INTERNATIONAL BAR ASSOCIATION

ANTITRUST COMMITTEE

WORKING GROUP ON THE COMMISSION'S QUESTIONNAIRE RELATING TO THE PUBLIC CONSULTATION ON THE FUNCTIONING OF THE CURRENT REGIME FOR THE ASSESSMENT OF HORIZONTAL COOPERATION AGREEMENTS UNDER EU ANTITRUST RULES, IN PARTICULAR, THE SPECIALISATION AND R&D BLOCK EXEMPTION REGULATIONS AND THE HORIZONTAL GUIDELINES

This submission is made to the European Commission (the "Commission") on behalf of the Working Group of the Antitrust Committee of the International Bar Association (the "Working Group") that has been formed in response to the Commission's Questionnaire relating to the public consultation on the functioning of the current regime for the assessment of horizontal cooperation agreements under EU antitrust rules (the "Questionnaire"). The Working Group appreciates this opportunity to make a submission to the Commission in this regard and hopes to contribute constructively to the Commission's internal evaluation process. The IBA's Antitrust Committee brings together antitrust practitioners and experts among the IBA's 20,000 individual members from across the world, with a unique blend of jurisdictional background and professional experience. The Working Group's comments and recommendations draw on the members' experience with the application of the current regime for the assessment of horizontal cooperation agreements under EU antitrust rules and in EU Member States. The members of the Working Group are set out in the Annex.

GENERAL CONSIDERATIONS

The Guidelines on the applicability of Article 81 to horizontal co-operation agreements[1] ("the Guidelines") were adopted while the exemption system still existed. The European Commission ("Commission") would exempt – or not exempt – certain forms of cooperation between competitors and thereby provided guidance along with the decisional practice it created by virtue of this system.

With the introduction of the modernization package, the exemption system and the accompanying guidance have been discarded such that competitors wishing to cooperate now have to make self assessments on the basis of, *inter alia*, Commission guidelines. One of the consequences of the current regime is that the guidance from the Commission's decisional practice is rather limited. Also, the guidance provided in the current Guidelines is based on the idea that competitors should

[1] Official Journal C 3 of 06.01.2001, p. 2.

notify in case of doubt. Therefore, in order to make self-assessments with legal certainty, the Guidelines should reflect clear enforcement priorities, the state of the case law and the likely application thereof by the Commission. The Guidelines have not yet been 'modernized' along these lines, and the Working Group is of the opinion that the Guidelines should be adapted to reflect the new situation. There exists therefore a need for more detailed and transparent guidance from the Commission on the specific forms of cooperation that are currently contained in the Guidelines. For example, the basic principles for the assessment under Article 81 would gain if it would include a section with more general guidance on the applicability of Article 81, as included in section 2 of the guidelines on the application of Article 81(3) of the Treaty (in the alternative, provide explicitly that these principles apply).

The members of the Working Group would like to point out that the Guidelines, in actual practice, do not only provide the parties to e.g. (potential) joint production or specialization agreements with guidance on the application of Article 81 EC to their arrangement. They also provide guidance to national competition authorities ("NCAs") and national courts which are called upon to decide cases that involve these types of arrangements. It is suggested that the Guidelines in their current form do not fully use their potential in this regard and that certain adjustments might prove beneficial to the application of European competition law at member state level, in particular by increasing the efficiency of a decentralized application of the European competition rules in this area. To achieve this aim, the members of the Working Group respectfully submit that a revision of the Guidelines should shift the focus of the text away from statements that very broad and too much focused on the negatives towards a more balanced overview that includes the many positive elements that are normally inherent in such arrangements. This would give those who actively seek to shape their arrangements in a way that is competition law compliant. In this regard, it is the experience of the Working Group that the Guidelines are not easily accessible for small and medium sized enterprises ("SMEs") who lack the resources to apply them efficiently. The economic analysis proposed by the Commission (market definition, market share assessment, identification of procompetitive and anticompetitive effects) is very often difficult to carry out because of the lack of information available to the public. Moreover, under article 81 EC, the analysis of the parties cannot be compared with the analysis of the Commission, as this is the case in the field of merger control.[2] The Commission should provide alternative tools that would allow SMEs to abide by competition law with as efficiently as undertakings that can rely on more important resources.

The Working Group has identified a number of instances where more guidance is desirable. These points will be discussed in detail below and are linked to the questions in the Commission's questionnaire. The Working Group would greatly value the opportunity to comment on a draft of possible new Guidelines, should the Commission decide to re-assess its current regime.

INPUT ON THE QUESTIONNAIRE

1. For each of the topics referred to above, please report any major problems raised by the application of the Specialisation and R&D Block Exemption Regulations and the Horizontal Guidelines. Please indicate also the sector in which such problems were encountered and the type of solution found, if any, to address the problems and results obtained.

> The Working Group has not identified any specific *major* problems raised by the application of the Horizontal Guidelines *in specific sector*s. The Working Group has, however, identified several points that are currently not working as well as they might or would merit a more detailed treatment in the Guidelines. These points are likely to be

[2] F. Brunet and G. Canivet, "Le nouveau droit communautaire de la concurrence", LGDJ. 2008.

relevant for most if not all sectors and will be discussed under question 3 of the questionnaire.

2. For each of the topics referred to above, please report the competition issues in relation to which you found that the application of the Specialisation and R&D Block Exemption Regulations and the Horizontal Guidelines have proven to be very useful in order to protect competition.

The Working Group has not identified specific *competition issues* in relation to which the application of the Specialisation and R&D Block Exemption Regulations and the Guidelines have proven to be very useful in order *to protect competition*. The Working Group does want to underline that the Guidelines constitute a useful tool in order to qualify the horizontal agreements at stake. The definitions are clear, except for R&D Agreements. Although the Working Group identified a number of instances where the examples provided by the Commission in the Guidelines merit a more balanced approach (see further below), generally, the examples give a pragmatic and clear approach of how the Commission would assess the different cases.

3. According to your experience, do you consider that some of the provisions in the current Specialisation and R&D Block Exemption Regulations and/or parts of the text of the Horizontal Guidelines have become unsatisfactory in order to address issues inherent to the economic developments that have taken place at the national and European level? Please provide reasons for your response.

(A) <u>Comments on the R&D Block Exemption and Guidelines</u>

(i) Introduction

The Working Group believes that with respect to R&D and specialization block exemptions as well as the Guidelines the review process should focus on simplifying and streamlining those texts and put them more in line with the objectives of the Lisbon Agenda, in particular by removing any disincentive against stimulation of competitiveness, innovation and growth.

In this context, we have the following comments on the R&D block exemption and the Guidelines:

(ii) The R&D Block Exemption

- Increase market share cap

The Commission should increase the market share cap in the R&D block exemption from 25% to 35% and the guidelines should be amended accordingly. A 25% cap is not adequate to indicate market power since market shares of that level are unlikely to raise concerns.

