RESPONSE TO THE EUROPEAN COMMISSION'S CONSULTATION ON DRAFT REGULATIONS AND GUIDELINES APPLICABLE TO HORIZONTAL COOPERATION AGREEMENTS

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1. INTRODUCTION

1.1 Freshfields Bruckhaus Deringer welcomes the opportunity to respond to the
European Commission’s public consultation on the two draft Regulations and draft
Guidelines (“Proposed Block Exemptions” and “Proposed Guidelines” respectively),
posted on the Commission’s website on 4 May 2010 and intended to replace the
existing block exemption Regulations 2658/2000\(^1\) and 2659/2000\(^2\) and the
accompanying Guidelines on horizontal cooperation agreements.\(^3\)

1.2 Our comments are based on our significant expertise and experience in
advising on issues raised by horizontal cooperation agreements of many types,
including complex non-full function joint ventures and joint purchasing agreements,
and information exchange arrangements.

1.3 The comments contained in this paper reflect the views of many in Freshfields
Bruckhaus Deringer. They do not necessarily represent the views of every partner in
the firm, nor do they represent the views of our individual clients.

2. EXECUTIVE SUMMARY

We welcome these revised texts as providing a clear framework for analysis of
horizontal cooperation arrangements, broadly suitable for practical application by
business. Our main observations and suggestions for their further development and
improvement are the following, and in the rest of this document we discuss these and
other points in more detail:

- The Commission should reconsider the need for some of market share
  thresholds used in these texts to be set so low, or at least explain the use of
  several different thresholds at various points in the texts;

\(^1\) Commission Regulation on the application of Article [101(3) TFEU] to categories of specialisation

\(^2\) Commission Regulation on the application of Article [101(3) TFEU] to categories of research and

\(^3\) Guidelines on the applicability of Article [101 TFEU] to horizontal cooperation agreements, OJ 2001
C3/2.
• Given that parties are themselves responsible for assessing the legality of their agreements, there is a need for more guidance from the Commission, in the form of formal “non-infringement” decisions and “informal guidance”, to clarify how Article 101, and in particular Article 101(3), applies to individual cases;

• More clarity is needed as to the scope of application of the framework of analysis which the Commission intends to apply to agreements between certain joint ventures and their parents;

• The guidance on information exchange could usefully include some guidance specifically directed at trade associations;

• The brief reference to information exchange between suppliers via a retailer, or between retailers via a supplier, may be misleading as to the circumstances in which this raises competition law issues, and we recommend deleting it;

• The issues of exploitative abuse and potential liability under Article 102, currently covered very briefly in the context of standard setting, are complex. It may be preferable for these to be examined instead on a different occasion, perhaps in the context of control of exploitative abuse more generally.

3. **INTRODUCTION AND GENERAL COMMENTS**

**Introduction**

3.1 This submission is structured as follows. In this part we will set out our overall support for the Commission’s proposals and make some general comments on the proposals as a whole. In the following parts we will focus in turn on some specific areas covered by the Proposed Guidelines. We will deal first with some points raised by the “Introduction” in the Proposed Guidelines, then with issues arising out of the section entitled “General Principles on the competitive assessment of information exchange”. Finally we will make some observations on the section “Standardisation Agreements”.
Support for the proposed texts

3.2 We fully support the Commission’s aim of providing a clear framework for analysis of horizontal cooperation arrangements, based on sound economic principles and broadly suitable for practical application by business. This is more important than ever in the light of the increasing importance of market sectors characterised by fast-advancing technology and dependent on innovation, and where EU businesses face global competition.

3.3 We welcome in particular the revised introductory section of the Proposed Guidelines, which clearly sets out the Commission’s essential concerns in this area and makes the text more consistent with the Commission’s “Guidelines on the application of Article [101(3) TFEU]”. We are especially pleased to see the introduction of a new section of guidance relating to information exchange. We also endorse the extension of the section on standardisation to provide more detailed guidance on issues related to intellectual property rights in the context of standardisation, and also to cover standard terms and conditions.

