ARNOLD & PORTER LLP

Review of the Current Regime for the Assessment of Horizontal Cooperation Agreements under EU Competition Rules - Public Consultation

Comments submitted by Arnold & Porter LLP

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Arnold & Porter LLP welcomes the opportunity to submit comments on the Commission's proposal for revised versions of the current *Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements* ("Horizontal Guidelines"),[1] *Commission Regulation No. 2959/2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements* ("R&D BER")[2] and *Commission Regulation No. 2658/2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements* ("Specialisation BER").[3]

The two block exemption regulations ("BERs") and the Horizontal Guidelines are of significant practical importance. They often constitute the only significant source of legal guidance for the self-assessment of horizontal cooperation agreements under EU competition law by companies and their advisors. Pertinent decisions and judgments of EU and Member State competition authorities and courts on horizontal cooperation agreements are scarce, and Regulation 1/2003 significantly reduced the possibility for companies to obtain *ex-ante* guidance from the Commission on specific agreements.

Overall, the draft texts have to be lauded for enhancing clarity with regard to several important aspects of EU competition law, and in particular for expanding the scope of the guidance by including in the draft Horizontal Guidelines a chapter on information exchange and significantly expanding the chapter on standardisation agreements, and for aligning the approach for the assessment of horizontal cooperation agreements with the approach expressed in other recent Commission documents, such as the Horizontal Merger Guidelines[4] and the General Guidelines (previously referred to as the Article 81(3) Guidelines).[5]

In the following, we propose amendments to the drafts that, from our experience with advising clients on numerous horizontal cooperation agreements, would further improve the practical effectiveness of the BERs and the Horizontal Guidelines.

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1 OJ C 3, 6 January 2001, p. 2.

2 OJ L 304, 5 December 2000, p. 7.

3 OJ L 304, 5 December 2000, p.3.

4 Guidelines on the assessment of horizontal mergers, OJ C 265, 18 October 2008, p. 6.

5 Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27 April 2004, p. 97.

Introductory Chapter of the Draft Horizontal Guidelines

1. Restriction of competition between a joint venture and its parent entities - paragraph 11 draft Horizontal Guidelines

Paragraph 11 of the draft Horizontal Guidelines proposes a general rule under which a restriction of competition within the meaning of Article 101 TFEU cannot arise between a joint venture and its parent entities if the relationship between the joint venture and its parent entities features certain characteristics mentioned in paragraph 11. In support of this proposed rule, paragraph 11 refers to the *Avebe* judgment,[6] which did not concern the question of whether or not a restriction of competition can arise between a joint venture and its parent entities, but the question of whether or not joint venture parent entities can be held liable for competition law violations committed by the joint venture.

Separate the question of whether or not a restriction of competition can arise between two entities from the question of whether or not one entity can be held liable for competition law violations of another entity. As a general matter, we submit that it is necessary to separate the question of whether or not a restriction of competition can occur between two entities from the question of whether or not one entity is liable for competition law violations of another entity. These issues are conceptually different, and Article 101 TFEU and other provisions of EU competition law do not require both to be answered according to the same criteria. Accordingly, we urge the Commission to confirm in the final text of the revised Horizontal Guidelines that any rule concerning restrictions of competition between a joint venture and its parent entities will not be applied beyond its wording to determine whether parent entities can be held liable for cartel violations of their joint venture (or, whether a joint venture can be held liable for cartel violations of its parent entities).

Clarify the characteristics that the relationship between the joint venture and its parent entities must feature so that restrictions of competition between a joint venture and its parent entities are excluded. We agree with the Commission that restrictions of competition cannot arise between a joint venture and its parent entities if the relationship between the joint venture and its parent entities features certain characteristics. However, we believe that paragraph 11 of the draft Horizontal Guidelines sets out inadequate criteria in this regard, and these criteria are also not sufficiently well explained. We are concerned that this will lead to significant legal uncertainty as to whether or not specific joint ventures and their parent entities can benefit from the proposed rule.

The criteria set out in paragraph 11, without any further explanations, are that the parent companies must "*jointly exercise decisive influence and effective control over the joint venture*". While the concept of joint control is sufficiently well understood from the EU merger control context, it is much less clear under what circumstances such control would constitute "*effective control*", and which additional circumstances would have to be present to allow the conclusion

[6] Case T-314/01, *Avebe*, [2006] ECR II-3085.

that the parent entities also "*exercise decisive influence*" over the joint venture. For the issue of parent liability for wholly-owned subsidiaries, the case law works with a rebuttable presumption (recently confirmed in the *Akzo* case)[7] that a parent entity exercises decisive influence over a subsidiary that is (almost) 100% owned by the parent entity. It is not clear from the case law if a presumption applies also in the context of joint ventures. The *Avebe* case, which paragraph 11 refers to, featured many particular circumstances such that we do not believe that it provides sufficient guidance for more typical joint venture situations.

We submit that the best solution would be to restate the proposed rule to the effect that restrictions of competition cannot arise between a joint venture and those of its shareholders that jointly control the joint venture (always provided the creation of the joint venture did not violate competition laws). The control criterion is well understood from the merger control context, making the rule operational with a sufficient degree of legal certainty. If the Commission decides not to rely exclusively on the control criterion, we urge the Commission to explain with a sufficient degree of clarity how the additional criteria will be applied in practice and whether the Commission intends to apply any presumptions in this context.