The choice of a 25% cap is also at odds with the Commission's views that most R&D agreements are pro-competitive and promote economic and technical progress since it *de facto* excludes a significant number of valuable R&D agreements from the scope of the R&D block exemption. This is particularly true for R&D agreements in the pharmaceutical industry where 'typical' R&D structures often involve a small biotech company teaming up with a large pharmaceutical company. This sort of cooperation is unlikely to raise antitrust

issues and is in line with the rationale of the R&D block exemption since, without the large company, the small biotech would not bear the risks of the R&D project. Yet, in most circumstances, it will not be covered by the block exemption because the parties' combined share will exceed 25%.

An increase of the market share cap is also particularly timely in view of the current economic climate, which is likely to affect undertakings' future strategy on cooperation. Companies may rely increasingly on R&D cooperation as a substitute to mergers and acquisitions. It is therefore important that the legal framework is adjusted not to act as a disincentive in this respect.

Last, the fact that an individual exemption is available when the parties' market shares exceed the 25% cap is not a strong argument in favour of keeping the current threshold. R&D agreements are generally long-term agreements, which give rise to significant risks and investment for the parties. Without the safe harbour of the block exemption and since the abolition of the notification system in 2004, companies may only rely on the possibility that, in the event of challenge, a court, the Commission or a national competition authority may find that the criteria forl Article 81 (3) exemption are met, which provides significant legal uncertainty. This acts as a major disincentive to enter into joint R&D and may induce the parties to enter into R&D agreements for shorter duration than what would be necessary to reap the whole benefits of the joint R&D.

- Remove reference to a specific duration

Consistent with increasing the market share cap, the Commission should remove any reference to a specific duration for joint R&D agreements (Article 4 and Articles 6(2) and (3) of the block exemption). As mentioned above, setting a specific duration does not take account of the fact that R&D agreements are often long-term projects involving a considerable amount of investment and risks. Limits on duration act as a big disincentive on joint R&D since companies face the prospect of having to unwind their investments either at the end of a 7-year period in case of joint exploitation and/or when their combined market share exceeds 25%.

- Reciprocal fields of use

Article 3(3) of the block exemption that prevents reciprocal fields-of-use when the parties are competitors at the time of signing the agreement is also a deterrent on companies to enter into joint R&D. We understand that the Commission is concerned that field-of-use restrictions may be used for purposes of market allocation. This may be true for R&D that leads to minor improvements of existing products. However, when R&D leads to significantly improved or new products, field-of-use restrictions (similar to exclusivity or active sales ban) should be deemed pro-competitive because (i) they allow each party to recoup investment and as such (ii) are often necessary for the parties to enter into R&D in the first place.

In addition, the fact that the parties are competitors on existing markets at the time of signing has little relevance in assessing field-of-use restrictions in the context of development of new products. Even if the parties are competitors for existing products, the fact that each party may want to specialize in a respective field of use where it holds particular skills should be pro-competitive since it will avoid duplication of costs and efforts in the development of a new product/technology.

- Clarification required on a number of provisions

The following provisions of the R&D block exemption should be clarified:

Article 3(3) should be clarified to make it clear that only pre-existing know-how contributed by a party will be accessible to the other one. Many companies have expressed concerns that a party could make use of Article 3(3) to access know-how not contributed by the other party by alleging that such know-how is necessary to achieve the results of the R&D.

Article 5.1(c) should make it clear that limitation of output or sales is without prejudice to an active sales ban or customer restrictions.

Under Articles 5.1(e) and (f), it is unclear whether the Commission intends to allow parties to joint R&D to cumulate customer restrictions and active sales ban. The wording of other block exemptions, such as the distribution and transfer of technology, suggests that these are alternative options. Cumulating both types of restriction would in fact enable the parties to have absolute territorial protection in certain territories for particular groups of customers. We are not certain that this is what the Commission had in mind when drafting the block exemption.

Article 5.1(e) should be clarified as to whether the restriction may apply to customer groups only (for example, allowing a party to exclusively serves customers in a particular industry) or whether it may also extend to individual customers (allowing a party to exclusively serve certain identified individual customers).

(iii) Guidelines

- Re-consider assessment of certain R&D agreements

The Working Group invites the Commission to re-consider how certain R&D agreements should be assessed in the Guidelines. For example, at para. 66, the Commission makes it clear that an R&D agreement is very likely to infringe EC competition law when significant competitors team up to develop a new technology particularly if either party has a significant position on existing technologies that are supposed to be replaced with the new technology. The Commission's reasoning is that the less competition companies face at the R&D level, the less incentives they will have to pursue technical improvements and pass them on to end-users. These views are also reflected in the example given at para. 75 of the Guidelines where the Commission argues that parties with no competition at the R&D level would have no incentive to pursue new technology at a high pace.

The Working Group submits that the Commission's reasoning is overly simplistic and one-sided. There are many pro-competitive reasons why two 'significant' competitors would strongly pursue the development of new products/technologies. The main incentive is that the development of a new product/technology may result in increased profits for the parties particularly if the R&D results in some major technological breakthrough or significantly enhanced product. This will in turn induce the parties to exploit the results of R&D and pass on benefits to end-users irrespective of the parties' positions on existing markets. There are numerous examples in the pharmaceutical industry of companies fiercely competing on the

technology market to develop blockbusters, this in spite of strong market positions on existing markets.

The Working Group believes that the main antitrust risk of two main competitors teaming up to develop new products or technologies is the possibility for them to obtain and abuse market power in the *downstream* market. If that was the case, it should be dealt with under Article 82. However, there is no reason why the possibility of obtaining market power in the downstream market should be used to prevent companies from developing new technologies in the *upstream* technological market. By doing so, the Commission would take the risk of depriving end-users of potentially important technological advances.

- Clarification required on a number of concepts

The Commission should take advantage of the reform to clarify a number of concepts that are commonly used in the Guidelines.

First, the Commission should remove any reference to a 'center of gravity' concept (para. 64 of the guidelines) in assessing whether an agreement can qualify as joint R&D. Such a reference is particularly confusing and very difficult to apply in practice. Cooperation or alliances are increasingly complex and involve some elements of R&D, specialization, distribution etc. As long as there is genuine R&D, the block exemption and Guidelines should apply, irrespective of the 'center of gravity' of the cooperation. The thresholds applicable to the different types of cooperation being different, it is difficult for undertakings to make sure that the agreement that they intend to conclude complies with competition law.

