

# Review of the new regime for assessment of horizontal co-operation agreements

## Response to European Commission Public Consultation

Submitted by Norton Rose LLP

### 1 Introduction and general comments

- 1.1 Norton Rose LLP (“**Norton Rose**”) thanks the Commission for the opportunity to respond to its public consultation in relation to the proposed new Draft Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (the “**Draft Guidelines**”); the new Draft Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of research and development agreements (the “**Draft R&D Regulation**”); and the new Draft Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of specialisation agreements (the “**Draft Specialisation Regulation**”).
- 1.2 The points raised by Norton Rose are made not on behalf of particular clients it represents, but more broadly represent its perspective on the proposed new rules and guidelines and the impact these will have on co-operation agreements, based on its extensive experience advising clients on these issues.
- 1.3 As an opening remark, Norton Rose welcomes the Commission’s efforts in revisiting these rules and would like to emphasise the importance of clear guidance in this area for companies. The degree to which companies rely on Commission guidance in assessing their positions in the world of “self-assessment” cannot be underestimated. Similarly, and equally as importantly, national courts and competition authorities refer to Commission guidance in reaching determinations in often complex issues. The Commission’s experience in this sector and the clarity with which it expresses its views have a decisive effect upon the competition law landscape and the extent to which companies are prepared to engage in pro-competitive cooperative arrangements.
- 1.4 A further opening remark concerns the required balance between:
  - (a) the need for cautious guidance which is not over-prescriptive and allows for a full and sound assessment of the economic context relevant to particular agreements

(recognising that effects of particular arrangements may be either pro-competitive or anti-competitive depending on the context); and

- (b) the need for legal certainty and allowing companies to operate in a context where they can make decisions efficiently and have comfort as to the legality of necessary cooperative arrangements.

- 1.5 In our experience, the current guidelines (the “**Current Guidelines**”)<sup>1</sup> covering horizontal agreements provide a useful framework which has been helpful as a starting point in any analysis and provide a degree of certainty as to the legal position in assessing relatively straightforward horizontal cooperation agreements. This is in particular the case, where arrangements mirror very closely the examples and facts included in the Current Guidelines, but less so as regards situations where the facts are slightly more complex or different and so not directly considered. The problem that we have often experienced, however, is that the majority of the horizontal co-operation agreements that we advise on do not easily fall within the relevant block exemptions and are frequently far more complex than envisaged in the guidelines, resulting in the Guidelines only providing limited assistance. While we recognise that the Commission cannot provide guidance for every situation, we think the correct stance is to focus on services markets more closely and to err on the side of caution in not creating legal uncertainty in situations which are more often than not likely to be pro-competitive or competitively neutral. In this context we would highlight that it is very hard for competitive harm to arise where there is no market power - and therefore cooperation arrangements between smaller market players (where these are not secret cartels) should be considered against a backdrop of a merger control regime which is permissive towards concentrations leading to generally far higher market shares than those provided for in relation to horizontal cooperation arrangements.
- 1.6 It is well known that the majority of companies are reluctant to spend an extensive amount of time considering the legality of their arrangements (and indeed it would be economically inefficient for them to do so). The “self-assessment” requirement, the lack of comfort or guidance from the Commission, and increasingly onerous fines (in particular as regards horizontal agreements) are making companies far more cautious about entering into cooperation agreements. The concern that the combination of the potential sanctions and the degree of legal uncertainty involved has a “chilling effect” on competition is - in our experience - a real one.
- 1.7 The revision of the Guidelines is a good opportunity to reduce this “chilling effect” by providing robust, practical guidance. The current drafts, however, do not yet do this. We set out below some areas for improvements in this regard.

## 2 Draft Guidelines - General

- 2.1 We welcome the Commission's initiative to include a separate section at the beginning of the Draft Guidelines on the basic principles and overall framework for an assessment under Article 101 and in particular Article 101(3). We anticipate that this will provide a helpful framework for future assessments of co-operation agreements generally.
- 2.2 We also think the extended lists of examples given in particular cases are helpful, but - as discussed further below - it would be helpful for the Commission to consider services sectors more than goods sectors to a greater extent in these examples as these often create the greater uncertainty for companies.

