of pro-competitive effects cannot be quantified (or translated into a meaningful monetized figure) and, in turn, weighed against to its anticompetitive effects.<sup>15</sup> For instance, a supplier contemplating the introduction of a selective distribution system might encounter insuperable difficulties in trying to weigh the pro-competitive promotional incentives of its retailers, against the exclusion of rival retailers from its distribution network. In that sense, the balancing test advocated by the Guidelines on Article 81(3) almost inevitably calls for a “*value judgment*” when the pro-competitive effects of an agreement are “*qualitative*” in nature.<sup>16</sup> Conversely, even a firm running a full-fledged quantitative assessment under Article 81(3) will encounter problems in demonstrating that its agreement’s efficiencies offset its anticompetitive effects, simply because the assessment under Article 81(1) does not necessarily require a symmetrical, let alone accurate, quantification of anti-competitive effects.

The Guidelines’ assumption that firms can undertake complex quantitative balancing assessments is thus overly optimistic. In most cases, the decision to proceed with a specific agreement is ultimately based on a judgment call, dependent on non-legal considerations (such as risk aversion, etc.)<sup>17</sup>, or on heuristics-based reasoning.<sup>18</sup>

## **II. The Guidelines are not consistent with the case-law of the Community institutions**

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<sup>14</sup> By contrast to competition authorities, which enjoy vast informational resources (requests for information, market studies, information gathered during previous investigations, etc.) and processing capacity (teams of expert economists).

<sup>15</sup> See D. GERADIN, “Efficiency Claims in EC Competition Law” in H. ULLRICH (Ed.), *The Evolution Of European Competition Law - Whose Regulation, Which Competition?*, Edward Elgar, Cheltenham, 2006, p.336.

<sup>16</sup> The Guidelines on Article 81(3) seem to acknowledge this in explaining that the question whether qualitative efficiencies (e.g. new and improved products) compensate for the anti-competitive effects of an agreement “*necessarily require value judgment*”. See paras 10 and 11 of the Guidelines on Article 81(3), *supra*.

<sup>17</sup> See M. PIERGIOVANNI and P. D’ELIA, *supra* at p.8. In practice, firms’ advisors are rarely able to provide “*clear-cut*” advice under Article 81(3). By contrast to those authors, however, we believe that this risk does not only exist in respect of “complex cases” where firms might actually consult expert economists.

<sup>18</sup> Understood as a form of over simplistic reasoning, that does not follow a sound, and well-informed, analysis. See on this, and on the implications of heuristics for law makers designing legal principles, R. KOROBKIN, “The Problems with Heuristics for Law”, in G. GIGERENZER and C. ENGLE (eds.) *Heuristics and the Law*, M.I.T. Press, 2006.

Several provisions of the Guidelines' convey a restrictive interpretation of Article 81(3) which is not entirely consistent with the case-law of the Community Courts (as well as previous Commission decisions). As will be seen below, the co-existence of dissonant interpretations of Article 81(3) is unsatisfactory. Firms which are not well-versed into EC law, or which are risk-averse, might rely on the restrictive provisions of the Guidelines and, in turn, be discouraged from concluding otherwise lawful agreements (a false negative situation). Conversely, firms with a lesser degree of risk aversion, might simply ignore the Guidelines altogether, including those provisions that are compatible with the case-law, and in turn enter into unlawful agreements (a false positive situation).

### *Non-competition concerns under Article 81(3) EC*

Perhaps the foremost area of inconsistency between the Guidelines on Article 81(3) and the case-law lies in the types of justifications that can be invoked in support of an exemption under the first condition of Article 81(3), which refers to "*improv[ements] in production or distribution of goods or to promoting technical or economic progress*".

Presumably prompted by the fear that the abolition of the Commission's exemption monopoly would induce NCAs and/or national courts to exempt unlawful agreements on national public-policy grounds –<sup>19</sup> thereby bringing about an increased degree of legal uncertainty/inconsistency – the Guidelines on Article 81(3) advocate an orthodox, micro-economic, interpretation of Article 81(3) which requires demonstration of "*objective economic efficiencies*" (e.g. synergies, economies of scale, of scope, etc.).<sup>20</sup>

By contrast, the case-law of the Community judicature (and previous Commission decisions) is more open-ended interpretation of Article 81(3), and covers not only pure "*economic efficiencies*", but also encompasses non-competition concerns.<sup>21</sup> For instance, the Community Courts and the Commission have demonstrably held that environmental benefits,<sup>22</sup> the protection of employment,<sup>23</sup> cultural diversity and media pluralism,<sup>24</sup>

<sup>19</sup> See A. KOMNINOS, "Non-competition Concerns: Resolution of Conflicts in the Integrated Article 81", Working Paper (L) 08/08, *The University of Oxford Centre for Competition Law and Policy*, p. 6.

