EC CONSULTATION: DRAFT REVISED RULES ON HORIZONTAL COOPERATION AGREEMENTS

Response of Bristows LLP

26 April 2022

I. Introduction

1. The following document is the response of Bristows LLP (**Bristows**) to the European Commission (**EC**) consultation inviting comments from interested parties on the draft revised Horizontal Guidelines (**Draft Guidelines**)[1], and the draft revised Block Exemption Regulations on Research & Development (**Draft R&D BER**)[2] and Specialisation (**Draft Specialisation BER**)[3] published on 1 March 2022 (together the **Revised Drafts**).

2. Bristows is a law firm based in Brussels and London. Bristows' core sectors, where we are recognized for our leading expertise are, are technology, life sciences and brands. We have therefore focused our comments primarily on those areas of the revised drafts most relevant to those core sectors – including R&D, Sustainability and Information Exchange. The comments set out below are those of Bristows and should not be taken to represent the views of any of our individual clients.

II. Executive Summary

3. If adopted in their current form, the Revised Drafts will bring about substantial changes in the EC guidance in relation to competitor collaborations. The EC's willingness to rethink its position on these issues and to offer expanded guidance in relation to many of them is to be welcomed. As set out further below, we believe that the proposed changes in relation to the treatment of joint ventures (**JVs**) and the assessment of standardisation agreements are significant positive developments.

4. However, some policy changes run the risk of creating disruption and legal uncertainty. We are concerned that a number of the changes proposed in the Revised Drafts may fall into that category. In particular, as detailed further below, we believe that the changes proposed in the following areas are potentially problematic or do not go far enough:

   (i) Research and development – where the proposed changes threaten unnecessarily to increase the cost of R&D collaborations and, as a result, to chill pro-competitive innovation efforts;

   (ii) Information exchange – and in particular the vague and unnecessarily broad proposed definition of exchanges that may constitute 'by object' restrictions;

   (iii) Joint purchasing – where the proposed distinction between naked buying cartels and potentially legitimate joint purchasing arrangements would not appear to be well grounded in either economic theory or legal precedent; and

   (iv) Sustainability – where in relation to what is perhaps the most pressing issue facing the EU (and the world) currently, the EC is proposing to adopt a partial and compromised approach to the recognition of efficiencies arising from the correction of market failures.

---

[1] Available at https://ec.europa.eu/competition-policy/document/download/c3388b84-153b-4848-a920-31ed69e74c0a_en?filename=draft_revised_horizontal_guidelines_2022_all_languages.zip.

[2] Available at https://ec.europa.eu/competition-policy/document/download/7821e3e1-ebe3-4ad3-9f4b-7e29ce075a95_en?filename=draft_revised_Research-and-Development_HBER_2022_all_languages.zip.

[3] Available at https://ec.europa.eu/competition-policy/document/download/c0847b92-eb0f-42ce-9249-28165c3c41c6_en?filename=draft_revised_Specialisation_HBER_2022_all_languages.zip.

5. In each of these areas we call on the EC to rethink its proposed approach and, where guidance already exists, to retain its existing guidance if no better solution can be found.

III. The Treatment of JVs

6. Paragraphs 11 to 14 in Chapter 1 (the Introduction) to the Draft Guidelines hold out the hope of real progress in an area of ongoing difficulty in relation to Article 101 TFEU: how to assess agreements between JVs and their parent companies.

7. The current case law suggests that, on the one hand, JV parents are obliged to treat JVs as independent third parties when entering into agreements with them while, on the other and simultaneously, being liable to fines for their JV's infringing activities on the basis that they form part of a single economic unit with their parent. In other words, parent undertakings are put in the unjust and uncomfortable position of being both constrained in the ability to control the activities of their JVs and being responsible for those activities when they lead to infringement.

8. Paragraph 13 of the Draft Guidelines seeks to resolve this tension in favour of treating parent companies and their JVs as a single undertaking for almost all purposes, stating:

> "parent companies and their joint venture form a single economic unit and, therefore, a single undertaking … in so far as it is demonstrated that the parent companies of a joint venture exercise decisive influence".