3.4 There are nevertheless a few aspects of the proposals which we do question, and these are set out in the following sections.

“Safe harbour” thresholds

3.5 The Proposed Block Exemptions include market share thresholds and the Proposed Guidelines provide an informal “safe harbour” threshold in some of the sections dealing with different types of horizontal cooperation. The Proposed Block Exemptions have thresholds of 25% and 20% for R&D agreements and specialisation agreements respectively, while the relevant sections of the Proposed Guidelines mention 15% for both purchasing and commercialisation agreements. While these safe harbours are undoubtedly useful, 15%, in particular, does seem extremely low, especially when compared with the Commission’s substantive guidance on horizontal merger analysis. We do question whether there is justification for the differences, and especially for the lowest thresholds. If so, it might be helpful at least to make the reasons explicit.

Examples in the proposed Guidelines

3.6 We very much welcome the use of many examples to illustrate the principles set out in the Proposed Guidelines. However, we do point out that:

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4 OJ 2004 L101/97.

5 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ 2004 C31/5.
• Example 9 at para. 188 suggests that there is market power where the relevant market share is 18%, which seems extremely low. We question whether this example is realistic, in that in these circumstances A and B would be more likely to (slightly) reduce their prices to enable them to use some of their new additional capacity to increase demand, rather than to raise their prices. They would have an incentive to do this because their lower costs would enable them to reduce their prices but at the same time increase their profit margin.

• We observe that the nine examples (paras. 180-188) given in the section on joint production tend mainly towards findings of negative outcomes for competition. It would be preferable to provide a better balance of examples, so as to make it clear that there are frequently significant economic benefits to such arrangements.

• Examples 1 and 2 at paras. 247 and 248 refer to a joint commercialisation agreement between four companies who together have 12% of the laundry services market in a city. It does not seem likely that there is sufficient effect on cross-border trade for Article 101 to be applicable to this situation.

Definition of “potential competition”

3.7 The Proposed Block Exemptions both define a potential competitor as “an undertaking that [in the absence of the agreement would] be likely to undertake, within not more than three years, the necessary additional investments or other necessary switching costs to supply [a competing product]”\(^6\). Three years seems too long a period to specify, as almost any firm might enter within such a long timeframe.

Need for guidelines and block exemptions to be supplemented by enforcement decisions

3.8 The Proposed Block Exemptions and Proposed Guidelines provide a great deal of assistance to parties in assessing whether their agreements fall within the scope of Article 101(1) and whether they can benefit from exemption under Article 101(3). However, given that such assessments now fall to be made by the parties themselves, without the possibility of recourse to the Commission for formal clearance or approval, we suggest that the Commission should consider providing further guidance in specific individual cases.

3.9 In our January 2009 response to the Commission’s questionnaire on the current regime for the assessment of horizontal cooperation agreements we observed that general guidelines have their limitations, in that they can only provide a starting

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\(^6\) Art. 1 of both Proposed Block Exemptions.
point for analysis of the most complex kinds of agreements. While it is clearly not reasonable to expect general guidelines to deal with cases of complicated strategic alliances, it would be very helpful if the Commission were to publish examples illustrating how it analyses such cases, and in particular how Article 101(3) is applied in concrete cases.

3.10 A few years ago, during the time leading up to the Commission’s 2004 “modernisation” reform which abolished the notification procedure, concerns were expressed in many quarters about a potential reduction in legal certainty for parties and about the risks of divergence in interpretation of the law across the European Union (EU). In consequence a number of mechanisms intended to minimise these risks were included in the new rules, including the possibility of formal Commission non-infringement decisions, and of informal, but published, guidance from the Commission where novel questions were raised. However, we are not aware of any instances of such non-infringement decisions being adopted or informal guidance provided, whether in the context of horizontal cooperation agreements or in any other area of application of Article 101 or 102.