<sup>20</sup> Cost efficiencies as well as efficiencies of a qualitative nature. See Guidelines on Article 81(3), *supra*, at para 59. The rationale for this interpretation is to ensure that, with decentralization, national competition authorities and courts will not exempt otherwise anticompetitive conduct on the basis of public policy goals. See, on this, L. KJOLBYE, *supra*.

<sup>21</sup> Also referred to as "*public-policy*" or "*general interest*" considerations. See, on this, A. KOMNINOS, *supra*; G. MONTI, "Article 81 EC and Public Policy", (2002) 39 *Common Market Law Review*, pp. 1057-1099; H. SCHWEITZER, "Competition Law and Public Policy: Reconsidering an Uneasy Relationship. The Example of Art. 81", in EUI Working Papers Law 2007/30, Italy.

<sup>22</sup> See Commission Decision of 8 December 1983, IV/29.955 – Carbon Gas Technologie, 83/669/EEC; Commission Decision 91/38/EEC, IV/32.363 – KSB/Goulds/Lowara/ITT, [1991] OJ L 19/25 at para 27; Commission Decision 92/96/EEC, IV/33.100 *Assurpol*, [1992] OJ L 37/16 at para 38; Commission Decision 2000/475/EC of 24 January 1999 (*CECED*), OJ [2000] L187/47 at paras 51 and 57; Commission Decision 2001/837/EC of 17 September 2001 (*DSD*), OJ [2001] L319/1; Commission Decision of 16 October 2003, ARA, ARGEV, ARO, OJ 2004 L 75/59.

<sup>23</sup> See ECJ, C-42/84, *Remia BV vs. Commission*, ECR 2545 [1985] at para 42 [1985]; ECJ Joined cases C-209/78 to 215/78 and 218/78, *Van Landewyck vs. Commission* [1980] ECR 3125 at para 182; Commission Decision of 4 July 1984, 84/380/EEC *Synthetic Fibres*, OJ 1984, L207/17, para 37.



regional development,<sup>25</sup> professional ethics,<sup>26</sup> etc. constituted legitimate factors to take into account when reviewing an agreement under Article 81(3).<sup>27</sup> This case-law has absorbed the attention of many commentators in the last few years.<sup>28</sup>

In an attempt to bridge this potential conflict with the case-law, the Guidelines on Article 81(3) declare that non-competition concerns are admissible under Article 81(3), provided that they (i) “*are pursued by other Treaty provisions*”; and (ii) “*can be subsumed under the four conditions of Article 81(3) EC*”.<sup>29</sup> In other words, the non-competition concerns followed must “*translat[e] into economic benefits*” that satisfy the four conditions of Article 81(3).<sup>30</sup> In substance, the Guidelines thus seem to require an economic quantification of benefits which are essentially non-economic or not purely economic in nature.

This paper shares the concern of the Commission that some NCAs and/or national Courts might take advantage of Article 81(3) to pursue public policy objectives at the expense of the competitive process. However, it submits that the narrow *substantive* interpretation of Article 81(3) introduced by the Guidelines on Article 81(3) yields a number of problems. First, in endorsing an interpretation of Article 81(3) which departs from the Community Courts case-law, the Commission undermines the precedential value of its Guidelines as a whole and causes legal confusion. Second, the Guidelines’ attempt to reconcile the Community Courts case-law with its proposed restrictive interpretation of Article 81(3)

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<sup>24</sup> See Commission Decision, *VBVB/VBBB*, 25 November 1981, IV/428, OJ [1982] L54/36; ECJ 43 and 63/82, *VBVB and VBBB vs. Commission*, [1984] ECR 19; Commission Decision *EBU/Eurovision System*, OJ 1993 L179/23, at para 62. See, more generally, M. ARIÑO, “Competition Law and Pluralism in European Digital – Broadcasting: Addressing the Gaps”, *Communications & Strategies*, no. 54, 2nd quarter 2004, p. 97 at p.107.