2. Establishment of the counterfactual - paragraphs 28, 124 and 157 draft Horizontal Guidelines

The draft Horizontal Guidelines rightly emphasize the need to establish a counterfactual when assessing whether or not an agreement between competitors leads to a restriction of competition by effect. However, the guidance provided for defining the counterfactual should be further improved. The draft Horizontal Guidelines' main statements on the issue are limited to the following:

- Paragraph 28 (in the introductory chapter): "*Consequently, horizontal co-operation agreements between competitors that would not be able to independently carry out the project or activity covered by the co-operation will normally not give rise to restrictive effects on competition […].*"

- Paragraph 124 (in the chapter on R&D agreements): "*If the parties are not able to carry out the necessary R&D independently, the R&D agreement will normally not have any restrictive effects on competition. […] The decisive question is whether each party independently has the necessary means as to assets, know-how and other resources.*"

- Paragraph 157 (in the chapter on production agreements): A production agreement between competitors does not restrict competition "*if the co-operation gives rise to a new market, i.e. if the agreement enables the parties to launch a new product or service, which the parties would not have been able to do otherwise.*"

[7] Case C-97/08 P, *Akzo*, not yet reported.

For purposes of establishing the counterfactual, focus the relevant question on the likelihood that the parties would independently carry out the project in question, as opposed to the parties' ability to do so. As a general matter, we submit that the relevant question for establishing the counterfactual should be whether or not it is likely that the parties would independently carry out the activity or project in question absent the cooperation agreement under assessment, rather than whether or not the parties are able to do so. There is a significant difference between "ability" and "likelihood" in this context. Clearly, if a company is not able to carry out a project independently, it also is not likely to do so. But, notably for financial reasons, a company may be unlikely to carry out a project independently even if, arguably, it is able to do so. It is common practice for companies to set internal standards concerning expected rates of return on investments and risk control, and projects that do not meet these requirements normally will not be carried out. Asking for the likelihood of independent action therefore leads to the more realistic prediction of the competitive situation absent the cooperation agreement under assessment and constitutes a better legal standard for the establishment of the counterfactual.

At the very least, recognize the relevance of financial risks when assessing a party's ability to independently carry out a specific project. If the Commission retains the "ability" standard in the final text of the revised Horizontal Guidelines, it would, as a minimum, be useful for the Horizontal Guidelines to state that this ability has to be established by means of a forward looking assessment that also takes into account the financial risks resulting from carrying out the project independently, and that a company cannot be found to have the ability to carry out the project independently if the financial risks associated with the project are too significant. The draft Horizontal Guidelines do not appear to contain a single reference to financial risks in this context. By contrast, financial risks have been recognized as a relevant factor for establishing the counterfactual in the Commission's General Guidelines (although also the General Guidelines - wrongly, in our view - rely on the question of the parties' ability to carry out a project independently for the definition of the counterfactual).[8] While paragraph 29 of the draft Horizontal Guidelines contains a general reference to the General Guidelines for the assessment of when a restriction by effect occurs, it would be useful to expressly refer to financial risks as a relevant factor also in the final text of the revised Horizontal Guidelines. The current wording might be interpreted as a departure from the General Guidelines as regards the relevance of financial risks.

[8] Paragraph 18(1) of the General Guidelines states: *"For instance, if due to the financial risks involved and the technical capabilities of the parties it is unlikely on the basis of objective factors that each party would be able to carry out on its own the activities covered by the agreement the parties are deemed to be non-competitors in respect of that activity."*

Research and Development Agreements

1. New definition of "specialization in R&D" - Article 1 No. 12 draft R&D BER

Under Art. 1 No. 11(c) of the draft R&D BER, which is identical to Article 2 No. 11(c) of the current R&D BER, research and development ("R&D") is carried out jointly (so that the R&D BER can apply) if the R&D tasks are "*allocated between the parties by way of specialisation in research and development*". Absent any guidance in the current R&D BER and Horizontal Guidelines, it has often been doubtful in the past whether a specific way of splitting R&D contributions between the parties qualified as specialisation in R&D in this sense. It is to be welcomed that the Commission seeks to remedy this legal uncertainty by proposing a new definition of "specialisation in R&D" in Article 1 No. 12 of the draft R&D BER. Under the first sentence of this provision, it is necessary that "*each party carries out some of the research and development activities […] and focuses on a distinct area of the research and development.*" The second sentence explicitly excludes from the scope of the definition those scenarios "*where one party carries out all the research and development and the other party merely finances these activities or exploits the results*". We have the following comments on this definition.