## 3 Information Exchange

- 3.1 We welcome the Commission's effort to provide practical guidance on information exchange in the Draft Guidelines. Given the increasing number of information exchange cases which are being assessed by national competition authorities, without structured and clear guidance different interpretations and confusion may result, and so the provision of guidance in this area is an important intervention.
- 3.2 Considering the applicability of Article 101 to information exchange is very important for trade associations, who play an important role in the collection, aggregation and dissemination of potentially competitive information, it might be useful if a specific section on trade associations is included in the Draft Guidelines (as was also done in the *Maritime Guidelines*).
- 3.3 Information exchange is of significant commercial importance and in many instances can be pro-competitive, as superior access to information allows companies to make more efficient decisions about the competitive response to any situation - the Commission explicitly recognises this at paragraph 58 of the Draft Guidelines.
- 3.4 To date, specific guidance in relation to information exchange has been largely absent, with companies having to refer to the principles established in the *John Deere* case<sup>2</sup> for guidance. More recently, the *Maritime Guidelines*<sup>3</sup> have provided specific guidance (largely re-stating the principles established in the *UK Agricultural Tractor* case<sup>4</sup>) but these should not be - and now hopefully will not be - the main source of reference by analogy for other industry sectors. The Commission has noted the demand from businesses and advisers for specific guidance in this area, and what the Draft Guidelines now offer is a clearer reflection of the legal position, and the

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<sup>1</sup> Commission Notice — Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, Official Journal C 3 of 06.01.2001, p. 2.

<sup>2</sup> Case C-7/95P *John Deere v Commission* [1998] ECRI - 1311.

<sup>3</sup> Communication from the Commission, "An Integrated Maritime Policy for the European Union" on 10 October 2007 - COM(2007)575 final.

<sup>4</sup> *UK Agricultural Tractor Registration Exchange* [1992] OJL68/1.

true risks companies face in relation to exchanges of information - even where those exchanges remain pro-competitive or competitively neutral.

- 3.5 The first point made abundantly clear in the Draft Guidelines is that exchanges of information between competitors where these relate to individualised future or current prices or quantities amount to an infringement of competition by object (and that following the *T-Mobile* case<sup>5</sup> there does not need to be any link between the practices in question and the prices actually charged to consumers). While we recognise that a secretive exchange of individualised pricing information is tantamount to a cartel, this approach also makes explicit quite how low the bar is for competition authorities in relation to establishing object infringements through exchanges of information, without having to show any effects.
- 3.6 This concern has arisen in several recent cases in the context of indirect information exchanges (the “hub and spoke” or “ABC” type-infringement). Under these rules, the normal competitive dynamic of a supplier attempting to push through a cost price increase by informing customers that this cost price increase is to be applied across the market generates a significant risk of communications in which one customer is informed of the current or future prices of a rival as part of that negotiation process. This occurrence in itself is under the Draft Guidelines to be treated as analogous to a traditional cartel - and risks incurring equivalent penalties. We consider that the appropriate approach for indirect information exchanges would be to either never treat them as object infringements; or to treat them as object infringements only when the parties intend that the information will be passed indirectly to the horizontal competitor, and the recipient is more than a passive recipient.
- 3.7 In support of this approach, we would refer the Commission to paragraph 141 of the UK Court of Appeal judgment on Toys and Football shirts<sup>6</sup> where the test for infringement requires not only constructive intention but also that “*C does, in fact, use the information for determining its own pricing intentions*”. The difficulty raised here is the excessively onerous legal standard applied to recipients of information to show their innocence (the position of C). As established in, for example, *Westfalen Gassen*<sup>7</sup>, a recipient of information is deemed to have accepted and been influenced by receipt of that information if it remains “*active on the market in question*” unless it can adduce evidence to prove that the information “*did not have any influence whatsoever*” on its conduct.<sup>8</sup> More recently, in the *T-Mobile* decision<sup>9</sup>, the General Court stated that “*the national court is required, subject to proof to the contrary, which it is for the undertakings concerned to adduce, to apply the presumption of a causal connection, according to which, where they remain active on that market, such undertakings are presumed to take*

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<sup>5</sup> Case C-8/08 *T-Mobile Netherlands BV and Others*, OJ C 2, 12.4.2008.

<sup>6</sup> *Argos Ltd and another v. Office of Fair Trading; JJB Sports v. Office of Fair Trading*, 19 October 2006 [2006] EWCA 1318.

<sup>7</sup> *Westfalen Gassen v Commission*, Case T-303/02, ECR 2006 II-04567, para. 132.

<sup>8</sup> See also *Hüls AG v Commission*, Case C-199/92 P, ECR 1999 I-04287, para. 167.

<sup>9</sup> See footnote 5, paragraphs 49 to 52.