9. Where this applies, the EC will only seek to apply Art 101 to agreements between a parent and a JV to the extent they fall outside the JV's existing product and geographic scope.

10. Legally, this is a somewhat uncomfortable compromise. It is hard to understand why the decisive influence exercised by a parent over its JV suddenly ceases to be relevant in areas outside the JV's existing product or geographic scope.

11. It also leaves unanswered a critical practical question – does the parent have to show that decisive influence has in fact been exercised or is it (as is the case under the EU Merger Regulation (**EUMR**)) sufficient that the parent has the "possibility" to exercise decisive influence.[4] That issue has been a significant source of ambiguity in the case law to date.[5] This ambiguity should be resolved by making express reference to the EUMR test in the guidance. It would have the great merit of aligning the concept of undertaking/single economic unit across all areas of EU competition law. More practically, it would avoid the need for extensive factual investigation of whether the ability to exercise decisive influence had in fact been implemented.

---

4 EUMR, OJ L 24, 2004, p.1, at Art 3(2) ("Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence" (emphasis added)).

5 See, eg, Alison Jones, The boundaries of an undertaking in EU Competition Law, European Competition Law Journal [2012] 8(2), pp 301 to 331 ("in contrast to the position under the EUMR where it is necessary only to assess whether rights to be acquired give a parent the possibility of exercising decisive influence over the subsidiary,70 the cases have consistently stressed that such a possibility is not enough - it must also be considered whether that power has actually been exercised … The extent to which this latter requirement in fact constitutes a material difference is controversial, however. In particular, in some scenarios the question of whether power has actually been exercised appears to be inferred from the potential/power to do so. For example, it has been seen that in cases where the parent owns 100%, or a de minimis amount less, of the shareholding in the subsidiary it is presumed that decisive influence has been exercised and it is uncertain whether, and if so how, that presumption can be rebutted. Further, even in cases of smaller shareholdings it seems that actual decisive influence may be inferred from evidence deriving from the organisational and economic links between the entities and the potential to exercise decisive influence. Indeed, as it seems clear that actual decisive influence does not necessarily have to result from specific instructions on elements of commercial policy but can arise even when a parent does not make use of any actual rights of co-determination and refrains from giving specific instructions or guidelines on individual elements of a commercial policy7 it appears that the power to exercise decisive influence will often be the determining factor."), available at https://ssrn.com/abstract=2131740.

12. Finally, it should be noted that an attempt to resolve the issue of how to treat parent-JV agreements was also made in 2010, when the EC was consulting upon changes to the previous guidance. Para 11 of the draft stated:

> "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."[6]

13. This language was, however, ultimately dropped prior to the adoption of the existing Horizontal Guidelines (**Existing Guidelines**)[7]. It is to be hoped that history does not repeat itself. If it survives to the final document, the proposed change in relation to the treatment of parent-JV relationships would represent a substantial improvement over the current situation.

IV. R&D Agreements

14. The proposed changes in relation to R&D Agreements include the Draft R&D BER and the changes in Chapter 2 of the Draft Guidelines (the chapter concerning R&D agreements). The combined effect is to further limit the scope of the existing R&D BER (**Existing R&D BER**)[8] – which is little used and little loved[9] – at the same time as reducing the comfort available to R&D agreements that fall outside the safe harbour of the block exemption. As a result, if the new texts are implemented, businesses will find it increasingly difficult to self-assess the competition risk associated with R&D projects.

15. It is unclear why the EC wishes to push up the cost and risk of innovation in this way . There seems to be no good justification for tightening the rules in this area. Most R&D agreements bring together parties with complementary skills and technologies, with a view to creating new technologies and products. They are, as a result, strongly pro-competitive.