Include in the definition of specialisation in R&D those situations where one party contributes financing without carrying out R&D work. We submit that it is doubtful whether there is a sufficient policy justification for excluding from the definition of "specialisation in R&D" and, hence, from the scope of the BER, those cooperation scenarios where one party contributes significant financing and the other party carries out the R&D work. There is a practical need for such cooperation given the financial costs and risks involved in many areas of R&D today. For example, if a start-up company that owns a technology which it has developed up to a certain stage needs to fund the next development stage, the most efficient solution leading to the quickest product development may be to turn to another company that is interested in the results of the R&D and therefore willing to provide financing, while leaving the R&D work in the hands of the technology owner. Another example is when two large companies cooperate to share the financial risks of R&D but where it is more efficient not to split the R&D work. In both cases, the cooperation constitutes an efficient combination of resources in the interest of bringing new or improved products to the market quicker (compare recitals 8 and 10 of the draft Horizontal Guidelines), just as it is the case when companies combine other resources. We therefore invite the Commission to consider including such financing scenarios in the definition of Article 1 No. 12.

Include in the definition of specialisation in R&D those situations where one party contributes relevant know-how or intellectual property rights without carrying out R&D work. The wording of Article 1 No. 12 of the draft R&D appears to exclude from the definition of "specialisation in R&D" those scenarios where one party does not carry out any R&D work but contributes know-how or intellectual property ("IP") rights that are relevant for the R&D work carried out by the other party. Again, there is a significant practical need for this type of cooperation, which often will also involve the provision of financing by the party providing the

know-how or IP rights. There does not appear to be a good policy reason for excluding such forms of cooperation from the scope of the BER.[9]

If the current definition is retained, two clarifications would be useful. If the Commission retains the requirement that each party participate in the R&D work, we suggest that the final texts clarify the following issues in the interest of legal certainty:

- It would be useful to clarify that the requirement that each party must "*focus on a distinct area of the R&D*" does not mean that each party has to deal with different subject matters of the R&D work. A functional division of tasks relating to the same subject matters should be sufficient. Overall, it should be clarified that the requirement that each party focus on a distinct area leaves the parties a high degree of flexibility to structure the R&D work in the most efficient way.

- It would also be useful to clarify whether or not the definition in Article 1 No. 12 of the draft R&D BER is met if both parties contribute personnel to a committee overseeing and directing the R&D work from a scientific or managerial perspective, but the personnel of only one party carries out the actual R&D work in a narrower sense. These situations frequently occur in practice, in particular if one party also provides financing and/or know-how and IP rights.

2. New definition of "specialisation in exploitation" - Article 1 No. 13 draft R&D BER

In parallel to the new definition of specialisation in R&D, Article 1 No. 13 of the draft R&D BER introduces a new definition of when specialisation in exploitation of the R&D results occurs. As a starting point, this is the case under Article 1 No. 13 if the parties impose restrictions upon each other regarding the exploitation of the R&D results or if they allocate between them individual exploitation tasks. Importantly, the draft definition goes on to require that each party "*carry out some of the exploitation of the results in the internal market*" and that, if production is centralized with one party, all parties "*carry out in the internal market some distribution activities regarding the contract products*". The last sentence of the proposed definition explicitly excludes from the scope of the definition those scenarios where only one party produces and distributes the contract products in the EU on the basis of an exclusive license granted by the other parties.

[9] Commission Regulation No 772/2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, OJ L 123, 27 April 2004, p. 11 ("Technology Transfer BER") can apply to such agreements only if the agreement defines the contract products (*see* the Commission's Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, OJ C 101, 27 April 2004, p. 2 ("Technology Transfer Guidelines"), paragraph 45) and provides for the production of the contract products by the licensee (Article 2(1) of the Technology Transfer BER), which may not be the case for all such agreements.

Remove the requirement that each party carry out some exploitation in the EU. In our view, there is not a sufficient policy justification for excluding from the scope of the BER those agreements that provide for exploitation of the R&D results by only one party in the internal market. This exclusion leads to unjustified differences in the legal treatment of such agreements if compared to other agreements that effectively have an identical impact on competition and are covered by the BER. For example, where a EU company cooperates in R&D with a non-EU company and the parties agree to limit their exploitation activities to their "home markets", the BER cannot apply even if the parties are not competitors. By contrast, the parties' agreement would be covered by the BER if the parties allocated a small EU Member State to the non-EU company and the remaining 26 Member States (thus, effectively the entire European market) to the EU company. The BER would also apply if the parties split exploitation rights by fields of use, allocating a commercially uninteresting field of use to the non-EU company. In commercial terms, and as regards the effect on competition, these alternative cooperation structures are virtually identical to the situation where a non-EU company is not given any exploitation rights in the EU. Yet, the BER only applies if some (notional) exploitation rights in the EU are given to the non-EU company. We submit that this does not constitute sound competition policy and that it would be better to remove the requirement that each party carry out some exploitation in the EU. This should not lead to significant harm to competition given that, for the R&D BER to apply, the parties to the agreement must be non-competitors or competitors with a combined market share not exceeding 25%.

Alternatively, if the exploitation requirement is maintained, it should be clarified that the parties' contractual obligation or freedom to exploit within the internal market is relevant, not their actual exploitation activity. If the requirement that each party must engage in some exploitation of the R&D results within the EU is included in the final version of Article 2 No. 13 of the revised R&D BER, the wording of this provision should be modified to make clear that it is sufficient that the R&D agreement foresees or allows some exploitation activity of each party in the internal market. The currently proposed wording (each party "*must carry out*") could be understood to mean that the relevant question is whether or not a party actually carries out exploitation of the R&D results in the EU. Such a rule would create an unacceptable level of legal uncertainty for the parties, because the application of the BER would depend on the actual behavior of all parties. In order to be certain that the BER applies, each party would have to verify whether or not the other party actually engages in exploitation. This will often not be possible without contractual reporting obligations between the parties to this effect. Moreover, each party would need a contractual mechanism to oblige the other party to engage in exploitation. All this is not practical. Accordingly, it should not be relevant whether each party actually exploits the R&D results in the EU, but whether it has the contractual right to do so under the R&D agreement.