*account of the information exchanged with their competitors.*” This, in effect, means that where a supplier informs a retailer of its competing retailers’ price, the retailer is assumed to be party to an object infringement unless it exits the market on which it is active. This clearly places the recipient of information in an unacceptable position - it cannot undo the fact it has been informed of something, and it cannot alter the fact that it must continue to compete in the market in the knowledge of whatever it has been told. It is this type of very low threshold for object offences that raises most concern for businesses and practitioners, and has a chilling effect on cooperation which has wider negative consequences for economic prosperity within the EU.

- 3.8 In this context, Norton Rose is concerned that the Commission has adopted too cautious an approach in relation to information exchange. In particular, the Commission suggests<sup>10</sup> that information exchanges between competitors of individualised data regarding (i) intended future prices or quantities; (ii) current conduct that reveals intentions on future behaviour; and (iii) different types of data which enables the direct deduction of intended and future prices or quantities should be considered a restriction of competition by object within the meaning of Article 101(1) and therefore effectively *per se* illegal (we appreciate that in theory such conduct could still qualify for exemption under Article 101(3), but in practice this is of limited comfort). While the Commission later recognises that public exchanges of information are less likely to infringe the rules, it is not clear that exchange of such information publicly is sufficient to remove the “object” classification.
- 3.9 Indeed, in many ways the distinction between restrictions by “object” and restrictive “effects” seems to be artificial in relation to information exchanges (unless the information exchange is clearly part of a cartel). This is because so many different elements play a role in the assessment of information exchanges under Article 101, that it makes it extremely difficult to characterise such practices in either category. We, therefore, suggest that the Commission either makes clear that unless the information exchange is clearly part of a cartel that it should not be treated as an object infringement, and that it gives clearer guidance as to the circumstances under which information exchanges clearly have no restrictive effects. In the same context, it seems that the characteristics of an information exchange which the Commission lists as the application of Article 101(3). This is confusing. We suggest that the Commission gives clearer guidance as to the circumstances under which information exchanges clearly do not fall within the scope of Article 101. For example, in an industry benchmarking exercise, does the fact that there are many competitors exchanging aggregated historic data mean that the agreement is outside Article 101(1) altogether or has restrictive effects but is exemptible under 101(3)?

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<sup>10</sup> In paragraph 68 of the Draft Guidelines.

- 3.10 What is also of concern is the position where information is not considered public unless it is “costless” to access<sup>11</sup> or accessible to “all competitors and buyers”<sup>12</sup>. The example<sup>13</sup> in relation to petrol station prices offers little comfort given that these prices are actual prices displayed in the market (see further below). Companies need greater legal certainty that normal actions, such as publication of a price list showing an upcoming price increase on their websites, cannot be characterised as “object” infringements because, e.g., certain buyers cannot access the website, or are not on the circulation list for hard copy delivery.
- 3.11 The concern above relates to our broader concern that - notwithstanding the Commission’s efforts to show when an information exchange might constitute an infringement by effect - the vast majority of investigations by the Commission and national competition authorities tend to be brought on the basis of infringement by object, where the test is far easier to satisfy. Companies want - and deserve - a competition regime which only uses the object infringement in cases which are manifestly anti-competitive and where anti-competitive effects cannot easily be identified (e.g. because the conduct was investigated before it occurred). The concern with chilling pro-competitive behaviour to the detriment of the wider EU economy is again relevant here.
- 3.12 Given that particular types of conduct - notably information exchange - can be either pro-competitive or anti-competitive depending on the market context, in the absence of evidence of anti-competitive effects, competition authorities should not be able to “stretch” the object box in order to reduce the legal burden on themselves to establish an infringement. The *T-Mobile* case<sup>14</sup> is a worrying precedent in this context, and the degree to which the Commission refers to it in these Draft Guidelines is alarming.
- 3.13 We offer some further comments below in relation to specific aspects of the information exchange section of the Draft Guidelines.

#### **Age of data**

- 3.14 As the Commission recognises, exchange of historic data is unlikely to lead to a collusive outcome and whether data is genuinely historic depends on the specific characteristics of the relevant market. However, it is often problematic for companies to determine with any degree of certainty whether data is sufficiently historic to be exchanged in a non-aggregated form.
- 3.15 The *UK Agricultural Tractor* case<sup>15</sup> (referred to in footnote 57 of the Draft Guidelines) gave a suggestion that one year might be a suitable threshold for determining whether the data is historic or not, yet the Commission retreats from offering a specific threshold that might give

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<sup>11</sup> Paragraph 82 of the Draft Guidelines.