16. The Evaluation support study conducted by the EC found **no examples** of formal enforcement action being taken during the 10-year period covered (2011 to 2020) against a pure R&D agreement by any EEA authority.[10] Despite this, to fall within the Existing R&D BER's safe harbour an agreement must satisfy certain stringent pre-conditions. In particular, including that all parties to the joint R&D have "full access" to both:

    (i) the final results of the R&D; and

    (ii) the other parties' pre-existing know-how (if necessary to exploit the final results).[11]

---

6 Draft Horizontal Co-operation Guidelines, SEC(2010) 528/2, para 11, available at https://www.cep.eu/Analysen_KOM/GVO_Spezialisierung/Draft_Guidelines.pdf.

7 Available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114(04)&from=EN

8 Available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R1217&from=EN.

9 Between November 2019 and February 2020, the EC held an initial public consultation on its current rules for horizontal agreements. The feedback indicated that most respondents rarely or never used the Existing R&D BER and twice as many thought it reduced legal certainty as found it helpful. In its subsequent Evaluation paper the EC concluded that respondents considered reported the Existing R&D BER "[does] not provide sufficient legal certainty" (at page 45), available at https://ec.europa.eu/competition-policy/system/files/2021-05/HBERs_evaluation_SWD_en.pdf .

10 Available at https://ec.europa.eu/competition-policy/evaluation-support-study-eu-competition-rules-applicable-horizontal-cooperation-agreements-hbers-and_en

11 Existing R&D BER, Article 3(2) and (3).

17. These pre-conditions are extremely uncommercial. Where one party is funding the entire R&D effort, a requirement to give other parties access to the results is, in effect, a requirement to allow free-riding. Perhaps more seriously, for many undertakings in high innovation sectors, their pre-existing IP (including know-how) is their most valuable asset. A requirement to give third parties access to that IP is a requirement to 'sell the crown jewels'. In our experience, it is a provision that is most often cited by a large organisation against a smaller counter-party as an attempt to extract rights that may not in fact be required.

18. Nor is there any clear legal basis for them. As described, these pre-conditions effectively require some parties to an exempted agreement to subsidize competitive entry by the other parties. As the EC itself made clear in *Boosey & Hawkes*, even a dominant undertaking is under no obligation to subsidise competition to itself.[12]

19. It might, nonetheless, be possible to argue that such pre-conditions were appropriate in cases where substantial pre-existing competitive rivalry would be lost in their absence. This would require that, prior to the agreement, the parties were head-to-head competitors, held substantial combined market power, and could effectively innovate independently. However, these conditions <u>cannot</u> be fulfilled by agreements potentially covered by the R&D BER. Its application is subject to a 25% market share threshold that is inconsistent with substantial market power. Moreover, many if not most R&D agreements that could usefully benefit from the block exemption will be between parties that are not competitors and are incapable of conducting the relevant R&D effectively acting alone.

20. In fact, parties typically collaborate because doing so brings together their complementary technologies, skills and/or ability to access cash, allowing them to achieve more together than apart. In such cases, the cooperation will typically be procompetitive, whether or not it meets the pre-conditions of the Existing R&D BER.

21. The fact that these pro-competitive agreements are excluded from the safe harbour of the block exemption is unfortunate, and could give rise to substantial legal uncertainty. Fortunately, that risk is currently mitigated by the fact that the Existing Guidelines expressly recognize the pro-competitive nature of such agreements. At para 130, they state clearly that:

> "[if] the parties are not able to carry out the necessary R&D independently … the R&D agreement will not normally have any restrictive effects".

22. Similarly, at para 140, they recognize that, in some circumstances, granting all parties full access to R&D results may not be commercially feasible, in which case granting exclusive access to one party or the other will not prevent the deal being lawful and pro-competitive. This will be the case where:

> "exclusive access rights are economically indispensable in view of the market, risk and scale of the investment required".

23. Perhaps most importantly, at para 128, they make it clear that R&D agreements will only constitute an automatic (by object) infringement of EU competition rules in extremely limited circumstances: specifically where:

> "they do not truly concern joint R&D, but serve as a tool to engage in a disguised cartel [through] price fixing, output limitation or market allocations" (para 128).