3. New requirement to disclose IP rights - Article 3(2) draft R&D BER

Article 3(2) of the draft R&D BER introduces a new condition for the application of the BER by requiring that the "*parties must agree that prior to starting the research and development all the*

parties will disclose all their existing and pending intellectual property rights in as far as they are relevant for the exploitation of the results by the other parties."

The proposed disclosure condition should not be adopted. We understand that the goal of the disclosure obligation is to avoid situations where some of the R&D partners would be prevented from exploiting the results of the joint R&D because of pre-existing IP rights of another party to the R&D agreement. Such a situation would have similarities to a patent ambush known from the standard setting context. We are doubtful as to the policy justification for this proposed condition. As far as we are aware, the absence of a disclosure requirement has not led to any problems under the current R&D BER. If the Commission has different information in this regard, it would be interesting to learn about it. Moreover, even if pre-existing IP rights were to prevent the exploitation of R&D results by some of the parties to the R&D agreement, it is questionable whether this could lead to significant competitive harm, given that the R&D BER only applies to agreements among non-competitors or to agreements among competitors with a combined market share not exceeding 25%.

Moreover, we believe that it is questionable whether the disclosure condition can achieve its objective in practice, given that it requires disclosure to take place only prior to the start of the R&D work, which normally will be after the R&D agreement has been entered into. At that point in time, it typically will no longer be possible to change the parties' contractual obligations, so that the disclosure often will be without any practical consequences. On the other hand, it would be even more problematic to require disclosure of IP rights before a binding agreement has been entered into.

Finally, ensuring compliance with the disclosure requirement can also raise practical difficulties, as it may not always be foreseeable at the beginning of the R&D work which IP rights might be relevant for the subsequent exploitation of the R&D results.

In light of these considerations, we submit that it would be a better policy decision not to introduce the disclosure condition.

4. Access requirement - Article 3(3) and (4) draft R&D BER

The draft R&D BER continues to include the "access" condition for the application of the BER, pursuant to which the BER only applies if each party is given access to the results of the joint R&D for purposes of further R&D and exploitation. Article 3(3) of the draft R&D BER modifies the access condition only by specifying that such access must be "*equal*".

Clarify that "*equal access*" does not exclude mechanisms of differentiated compensation between the parties. The final version of the revised R&D BER or of the revised Horizontal Guidelines should clarify that the requirement of equal access can be satisfied even if the parties provide for access on differentiated terms, for example with regard to compensation that the parties pay to each other in the form of royalties for the use of the jointly developed know-how or IP rights. Differentiated compensation may be required to reward the parties for unequal contributions to the R&D work. If all parties must have access to the R&D results on identical

terms and conditions, this would make it much more difficult for companies to engage in joint R&D because companies might fear that such a requirement would result in them receiving insufficient compensation for their contributions.

Clarify the time at which access must be granted. The current R&D BER suffers from a significant deficiency because it does not clarify at which point in time the parties must have access to the R&D results so that the access condition is complied with. This renders the application of the R&D BER uncertain for numerous R&D agreements we have seen in the past. The Commission's draft revised documents do not address this issue, and we urge the Commission to do so in the final text of the revised R&D BER. We submit that it follows from the structure of the current and the draft revised R&D BER that the access condition cannot reasonably be interpreted to require that the parties have access to the R&D results (if access, a term which is not defined, is understood as a situation of (co-)ownership of the R&D results by each party or a license to the R&D results owned by the other party, but in each case coupled with unrestricted use rights) before the joint exploitation of the R&D results ends. For as long as joint exploitation takes place under the R&D agreement, the R&D BER allows the parties to limit their individual exploitation rights and also to exclude independent R&D in the field of the joint R&D.[10] However, commentators have expressed different views as to the time at which access must be granted, some of them suggesting that access has to be granted immediately once the R&D has yielded any result. It would constitute a significant step towards greater legal certainty if the Commission were to clarify this issue.

Confirm that non-competitors can limit access rights to certain fields of use. Article 3(3) second sentence of the current R&D BER specifies that non-competitors that enter into a R&D agreement that does not provide for joint exploitation can comply with the access requirement even if they limit each party's access to certain fields of application. This provision is no longer included in the draft R&D BER. We invite the Commission to clarify whether this means that the split of access rights by field of use is no longer allowed in such situations, which we would consider not to be sound policy. Indeed, we do not see any reason why non-competitors should not be allowed to split their exploitation rights according to fields of use if the agreement does not provide for any period of joint exploitation or for the time after an initial period of joint exploitation has ended. By contrast, if the Commission takes the view that the split of exploitation rights according to fields of use necessarily leads to joint exploitation by means of specialisation in exploitation under the new definition of Article 1 No. 13 of the draft R&D BER, it would be useful for the final text of the revised Horizontal Guidelines to clearly state this.