<sup>12</sup> Paragraph 84 of the Draft Guidelines.

<sup>13</sup> Example 6 in paragraph 103 (*Genuinely public information*) of the Draft Guidelines

<sup>14</sup> *Case C-8/08 T-Mobile Netherlands BV and Others*, OJ C 2, 12.4.2008

<sup>15</sup> *UK Agricultural Tractor Registration Exchange* [1992] OJL68/1

greater certainty to companies who do not want to expend significant resources trying to establish whether the specific characteristics of their market lend themselves to requiring a longer or shorter period. We would encourage the Commission to consider whether the Draft Guidelines should explicitly acknowledge that in some industries information much more recent than a year old may also be historic.

### **Aggregation of data**

- 3.16 The working assumption in relation to aggregation of data following the *UK Agricultural Tractor* case,<sup>16</sup> has been that - provided companies cannot “undo the aggregation” to find individual positions - aggregation simply provides an industry benchmark which should not lead to any illegality. We are concerned that the Commission’s statement<sup>17</sup> that exchange of aggregated data may also lead to a collusive outcome is not clear. The example referred to<sup>18</sup> does not offer any clarity as to the circumstances in which this might happen, given that it refers to a situation where individualised data is exchanged between “*three large companies with a combined market share of 80 per cent*”. While we appreciate the Commission’s caution, it would be more efficient and offer greater certainty to businesses to suggest a threshold of market concentration (by reference to HHIs or market shares) below which such concerns would not typically arise.
- 3.17 We also note with some concern the wording of footnote 59 of the Draft Guidelines which states that “*it should not be presumed that a price commitment vis-à-vis competitors is always good*”. To businesses this will be seen as an example of the Commission lacking an understanding of commercial reality and having an almost paranoid approach to market behaviour. The Commission should be more conscious of the chilling effect on competition that such statements can have. This type of statement is in practice far more likely to be made in a pro-competitive context, and with the intention of advertising the low pricing strategy of a company, than as a device to deter competitive pricing. We also query the likelihood of a competition authority bringing infringement proceedings on the basis of price guarantees. We suggest the Commission considers revising the emphasis of this statement to ensure it does not deter the very competitive behaviour it is seeking to promote.
- 3.18 Finally, while we welcome the Commission providing examples in respect of the characteristics that influence the likelihood of whether information exchange would lead to a collusive outcome, it would be helpful if further examples could be included, in particular some dealing with more complex cooperation arrangements or dealing with aspects of the arrangements that lie within the grey areas where the analysis is less well established. For example:

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<sup>16</sup> *UK Agricultural Tractor Registration Exchange* [1992] OJL68/1.

<sup>17</sup> Paragraph 85 of the Draft Guidelines.

<sup>18</sup> Example 4 in paragraph 101 (*Bench marking benefits - criteria of Article 101(3) not fulfilled*) of the Draft Guidelines.

- (a) Example 1<sup>19</sup> could make clear what would happen if the fare information were also shared with agents via a central booking system - or where customers could access the information but only through a subscription website. Would this still be an object infringement?
- (b) Example 3<sup>20</sup> could address a situation which is not a tight oligopoly, or explain how easily and accurately competitors must be able to deduce pricing from the data provided (in this case occupancy rates and total revenues) in order to be anti-competitive. In this case, for example, hotel rooms will have widely varying prices depending on factors such as room size; quality; number of occupants; duration of stay; how long in advance the booking was made; group booking etc. Given this, it is not clear how the rival hotels could accurately ascertain each other's current pricing from the information provided.
- (c) Example 4<sup>21</sup> could address the relevance of these costs to the companies in question. If in a competitive duopoly, costs information is exchanged in relation to a minor cost input, would this lead to "a collusive outcome"? It is not clear how information on a relatively minor shared cost would lead to collusion. At worst it may lead to an improved bargaining position for the company paying a higher price for that cost input, and therefore allow it to lower its cost base and improve efficiency.
- (d) Example 5<sup>22</sup> could explicitly address the minimum age of data in the context of three-month contracts for it to be presumed legal. While we are led to understand three years would be acceptable, would two years also be acceptable? Would the one year suggested in *UK Agricultural Tractor*<sup>23</sup> not be acceptable in this case?
- (e) Example 6<sup>24</sup> suggests that the exchange of petrol station prices would have the effect of restricting competition as these prices, although "public", are not "genuinely public" because of the cost of gathering the information independently. However, the example does not make clear whether there is local pricing in this market (which would of course increase these costs) or what level of costs would be small enough to offset this concern. It might also address the situation if this information were provided by a drivers' association to encourage competitive pricing between the petrol stations. In retail industries, for example, it is common practice to monitor competitor on-shelf pricing in order to compete aggressively, and for suppliers to inform retailers if their product is better priced in order to encourage the retailer to price more aggressively. This simplistic example does not address this complex dynamic.