Second, experience shows that companies are often in doubt as to how to interpret the definition of joint R&D in Article 2(11) particularly in relation to the level of integration and allocation of tasks that would be necessary for their cooperation to qualify as joint R&D. Other recurring questions are whether the parties should make even IP contributions, whether it is still necessary to have an R&D program or some minimum joint structures (such as steering committees or joint teams), whether joint manufacturing may be part of joint development etc. Other concepts such as joint distribution are not at all defined in the R&D block exemption.

We understand that the Commission's decision to adopt a 'loose' definition in comparison to the previous definition in Regulation 418/85 was aimed at giving companies more flexibility as to the structure they could set up in support of joint R&D. Yet, it would be useful if the Guidelines included some examples of joint R&D agreements (including joint exploitation and joint distribution) or, in the alternative, a non-exhaustive check list of the main themes common to most joint R&D agreements. Such examples could be taken from the Commission's own experience in dealing with individual notifications before the abolition of the system in 2004.

Third, a recurrent theme in the Guidelines is that horizontal agreements should not significantly foreclose competition. This applies not only to joint R&D but also to other types of cooperation. However, the Guidelines give no guidance on what constitutes significant foreclosure. Based on past individual notifications, the Commission may want to include some examples of R&D agreements that involved significant foreclosure effects and again decisions in individual notifications may be used as a valuable source in this respect.

Last, many of the examples used in the Guidelines (not only for R&D but also for other types of agreements) are clear-cut examples that describe situations at the two ends of the spectrum, i.e. manifestly risk-free and manifestly 'risk-full'. In addition, most of these examples are based on the parties' market shares as a determining factor in the antitrust assessment.

More guidance would be welcomed on more complex 'middle-type' situations where companies may find it more difficult to balance the risks of foreclosure on the one hand with the efficiencies brought about by the agreement on the other. It would be useful if the Commission's examples focused more on fact-finding and market structure and less on market shares. Again, past individual exemption decisions (or refusals to grant an exemption) could be used as a valuable source from which to draw some of these examples. It would be particularly interesting to have examples of situations where R&D agreements were individually exempted in spite of the parties' high market shares because of other market characteristics (barriers to entry, emergence of a totally new product etc.).

(B) <u>Comments on the Guidelines in relation to production agreements (including specialisation agreements)</u>

(i) Review of basic principles

In relation to the section of the Guidelines that relates to production agreements, the members of the Working Group would suggest that the overview of basic principles set out in para. 96 (market position of parties, concentration ratio etc.) would benefit from a thorough review. The text as it stands today gives too categorical an impression that a combined market share of slightly more than 20% in a concentrated market leads by definition to a restriction of competition.

Firstly, Recital 13 of Reg. 2658/2000 makes it clear that a positive assumption of compatibility should be associated with any agreement the parties of which are below the threshold; the Guidelines on the other hand tend to leave the impression, that any agreement between parties which exceed the market share gives rise to competition issues. The members of the Working Group in this respect would like to point out that the wording of the current Guidelines could be understood to indicate that a commonality of costs will under certain circumstances almost inevitably lead to a coordination of the competitive behaviour and that such agreements should be viewed very critically. In this context, we would like to refer to Recital 8 of Regulation 2658/2000, where the Commission rightly points out that "Agreements on specialisation in production generally contribute to improving the production or distribution of goods, because the undertakings concerned can concentrate on the manufacture of certain products and thus operate more efficiently and supply the products more cheaply." It is suggested that any guidance on the application of Article 81 EC to joint production and specialization agreements might benefit from taking this finding as the starting point. It puts these agreements into the right context for the economic assessment that needs to govern the analysis; the current Guidelines, which (at para. 96) start the analysis at the 20 % market share threshold on the other hand, seem to imply a negative assumption of incompatibility with competition rules.

The degree of commonality of costs plays an important role in this section of the Guidelines (see para. 84 and examples). There is however little guidance on where the commonality of costs shifts the situation from non-problematic to problematic. In the examples, the example

is given of a very high commonality of costs. It is the grey area in between which is in practice the one most common and where more guidance would be very valuable. The same applies to the role of commonality of costs in the assessment of joint purchasing agreements – see further under C (iii).

In addition, the members of the Working Group would suggest that the Guidelines could benefit from greater emphasis being put on the dynamics of the market in order to achieve a more balanced and realistic assessment of agreements that are potentially subject to Article 81 EC.

(ii) More examples

The members of the Working Group note that out of the 6 examples which are provided in the guidelines on joint production, 5 examples provide an example of situations which are problematic. If a nuance is being made that under certain circumstances the assessment could be different (e.g. examples 3 and 5), very little explanation is provided. In line with the general observations in the above, we would suggest to increase the number of examples and to put more emphasis on and provide more examples of situations that have a relatively high likelihood of not falling under Article 81(1) or fulfilling the conditions under Article 81(3).

(iii) Non-compete provisions

The members of the Working Group believe that non-compete provisions in joint production / specialization agreements are a key condition for the realization of the efficiencies which these types of agreements as a rule give rise to. We would therefore suggest that such clauses and their effects should be adequately addressed in the Guidelines. Putting these clauses into the context of the overall – beneficial – economic effects of such arrangements would allow the parties to derive significant guidance with regard to the type of arrangements that would be compatible with Article 81 EC. It would also increase the usefulness of such guidance with any national judge called upon to assess the compatibility of such arrangements with Article 81 EC.

(C) <u>Comments on the Guidelines in relation to joint purchasing</u>

(i) Introduction

The Guidelines describe the assessment of joint purchasing agreements under Article 81(1) in paragraphs 123 – 131. The Guidelines state that the starting point for the analysis is the examination of the parties' buying power. The subsequent paragraphs seem to suggest that the assessment under Article 81(1) is actually limited to buyer power since no other possible indicia of competition law issues are discussed in the remaining paragraphs. It follows, however, from the examples mentioned under 4.5 of the Guidelines and current legal and economic thinking as well as practice that there are other points that merit (more) attention and guidance from the Commission in possible new guidelines. We will describe these points below and gladly make use of the possibility to suggest in which manner the Working Group would like to see these points addressed in future guidance from the Commission. We first describe the concept of buying power under (ii), we address the issue of commonality of costs under (iii) and then address the important *indicium* of the competitive situation on the downstream market under (iv). We address under (vi) some

points that the Working Group identified in relation to the Guidelines and the assessment under Article 81(3).