5. Calculation of market shares for technology markets

Remove the requirement to calculate the BER's 25% market share threshold in technology markets on the basis of licensing income. Under paragraph 119 of the draft Horizontal

[10] The wording of Article 5(a) of the draft R&D BER clarifies that independent R&D in the field at issue can be excluded for the entire duration of the R&D agreement, not only for the duration of the R&D work.

Guidelines, it appears that the 25% market share threshold of Article 4 of the draft R&D BER has to be calculated in two cumulative ways if the R&D leads to technology that the parties exploit on technology markets. The first method asks for the parties' share of the total licensing income from royalties generated under all licenses for competing technologies. The second method looks at the product level and asks whether the products incorporating the parties' products account for 25% of the relevant product market regardless of whether or not relevant technology is being licensed by other parties. The second approach has been adopted for purposes of calculating market shares under the Technology Transfer rules,[11] and there does not appear to be a good policy reason for requiring a double calculation for purposes of the R&D BER. Paragraph 119 of the draft Horizontal Guidelines explicitly recognizes that the first approach "*may often be a mere theoretical and not very practical way to proceed because of lack of clear information on royalties, the use of royalty free cross-licensing etc.*". Accordingly, we suggest clarifying in paragraph 119 that the parties' market share on technology markets has to be established exclusively under the second calculation method.

6. List of hardcore restrictions - Article 5 draft R&D BER

Clarify that field of use restrictions do not fall under the hardcore provisions of Article 5 (d) and (e) draft R&D BER. Article 5 (d) and (e) of the draft R&D BER define as hardcore restrictions certain sales restrictions related to territories into which, and customers to whom, the parties may actively or passively sell the contract products. It would be useful to clarify in the final text of the revised Horizontal Guidelines or the R&D BER that field of use restrictions do not constitute territorial or customer restrictions in this sense.

Consider allowing some type of passive sales restrictions. Article 5(d) of the draft R&D BER treats all types of passive sales restrictions related to territories and customers as hardcore restrictions. This approach is significantly stricter than the treatment of passive sales restrictions under the Technology Transfer rules, which allow certain passive sales restrictions in technology transfer agreements between non-competitors and even between competitors (Articles 4(1)(c)(iv) and 4(2)(b) Technology Transfer BER). The approach under the draft R&D BER is also stricter than the approach adopted under the rules on Vertical Restraints, which notably allow passive sales restrictions for a period of two years to protect the territory or customers allocated to a distributor who introduces a new product on a market (paragraph 61 Vertical Guidelines). We invite the Commission to consider allowing some forms of passive sales restrictions also under the R&D BER, at least for agreements between non-competitors. Notably, the reasoning relating to the introduction of a new product, which led to the adoption of the rule in paragraph 61 of the Vertical Guidelines, will often also apply with regard to the commercialization of R&D results.

[11] Article 3(3) of the Technology Transfer BER and paragraph 23 of the Technology Transfer Guidelines.

7. Transitional period - Article 8 draft R&D BER

Consider grandfathering existing R&D agreements that comply with the current R&D BER or extending the duration of the transitional period. Article 8 of the draft R&D BER provides that R&D agreements that are in force on 31 December 2010 can continue to benefit from the current R&D BER until 31 December 2011. It follows that existing R&D agreements that run beyond this date have to be amended so that they comply with the revised BER as of 1 January 2012. We submit that it is particularly difficult for companies to renegotiate R&D agreements at a time when the R&D work has been completed and the parties are exploiting the R&D results under the agreement. Thus, it would be useful to grandfather such agreements so that they permanently can benefit from the protection of the current R&D BER. Absent grandfathering, we would invite the Commission to consider extending the duration of the transitional period. A transitional period of almost two years was adopted in the Technology Transfer BER.

Production Agreements

1. Clarify whether a reduction of production volumes or only a capacity reduction constitutes a partial cessation of production under Article 2(1)(a) and (b) draft Specialisation BER

Article 2(1)(a) and (b) of the draft Specialisation BER extend the scope of the BER to unilateral and reciprocal specialisation agreements under which the parties partly cease manufacturing a product. The current Specialisation BER requires the parties to fully cease their existing production. This broadening of the scope of the Specialisation BER is to be welcomed. However, for reasons of legal certainty, the Commission should clarify whether an agreement to reduce production volumes qualifies as a partial cessation of production in this sense, or whether a (permanent) reduction of existing capacity is required.

2. With regard to reciprocal specialisation agreements, confirm that "different products" can belong to the same product market

Under the current Specialisation BER, it is not clear whether an agreement under which each party ceases to manufacture certain products constitutes a reciprocal specialisation agreement if the products in question belong to the same product market. Article 2(1)(b) of the draft Specialisation BER appears to say that reciprocal specialisation can occur with regard to different products in the same product market, because the first part of that provision refers to "*reciprocal specialisation agreements between two or more parties which are active on the same product market(s)*", thus including the possibility that the parties are active only on a single product market. Nevertheless, it would be useful if the final text of the revised Horizontal Guidelines confirmed this interpretation.