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<sup>19</sup> In paragraph 98 (*Exchange of intended future prices as a restriction by object*) of the Draft Guidelines.

<sup>20</sup> In paragraph 100 (*Current prices deducted from the information exchanged*) of the Draft Guidelines.

<sup>21</sup> In paragraph 101 (*Benchmarking benefits - criteria of Article 101(3) not fulfilled*) of the Draft Guidelines.

<sup>22</sup> In paragraph 102 (*Historic data*) of the Draft Guidelines.

<sup>23</sup> *UK Agricultural Tractor Registration Exchange* [1992] OJL68/1.

<sup>24</sup> In paragraph 3 (*Genuinely public information*) of the Draft Guidelines.

## 4 Removal of “centre of gravity” test

- 4.1 We support the Commission’s replacement of the “centre of gravity” test in deciding how to analyse horizontal agreements. Focus on the most “upstream indispensable building block” in an agreement which covers several stages of the production chain will simplify the assessment for companies.
- 4.2 However, the reservation that while in principle all sections of the Draft Guidelines pertaining to the different parts of an integrated agreement will be relevant for the competition analysis means the benefits of this clarification are to some extent offset by the ongoing need to consider the Draft Guidelines (and the Draft R&D Regulation and the Draft Specialisation Regulation) in full.

## 5 Clarification of joint venture and “undertaking”

- 5.1 In view of the long standing hesitations of competition authorities on how to treat joint ventures and, in particular, given the complexities frequently involved in their analysis and the different approaches various jurisdictions take to important aspects of the joint venture analysis (e.g. the concept of control), we welcome the Commission’s effort to provide explicit guidance as to when relations between a joint venture and its parent companies will be subject to Article 101.
- 5.2 However, we are concerned that the proposed explanation in paragraph 11 of the Draft Guidelines is over simplified and risks distorting the “single economic unit” concept by giving it variable geometry depending on the situation and what the Commission wants to achieve.
- 5.3 In support of the Commission’s suggestion that “*a joint venture forms part of one undertaking with each of the parent companies that jointly exercise decisive influence and effective control over it*”<sup>25</sup>, the Commission refers to the General Court’s decision in *Avebe*<sup>26</sup>. However, while the Court in that case concluded that “*taken together, the factual evidence provides a sufficient basis for the presumption that Akzo and Avebe determined jointly [the joint venture’s] course of action on the market to the point where [the joint venture] was deemed not to have any real autonomy in the matter*”<sup>27</sup>, the Court did not hold that a mere 50/50 situation would automatically create a presumption of lack of autonomy in the joint venture’s conduct of its business.
- 5.4 The wording in paragraph 11 of the Draft Guidelines implies that there is no autonomy of the joint venture vis-à-vis its parents and vice-versa. The initial section of the paragraph could also be read to suggest that the parents form a single economic entity amongst themselves because of the existence of the joint venture. The Commission then clarifies the situation by stating

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<sup>25</sup> Paragraph 11 of the Draft Guidelines.

<sup>26</sup> Case T-314/01, *Avebe*, ECR II - 3085, paragraphs 138 and 139.

*“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”<sup>28</sup>*, thus making it clear that the traditional concerns as to spillover effects arising from a joint venture are still clearly within the scope of Article 101. However, the very fact that a full function joint venture should be treated as forming a “partial single economic entity” with each of its parents - i.e. the joint venture is part of a single economic entity with each of its parents but the parents are not part of a single economic entity - unhelpfully erodes the concept of a single economic unit.

- 5.5 Norton Rose believes that it would be very helpful, given its importance, if the Commission could provide more coherent and concrete guidance as to how Article 101 interacts with joint ventures to give more legal certainty to those contemplating entering into such arrangements.
- 5.6 Whilst we welcome the clarification given by the Commission in the Draft Guidelines, there still remain difficulties with the treatment of parent joint venture relationships in relation to full-function joint ventures. For example, the Commission should clarify the status of the “ancillary restraints” notice, as according to the latter, Article 101 does in general apply to relations between the parents and the joint venture (e.g. to supply agreements).