<sup>25</sup> See Commission Decision 93/49/EE of 23 December 1992, IV/33.814 *Ford Volkswagen*, OJ [1993] L20/14/

<sup>26</sup> See Commission Decision, 15 April 2002, *Laurent Piau vs. FIFA*, para 29. In this case, the Commission considered that the FIFA rules on the professional conduct for the occupation for players’ agents worldwide “[t]hat can be justified by the general interest, are proportionate and compatible with competition law” ( paras 60-61). See, on this, E. LOOZEN, “Professional Ethics and Restraints of Competition”, (2006) Vol.31 No.1, *European Law Review*, at p.41.

<sup>27</sup> Certain observers have sought to construe the occasional Commission and Courts’ references to non-competition benefits as *obiter dicta*. See L. GYSELEN, “The Substantive Legality Test under Article 81-3 EC Treaty – Revisited in light of the Commission’s Modernization Initiative”, in VON BOGDANDY, MAVROIDIS and MENY (Eds) *European Integration and International Coordination, Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann*, The Hague/London/New York, 2002. Similarly, it has been argued that most of those non-competition concerns could be reconciled with the Guidelines approach, in that they contained an efficiency component. Finally, others have explained that such non-competition concerns were, by their very nature, ancillary, and could thus potentially be taken into account within the Article 81(1) assessment under the ancillary restraints doctrine. See E. LOOZEN, *supra*.

<sup>28</sup> See J. BOURGEOIS, and J. BOCKEN, “*Guidelines on the Application of Article 81(3) of the EC Treaty or How to Restrict a Restriction*”, Legal Issues of Economic Integration - Legal Issues of European Integration, Vol. 32, No. 2, 2005, pp. 111; P. LUGARD and L. HANCHER, “Honey, I Shrunk the Article! A Critical Assessment of the Commission’s Notice on Article 81(3) of the EC Treaty”, (2004) 7 *European Competition Law Review*, 413.

<sup>29</sup> See para 40 of the Guidelines on Article 81(3), *supra*.

<sup>30</sup> See L. KJOLBYE, *supra* at p.570.

fails to convince.<sup>31</sup> This, in turn, is because many non-competition concerns that have been held admissible by the EC courts are not amenable to a pure economic quantification and cannot, therefore, be “*subsumed*” under the four conditions of Article 81(3) in the manner envisaged by the Guidelines. For instance, it is unclear how an anticompetitive agreement that prevents cuts in the labour force –<sup>32</sup> and protects inefficient production units from going out of business – directly benefits to consumers within the meaning of the second condition of Article 81(3) as interpreted by the Guidelines.<sup>33</sup> Similarly, and contrary to the Commission’s position, the case-law of the Community Courts seems to accommodate within Article 81(3) a variety of non-competition concerns that cannot, *sensu stricto*, be ascribed to the goals “*pursued by other Treaty provisions*”.<sup>34</sup> For instance, a long term supply agreement that fosters the security of energy supplies could potentially<sup>35</sup>, under the EC Courts open-ended case-law, be found admissible for an exemption under Article 81(3). However, to the best of our knowledge, the security of energy supplies does not yet constitute, a goal explicitly pursued by the EC Treaty.<sup>36</sup>

Instead of advocating an approach which is inconsistent with the case-law, this paper submits that the Commission could achieve its purported goal of disciplining firms, NCAs and national courts through an alternative *institutional* approach. To limit the risk that firms, NCAs and national courts abusively avail themselves of non-competition arguments in the context of Article 81 assessments, the Commission could in particular

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<sup>31</sup> The legal basis for this theory is debatable. The Commission relies on the *Matra* judgment (CFI, T-17/93, *Matra*, ECR [1994] II-595) which, it argues, “*implicitly*” embodies the principles that non-competition concerns should be subsumed under the four conditions of Article 81(3). However, in *Matra*, the Court arguably held that regardless of non-competition concerns, the agreement could benefit from an exemption solely on the basis of a classic economic analysis. See Guidelines on Article 81(3) at footnote 54.