3. Define joint production within the meaning of Article 2(1)(c) draft Specialisation BER

Just as the current Specialisation BER, the draft revised Specialisation BER not only applies to unilateral and reciprocal specialisation agreements, but also to "*joint production agreements, by virtue of which two or more parties agree to produce certain products jointly*" (Article 2(1)(c) of the draft Specialisation BER). However, neither the draft BER nor the draft Horizontal Guidelines define the requirements that must be met to allow the conclusion that there is joint production in this sense. Some passages of the draft Horizontal Guidelines suggest that joint production can only take place in the form of a jointly controlled joint venture company. We submit that such an approach would be unnecessarily restrictive. It would be useful to clarify in the final texts when joint production occurs. The clarification should also extend to the issue of whether or not the parties have to (partly) cease their existing production in order for their agreement to qualify as joint production. A precise definition of joint production is necessary also to distinguish joint production from the newly defined category of "*subcontracting agreements with a view to expanding production*" (paragraph 146 of the draft Horizontal Guidelines) that do not fall under the Specialisation BER.

4. Exclude field of use restrictions from the list of hardcore restrictions

Under the current wording of Article 4(b) of the draft Specialisation BER ("*limitation of output or sales*"), field of use restrictions arguably constitute hardcore restrictions. To align the approach of the Specialisation BER with the approach of the Technology Transfer rules and the approach of the draft revised R&D BER (see above), we invite the Commission to introduce a third sub-paragraph under Article 4(b) to exempt field of use restrictions from the hardcore list.

5. Modify the assessment of Example 3 - paragraph 182 draft Horizontal Guidelines

It follows from Example 3 at paragraph 182 of the draft Horizontal Guidelines that the Commission considers that a production agreement between competitors A and B automatically creates competitively harmful links between competitors A and Z, if B and Z already have a separate cooperation agreement in the same product market. We submit that it is misguided to conclude from the fact alone that separate production cooperation agreements exist between A and B and between A and Z that competitively harmful links will also arise between A and Z. There is no basis for such a sweeping proposition. Rather, any negative competitive effects potentially resulting from the existence of separate production cooperation agreements entered into by one competitor with different other competitors have to be established in light of all relevant circumstances of the case.

6. Improve the section on commonality of costs - paragraphs 169-173 draft Horizontal Guidelines

We have two comments on paragraphs 169-173 of the draft Horizontal Guidelines discussing commonality of costs as a possible way in which a production agreement can lead to a collusive outcome and thus a restriction of competition by effect.

- First, we disagree with the Commission's proposition in paragraph 173 of the draft Horizontal Guidelines that a horizontal sub-contracting agreement under which one party, the sub-contractor, supplies product to a competitor, the contractor, leads to any cost commonality between the parties. Paragraph 169 of the draft Horizontal Guidelines rightly defines cost commonality as the proportion of costs that the parties have in common. A horizontal sub-contracting agreement does not lead to any cost commonality in this sense. It merely provides the sub-contractor with knowledge about the input cost of the contractor. This knowledge can lead to anticompetitive effects, but the likelihood of anticompetitive effects to arise is much lower in these situations of one-way cost transparency than in cases of (two-way) cost commonality. The final version of the revised Horizontal Guidelines should recognize this difference.

- Second, we believe that the current text can be improved by better explaining the consequences of the creation of a commonality in fixed costs. The draft Horizontal Guidelines exclusively focus on commonalities with regard to variable costs. For example, if parties share investment costs for a new production plant for a product with regard to which they compete, we believe that the parties would normally treat such investment costs as fixed costs, not as variable costs. If it is the Commission's position that commonality of fixed costs cannot lead to competitive concerns, it would be useful for the final version of the revised Horizontal Guidelines to explicitly state this.

Information Exchange

We welcome the Commission's initiative to explain for the first time in the draft Horizontal Guidelines its general approach towards assessing information exchange between competitors under Article 101 TFEU. The draft Horizontal Guidelines set out a sound analytical framework, which includes the emphasis on an effects-based approach, the acknowledgement that information exchange may have pro-competitive as well as anticompetitive effects and the description of the relevant theories of harm. However, we believe that the chapter on information exchange could benefit from further improvement.

1. Concerted Practice

Provide more guidance on the concept of concerted practice. It would be useful to include in the final text of the revised Horizontal Guidelines a discussion of the concept of "concerted practice", which is highly relevant in the context of information exchange. In particular, the distinction between a concerted practice and the intelligent and independent adaptation to the behavior of other market players, which does not constitute a concerted practice, becomes relevant in this regard.

The final text of the revised Horizontal Guidelines should also lay out the requirements regarding the necessary causal link between concertation in the form of information exchange and the subsequent market behavior of the companies involved. The draft Horizontal Guidelines are silent on this topic, which involves difficult questions as to, for example, what kind of evidence

is needed and who bears the burden of proof. The ECJ's *T-Mobile Netherlands* judgment[12] and the Commission's *Bananas* decision[13] contain important statements on these issues:

- According to established case-law, there is a rebuttable presumption that information exchange will influence the market behavior of the participating companies. The *Bananas* decision cites this case-law but seems to indicate that the rebuttal is very difficult in practice by requiring that "*the undertaking must at least have ended its participation in the anticompetitive arrangements and have publicly distanced itself from what was discussed or show that its participation in the anticompetitive arrangements was without any anticompetitive intentions by demonstrating that it was participating in those meetings in a spirit that was different from the others. It is not sufficient to merely submit arguments claiming that there was no anticompetitive spirit, but the undertaking involved in such practices needs to adduce evidence*" (paragraph 234). The final version of the revised Horizontal Guidelines should clarify whether the Commission intends to apply this strict standard generally and should also provide some guidance as to how such exculpatory evidence could look like.