## **6 Notion of “restrictive effects on competition”**

- 6.1 The Draft Guidelines repeatedly refer to the concept of “restrictive effects on competition”. We believe this is a helpful development and offers more certainty than simply “effects on competition”. At paragraph 25 of the Draft Guidelines, the Commission confirms that for a restrictive effect on competition to arise, an agreement must have an actual or likely appreciable adverse impact on at least one of the parameters of competition. It then goes on to state that this means an agreement must *“reduce the parties’ decision-making independence”* either through obligations in the agreement or through altering incentives.
- 6.2 While we think this is a helpful development, it would be more helpful if this test were applied more rigorously in the examples the Commission provides. In particular, the Commission’s examples are very heavily focussed on tight oligopoly situations. While we appreciate this is because competition concerns will be far less likely to arise in non-oligopolistic markets, the Commission should have the courage of its convictions and make this explicit. If the Draft Guidelines were to state that in non-oligopolistic markets (which typically exist below a defined HHI threshold), restrictive effects on competition are unlikely to arise in relation to any of the particular forms of conduct discussed, this would dramatically alter the position for many companies and significantly reduce the burden of legal uncertainty they currently face in relation to attempting to assess the restrictive effects on any particular arrangement.

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<sup>27</sup>

Ibid.

<sup>28</sup>

Paragraph 11 of the Draft Guidelines.

## 7 Joint purchasing/exchange of costs information

7.1 Our primary concern with joint purchasing is that the Commission continues to overstate the likelihood of competitive harm arising from such behaviour. Put simply, competitive harm from joint purchasing should only arise where:

- (a) there is such a degree of purchasing power that other purchasers are forced to pay higher prices to compensate for the lower prices the joint purchasers are able to negotiate (i.e. foreclosure of other purchasers through a waterbed effect); or
- (b) the products or services being purchased represent such a high proportion of overall costs that the joint-purchasers achieve a level of transparency as to each other's likely downstream pricing that is likely to lead to collusive outcomes.

7.2 This position is much more explicitly recognised for example in the US guidance:

*“Joint purchasing arrangements are unlikely to raise antitrust concerns unless (1) the arrangement accounts for so large a portion of the purchases of a product or service that it can effectively exercise market power in the purchase of the product or service, or (2) the products or services being purchased jointly account for so large a proportion of the total cost of the services being sold by the participants that the joint purchasing arrangement may facilitate price fixing or otherwise reduce competition. If neither factor is present, the joint purchasing arrangement will not present competitive concerns.”*<sup>29</sup>

7.3 In contrast, the Commission in the Draft Guidelines has maintained its position that there is no absolute threshold above which it is presumed that a purchasing agreement creates market power, but that in most cases *only if* the combined market share of the parties is less than 15 per cent on both the purchasing and selling market, are the parties to the agreement unlikely to have market power.

7.4 The Draft Guidelines (as in the Current Guidelines) thereby establish a market share threshold of 15 per cent above which there is increased uncertainty and the parties to a joint purchase arrangement would have to assess in the market context whether there are restrictive effects upon competition, and if so, to ensure that their arrangements satisfy the conditions contained in Article 101(3). We consider this threshold to be unnecessarily low - especially as the purpose of the threshold is to identify “market power” which is normally only recognised at far higher market share levels - and would encourage the Commission to reconsider whether this market threshold is appropriate. By way of comparison the US DOJ and FTC guidelines referred to above contain a 35 per cent threshold for joint purchasing as a level below which the agencies will not challenge the arrangement “*absent extraordinary circumstances.*”