(ii) Buying power

The Guidelines currently state that buying power can be assumed if a purchasing agreement accounts for a sufficiently large proportion of the total volume of a purchasing market so that prices can be driven down below the competitive level or access to the market can be foreclosed to competing buyers.[3] The Guidelines further note in para. 129 that *"significant buying power by one group of customers may lead to foreclosure of competing buyers by limiting their access to efficient suppliers. It can also cause cost increases for its competitors because suppliers will try to recover price reductions for one group of customers by increasing prices for other customers (e.g. rebate discrimination by suppliers of retailers). This is only possible if the suppliers of the purchasing market also have a certain degree of market power. In both cases, competition in the selling markets can be further restricted by buying power."*

The possible anticompetitive effects of buying power described in this paragraph are inconclusive on the question of whether they result or have to result in consumer harm in order to fall within Article 81(1). The Working Group is of the opinion that there should be a theory of consumer harm in order to fall within Article 81(1). This is also reflected – as will be discussed below – in current economic thinking and in recent case law of the European Courts. More specifically, the "waterbed effect" (cost increases for competitors because suppliers try to recover price reductions for one group of customers by increasing prices for other customers) as described in para. 129 should, from an antitrust perspective, not give rise to immediate concerns.[4] Inderst and Valetti (2008) argue that this is so for two reasons. First, even if smaller firms increase purchase prices they may still be forced to cut final (retail) prices given that their larger competitors charge lower prices. Second, even if smaller firms were to pass on some of the increase in their wholesale price to a higher retail price, if the retail price of the large buyer dropped sufficiently, total consumer surplus could still be higher.[5] It is only under clearly defined conditions that a waterbed effect is sufficiently strong so as to lead both to higher retail prices at smaller intermediary firms and to lower overall consumer surplus.[6] These economic insights would therefore merit more attention from the Commission as to the question of determining when cost increases for competitors result in sufficient consumer harm and fall within the ambit of Article 81(1).

Next, the Guidelines do not mention the theoretical possibility that cooperating competitors must accept other companies joining in on their joint purchasing (in case of, for example, a co-operative purchasing association[7]). This would, theoretically, be the case when a co-operative purchasing association is in the position to exercise substantial buying power that would lead to the (potential) exclusion of competitors. Such a scenario would arise if

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3 Paragraph 126.

4 See also R. Inderst and T.M. Valletti , "Buyer Power and the "Waterbed Effect"", Research paper series Vol. 6, Issue 1, No. 107 – January 2008.

5 *Ibid.,* page 3.

6 Inderst and Valetti (2008) provide a model.

7 In for example Case C-250/92 Gottrup-Klim v DLG [1994], ECR I-5641.

membership in a co-operative purchasing association brings along important economic benefits that cannot be obtained by competitors independently.[8] An assessment of the eligibility of new members should then be based on transparent, objective and non-discriminatory criteria. The Working Group would welcome more guidance from the Commission on this aspect.

Economic literature is sceptical about the use of market share thresholds in determining buying power and argues that this is not necessarily the best approach.[9] The consensus is that any threshold of buyer power should be arrived at and interpreted in conjunction with an analysis of the way in which consumer harm might arise from buyer power under particular circumstances. However, the Working Group does see the advantages in a market share threshold approach of the Commission in the current Guidelines in para. 130. This is desirable especially with respect to parties with low combined market shares. It provides at least a minimum of legal certainty. A departure from a market share threshold approach for safe harbour cases should be accompanied with clear guidelines as to the approach and the consumer harm analysis that the Commission will take in determining buying power. In contrast, para. 131 provides uncertainty by stating "*joint buying that involves parties with a combined market share significantly above 15% in a concentrated market is likely to come under Article 81(1), and efficiencies that may outweigh the restrictive effect have to be shown by the parties"*. Firstly, what percentage would the Commission qualify as significant? Second, as discussed above, thresholds for an analysis of market or buyer power should be linked to the type and extent of potential harm that can be expected. When, as discussed above, there is no clear presumption that the exercise of buyer power causes consumer harm, a threshold for buyer power should be accompanied with the potential theory of harm that would be applied.[10] The potential theory of harm is currently underdeveloped in the Guidelines.

Following the Guidelines, cooperation between purchasers not active on the same downstream (selling) market is not caught by Article 81, unless the parties to the cooperation agreement have a "very strong position in the buying markets". The current Guidelines do not clarify as to what the Commission regards as "a very strong position" within that meaning whilst at the same time the Guidelines provide such clarifications for cases where the parties to the purchasing agreement are competitors. Article 81 generally does not apply in such cases if the parties have a combined market share on the purchasing market of below 15%.

The Working Group believes that the Guidelines could provide some further clarifications with regard to the application of that 15% market share: According to the Guidelines, it is unlikely that market power exists if the parties have a market share of less than 15% on the purchasing and on the downstream selling market. The Working Group believes that the

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8 The Ducth Competition Authority decided as such in NMa case no. 3022 *Stichting Automatisering Gezondheidszorg Breda* (15 November 2004).

9 See for example C.Doyle and R. Inderst, 'Some economics on the treatment of buyer power in antitrust', *European Competition Law Review,* 2007, p. 210-219 and R. Inderst and T.M. Valletti , 'Buyer Power and the "Waterbed Effect"', *Research paper series Vol. 6, Issue 1, No. 107* – January 2008.

10 C.Doyle and R. Inderst, 'Some economics on the treatment of buyer power in antitrust', *European Competition Law Review,* 2007, p. 215.

Guidelines could explain whether that thresholds should also apply where the product that is purchased is not or only indirectly related to the relevant downstream market (for example: producers selling the product x on the downstream market buy office supplies together). On a more general note, the Commission may want to use the opportunity of the Guidelines review in order to assess whether the 15% market share threshold remains an appropriate rule of thumb.

(iii) Commonality of costs

Competitors that enter into a joint purchasing agreement share costs for the products that are purchased by virtue of that cooperation. This may lead to an implicit coordination of commercial behaviour and reduced rivalry between the cooperating competitors. This occurs when (i) the sales and purchases have a significant influence on the end price of the products and (ii) competition on the downstream market is weak. The scope for competition at the sales stage might thus be limited as a result of the joint purchasing.

The Guidelines currently provide limited guidance on this subject. They currently note in para. 128 that the more combined power the parties have on their selling markets, the higher is the incentive for the parties to coordinate their behaviour as sellers. Following the Guidelines, this may be facilitated if the parties achieve a high degree of commonality of costs through joint purchasing. Furthermore, the Guidelines refer to this aspect in example 4 in section 4.5. In the example, the joint purchasing arrangement is likely to have an effect on the competitive behaviour of the competitors if (i) the arrangement accounts for roughly 50% of total costs, (ii) the competitors have a combined market share between 25% and 40% on the procurement market and (iii) the competitors have a combined market share of around 40% on the selling market.[11] Although the example also refers to the market share on the procurement market, a high percentage of commonality of costs in combination with a high market share on the selling market may by themselves result in incentives to coordinate commercial behaviour in a downstream market.

The Working Group would value concrete guidelines on the concept of commonality of costs and the role it plays in the assessment of joint purchasing agreements. A suggested improvement would, for example, be to abstract the criteria from the example referred to above and state that a combination of 50% of shared costs with a 40% market share on the selling market could under further defined circumstances affect the commercial behaviour of the competing undertakings to the detriment of end consumers. Circumstances that would have to be included in this assessment are whether there exist entry barriers and an analysis of the competitive situation on the downstream market, see further under (iv).