24. For most R&D arrangements this comfort is sufficient to relieve them from the need to rely on – and therefore comply with the specific requirements of – the Existing R&D BER.

25. The proposed changes in the Revised Drafts would, if implemented, reduce legal certainty and make the current (already unsatisfactory situation) worse. First, they reduce the – already over

---

[12] *BBI/Boosey & Hawkes* OJ L 286, 1987, p. 36, para 19.

narrow – scope of the R&D BER. Second, they eliminate or water-down many of the key paragraphs in the Existing Guidance.

26. The Draft R&D BER retains all the major weaknesses of the Existing R&D BER. In particular, it retains the requirement that all parties have 'full access' to results of the joint R&D and necessary pre-existing know-how (regardless of their contribution to the joint effort). They also retain the existing 25% market share threshold.

27. To these, it adds a further layer of complexity and uncertainty. Where the parties compete "in innovation", three or more competing R&D efforts that are "comparable" must exist before the block exemption will apply.[13] Precisely how parties should count the number of – doubtless confidential – third party innovation efforts, or assess whether they are comparable, is unclear. This proposed change is perhaps influenced by recent merger decisions in relation to pipeline products in the pharma sector, where divestments have been required where the number of independent competitors are reduced to fewer than three. This appears misguided: requirements to divest in cases such as *GSK/Novartis*[14] or *Hospira/Pfizer*[15] related to pipeline products rather than early-stage R&D. In those cases, the contemplated acquisitions clearly resulted in a reduction of independent products; R&D collaborations by contrast are intended to *increase* innovation.

28. More problematic are the proposed changes in the Draft Guidelines. First, the comfort offered to agreements between parties unable to carry out the R&D independently has been materially qualified. The Draft Guidelines (para 72) now state only that:

> "R&D cooperation between not competing undertakings generally does not give rise to restrictive <u>horizontal</u> effects on competition" (emphasis added).

29. This raises the spectre of R&D agreements giving rise to restrictive <u>vertical</u> effects, without offering guidance on how to identify or avoid such effects.

30. Second, the recognition that, if exclusive access rights are commercially indispensable, R&D agreements may be lawful despite not giving all parties "full access" to prior rights and results – and therefore falling outside the block exemption – has been deleted altogether. Such a change could only be justified if the EC had grounds for believing that there are no circumstances in which it is not commercially reasonable to grant full access rights. No such grounds exist. Indeed, our extensive commercial experience suggests that, to the contrary, the circumstances in which such draconian conditions are commercially acceptable to parties active in high innovation sectors are few and far between.

31. Third, the Draft Guidelines indicate that R&D agreements may operate as automatic (by object) infringements of EU competition rules in a much wider range of circumstances (para 70), including where they:

> "(a) prevent or delay the market entry of products or technologies, (b) coordinate the characteristics of products or technologies which are not covered by the R&D agreement or (c) limit the potential of a jointly developed product or technology when they bring such a product or technology individually to the market."

32. The third by object category, agreements that "limit the potential of a jointly developed product or technology" is particularly troubling given that it is entirely unclear what this might mean. There is nothing in the long history of non-intervention in relation to R&D agreement identified in the Evaluation support study that could possibly justify this type of expansion of the by object category and the increased legal uncertainty in inevitably creates.

---

[13] Draft R&D BER, Art 6(3).

[14] Case M.7276 *Glaxosmithkline/Novartis Vaccines Business (Excl. Influenza)/Novartis Consumer Health Business*.

[15] Case M.7559 *Pfizer/Hospira*.