- In *T-Mobile Netherlands*, the ECJ arguably assumes a very low evidentiary standard regarding the proof of the necessary causal link by stating that "*in so far as the undertaking participating in the concerted action remains active on the market in question, there is a presumption of a causal connection between the concerted practice and the conduct of the undertaking on that market, even if the concerted action is the result of a meeting held by the participating undertakings on a single occasion*" (paragraph 62). The draft Horizontal Guidelines only discuss this statement in the context of the characteristics of the information exchange ("frequency", paragraph 87).

2. Restriction of competition by object

We welcome the Commission's initiative to provide guidance on when information exchange leads to a restriction of competition by object, an issue which was explicitly excluded from the information exchange chapter in paragraphs 38 *et seq.* of the Maritime Guidelines.[14] We agree with the Commission that a restriction by object only occurs where "*individualized data regarding intended future prices or quantities*" is exchanged (paragraph 68 of the draft Horizontal Guidelines). However, we note a potential tension between the approach set out in the draft Horizontal Guidelines and the statement of the ECJ in *T-Mobile Netherlands* that "*[a]n exchange of information between competitors is tainted with an anticompetitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings*" (paragraph 43). The Court seems to take a rather broad approach in

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[12] Case C-8/08, *T-Mobile Netherlands*, not yet reported.

[13] Case COMP/39188, *Bananas*, decision of 15 October 2008.

[14] Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, OJ C 245, 26 September 2008, p. 2 ("Maritime Guidelines").

that it does not limit the "restriction by object" category to the exchange of - forward looking - information on prices and quantities. In order to provide clear guidance for the business community, it would be useful if the Commission could discuss the relationship between the Court's statement and the arguably more limited approach it is proposing.[15]

Irrespective of the fact that the *Bananas* decision is currently under appeal, we also urge the Commission to add in the final version of the Horizontal Guidelines a discussion of the detailed statements on an "infringement by object" contained in that decision, which seems to mark the first time that the Commission has carried out a detailed analysis of this issue in the information exchange context.

3. Restriction of competition by effect

We agree with the three main categories of assessment criteria for a restriction by effect, namely market coverage, market characteristics and characteristics of the information exchange. However, and unfortunately, this part of the draft Horizontal Guidelines is largely descriptive rather than analytical so that a significant degree of legal uncertainty remains. While we acknowledge that this is a complex and multi-layered issue and that it will not be possible to develop definite guidelines covering all conceivable scenarios, we submit that the Commission could provide some more specific guidance. This could, and in our view should, include the creation of clearly defined safe harbors regarding "*market coverage*" and certain of the "*characteristics of the information exchange*".

Introduce a safe harbor as regards market coverage. The term "*sufficiently large part of the relevant market*" (paragraphs 71 and 72 of the draft Horizontal Guidelines) needs to be more clearly defined in order to provide useful guidance. While we acknowledge that there may be no "one size fits all" solution, we do think that a safe harbor would be beneficial. This could be achieved by introducing either a market share threshold, for example, of 25%, for the undertakings involved, or a clear definition of the term "*atomized nature of supply*" used in the ECJ's *Thyssen Stahl* judgment of 2003,[16] which renders it highly unlikely, according to the Court, that an information exchange will reduce or remove the uncertainty about competitors' future conduct (paragraph 84). The creation of a safe harbor in this context appears to be all the more appropriate as it would arguably lead to very few, if any, "false negatives" given that forward-looking information exchange on prices and quantities would not be covered by the safe harbor (since this would constitute a restriction by object).

Introduce a safe harbor for the exchange of genuinely public information. We agree with the draft Horizontal Guidelines' narrow definition of "*genuinely public information*" (paragraph 82) but submit that the Commission should be more explicit regarding the assessment of the

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[15] The draft Horizontal Guidelines deal with the *T-Mobile Netherlands* judgment in the "infringement by object" section only insofar as they cite the finding of the Court that there does not need to be a link between the concerted practice and prices charged to the final customers (footnote 48).

[16] Case C-194/99 P, *Thyssen Stahl AG vs. Commission*, [2003] ECR I-10821, paragraph 84.

exchange of such information than simply stating that an infringement of Article 101(1) TFEU is "*unlikely*". We think that a safe harbor for the exchange of genuinely public information is warranted. Moreover, we would welcome a clarification regarding the reference to "*incremental information*" (paragraph 83), which the undertakings exchange in addition to the genuinely public data. In particular, the Commission should specify whether it is of the view that any kind of comment etc. on genuinely public information may "*tip the market balance*" or whether there are certain minimum requirements such as the exchange of "*strategically useful*" data as mentioned in Example 3 (paragraph 100).