(iv) Competitive situation in the downstream market

The Working Group is of the opinion that the Guidelines currently do not describe, sufficiently, the importance of the competitive situation of the downstream – selling – market in the assessment of joint purchasing agreements under Article 81(1). Consumer harm is unlikely to exist if sufficient competition remains on the downstream market between the cooperating parties themselves and their competitors. Lower prices obtained through high volume purchases are likely to be passed on to consumers – also in a situation where joint purchasing leads to buying power. As described above, buying power should only fall under Article 81(1) where the scenario is accompanied by a theory of harm. This

[11] Paragraph 137.

becomes even more apparent if a highly competitive situation in the downstream market comes about as the lower prices obtained on wholesale level are likely to be passed on to end consumers. Although the Guidelines currently do emphasize that purchasing and selling markets are connected through interdependencies, the Guidelines should emphasize even more that competition problems are unlikely to arise when the downstream market is characterized by fierce competition. This is illustrated in the case of the grocery market in The Netherlands which is characterized by relatively high market shares of certain parties on the – national and sometimes international – purchasing market and at the same time a situation of fierce competition on the – local – selling market. Cost efficiencies obtained through higher volumes on the purchasing market through joint buying are passed on to consumers due to fierce competition downstream. This has been one of the important aspects in some – merger – decisions of the Dutch competition authority in the grocery market over the recent years to dismiss possible anti-competitive effects resulting from these mergers.[12] The Working Group suggests that the Commission take this aspect into greater account when re-defining the current regime.

(v) Internet cooperation agreements

Certain internet platforms allow ad hoc purchasing agreements and the Working Group believes that future guidelines should provide clarification as to how such ad hoc purchasing agreements need to be assessed.

For example, ad hoc purchasing agreements regularly have a lower risk that the parties coordinate their behaviour on the downstream selling market (inter alia because there is smaller risk of an adjustment of "production" costs in the sense that everyone pays the same cost price). In addition, the pressure put on the suppliers is usually lower.

The market shares of the parties to an ad hoc agreement are more difficult to assess: often purchasers do not know the identity of the other purchasers (whose demand is bundled with their own) in an ad hoc agreement. Is the operator of the internet platform responsible for an assessment?

(vi) Exemption conditions

Paragraph 133 states that "*an obligation to buy exclusively through the cooperation can in certain cases be indispensable to achieve the necessary volume for the realization of economies of scale. However, such an obligation has to be assessed in the context of the individual case.*"

This paragraph refers implicitly to case law of the European Court of Justice ("ECJ"), and particularly to the ECJ judgment in *Gøttrup-Klim*.[13] The ECJ ruled in this case that dual membership of a cooperative would jeopardize both the proper functioning of the cooperative and its contractual power in relation to producers. Prohibition of dual membership – or a *de facto* obligation of buying exclusively through the cooperation –

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12 In case no. 1710/Schuitema – A&P the NMa concluded that the combined market share of the merging parties on the procurement market would amount to 30-40% (or even 50-60% looking at the supermarket distribution channel only). The NMa considered that sufficient competitive pressure from other supermarkets and distribution channels on the downstream market remained.

13 Case C-250/92 *Gøttrup-Klim v. DLG* [1994] ECR I-5641.

does not, according to the ECJ, necessarily constitute a restriction of competition within the meaning of Article 81(1) if it is limited to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers.[14] Paragraph 133 of the Guidelines, however, already assumes that the case of buying exclusively through the cooperation falls within Article 81(1) and requires an exemption assessment under Article 81(3). The Guidelines therefore dogmatically err in this regard and act against the Court's case law by ignoring that this is an *inherent restriction* and therefore needs to be assessed as such. The Working Group suggests that the Commission repair this situation when re-defining the current regime.

Next, paragraph 134 of the Guidelines states that where the joint purchasing agreement could lead to dominance on either the buying or selling side of the market, the terms of Article 81(3) would, in principle, not be satisfied. The Court of First Instance has now decided, however, that agreements leading to collective dominance can still be exempted under Article 81(3).[15] The Working Group would therefore suggest a more case law consistent approach in future guidance. The Working Group suggests that the Commission adopt the approach of paragraph 106 in the Guidelines on the application of Article 81(3) of the Treaty[16] and apply this approach to the assessment of joint purchasing agreements also.

The Working Group believes that further clarification would be helpful on circumstances under which an obligation to buy exclusively through the cooperation is indispensable within the meaning of Article 81(3). The guidelines only mention that this could be the case if such an obligation is indispensable to achieve the necessary volume for the realisation of economies of scale. However, other circumstances may occur where such exclusivity is indispensable. For example, where substantial start-up costs need to be recovered or where availability of a certain assortment of goods (Kernsortiment) is essential for the existence of the cooperation.

Furthermore, that part of the Guidelines implicitly suggests that such obligations are always caught by Article 81(1) EC. However, it is unclear under which circumstances this will be the case if the market share of 15% is not met.

Finally, the Guidelines should further clarify that an explicit obligation to buy exclusively is assessed in the same manner as a de facto obligation, e.g. in case of economic disadvantages if a party purchases goods outside the cooperation (e.g. rebate schemes). The Working Group believes that this also holds true for the question as to what extent it is in line with Article 81 EC if the purchasing agreement provides for a minimum purchase volume and for restrictions with regard to the selling side intended to "transfer" the "identity" of the purchasing cooperation to the downstream market (e.g. restrictions regarding fields of use or selling conditions).

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14 *Ibid.,* paragraph 34 and 35.

15 Case T-193/02, *Piau*, [2005], ECR II-209.

16 OJ [2004] C 101/97.

(D) Comments on the Guidelines in relation to standard setting agreements

As regards standards agreements, the lack of enforcement measures by the European Commission and NCAs as well as the self-correcting ability of many standards bodies have meant that, the Guidelines have, by and large, successfully reflected both legal requirements and economic needs. The Working Group believes, however, that a number of observations are worthwhile.

It is important to acknowledge that standards development is increasingly international. Mature economies have their own standardization regimes, with major standard setting organizations mutually recognizing each others'standardization efforts. Emerging economies seeking to establish their own regulatory models are looking to European and US practices for guidance. With many participants involved in standardization operating globally, a level of comity is now needed. As such the Guidelines should be cognizant that a corpus of standard norms is now accepted and should reflect this trend. At the same time, it would be beneficial to ensure consistency in the substantive approach to assessing standards setting arrangements amongst competition authorities in the major economies, in particular the EU and the USA.