<sup>32</sup> An objective falling within the scope of Article 81(3) according to the ECJ in *Remia*, supra note [ ] at §42 (“[I]n connection with the argument to the effect that the survival of the undertaking and the preservation of jobs are only possible if the non-competition clause applies for a period of 10 years, it must indeed be admitted that, as the Court held in its judgment of 25 October 1977 in case 26/76 (*Metro*, (1977) ECR 1875), the provision of employment comes within the framework of the objectives to which reference may be had pursuant to article 85 (3) because it improves the general conditions of production, especially when market conditions are unfavourable”).

<sup>33</sup> Of course, an agreement of this kind may be beneficial to consumers in the long run. Yet, the Guidelines take a restrictive stance on long run efficiencies. At para 87 the Guidelines provide that whilst “[t]he fact that pass-on to the consumer occurs with a certain time lag does not in itself exclude the application of Article 81(3), [...]the greater the time lag, the greater must be the efficiencies to compensate also for the loss to consumers during the period preceding the pass-on” (emphasis added).

<sup>34</sup> Along the lines of the “*mandatory requirements*” doctrine that applies under Article 30 EC. See, on this, A. KOMNINOS, *supra* at p.12.

<sup>35</sup> For example, an agreement to build new generation capacity (a nuclear plant); an agreement to build a new pipeline for the transport of gas; a 25 years supply agreement between a gas producer and a gas distributor.

<sup>36</sup> It is only defined, in passing in a number of EC secondary law instruments in the gas sector.



rely on the *institutional mechanisms* provided for by Regulation 1/2003.<sup>37</sup> For instance, the Commission could:

- Expressly indicate that, where an otherwise anticompetitive agreement is likely to contribute to the “general interest”, parties to an agreement should informally consult the Commission prior to the conclusion of their agreement (by requesting, for instance, a guidance letter);
- Invite national courts to solicit the Commission’s opinion pursuant to Article 15(1) of Regulation 1/2003 and submit, on its own initiative, written observations pursuant to Article 15(3) where non-competition concerns appear to be at stake;
- Discuss, in the context of the European Competition Network, of NCA cases involving non-competition concerns and, ultimately threaten to apply Article 11(6) of Regulation 1/2003 where the non-competition concerns are manifestly unfounded.

Whilst this *institutional* approach is certainly more burdensome from an enforcement perspective (it entails monitoring costs, etc.), it has the advantage of (i) being lawful and (ii) not fettering, as the Guidelines arguably do (through the creation of legitimate expectations on the part of firms), the ability of the Commission to rely occasionally on public policy considerations in its own enforcement initiatives.

#### *The “market by market” standard*

At paragraph 43, the Guidelines on contend that “*the efficiencies generated by the restrictive agreement must be sufficient to outweigh the anti-competitive effects produced by the agreement within that same relevant market*” (emphasis added).<sup>38</sup> The rationale for this rule is fairly obvious. As explained by a former Commission official, the Guidelines seek to preclude complex “*inter-personal comparisons*”.<sup>39</sup> Back in 2004, the Commission indeed feared that, in the case of an agreement which harms consumers of product A/Member State A and benefits to consumers of product B/Member State B, NCAs and national courts might give preference to consumers of a certain product market/geographic market, on the basis of non-economic considerations (national bias, for instance). To avoid this problem, the Guidelines thus provide that the anticompetitive

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<sup>37</sup> Interestingly, a somewhat similar institutional approach already prevails in EC merger control. The Member States “*legitimate interests*” (which encompass the plurality of the media, public security and prudential rules) are taken into account, and controlled, through Article 21(4) of the EC merger regulation.

<sup>38</sup> See para 43 of the Guidelines on Article 81(3), *supra*.