- 7.5 The US guidance also makes clear that the authorities would not challenge joint-purchasing which relates to costs accounting for less than 20 per cent of an undertaking's total revenues. This addresses our second concern with joint-purchasing referred to above - as well as our concern (discussed in relation to information exchange) that competitors sharing information on costs should not risk illegality unless such exchanges are likely to increase transparency in relation to downstream pricing to such a degree that a collusive outcome is likely.
- 7.6 The Commission does not directly address this point - creating uncertainty for EU businesses in comparison to their US counterparts. Indeed the examples the Commission provides in relation to joint purchasing are also unhelpful on this point as they feature either very high market shares and commonality of costs (the parties in Example 2 in paragraph 217 (*Commonality of costs and market power on selling market*) of the Draft Guidelines have a combined market share of 60 per cent and joint purchasing relating to 80 per cent of variable costs); or very low market shares (20 per cent between 150 retailers in Example 1 in paragraph 216 (*Joint Purchasing by small companies with moderate combined market shares*) of the Draft Guidelines - a number of companies which would make any collusive outcome very difficult to monitor and inherently unstable).
- 7.7 The other examples given also avoid the more difficult issues - Example 4 in paragraph 219 (*Information exchange*) of the Draft Guidelines features a product "Z" which is "*not a significant cost factor*" and where the joint purchasers act through a third party which acts as a barrier for all sensitive information and where the combined market share in any event is only 30 per cent. It would be more helpful and limit the likelihood of any chilling effect on beneficial competitive behaviour, if the Commission were prepared to give certainty to businesses that where combined market shares are 30 per cent or below, competition concerns are highly unlikely on joint purchasing of an insignificant input even if the companies do so directly rather than via a third party (and clarify at what level of commonality of costs an input becomes significant).
- 7.8 A final point in relation to joint purchasing is the difference between a joint purchasing cartel (which is a restriction by object) and legitimate forms of joint purchasing. This is another area where we believe the Commission could offer more guidance. Currently, paragraph 200 of the Draft Guidelines states "*Purchasing agreements constitute a restriction of competition by object if they do not truly concern joint purchasing (...)*". This is a very loose test.
- 7.9 We suggest there should be a reference to a set of criteria, for example the existence of a purchasing negotiation or the integration of the sourcing process that reflects the difference between a purchasing cartel and a joint-purchasing arrangement. See for example the US guidance on the point: "*An agreement among purchasers that simply fixes the price that each purchaser will pay or offer to pay for a product or service is not a legitimate joint purchasing*

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<sup>29</sup> US Department of Justice and Federal Trade Commission, Statements of Antitrust Enforcement Policy in Health Care,

*arrangement and is a per se antitrust violation. Legitimate joint purchasing arrangements provide some integration of purchasing functions to achieve efficiencies."*

- 7.10 At paragraph 201 the Draft Guidelines, the Commission elaborates somewhat on this issue, but remains relatively vague. Again the Commission could be more forthcoming in setting out the criteria it will use, as it did in the "purchasing cartel" bitumen case<sup>30</sup>, whose criteria it could borrow from. Perhaps an additional example based on the bitumen case would be helpful to clarify this point.
- 7.11 As a final point, we consider that it would be useful if the Commission were to confirm the position of joint-purchasing agreements in relation to the purchaser market share to be taken into account under the Vertical Block Exemption Regulation<sup>31</sup> when assessing vertical relationships between companies purchasing jointly and their suppliers (i.e. to confirm that it is not the individual market shares of the companies concerned, but the combined market share in the purchasing markets which is relevant to determining whether the 30 per cent threshold has been exceeded).

## **8 Definition of competitor and potential competitor**

- 8.1 We note that in both the Draft R&D Regulation and the Draft Specialisation Regulation the Commission has sought to clarify the definition of "potential competitor" by reference to a period for possible market entry of "*not more than three years*"<sup>32</sup>.
- 8.2 However, in the Draft Guidelines, the Commission states that "*a company is treated as a potential competitor of another company if, absent the agreement, in case of a small but permanent increase in relative prices it is likely that this first company, within a short period of time, would undertake the necessary switching costs to enter the relevant market on which the other company is active*" (emphasis added). We further note that the Commission has removed the footnote in the Current Guidelines referring to an entry period of a maximum of one year for potential competitors, with longer periods being taken into account in individual cases. In contrast, the one year period is still the relevant period in the Vertical Restraints Guidelines (paragraph 27 of the Vertical Restraints Guidelines<sup>33</sup>).
- 8.3 We recognise that the ability for a company to establish itself as a competitor varies enormously by industry - in some sectors, a company can enter the market with a straightforward purchase of assets and/or employees; in other sectors regulatory licences, IP, infrastructure costs, or the need for recognised brands may make market entry highly unlikely. Attempting to estimate, *at*

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August 1996, Statement 7, No 17.

<sup>30</sup> See in particular paragraphs 165 and 166 of the Commission's Decision of 13 September 2006 in Case COMP/F/38.456 - *Bitumen - NL*

<sup>31</sup> Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Foundation of the European Union to categories of vertical agreements and concerted practices.

<sup>32</sup> Definitions 16 and 12 respectively

*the time of entering a cooperative agreement*, how long it would take for a company to establish itself in a new market as a competitor in that market *in the absence of the agreement*, is also an entirely speculative exercise. In this context we believe the Commission's attempts to put a timeframe on the period for new entry in order to classify potential competitors is misguided: it will inevitably lead to uncertainty, and our preference would be for the Draft R&D Regulation and Draft Specialisation Regulation to follow the more straightforward approach taken in the Draft Guidelines.