33. The combined effect of limiting the scope of the block exemption safe harbour and reducing the comfort available to R&D agreements that fall outside that safe harbour will be to increase the cost of risk assessment in relation to such agreements. Access to robust and well-informed external legal advice will increasingly be required – but it will come at a cost (both monetary, and potentially in terms of projects' increased risk-profile). Inevitable economic logic suggests that increasing costs and risks will reduce supply. In other words, the impact of the EC's proposed changes is likely to be to reduce R&D and thus innovation. It is well recognized that innovation is a key driver of economic growth (including by the EC itself, as evident in DG Research and Innovation's Strategic Plan for 2020-2024[16]), and R&D is of course a key driver of innovation. We cannot think that the EC's goal is to hinder R&D in Europe in this way, so invite the EC to reconsider the points identified above.

V. Information Exchange

34. Most if not all competitor collaborations give rise to some risk that commercial information will be exchanged between the parties. The legality of such exchanges is therefore a core concern in relation to horizontal cooperations generally. Unfortunately, the Draft Guidelines are drafted in such a way as to create additional uncertainty in an already difficult area. It does so in two ways.

35. First, the Existing Guidelines identify a relatively narrow set of circumstances in which information exchange will constitute an automatic, by object, infringement of competition rules. They identify the focus of concern as information relating to "future conduct regarding prices or quantities".

36. This narrow focus is appropriate. By definition, any pure information exchange cannot involve an agreement as to how the parties should coordinate their market behaviour – since the overall arrangement would then (by definition) go beyond a mere exchange of information. It follows that any competition concerns associated with pure information exchange must be based on tacit coordination.[17] It is well established as both a matter of economic theory and EU law that tacit coordination concerns will plausibly arise only in a narrow range of circumstances. Although the bulk of the relevant case law on tacit coordination in the context of a non-covert agreement relates to decisions taken under the EUMR (including *Sony*[18] and *Airtours*[19]), its relevance is acknowledged (and the cases cited) in the Existing Guidelines.[20] Following these cases the official guidance issued by the EC for horizontal mergers establishes three criteria that must be fulfilled in terms of the characteristics of the relevant market:

   (i) the market must be sufficiently transparent to allow coordinating firms to monitor adherence to the coordination;

   (ii) there must be some form of credible deterrent mechanism; and

   (iii) the reactions of outsiders, such as customers and competitors, must not be able to jeopardise the results expected from the coordination.[21]

---

16 Available at https://ec.europa.eu/info/sites/default/files/rtd_sp_2020_2024_en.pdf.

17 See, eg, Richard Posner, Antitrust Law, 2nd Ed., at p. 164 ("The first thing to note about the *Hardwood* case – now approaching it from an economic standpoint – is that there was no evidence of an explicit price-fixing agreement. If it was collusive pricing, it was tacit"). Note that this point is not contradicted by the foreclosure theories of harm discussed at paras 420 to 422 of the Draft Guidelines. The harm in those cases arises from the refusal to grant access to the information being exchanged, not from the exchange of information itself.

18 Case C-413/06 P *Sony* [2008] ECR I-4951.

19 Case T-342/99 *Airtours* [2002] ECR II-2585.

20 Existing Guidelines, para 76.

21 EC Horizontal Merger Guidelines, para. 41, fn 7. http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0205(02):EN:HTML

37. In addition, the information being exchanged must increase the likelihood of coordination in some way, most plausibly by increasing transparency in relation to some credible focal point for coordination. This point is well explained (with reference to the *Sony* and *Airtours* case law) at para 76 of the Existing Guidelines.

38. As a result, it is only where information is of the most sensitive type that the blanket presumption of illegality that by object treatment represents is appropriate. As set out in the Existing Guidelines, that narrow category covers information that is both:

    (i) individualized, in the sense of being attributable to a particular undertaking, customer or transaction; and

    (ii) related to future pricing or output (including innovation).

39. Regrettably, this narrow approach has been abandoned in Chapter 6 of the Draft Guidelines, which deals with information exchanges, and replaced (at para 448) with language that, on its face, is very much wider:

    > "An information exchange will be considered a restriction by object when the information is commercially sensitive and the exchange is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market".

40. This language is potentially so broad that it is not obvious what commercially sensitive information competitors could exchange in the context of a collaboration agreement without risking an object infringement. As a result, many legitimate and pro-competitive competitor interactions risk being tainted by automatic illegality due to information exchange risk.