3.11 On the other hand, we are aware that, despite the general success of the European Competition Network in promoting convergence through its “behind the scenes” work, there are instances of diverging interpretation and application, in particular of the criteria of Article 101(3). We entirely understand the Commission’s desire to avoid recreating the old notification system. However, we do suggest that if the Commission were to deal with a few well-chosen horizontal cooperation cases through these mechanisms, and in particular some applying the Article 101(3) criteria, this could provide very useful guidance that would be greatly welcomed by those who have to apply the rules.

4. **PROPOSED GUIDELINES: “INTRODUCTION”**

4.1 We welcome the fact that the “Introduction” in the Proposed Guidelines provides a largely modern, economic effects-based framework for analysis, and that

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8 Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), OJ 2004 C101/78.

9 The UK Office of Fair Trading has introduced a form of guidance known as “short-form opinions”, because it recognises that the lack of legal precedents since “modernisation” does raise potential problems. See Jackie Holland “The OFT’s new short-form opinion process: filling a gap in the self-assessment regime?”, *Journal of European Competition Law and Practice* Vol. 1, No.5 (forthcoming).
this is more consistent with the Commission’s Guidelines on the application of Article [101(3) TFEU] than are the existing guidelines. The following suggestions are made for some further improvements.

**Joint venture analysis**

4.2 Para. 11 of the Proposed Guidelines sets out text intended to clarify the framework for analysis of horizontal cooperation involving certain types of joint venture. It states that:

"...As a joint venture forms part of one undertaking with each of the parent companies that jointly exercise decisive influence and effective control over it, Article 101 does not apply to agreements between the parents and such a joint venture, provided the creation of the joint venture did not infringe EU competition law. Article 101 could, however, apply to agreements between the parents outside the scope of the joint venture and with regard to the agreement between the parents to create the joint venture."

4.3 We very much welcome the Commission providing more guidance on the application of Article 101 to these types of arrangement, but we are concerned that, as currently drafted, it is insufficiently clear in precisely what situations Article 101 may or may not apply, and that it therefore may be misleading. It is particularly important that more clarity be provided, given that the current wording appears to conflict with some past cases.  

4.4 Firstly, it appears that this approach applies subject to the requirement that each parent “jointly exercise decisive influence and effective control” over the joint venture. In footnote 7 reference is made to the Commission Consolidated Jurisdictional Notice11 ("the Jurisdictional Notice") for the notion of “control”. This Notice serves to interpret EU merger control legislation12, which does not in itself preclude reference to it for the purposes of applying Article 101. However, the wording of para. 11 of the Proposed Guidelines as currently drafted is confusing, because it does not correspond exactly to the concepts used in the EUMR and the Jurisdictional Notice.

4.5 Para. 11 refers to “decisive influence”, which forms part of the concept of “control” used in and in the Jurisdictional Notice. However, the EUMR refers to elements that confer the possibility of exercising decisive influence”13 (emphasis

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11 OJ 2008 C95/1.

12 Regulation 139/2004 on the control of concentrations between undertakings (“EUMR”).

13 Art. 3(2).
added) whereas para.11 of the Proposed Guidelines refers to the "exercise" of such influence. We ask that the Commission clarify whether it intends that this approach (that is, not applying Article 101 to agreements between a parent and its joint venture) should apply in all cases in which the EUMR test of "control" is satisfied, and if so, that the wording of para.11 be adjusted to make this clear.

4.6 In addition, para.11 also mentions a concept which does not feature in the EUMR, which is that of the exercise of "effective control". It is not clear whether this is intended as an additional requirement, making the threshold for when a joint venture and parent form part of the same undertaking higher than the "control" threshold under the EUMR. Nor, if indeed this is the case, is it clear in precisely what way the threshold is intended to be higher. We would ask that the wording "and effective control" be either deleted or clarified.