<sup>39</sup> See L. KJOLBYE, *supra*, p.572.

effects that take place in a certain relevant market cannot be compensated with pro-competitive effects that take place in another relevant market.<sup>40</sup>

At first glance, the “market by market” standard constitutes a commendable development, which is likely to simplify the assessment of agreements under Article 81. Yet, it is the submission of this paper that this standard unduly restricts the range of efficiency arguments that can be invoked under Article 81(3) and is inconsistent with the case law which, contrary to the position adopted by the Commission in the Guidelines, accepts in principle that the balancing of pro and anti-competitive effects can be conducted across different markets.<sup>41</sup> Under the EC Court’s case-law, any agreement that on the whole produces a net positive effect on consumers, regardless of whether some consumers are harmed whilst others are favored, is deemed pro-competitive and benefits from Article 81(3). In *Compagnie Maritime Belge vs. Commission*, the Court of First Instance (“CFI”) held that:

*“for the purposes of examining the merits of the Commission’s findings as to the various requirements of Article [81(3)] of the Treaty, [...] regard should naturally be had to the advantages arising from the agreement in question, not only for the relevant market, [...] but also, in appropriate cases, for every other market on which the agreement in question has might have beneficial effects [...] (emphasis added)”*.<sup>42</sup>

Similarly, in *GlaxoSmithKline vs. Commission* (a judgment handed down after the adoption of the Guidelines), the CFI noted that:

*“It is therefore for the Commission, in the first place, to examine whether [...] the agreement in question must enable appreciable objective advantages to be obtained, it being understood that these advantages may arise not only on the relevant market but also on other markets (emphasis added)”*.<sup>43</sup>

Finally, in a somewhat similar language, the ECJ held more recently in *Asnef-Equifax* that under Article 81(3):

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<sup>40</sup> Additionally, a number of less explicit motives may have prompted the Commission to establish this standard. Amongst other things, the “market by market” standard eradicates the risk that public policy considerations – which do not, *sensu stricto*, take place on a relevant market – might be invoked to justify an otherwise anticompetitive agreement.

<sup>41</sup> In economic language, the standard endorsed by the case-law of the Community Courts comes close to a “total welfare” standard.

<sup>42</sup> See CFI, T-86/95, *Compagnie Générale Maritime and others vs. Commission*, ECR [2002] II-1011, at para 343. This point has been confirmed in a number of recent rulings of the Community courts. See, on this, J. AITKEN and S. MITCHELL, “Efficiency Defences under Art. 81 EC – Is the Hurdle Getting Higher?”, in *Competition Law*, 2009, pp.64-65. The CFI went on to note that Article 81(3) does not “requir[e] a specific link with the relevant market”.

<sup>43</sup> See CFI, T-168/01, *GlaxoSmithKline vs. Commission*, ECR [2006] II-2969, at para 248.

*“it is the beneficial nature of the effect on all consumers in the relevant markets that must be taken into consideration, not the effect on each member of that category of consumers (emphasis added)”*.<sup>44</sup>

Interestingly, the Guidelines on Article 81(3) are also inconsistent with the Commission’s practice in other fields of competition law. For instance, the Guidelines on horizontal cooperation agreements suggest that the anticompetitive “*spill-over*” effects that arise on the market(s) where the parties to a joint venture remain independent can be exempted if, for instance, the agreement meanwhile generates efficiencies on the market concerned by the cooperation.<sup>45</sup> Moreover, in other fields, such as Article 82, the Commission is ready to balance the *actual* anticompetitive effects on consumers in a defined relevant market, with the *future* pro-competitive effects on consumers in prospective, undefined, relevant markets. For instance, the Commission will balance the actual harmful effects of an alleged abusive refusal to license intellectual property rights, with its positive effects on the dominant firm’s incentives to invest into R&D and market new products.<sup>46</sup>

Again, in devising an assessment standard that is not entirely consistent with the case-law, the Guidelines do not provide an appropriate degree of guidance to firms that contemplate the adoption of a potentially anticompetitive agreement.<sup>47</sup>

#### *Hardcore restrictions under Article 81(3) EC*

A final area of divergence between the Guidelines on Article 81(3) and the case-law of the Community courts relates to the analytical treatment of so-called “*hardcore restrictions*” under Article 81(3). Under a widespread, conventional, view, certain types of restrictive agreements (or contractual clauses) are by their very nature so harmful, that they should (i) be automatically prohibited, regardless of their actual effects on the market; and (ii) never be salvaged through the benefit of an exemption. This is, for

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<sup>44</sup> See ECJ, C-238/05, *Asnef-Equifax*, ECR [2006] I-11125, at para 70. The Court accordingly dismissed the allegation that an agreement which had a detrimental effect on a particular category of consumers, and no pro-competitive effects in their respect, was unlikely to benefit from an exemption.