41. The second key change increases this risk. The Existing Guidelines state (at para 56) that, where information is exchanged as part of a wider cooperation, the legality of the exchange must be assessed in the context of the overall arrangement. The clear implication is that the exchange of information will generally be lawful where it is a necessary part of a wider pro-competitive collaboration. The Draft Guidelines remove this language and the comfort it provided. Instead, they state only that an exchange is "more likely to meet" the criteria for exemption if the information exchanged is limited to "what is necessary to enable the cooperation" (para 409). The implication is that, even where the exchange is necessary in the context of a wider cooperation, a separate assessment under the Art 101(3) exemption criteria is required.

42. Each individually problematic, the two changes are worse together, since a, the bar to making a robust exemption argument under Art 101(3) in relation to an object infringement is extremely high. In practice, therefore, the new draft threatens to condemn many if not most competitor collaborations to legal uncertainty.

43. The rationale for these unfortunate changes seems to be a view on the part of the EC that the Existing Guidance does not capture the full range of information exchanges that have been found as a matter of law to constitute restrictions by object. In particular, the Draft Guidance includes, at para 424, a list of "[i]nformation that has been considered to be particularly commercially sensitive and the exchange of which was qualified as a by object restriction". That list covers:

    (i) "The exchange with competitors of an undertaking's pricing and pricing intentions;

    (ii) The exchange with competitors of an undertaking's current and future production capacities";

    (iii) The exchange with competitors of an undertaking's intended commercial strategy;

(iv) The exchange with competitors of an undertaking's arrangements relating to current and future demand;

(v) The exchange with competitors of an undertaking's future sales;

(vi) The exchange with competitors of an undertaking's current state and its business strategy;

(vii) The exchange with competitors of future product characteristics which are relevant for consumers;

(viii) The exchange with competitors of information concerning positions on the market and strategies at auctions for financial products" (emphases added).

44. The EC concludes that:

> "From the examples given in paragraph 424, it is clear that there is no direct connection required between the information exchanged and consumer prices for the exchange to constitute a by object restriction".[22]

45. Regardless of whether or not that is correct, it is equally clear from para 424, that all of the examples cited would fall within the scope of the definition of by object type information exchanges in the Existing Guidance (quoted above) in that they cover information relating to future prices or output (reading output to include issues relating to product quality – and therefore innovation – as well as quantity). In other words, on its face, the case law relied on offers no justification for the vague and open-ended guidance contained in para 448 of the Draft Guidance. At most, what would appear to be required is clarification of the term "output".

VI. Standardisation

46. The changes in Chapter 7 of the Draft Guidance, dealing with standardisation agreements, are broadly positive and we welcome them. The expanded guidance on the application of the safe harbour usefully clarifies the EC's position on a range of issue. For example, the recognition at para 496 of the Draft Guidance that restricting participation in the standard setting process may not have restrictive effects on competition in various situations – including where open participation would have rendered adoption of the standard impractical or significantly delayed its adoption – represents a pragmatic and realistic approach to these issues that it to be welcomed.

47. We note that para 482 of the Draft Guidance retains the statement that:

> "In order to ensure effective access to the standard, the IPR policy would need to require participants wishing to have their IPR included in the standard to provide an irrevocable commitment in writing to offer to license their essential IPR to all third parties on fair, reasonable and non-discriminatory terms ('FRAND commitment')" (emphasis added).

The EC is aware that this phrasing is considered ambiguous and has caused controversy. In many cases, it will be sufficient for third parties if they have effective access on FRAND terms, rather than necessarily a right to a direct licence.

VII. Joint Purchasing

48. From a competition policy perspective, joint purchasing is an unusual form of competitor collaboration. The primary concern of a purchaser is to reduce the prices it pays and therefore

[22] Draft Guidelines, para 449.

to reduce its cost base. As a result, the expected first order effect of joint purchasing is to lower prices to downstream consumers. Significant harm to consumer welfare is likely only where:

(i) the collaboration extends beyond joint purchasing in ways likely to affect competition on downstream markets; or

(ii) the collaborating parties have significant market power on the purchasing market (such that consumer harm through reduced output or innovation may arise).