4.7 Secondly, as to the wording "Article 101 could, however, apply to agreements between the parents outside the scope of the joint venture", we assume this does not change the position that, where a joint venture could lead to coordination between independent parents outside the establishment and operation of the joint venture, such coordination could be captured by Article 101. It may be preferable to change the word "agreements" in this last sentence to, say, "coordination or practices between the parents which affect the competitive behaviour of independent undertakings outside the scope of the joint venture" so as to make it consistent with Articles 2(4) and (5) of the EUMR.

4.8 Finally, if the same concept of "control" is to be applied (i) in the EUMR context and (ii) when assessing the application of Article 101 as between a parent and a joint venture, it would also be appropriate to clarify that the Commission will also apply this same concept of control (iii) when assessing whether to apply Article 101 as between a parent and its partially owned subsidiary. It would not be desirable to have different tests applying to the Article 101 analysis depending on whether the issue concerns a parent and a joint venture on the one hand and a parent and a partially-owned subsidiary on the other.

4.9 A separate concern that we have relating to para.11 is that it might be read across as applying to a completely different issue, which is the circumstances in which a parent is liable for cartel activity of its joint venture. For this reason we request that additional wording (underlined below) be inserted in para. 9 of the Proposed Guidelines so that it reads:

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14 The reference in footnote 6 to the Avebe case, which in fact deals not with whether Article 101 applies to an agreement between a parent and its joint venture, but rather with a question of liability for cartel conduct, increases this concern.
“Whereas these guidelines contain certain references to cartels, they are not intended to give any guidance as to what does and does not constitute a cartel, or as to the circumstances in which one entity may be held liable or subjected to penalties for cartel conduct of another entity ...”

The interface between Article 101(1) and Article 101(3)

Para. 20 refers to the bifurcated structure of Article 101 and sets out the need to perform the relevant analysis under each of these two heads. However, although some case law is mentioned in the relevant footnotes, there is no reference to the Wouters\textsuperscript{15} and Meca-Medina\textsuperscript{16} case law. While we appreciate that the Proposed Guidelines cannot be expected to include all case law, we consider that not to make a reference to this line of case law would be to omit an important aspect of the Article 101(1) analysis, namely the possible relevance of non-competition public policy objectives to that analysis. This is all the more the case given that the Metropole judgment is referenced, and that read in isolation gives only a partial view of the jurisprudence of the European Court of Justice on this issue.

Public policy objectives

Para. 21 deals with agreements that are in some way encouraged, approved or mandated by the State. In the main we accept this as a statement of the law as it stands, but we would ask for further clarification on the final words of this paragraph, which say that undertakings are shielded from the application of Article 101 if legislation requires them to engage in anti-competitive conduct or if “government authorities impose irresistible pressure on them to do so”. It would be helpful to understand what the Commission intends by “irresistible pressure”.

In some Member States there is a growing tendency for government to seek to achieve certain (non-economic) public policy aims not through binding legislation but through more informal means, and this can place parties in difficulties. We recognise that it may not be appropriate for general guidelines to deal with the treatment of individual public policy issues, and the likely application of Articles 101(1) and 101(3) to such issues. But this would be an area where the exercise by the Commission of its power to give informal guidance could be extremely useful.

Effects on parties’ financial interests

Some of the wording used in para. 32, which sets out ways in which horizontal cooperation may limit competition, is undesirably general and broad. The third part refers to agreements that “affect the parties’ financial interests in such a way that their

\textsuperscript{15} Case C-309/99.

\textsuperscript{16} Case C-519/04 P.
decision-making independence is appreciably reduced". It would be helpful to have specific examples of such situations, or at least for it to be made clear that this will only be relevant in combination with certain other elements of fact.

5. **PROPOSED GUIDELINES: INFORMATION EXCHANGE**

**Guidance for trade associations**

5.1 We warmly welcome the introduction of a section on information exchange, as such guidance is much needed. We do wonder whether it might in addition be useful, especially given that this section is already quite detailed, to add some wording specifically dealing with the kind of work typically done by trade associations, such as the collection and aggregation of statistics for members.