Clarify that the exchange of aggregated data can only result in a restriction by effect in oligopolistic markets. The Maritime Guidelines come very close to establishing a safe harbor for the exchange of appropriately aggregated information by stating that the exchange of such data "*in principle does not fall within Article [101(1) TFEU]*" (paragraph 52). The corresponding language in the draft Horizontal Guidelines is arguably less far-reaching. The draft Horizontal Guidelines only state that "*exchanges of genuinely aggregated data ... are less likely to lead to restrictive effects on competition than exchanges of company level data*", with information exchange in a tight and stable oligopoly mentioned as just one example for a potentially collusive outcome of the exchange of aggregated data (paragraph 85). We would welcome if the draft Horizontal Guidelines were further revised so that they mirror the approach taken in the Maritime Guidelines more closely, with tight and stable oligopolies clearly marked as the only exception to the general rule that the exchange of aggregated data should not raise concerns under Article 101(1) TFEU.[17]

Confirm that the aggregation of data for three companies constitutes a sufficient degree of aggregation. The Commission has traditionally taken the view that the combination of data from at least three companies leads to a sufficient degree of aggregation.[18] The draft Horizontal Guidelines do not refer to this case-law. This should be changed in the final version of the revised Horizontal Guidelines.

Introduce a safe harbor for the exchange of historic information, and define when information can be considered as historic. In our view, the Commission should introduce a safe harbor for the exchange of truly historic data. The Maritime Guidelines come very close to doing this by stating that the "*[e]xchange of historic information is generally not regarded as falling within Article [101(1) TFEU]*" (paragraph 54), while the wording in the draft Horizontal Guidelines is somewhat less clear ("*[t]he exchange of historic data is unlikely to lead to a collusive outcome*", paragraph 86). As regards the distinction between "recent" and "historic" information, footnote 57 of the draft Horizontal Guidelines refers to the assumption set out in a

[17] We also note that the Maritime Guidelines and the draft Horizontal Guidelines contain somewhat diverging definitions of the term *"aggregated data"*. While the Maritime Guidelines require that *"the recognition of individual data is impossible"* (paragraph 52), the draft Horizontal Guidelines only request that the *"recognition of individualized company level information is sufficiently difficult"* (paragraph 85). We agree with the approach taken in the draft Horizontal Guidelines.

[18] See, *e.g.*, the *CEPI-Cartonboard* case of 1996, OJ C 310, 27 November 1996, p. 3 (paragraph 16).

number of Commission decisions that data that is more than one year old is to be considered as historic. The Maritime Guidelines have created some legal uncertainty as they require "*some flexibility*" in this context (paragraph 54), and the draft Horizontal Guidelines do not take a sufficiently clear position on this issue. Also, we submit that the Commission should add the statement contained in the Maritime Guidelines that "*[t]he time when the data becomes historic is likely to be shorter if the data is aggregated rather than individual*" (paragraph 54).

4. Assessment under Article 101(3) TFEU

Provide additional guidance on pass-on requirement. Concerning the requirement in Article 101(3) TFEU that efficiency gains must be passed on to the consumers, the final version of the Horizontal Guidelines should make reference to the ECJ's statement in its *Asnef-Equifax* judgment[19] that "*it is not necessary, in principle, for each consumer individually to derive a benefit ... However, the overall effect on consumers in the relevant markets must be favorable*" (paragraph 72).

5. Other issues

Provide additional guidance on information exchange for benchmarking purposes. The draft Horizontal Guidelines deal with the exchange of information for benchmarking purposes only as regards the assessment under Article 101(3) TFEU, by stating that benchmarking may lead to efficiency gains (paragraph 88) and that the exchange of individualized data in this context is generally not "indispensable" (paragraph 94). The analysis under Article 101(1) TFEU is currently confined to a few sentences regarding a rather straightforward example (paragraph 101) and are thus only of limited help. Given that benchmarking is of high practical relevance, the Commission should provide additional guidance on this specific category of information exchange.

Provide additional guidance on information exchange for purposes of establishing price indices. The assessment of an information exchange with a view to establishing a price index is not discussed at all in the draft Horizontal Guidelines. We urge the Commission at least to copy the language of paragraph 57 of the Maritime Guidelines, to the extent that it is not specific to the maritime sector. In particular, the final text of the revised Horizontal Guidelines should indicate that a price index based on appropriately aggregated data is unlikely to infringe Article 101(1) TFEU and that the historic or recent nature of the data reflected in the index and the frequency of the index' publication are other relevant assessment criteria in this context.

Improve the usefulness of the examples. The examples in paragraphs 98-104 of the draft Horizontal Guidelines largely deal with fact patterns, for which the assessment under Article 101(1) and/or Article 101 (3) TFEU is rather straightforward. While the overall number of examples does not necessarily need to be increased, the Commission should revise this section with a view to providing better guidance for borderline cases. For instance, Example 5

[19] Case C-238/05, *Asnef-Equifax*, [2006] ECR I-1125.

(paragraph 102) deals with an industry characterized by short-term contracts and the exchange of information that is three years old. In this case, it is quite obvious that the data at issue are historic and that Article 101(1) TFEU is not infringed. However, it would be interesting to know how the Commission would assess information exchange in the same industry that takes place every four or six months, a scenario that appears to be more likely to occur in the real world.

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