49. These economic facts suggest that joint purchasing should be treated as an automatic, by object, infringement only where there is some threat of restricting competition on the downstream market (market power being an issue to be assessed as part of an effects analysis). The Existing Guidelines address this, at para 205, by indicating that joint purchasing is likely to constitute an object infringement where it “does not truly concern joint purchasing, but serves as a tool … [for] price fixing, output limitation or market allocation”.

50. Chapter 4 of the Draft Guidelines, which deals with purchasing agreements, abandons this targeted approach, instead labelling as a “buying cartel” any arrangement that involves “coordination of purchase prices or parts thereof” or influences “purchaser’s individual negotiations” unless it also involves collective negotiation and conclusion of an agreement (paras 316 and 317). In other words, a distinction is made between, on the one hand, potentially lawful arrangements that “truly concern joint purchasing” and, on the other, ‘naked’ coordination in relation to purchasing that is automatically unlawful. This approach has been heavily influenced by the Expert Report prepared by Richard Whish and David Bailey (the **Whish Report**).[23]

51. Unfortunately, this both economically unjustified and fails to properly identify problematic purchasing coordination. In terms of the economic assessment, a good resource is the report prepared by RBB Economics for the UK Office of Fair Trading in 2007 (the **RBB Report**).[24] At various points, including para 5.9, the RBB Report identifies a series of factors which, if present, potentially indicate that an arrangement involving joint purchasing will have an anti-competitive effect. These include where the joint purchasing involves:

(i) the fixing of purchase quantities (and therefore limits output quantities on the downstream market); or

(ii) the exchange of information relating to output on the downstream market or quantities being purchases (see above).[25]

52. The Whish Report includes, at page 38, a list of 7 EC decisions involving joint purchasing that were treated as object restrictions. Of these 7, at least six can be explained on the basis of the two factors listed above and identified in the RBB Report. Two, *Air Freight* and *Dutch Bitumen*, involve standard output restricting cartels between suppliers, in addition to the joint purchasing. Three more, *Spanish Tobacco*, *Italian Tobacco* and *French Beef*, involve restrictions on purchase quantities (and therefore restrictions on output on the downstream market). Indeed, the RBB Report specifically refers to *Spanish Tobacco* as an example of joint purchasing involving the fixing of output quantities as a result of fixing purchasing quantities.[26] The facts of *Italian Tobacco* are very similar.[27] In *French Beef*, the restriction on purchase/output quantities was achieved through a prohibition on all imports of non-French beef.[28] The facts in

23 Available at https://ec.europa.eu/competition-policy/system/files/2022-03/kd0722013enn_purchasing_agreements.pdf

24 Available at https://www.rbbecon.com/downloads/2012/12/oft863.pdf

25 RBB Report, para 5.9 at pp 65 and 66.

26 RBB Report, footnote 79 at pp 65 and Case *Spanish Tobacco* OJ L 102, 2007, p. 14 at 6.1.

27 *Italian Tobacco*, para 240

28 Case C38.276 *French Beef* OJ L 209, p 12, paras 1 and 126.

Car Batteries are less clear cut, but the exchange of information in that case went well beyond purchase prices and appears to have included purchase and/or downstream production volumes. The case that can't necessarily be explained using the RBB Report factors is *Ethelyn*, because the full facts are not in the public domain as the non-confidential decision has not yet been published. However, the EC press release in relation to the decision noted that the parties exchanged "price related information" in addition to fixing purchase prices.[29]

53. In contrast, the distinction between joint purchasing arrangements that involve actual integration and those that do not, is not one that appears capable of explaining the outcome in these cases. It seems likely that activity penalised in *Car Batteries* would have been considered unlawful even if the parties had integrated their collective buying activity via a joint purchasing arrangement.