<sup>45</sup> See para 82 of the Guidelines on Article 81(3), *supra*. However, in a setting of this kind, the agreement may benefit from the derogation enshrined at para 43 of the Guidelines: “*efficiencies achieved on separate markets can be taken into account provided that the group of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same*”.

<sup>46</sup> See Guidance Communication on the Commission’s enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, *supra* at para 90.

<sup>47</sup> In addition, the total welfare standard which surfaces from the above cases invalidates almost entirely the Commission’s concerns for complex “*interpersonal comparisons*”, as such situations only arise in the hypothetical case where the harm to consumers of product/Member State A perfectly equals the benefits of consumers of product/Member State B. Should this standard be good law, the concern that “*inter-personal comparisons would have to be carried out in each and every case where competition concerns and efficiencies occur in distinct markets*” seems overstated. See L. KJOLBYE, *supra* at footnote 42.

instance, the case of horizontal price-fixing arrangements or of vertical resale price maintenance systems. In line with this, the Guidelines on Article 81(3) declare at paragraph 46 that:

*“[S]evere restrictions of competition are unlikely to fulfill the conditions of Article 81(3). Such restrictions are usually black-listed in block exemption regulations or identified as hardcore restrictions in Commission guidelines and notices. Agreements of this nature generally fail (at least) the two first conditions of Article 81(3). They neither create objective economic benefits nor do they benefit consumers”.*<sup>48</sup>

However, this far reaching statement, which promotes a restrictive interpretation of Article 81(3), departs from a number of ECJ and CFI rulings to the effect that all restrictions of competition – including hardcore restrictions – can benefit from an exemption if they fulfill the four conditions of Article 81(3).<sup>49</sup> In *GlaxoSmithKline Services Unlimited vs. Commission*, the CFI unambiguously held that: *“Any agreement which restricts competition, whether by its effects or by its object, may in principle benefit from an exemption”*.<sup>50</sup>

In stark contrast with the Guidelines, the Community Courts seem to consider that no agreements (or contractual clauses) shall, in and of themselves, be precluded from the benefit of an exemption pursuant to Article 81(3).<sup>51</sup>

### *Conclusion*

The above findings underscore the limited authoritative value of the Guidelines on Article 81(3). This might explain why, as previously noted, firms, NCAs and national courts have only paid lip service to the Guidelines when reviewing potentially anticompetitive agreements.<sup>52</sup>

### **III. The Guidelines interpretation of the fourth condition under Article 81(3) EC exhibits a logical flaw**

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<sup>48</sup> See para 46 of the Guidelines, *supra*. However, it ought to be noted that, prior to this, the Guidelines state as a general proposition that *“Article 81(3) does not exclude a priori certain types of agreements from its scope. As a matter of principle all restrictive agreements that fulfill the four conditions of Article 81(3) are covered by the exception rule”*.

<sup>49</sup> See CFI, T-17/93, *Matra*, *supra* at p.85.

<sup>50</sup> See CFI, T-168/01, *GlaxoSmithKline Services Unlimited vs. Commission*, *supra* at para 233.

<sup>51</sup> Those agreements however remain subject to a *per se* prohibition principle pursuant to Article 81(1). Price-fixing agreements are indeed forbidden regardless of their effects on the market. As a result of the principle enshrined in the Guidelines, firms may be deterred to engage into otherwise lawful, and welfare-enhancing conduct (type I error).

<sup>52</sup> Firms, NCAs and national courts probably prefer to rely on stronger sources of legal authority/precedent (*i.e.* judgments handed down by the EC Courts and Commission’s decisions).

A final criticism that can be leveled against the Guidelines on Article 81(3) lies in their somewhat illogical interpretation of the fourth condition of Article 81(3), which requires the proof that the anticompetitive agreement does not “*eliminate competition in a substantial part of the products concerned*”. Under this condition, the Guidelines say that the Commission will review “*the degree of competition existing prior to the agreement*” and the “*reduction in competition that the agreement brings about*”.<sup>53</sup> To this end, the Guidelines on Article 81(3) simply encourage the parties to assess their market shares, the position of competitors, as well as a – limited – range of other parameters (*i.e.* actual market conduct of the parties<sup>54</sup> and barriers to entry).<sup>55</sup>