For example the Guidelines, in para. 163, refer to access to standard setting participation as needing to be ‘unrestricted and transparent’ and governed by ‘non-discriminatory, open and transparent procedures’. The Guidelines could be amended to reflect internationally accepted conditions for access to standardization processes e.g. in the technology sector the participating groups in the Global Standards Collaboration (which include the major standards organizations i.e. ARIB, ATIS, CCI, CCSA, ETSI, ISAAC, ITU, TIA, TTA and TTC) which recently reaffirmed that “open standards” are characterized by the following fundamental elements: (i) a collaborative consensus-based and transparent process; (ii) the non-exclusion of materially affected and interested parties; (iii) the use of RAND/FRAND IPR policies, “which do not mandate, but may permit, at the option of the IPR holder, licensing essential intellectual property without compensation”; and (iv) the standard is published and made available to the general public for a reasonable fee or free.[17]

Such an approach would also fit with the Commission’s current review of European standardization policy. It would also fit with the Commission’s recognition of the importance of informal standards and the Commission’s attempt to create a framework around de facto standardization efforts. As a result paragraph 174 of the Guidelines might also need to be revisited.

The Working Group submits that the Guidelines need to set out clearly the Commission’s focus on an economics based-approach in assessing standard setting agreements. The Working Group believes that the Guidelines should more clearly acknowledge the fundamentally pro-competitive nature of open standards and their ability to bring about significant benefits for consumers. While the present Guidelines do make reference to the generally positive attitude the Commission adopts “towards agreements that promote economic interpenetration in the common market or encourage the development of new markets and improved supply conditions”, it does not specifically address the generally pro-competitive nature of such arrangements and the benefits they are likely to generate for consumers. The members of this Working Group are aware of the fact that the Commission

[17] See Resolution GSC-13/24: (IPRWG) Open Standards (Reaffirmed) , 17 July 2008.

has on various other occasions taken the opportunity to point out the beneficial effects of standardization arrangements in particular in the context of fulfilling the Lisbon Agenda and the fostering of a knowledge based economy to which they contribute. However, they believe that guidance in this particular context should also involve both positive as well as potentially harmful effects of such arrangements. It is suggested that the Commission might wish to reconsider the balance it strikes in this regard in the Guidelines. This would appear to be particularly important for the benefit not just of those undertakings and standard setting bodies seeking to self assess their arrangements; it would also be beneficial to guide national judges in their assessment when any disputes involving standard setting arrangements and their compatibility with competition law come before them.

At the same time, the members of the Working Group believe that the Guidelines should also reflect the Commission's focus on only pursuing behaviour that has the objectively demonstrable anticompetitive effect with clear evidence of consumer harm. They suggest that a parallel may be drawn to the Commission's recent Article 82 Guidance on the Commission's Enforcement Priorities. Such a parallel would seem to be appropriate in particular in the light of the fact that the potential concerns raised by the Commission in the context of standard setting arrangements primarily relate to foreclosure issues (see e.g. paras. 168 and 175). This gives rise to similar considerations in the context of both Articles 81 and 82 EC. Such a clarification would be critical as the Guidelines are used for self-assessment, notably in markets which are dynamic in nature and which may result in high market shares for innovators in the first phase of a product's life-cycle or where prices are initially high to allow companies to recoup on investment and R&D spend.

The Guidelines should also ensure that they do not inhibit innovations in standard setting models, which evolve to reflect the nature of the participants and products or technologies being standardize.

The members of the Working Group believe that in order to maximize the efficiency of standards agreements and the consumer benefits associated with them, the Guidelines, in relation to those standards agreement involving intellectual property rights, should complement strong IPR protection, considering the particular nature and function of IPR, which aim to ensure incentives for investment and further innovative endeavours.

In this context, the Guidelines refer to access to de facto standards under Fair, Reasonable and Non-Discriminatory (FRAND) terms. As major international standard setting organizations also espouse FRAND or RAND policies these policies should be recognized, but without affecting the delicate balance that FRAND policies foster; of encouraging participation of all players in the standardization process, enhancing both upstream and downstream competition. The Guidelines should therefore reflect the role that the major standard setting organizations have in advancing innovation and competitiveness, already recognized in other Commission policies.

Regulatory intervention in specific cases, organizations or industrial sectors runs a real risk of creating unwelcomed precedent for standardization in Europe and indeed internationally. Most formal standards bodies have shown that they possess the tools to address foreclosure concerns themselves, appropriately reflecting the specific nature of their membership needs and tasks of the organization. It is also worth noting that antitrust is not necessarily the solution to resolve every obstacle to the smooth functioning of agreements on standards or the organizations responsible for them. Any revision of the Guidelines should therefore be

carefully considered in order that the Guidelines do not proscribe solutions best identified and implemented by the organizations themselves.

While antitrust scrutiny does have a role to play in standard setting, it should be activated only in exceptional circumstances. In this respect, the members of the Working Group suggest that a particularly light touch should be applied to any regulatory intervention in the operation of standard setting bodies. This applies to both the substantive assessment but also the intensity with which regulators become involved in proscribing certain rules for specific organizations. Thus, it is suggested that the Guidelines in this particular area should acknowledge that a rigid system of formal rules and overly specific guidance is inappropriate in this particular context. The Commission may wish to explicitly acknowledge that these arrangements are often administered by organizations which aim to create and maintain a delicate balance of interests of the various undertakings involved and that detailed intervention by competition authorities would be likely to cause more harm than benefits.

(E) Comments on the Guidelines in relation to commercialisation agreements

(i) The Commission's restrictive approach

Some scholars are of the view that the approach of the Commission is more restrictive towards horizontal agreements than towards mergers. [18] According to them, in the field of merger control, the Commission could agree with a merger that has procompetitive effects, whereas a commercialisation agreement providing for joint price fixing would be considered as per se illegal under article 81 EC. For instance, a commercialisation agreement concluded between two manufacturers holding a 10% market share each, and containing a joint price fixing clause is illegal as regards article 81(1) and can be valid only if exempted, i.e. if the conditions of article 81(3) are met. If this is not the case, the agreement is illegal. However, if the Commission were to assess a merger between the same manufacturers, the transaction would be authorised since the combined market share of the parties would only amount to 20%. Therefore, the transaction would not have anticompetitive effects. [19] There is a discrepancy between the safe harbour provided under merger control provisions and the per se prohibition provided under article 81 EC.

(ii) The need for a block exemption regulation

There is no block exemption regulation applicable to commercialisation agreements. The safety zone is set by the European Commission in the Guidelines. For the sake of legal certainty, commercialisation agreements should also be covered by a block exemption regulation, or a global horizontal block exemption regulation could cover all forms of horizontal cooperation, even by providing different thresholds for each type of agreement.