54. Finally, treating all collaborations in relation to purchase prices that do not involve integration of purchasing functions as by object infringements will call into question the legality of well-established and pro-competitive behaviour such as the exchange of cost data for benchmarking purposes.[30] If such an exchange might affect the way that parties negotiate purchase prices (its purpose) this would appear to fall within the definition of a buying cartel (which expressly covers information exchanges, see para 318). By adopting an over-broad and poorly focused test for illegality that is divorced from any economic rationale, the EC risks having a substantial chilling effect on pro-competitive activity.

55. A better solution would be a more minor amendment to the language of para 205 of the Existing Guidelines, to the effect that joint purchasing arrangements are <u>only</u> likely to constitute an object infringement where they:

> "serve as a tool for price fixing, output limitation or market allocation on downstream markets, in particular as a result of restrictions on the quantities purchased or the exchange of competitively sensitive information relating to prices or quantities on downstream markets".

VIII. Sustainability

56. The key issue for sustainability is how to apply the 'fair share' aspect of the exemption criteria under Art 101(3). In the new section on sustainability agreements in Chapter 9 of the Draft Guidance, the EC fudges the issue in a way that seems destined only to store up trouble.

57. The central problem in relation to sustainability is market failure resulting from negative externalities. For example, the fact that the driver of a petrol vehicle causes pollution that causes harm to others for which he does not have to pay. A solution that corrects this market failure will benefit society as a whole, but will also increase the driver's costs.

58. If the solution involves some restriction of competition, an exemption under Art 101(3) will be required. Such exemption is available only if "consumers" receive a "fair share" of the benefits. If the term consumers is understood to mean all end consumers (i.e., all individuals) no problem arises. However, in the Draft Guidelines, the EC takes the (somewhat tortured) position that the term "consumers" means direct customers (specifically "consumers in the relevant market", see para 600 et seq.). It follows that, where the driver is the direct consumer, any solution that increases his or her costs (i.e., one that corrects the market failure) cannot in principle qualify for exemption.

59. To solve this self-created problem, the EC proposes a fudge. If there is a "substantial overlap" between direct customers and the group that benefits from the solution, then the fair share

[29] https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1348

[30] See, eg, the official EC publication "EU Competition Law Rules Applicable to Antitrust Enforcement Volume II: General Block Exemption Regulations and Guidelines Situation as at 1st July 2013", https://ec.europa.eu/competition/antitrust/legislation/handbook_vol_2_en.pdf, at para 57.

requirement may be satisfied. At para 604, the draft Guidelines explain how this might operate on the basis of two hypothetical examples:

> "For example, drivers purchasing less polluting fuel are also citizens who would benefit from cleaner air, if less polluting fuel is used. To the extent that a substantial overlap of consumers (the drivers in this example) and the beneficiaries (citizens) can be established, the sustainability benefits from cleaner air are in principle relevant for the assessment and can be taken into account if they are significant enough to compensate consumers in the relevant market for the harm suffered. Conversely, consumers may buy clothing made of sustainable cotton that reduces chemicals and water use on the land where it is cultivated. Such environmental benefits could in principle be taken into account as collective benefits. However, there is likely no substantial overlap between the consumers of the clothing and the beneficiaries of these environmental benefits that occur only in the area where the cotton is grown".

60. On its face, this might seem a reasonable outcome. But consider two similar, but slightly different, scenarios. First, a less polluting but more expensive fuel for commercial trucks. Most consumers are not drivers of commercial trucks, does that mean that exemption is (or should be) precluded? Second, sustainable ornamental house plants grown in Slovenia exclusively for high end consumers in Germany. Are the environmental benefits to EU citizens in Slovenia irrelevant under Art 101(3)? The correct answer is surely that where a collaboration demonstrably benefits consumers as a whole (or at least consumers in the EEA) exemption should in principle be available. The Horizontal Guidelines should reflect this.

Bristows LLP
London/Brussels
26 April 2022