**Availability of leniency**

5.2 We observe that such cases sometimes raise difficult issues related to whether a given instance of information exchange is deemed a cartel of a type that entitles the parties to apply for leniency. We accept that the Proposed Guidelines may not be the appropriate place to deal with this issue, but we would like to stress that it is at present frequently very difficult for a company that uncovers such conduct to know whether or not to approach the Commission.

**"Hub and spoke" information exchange**

5.3 Para. 54 states that information exchange may occur through a third party, with the only further explanation being that given in footnote 39. This is to the effect that "[i]nformation exchange through third parties may involve, for example, indirect exchange of information through a market research organisation or through the parties' suppliers or retailers".

5.4 We acknowledge that indirect exchange of information through a third party, such as a market research organisation, can be a breach of competition law. However, a simple reference to indirect exchange of information through suppliers or retailers (or other parties) is in our view insufficient. There could be a risk that this concept is interpreted more broadly than it should be. Clearly there may be circumstances in which firms consciously and intentionally engage in anti-competitive arrangements through such "hub and spoke" systems. However, there are equally good commercial reasons why non-competitor firms need to pass each other information as part of their day-to-day business operations (in particular retailers and suppliers). It would not therefore be justified in principle, nor desirable as a matter of policy, to interpret Article 101 as applying in the absence of clear evidence of intent on the part of the
party supplying the information and the knowledge of that intention on the part of the party ultimately receiving it (mere assumptions or inferences as to such intent should not suffice). It is also arguable that in this type of case it needs to be shown that the information also in fact influenced the receiving party's competitive behaviour again mere inferences or assumptions should not suffice (for example, it is insufficient to rely on the Anic presumption in these circumstances where the parties are not competitors and this is not a hard-core horizontal cartel).

5.5 We therefore suggest that, pending more detailed clarification from the Commission or the European Courts on retailer-supplier communications, the words "or through the parties' suppliers or retailers" should be deleted from the footnote altogether.

6. PROPOSED GUIDELINES: STANDARDISATION

Article 102

6.1 The Proposed Guidelines refer in their title only to Article 101, but in fact they include brief guidance as to the application of Article 102 to standard setting. Given the controversial nature of antitrust control of exploitative abuse of market power, in particular where intellectual property rights (IPRs) are involved, we question whether it is desirable for the Commission to deal with this point briefly here, without dealing with all the issues raised. For example, the issue of when an IPR holder is dominant within the meaning of Article 102, and what the criteria are for assessing dominance in this context, are not touched on. We suggest that it might be preferable for this topic to be examined more fully on a different occasion, perhaps in the context of control of exploitative abuse more generally.

Disclosure of essential IPRs

6.2 We support the requirement in para. 281 that there should be good faith disclosure by companies participating in standards setting of essential patent rights. We understand the aim is to avoid later patent ambushes which could amount to an abuse. However, we perceive several problems with this broad guidance as currently drafted.

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17 See e.g. UK Court of Appeal, Argos Ltd and another v Office of Fair Trading; JJB Sports plc v Office of Fair Trading [2006] EWCA Civ 1318.

18 That is, the presumption "that undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market", Case C-49/92P, [1999] ECR I-4125.

19 Paras. 284-285, under the heading "7.3 Assessment under Article 101(1)".
6.3 Firstly, “IPR” might be understood as including trade secrets which do not form part of a publicly available standard. It would be helpful to make it clear that trade secrets are not included, since by definition there will be no trade secret rights in a technical standard which has been published. For the same reason, trade secret rights could not be used for a standards-related essential IPR ambush. We therefore suggest that it be made explicit that the good faith obligation to disclose "essential IPR" should be restricted to essential published registered rights and applications (i.e. patents, utility models and registered designs and applications for any of these which have reached the disclosure stage).

6.4 In addition, patent applications may remain confidential for a period of time during their filing. We suggest that it be made clear that the obligation to disclose essential patent applications only applies once those applications have been published (usually around 18 months after the initial filing).