(iii) A very low market share threshold in the Guidelines

Para. 149 of the Guidelines states that *"Commercialisation agreements between competitors which do not involve price fixing are only subject to Article 81(1) if the parties to the*

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[18] F. Brunet and G. Canivet, "Le nouveau droit communautaire de la concurrence", LGDJ. 2008.

[19] F. Brunet and G. Canivet, "Le nouveau droit communautaire de la concurrence", LGDJ. 2008.

agreement have some degree of market power. In most cases, it is unlikely that market power exists if the parties to the agreement have a combined market share of below 15 %. In any event, at that level of market share it is likely that the conditions of Article 81(3) explained below are fulfilled by the agreement in question". , This threshold appears to be quite low as compared to those provided by the block exemption regulations. It is also low as compared to the merger regulation. Under regulation 139/2004, *"Concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market. Without prejudice to Articles 81 and 82 of the Treaty, an indication to this effect exists, in particular, where the market share of the undertakings concerned does not exceed 25 % either in the common market or in a substantial part of it".*[20] The 15% threshold appears to be also very close to the de minimis threshold (10% for the horizontal agreements).[21] Under US law, the general threshold of exemption of horizontal agreements is 20%.[22] "*Absent extraordinary circumstances, the Agencies do not challenge a competitor collaboration when the market shares of the collaboration and its participants collectively account for no more than twenty percent of each relevant market in which competition may be affected The safety zone, however, does not apply to agreements that are per se illegal, or that would be challenged without a detailed market analysis, or to competitor collaborations to which a merger analysis is applied".*[23] Besides , the Commission does not provide any example implying an undertaking holding a 15% market share. The rationale of the Commission seems to be based on the fact that a high market share necessarily means that the undertakings concerned also have an important market power. However, this is not necessarily the case, undertakings holding an important combined market share may not have enough market power for their agreement to affect competition where the market is easy to access because of the absence of barriers to entry, or when there are potential entrants to the market, or when market power of the undertakings concerned can be compensated by the market power of their clients, or suppliers. In addition when the high market share of the undertakings involved is due to the fact that they commercialise a new product, these undertakings do not necessarily have market power and the market share should lessen as soon as competitors enter the market. One can wonder why the Commission approach seems to be more restrictive towards agreements that are limited in time and scope, while a merger that deletes all competition between the undertakings concerned, would be authorised. [24]

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[20] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), Official Journal L 24, 29.01.2004, p. 1-22, §32.

[21] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis), Official Journal C 368, 22.12.2001, p.13-15.

[22] Antitrust Guidelines for Collaborations Among Competitors, Issued by the Federal Trade Commission and the United States Department of Justice, April 2000, paragraph 4.2.

[23] Antitrust Guidelines for Collaborations Among Competitors, Issued by the Federal Trade Commission and the United States Department of Justice, April 2000, paragraph 4.2.

[24] F. Brunet and G. Canivet, "Le nouveau droit communautaire de la concurrence", LGDJ. 2008.

(iv) Per se prohibition of price fixing

Commercialisation agreements very often comprise joint price fixing of the products or services commercialised. According to the European Commission, such agreements necessarily fall within the scope of article 81(1). This means that the majority of commercialisation agreements fall within the scope of article 81(1), regardless of the market power of the parties. [25] The US Supreme Court today applies the rule of reason to legitimate joint ventures that fix the prices of their products. This issue was resolved in Broadcast Music, Inc. v. CBS, where the US Supreme Court ruled that per se analysis of prices fixed by an integrated joint venture was not appropriate where such an agreement is necessary for the product to be made available at all and provided substantial efficiencies.[26] Instead such pricing arrangements are reviewed under the rule of reason. European case law also provides for examples of validation of price fixing. In France, in 2004, an ordinance introduced the authorisation of horizontal price fixing in the French Commercial Code.[27]. According to article L. 124-1 of this code, *"Through the collective efforts of their members, retail cooperative societies seek to improve the conditions in which they conduct their business. To that end, they may, inter alia, directly or indirectly engage in the following activities on behalf of their members: […] 6. Drawing up and implementing a common commercial policy designed to ensure the development and permanence of its members by any means, including: […] - the carrying out of commercial operations, of an advertising or other nature, which may include common pricing […]"*. This recent piece of legislation shows that price fixing does not necessarily and automatically harm competition and the statement made by the Commission in paragraph 148 of the Guidelines could be amended.

(v) Mixed agreements

The Guidelines seem to lack clarity as regards the treatment of agreements that combine different forms of horizontal cooperation (eg: an agreement covering research and development activities, as well as joint production and commercialisation). As a matter of fact, the thresholds applicable to the different types of cooperation are different, which makes it al the more difficult for companies to make sure that the agreement complies with competition law.

(vi) Duration of exemption

The guidelines do not provide for a limitation of the validity of the exempted agreement as this is the case in the vertical agreements block exemption regulation and guidelines for example. Limiting the duration of the exemption would allow authorities to take into account the evolution of the conditions of the market. For instance, the conditions of the market can evolve and the cooperation could become unnecessary to achieve the legitimate goal initially sought. The market conditions could evolve and allow the parties to develop their own offer, independently of the other party, and therefore become a competitor. The absence of limitation of the duration of the exemption can constitute an obstacle to potential competitors wishing to enter the market. The duration of the exemption could be for example limited to the time necessary to achieve amortization of the investments made.

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[25] F. Brunet and G. Canivet, "Le nouveau droit communautaire de la concurrence", LGDJ. 2008.

[26] 441 U.S. 1, 8-9 (1979).

[27] Order No. 2004-274 of 25 March 2004 Art. 1 Official Journal of 27 March 2004.

However, this would raise the issue of controlling that the parties abide by the term of the exemption.

(vii) Joint Promotion

Although promotion agreements between competitors are considered by the Commission as a form of commercialisation agreement (paragraph 139 of the Guidelines), the Guidelines do not provide a clear statement of the Commission's approach towards these agreements. In its previous guidelines of 29 July 1968, the Commission considered that joint promotion agreements did not fall within the scope of article 81 EC, provided that they did not prevent the parties from carrying out promotion for their own production.[28] Since the adoption of the Guidelines, this topic has been addressed by different decisions (eg : CFI, 28 March 2001, Institut des mandataires agréés près l'Office européen des brevets v. European Commission, case T-144-99; CFI, 16 December 2003, Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied ; Technische Unie BV v. European Commission; CEF City Electrical Factors BV ; CEF Holdongs Ltd, case T-5-00, T-6-00). This shows that joint promotion agreement remain an important subject that should also be addressed by the Commission in its Guidelines.

4. In light of the changes that you deem likely to occur in the European economies, do you believe that there are any specific horizontal competition "issues" not currently addressed by the current Specialisation and R&D Block Exemption Regulations or Horizontal Guidelines and that should be considered in the review (e.g., information exchange)? Please provide reasons for your response.