- 8.4 In the alternative, we would suggest that the Commission consider clarifying the meaning of "within a short period" and the type of evidence that would be considered in defining the relevant period. In any event, we think the Commission should adopt a consistent approach to the definition of "potential competitor": there is no reason why the concept of "potential competitor" should be defined differently under the vertical and horizontal regimes and this will only create legal uncertainty.

## **9 Further issues**

- 9.1 We address below some further issues where we believe the Commission could offer further guidance on where horizontal cooperation will raise concerns.

### Non-compete guidance

- 9.2 In addition to the basic principles relating to an assessment under Article 101, it would be helpful to receive some guidance on the extent to which non-compete clauses in relation to the various co-operation agreements would be viewed as likely to infringe Article 101. The Commission's guidelines dealing with ancillary restraints are of limited assistance outside the merger context. In particular, in many joint production agreements, non-compete provisions are key for the realisation of synergies and efficiencies. Therefore, receiving further guidance regarding the type of arrangements that would be acceptable and beneficial would be very useful - both to the companies and any national authorities/courts that need to assess the compatibility of such arrangements. Companies are often unwilling to enter cooperative arrangements without the benefit of the protection provided through non-compete provisions in relation to their residual businesses, or the newly exploited product. More certainty as to when non-compete clauses are acceptable (and for how long) would improve encourage pro-competitive cooperation in many situations.

### Cooperation through alliances

- 9.3 There are many types of cooperation through alliances which the Draft Guidelines would be well placed to address. In sectors such as aviation and shipping where there has not been major

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<sup>33</sup> Commission notice of 13 October 2000, Guidelines on vertical restraints, COM(2000/C 291/01)

consolidation, alliance operations generate efficiencies and allow operators to share costs for provision of necessary infrastructure etc. These shared costs are analogous to the joint-purchasing scenario, but should be more explicitly addressed as such.

#### Government-sponsored / "public interest" cooperation

- 9.4 One area which has raised concerns for our clients has been the unwillingness of the competition authorities to acknowledge where conduct might be taken in the wider public interest or at the behest of a Member State government. For example, in the UK there have, for example, been initiatives to encourage retailers to introduce charges for carrier bags, or to act together on reducing unhealthy additives, salt or fat content in food. Where competitors are requested to discuss such issues which are broadly seen to be in the public interest, the competition rules should not be used to punish them and the guidance should acknowledge such possibilities.
- 9.5 There are obvious analogies with standardisation agreements where the standards being introduced may be of benefit to the wider industry, and to customers, but where there will be a concern that standards are not being used for collusive or exclusionary purposes. It should be made explicit in the Draft Guidelines that participation in other public interest schemes - including environmental initiatives which are set to become a growing feature of business in years to come - will not (without additional restrictive measures) put companies at risk of penalty under competition law, or at a minimum this issue should be addressed to allow companies to understand more clearly the risks they face.

#### Standardisation agreements

- 9.6 We have no further comments in relation to the section of the Draft Guidelines on standardisation and believe adding this safe harbour for unrestricted, transparent standard setting in industries is a sensible and helpful change in response to a common concern amongst our clients.

## **10 Draft R&D and Specialisation Block Exemptions**

- 10.1 We do not have extensive comments on the two Draft Block Exemption Regulations, which have not substantially changed. In relation to the Draft R&D Regulation we note the new requirement to disclose all relevant existing and pending IP rights to the partner company in the joint venture to avoid situations of "patent ambush". This is an important and we believe helpful amendment, although we have some concern that it will open the door to patent litigation in relation to what may or may not have been relevant to a particular joint venture.
- 10.2 We also note the alterations to the "hardcore" provisions making clearer that (i) restrictions on independent R&D are now permitted for the life of a joint venture agreement; (ii) passive sales

bans are prohibited; and (iii) "no challenge" clauses have become excluded from the Draft R&D Regulation rather than "hardcore".

- 10.3 We support these changes which we think add clarity to the system and will be beneficial for companies.
- 10.4 We do not have any further comments on the Draft R&D Regulation, or the Draft Specialisation Regulation (subject to the point made above in relation to definition of potential competitors).

We would of course be happy to discuss any of our comments with the Commission at its convenience if that would be of assistance.

**Norton Rose LLP**

**Antitrust, Competition and Regulatory Group**

**25 June 2010**