In our view the Guidelines vague wording – which seems to import the assessment standards of Article 81(1) within Article 81(3) – is unfortunate. If we follow the standards of assessments contained in the Guidelines on Article 81(3), any agreement that is deemed to “*appreciably restrict competition*” under Article 81(1) would also likely lead to the “*elimination of competition*” under Article 81(3).<sup>56</sup>

This cannot be correct. To be at all meaningful in the bifurcation system of Article 81(1) and 81(3) EC, the notion of “*elimination of competition*” under Article 81(3) cannot have the same meaning as the notion of “*restriction of competition*” under Article 81(1).<sup>57</sup>

Thus, this paper submits that the Commission should articulate a clearer definition of “*elimination of competition*”, distinct in substance from the “*restriction of competition*” caught under Article 81(1) EC. This definition should make clear that the fourth condition of Article 81(3) constitutes a “last-look” safeguard mechanism, the purpose of which is to rule out the application of Article 81(3) in the presence of egregious restrictions of competition (those which eliminate competition in a substantial part of the products concerned).

Moreover, the Guidelines on Article 81(3) should define the *magnitude* of the reduction of competition which is required for a finding that competition is being eliminated in a substantial part of the products concerned. In this regard, the vague structural assessment standards of the Guidelines on Article 81(3) should be replaced with a concrete provision to the effect that when, pursuant to an agreement, the parties (i) occupy individually or collectively an entrenched dominant position; and/or (ii) coordinate their commercial policies in respect of a large range of (or of the most important) competition parameters in the relevant market (price, output, distribution, R&D investments, advertising

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<sup>53</sup> See para 107 of the Guidelines, *supra*.¶

<sup>54</sup> See para 111 of the Guidelines, *supra*.

<sup>55</sup> See paras 115-116 of the Guidelines, *supra*.

<sup>56</sup> See para 24 of the Guidelines, *supra*.

<sup>57</sup> In other words, the assessment under Article 81(3) requires the proof of a *qualified* Article 81(1) restriction of competition that goes beyond the proof of appreciable anticompetitive effects.

expenditures, etc.)<sup>58</sup>, there will be a likely elimination of competition pursuant to Article 81(3). In practice, this may for instance occur if, pursuant to an Article 81(1) assessment, an agreement is deemed restrictive of competition because it leads to a situation of oligopolistic tacit collusion. This, in turn, is because a situation of tacit collusion can only be sustained if all competition is eliminated. A tacitly collusive price/output level can only be sustained if the parties to the agreement (i) together account for a major share of the relevant market; (ii) are insulated from the competition of actual and potential competitors which cannot challenge their coordinated conduct; and (iii) cannot “deviate”, *i.e.* engage into competitive courses of conduct, in respect of other competition parameters (such as R&D investments, service, etc.).

In sum, therefore, the Commission should devise clearer benchmarks above which an agreement is likely to eliminate competition, and should be subject to a detailed appraisal.

## CONCLUSION

By fear, perhaps, of promoting a “*mechanical application*” of Article 81(3), the Guidelines on Article 81(3) provide little, if any, bright-line principles for separating lawful from unlawful agreements.<sup>59</sup> In establishing an overly demanding and abstract framework for the assessment of pro-competitive effects under Article 81, the Guidelines have blurred the clarity and the precision of Article 81(3).<sup>60</sup> Moreover, to mitigate the risk that NCAs and national courts adopt inconsistent decisions under Article 81(3), the Guidelines on Article 81(3) advocate a restrictive interpretation of the Treaty, which in material particulars is inconsistent with the case-law of the Community Courts. As a result, the Guidelines have failed to “promote” the application of Article 81(3), in deterring firms, NCAs’ and national courts from relying on this provision.

This paper considers that this situation is regrettable. The Commission should thus review its Guidelines on Article 81(3) with a view to improve the degree of guidance afforded to firms and their counsels.

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<sup>58</sup> The Guidelines on Article 81(3) explain that the last condition under Article 81(3) is not fulfilled “*if the agreement eliminates competition in one of its most important expressions. This is particularly the case when an agreement eliminates price competition or competition in respect of innovation and development of new products*”. See para 110 of the Guidelines, *supra*.

<sup>59</sup> See para 6 of the Guidelines on Article 81(3), *supra*.

<sup>60</sup> And thus may have undermined its intrinsic ability to enjoy direct effect.