(A) <u>Information exchange agreements</u>

Well-oriented exchanges of information between competitors contribute to the good functioning of the market. Except in those cases in which information exchange agreements are used to enforce or monitor a hardcore agreement, the distinction between pro-competitive and anti-competitive information exchanges between competitors is not always clear and several factors have to be taken into consideration to make a correct analysis.

In the 1968 Horizontal Guidelines[29] the Commission included a reference to information exchange agreements to state that not all of them are anticompetitive, while at the same time including some of the elements that need to be considered to determine when they are pro-competitive and when anti-competitive.

The Commission did not include a specific assessment of information exchange agreements in the 2001 Guidelines, but they are referred to (as risky) in the context of other types of cooperation agreements, such as commercialization agreements.

Information exchanges as such between competitors are common practice in the market. The fact that such agreements are not dealt with in the Guidelines, together with statements

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28 Commission notice – Guidelines on agreements, decisions and concerted practices concerning cooperation between undertakings, OJ C 75, 29 July 1968, p. 3.

29 OJ nº C 75, of 29.7.1968, p. 3.

in the Guidelines or other public documents concerning the risk that exchanges of information between competitors may entail and the intensive performance of Competition Authorities in the field of cartels, may give the wrong impression that information exchange agreements are, in all cases, anticompetitive. The lack of legal certainty in this matter would in our opinion contribute to this perverse effect.

Considering that information exchange agreements between competitors are not only common practice but also contribute –when carried out correctly- to improve the efficiency and competitivity of markets, it is our opinion that the Commission should give specific guidance on this subject in order to provide some legal certainty and, at the same time, foster pro-competitive exchanges of information allowing companies to benefit from positive effects of such exchanges without constant fear of investigations. It should be noted that, at international level, exchanges of information between competitors which do not in themselves amount to a hardcore restriction have been subject of study by the OECD, who has recently published a paper on "Facilitating Practices in Oligopolies", where it gathers contributions of several states (and the Commission itself) [30] on the treatment of information exchanges among competitors from a competition law perspective.

Also the Commission itself has very recently provided explicit guidance as to how information exchanges between competitors in the maritime sector should be examined from a competition perspective.[31] Being the only Commission's explicit guidance on this issue so far (apart from its few decisions), there is a certain tendency to apply those principles generally.

Nothing seems to impede the provision of general guidance by the Commission on this issue. The economic theory, as well as the European Court of Justice and the Commission itself, recognizes that certain exchanges of information are beneficial for the economy. As said, the Commission has recently published some guidelines in the maritime transport sector, acknowledging that exchanges of statistics and general market information are common practice in several sectors of the economy and are a good means to increase market transparency and customer knowledge, and thus may produce efficiencies.[32]

Since exchanges of general market information are common practice in several sectors of the economy, a clear legal framework as to how the Commission will treat information exchange agreements would contribute to a better functioning of the European market, allowing companies to take advantage of a certain degree of transparency in the market (and in the legislation) to take better decisions that would benefit consumers. A clear legal framework would also have a certain "auto-regulatory" effect for companies, since they would adjust their behavior to the "safe harbors" provided by the legislation.

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[30] The Commission's contribution to the OECD Paper is based mainly on two judgments of the European Court of Justice ("Asnef-Equifax" and "UK Agricultural Tractor Registration Exchange") and concludes, among other things, that in the Commission's enforcement practice pure facilitating practices such as information sharing (which do not have as their object to restrict or eliminate competition) are <u>not</u> regarded as *per se* type of infringements, as it was reflected in the case "Asnef-Equifax" (page 128 of the OECD Paper).

[31] Guidelines on the application of Article 81 of the EC Treaty to maritime transport services (OJ nº C 245 of 26.9.2008, p. 2).

[32] Paragraph 39 of the maritime transport guidelines.

As to the legal instruments that could be chosen to deal with information exchange agreements, a new section could be included in the future guidelines[33] or even a Block Exemption Regulation (BER) could be adopted. The parameters to be used in both legal instruments would be the same: the characteristics of the information exchanged (e.g. whether the information is public, individual or aggregated, etc.), the characteristics of the market in which the exchange takes place (mainly the degree of concentration of the market and the existence of barriers to entry) and the way in which the information exchange is organized (e.g. non-discriminatory access to all companies interested in the exchange, exchanges through a third entity, confidentiality requirements, etc.).

The exchange of information between competitors is a general practice in the market; therefore, a BER could be a more suitable legal instrument than guidelines to provide legal certainty to operators involved in such practices.

Considering the usual structure of a BERs, it could be easily adaptable to information exchange agreements by providing a safe harbor for information exchanges with certain characteristics (e.g. in markets where the degree of concentration of is very low, confidential requirements are put into place, information is aggregated, all operators can equally participate in the exchanges, data is made publicly available, etc.) and a black list of clauses or agreements that would be considered non-exempted (e.g. exchanges to monitor the implementation of a cartel), alongside the usual power of the Commission and National Competition Authorities to withdraw the benefit of the exemption. A block exemption regulation may have the effect of standardizing exchanges of information, since there would be a tendency of companies to come closer to the safe-harbor provided by the BER.

Spain's experience shows that this regulatory option is feasible: Royal Decree 602/2006 approved the BER for exchanges of information on late payers. The exemption applies to agreements meeting particular requirements, such as non discrimination, transparency and non compulsory participation and in markets where the degree of concentration does not exceed a particular threshold (in terms of combined market share of the three major suppliers).

In any case (either by means of a particular section in the Guidelines or through a Block Exemption Regulation), guidance on how information exchange agreements would be treated by the Commission would encourage companies to optimize their commercial practices through information exchanges with other actors in the market within clear limits and with certainty.

(B) More legal certainty

The texts do not deal with the clauses that undertakings are allowed to include in their agreement or not. Even if, when adopted, the objective of these texts was to bring an end to the standard contract made by the Commission through the prohibition of certain clauses (black clauses), and the authorisation of others (white clauses), a legal counsel drafting a horizontal agreement's major problems are whether the agreement would comply with article 81 EC if a specific clause was to be included in it. In our opinion, the current legal framework does not provide legal certainty as to the possibility to include specific clauses

[33] As it is the case in the US Antitrust Guidelines for Collaborations among Competitors of the FTC and the Department of Justice (April 2000).

in horizontal agreements. The vertical restraints block exemption regulation and guidelines could serve as a model on that specific point.[34]

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[34] Commission notice - Guidelines on Vertical Restraints, OJ C 291, 13.10.2000, p. 1–44.

ANNEX

List of working group members

Name	**Law Firm / Company**
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Thomas Janssens Onno Brouwer Joanna Goyder	Freshfields Bruckhaus Deringer
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