ASSOCIATION DES AVOCATS PRATIQUANT LE DROIT DE LA CONCURRENCE

RESPONSE TO THE EUROPEAN COMMISSION'S CONSULTATION ON THE CURRENT REGIME FOR THE ASSESSMENT OF HORIZONTAL COOPERATION AGREEMENTS

The APDC is an association of French lawyers whose main practice areas are French and European Competition law. The aim of the APDC is to encourage the positive development of Competition law by advocating clear and transparent rules that respect fundamental legal principles. In pursuit of this, the APDC welcomes the opportunity to participate in the current consultation.

For ease of reference and clarity this submission tackles each of the three new legal instruments separately which are presented in the following order:

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PART I: THE DRAFT HORIZONTAL GUIDELINES

As practitioners, we feel that the guidelines must provide clear guidance that is of practical significance so as to allow us to better advise clients on the legality of their commercial pursuits. In order for the final Guidelines to reach this objective we feel that several changes could, and in some cases should, be made. In essence, the changes that we submit are as follows:

- The principle set forth in §11 by which a single economic entity exists between a parent company and its joint venture has the negative effect of rendering parents companies liable for any competition infringements committed by the joint venture. The APDC feels that the Commission should rethink this position, taking into account exculpatory evidence, adopting an *ex post* analysis and clarifying the relationship with ancillary restraints (**Section 1**).

- In general, when assessing pass-on of efficiencies to consumers a higher market share held by the participants of the agreement should not be immediately considered as a factor which reduces the likelihood of such pass-on (**Section 2**).

- The new section on information exchange is a welcome addition to a complex and rapidly evolving area of law. However, the position adopted in the Draft Guidelines is too conservative and hinges on object based restrictions; to remedy this, the APDC suggests that the Commission reconsider its references to exceptional cases and abandon the parts on object based restrictions. Further clarification of generic terms such as "likely effects" or "readily accessible to competitors" is also necessary, as are further illustrations of information that is deemed to be "sensitive". Lastly, the APDC would welcome guidance on information exchange in a pre-merger context (**Section 3**).

- The APDC welcomes the rationalisation of the section related to R&D agreements but would find it helpful if the Commission were to include additionally examples of common self-assessment issues – such as the calculation of market shares in technology markets or situations relating to joint exploitation of the results – Moreover the Commission's approach appears to somewhat stigmatise R&D agreements compared to the current guidelines (**Section 4**).

- The notion of commonality of costs would be of greater practical use if the Commission were to elaborate in more detail between the commonality of costs and the risk of a collusive outcome (**Section 5**).

- With regards to production agreements, the assessment of commonality of costs should include external factors which render collusion more or less likely; in essence the assessment should not focus solely on the quantification of the commonality of costs. Moreover, examples 2 and 9 must be further clarified with regards to capacity utilisation rate, the market structure and the possibility of building the production facility individually (**Section 6**).

- It would also be useful to include further analysis on agreements that combine different stages in addition to purchasing so as to illustrate how the notion of "most upstream indispensable building block" is applied (**Section 7**).

- With regards to commercialisation agreements the notion of necessity of an agreement to enter a market could benefit from further clarification. As such, it would be helpful to include more examples of unproblematic situations where an agreement is necessary to enter a market as well as guidance on situations where several undertakings take part in a bidding consortium (**Section 8**)

- With regards to standardisation agreements, the guidelines reserve to possibility of assigning responsibility under Article 101(1) to the standard setting organisation for failing to implement rules that prevent an abuse of dominance occurring. This is undesirable and these references should be removed. Equally the Commission should adopt a less restrictive object based approach to the discussion of licensing terms between members of standard setting organisations in order to facilitate *ex ante* disclosure of restrictive terms (**Section 9**).

- Overall, the guidelines seem to be a step back from the effects based analysis backed by the Commission in that they rely heavily on object based restrictions and exceptional circumstances. The Commission should therefore provide further guidance on how object based restrictions are assessed (**Section 10**).

- Finally, the consultation procedure appears to be flawed insofar as the Commission has not made clear what the main objectives of the reform are, which in turn inhibits stakeholders from effectively commenting on the real key issue. It would also be useful for the Commission to publish a document stating which changes are merely stylistic and which are more fundamental. Moreover, it would appear that the ECN has already been consulted which severely limits the ability of stakeholders to have a fair say in what changes should be made (**Section 11**).

1 THE NOTION OF A SINGLE ECONOMIC UNIT (§11)

1.1 An *ex post* analysis must be undertaken

For establishing "decisive influence and effective control", the Draft Guidelines reference the Court of First Instance ("CFI") judgement in *Avebe* as regards "decisive influence" and the Consolidated Jurisdictional Notice as regards "control". The use of both of these texts seems to be contradictory in part. On the one hand, the test set out in *Avebe* explicitly states that the Commission must demonstrate actual existence of decisive influence. On the other hand, the Consolidated Jurisdictional Notice analyses control as the possibility of exercising decisive influence. Although both provisions have the same basic goals, their analytical standpoint is inherently different; Merger Control is based on an *ex ante* approach as opposed to the *ex post* approach of Article 101(1).

The use of the notion of "control" as developed in the Consolidated Jurisdictional Notice may result in fallacious findings of a single economic entity based on the aptitude of parent companies to jointly exercise decisive influence over a joint venture rather than an actual demonstration thereof. Indeed, in *Avebe* the CFI explicitly rejected the Commission's argument to this end finding that "contrary to the Commission's assertions (…), the

Commission cannot merely find that an undertaking 'was able to' exert such a decisive influence over the other undertaking, without checking whether that influence actually was exerted." [1]

The APDC suggests that the Commission reconsiders its reference to the Consolidated Jurisdictional Notice in favour of inserting an additional paragraph setting out the main conditions necessary for a finding of "decisive influence"

1.2 Exculpatory evidence must be taken into account when assigning liability to parent companies

The presumption set forth in the Draft Guidelines implies that where the Commission makes a finding of joint exercise of decisive influence over a joint venture, the parent companies will in turn be liable for any infringements of Article 101(1) committed by the joint venture as it will be considered as forming a single economic entity with each parent.

The Draft Guidelines do not make any reference to this and it is desirable that the Commission provide additional guidance on the issue. To this end, the definition of "decisive influence" must take into account exculpatory evidence that can be used to assign liability solely upon the joint venture should this be appropriate;[2] the inclusion of such elements is all the more important considering that in the case of joint ventures there does not exist any presumption of decisive influence by the parent companies. This would include situations where the joint venture acted unilaterally and in opposition of the parents' instructions,[3] where it is only the joint venture that is identified as a participant at conduct fixing meetings,[4] or where there is no evidence of material involvement of the parent company in the infringement absent the corporate link[5].

The APDC suggests that the Commission include exculpatory circumstances in the new paragraph relating to the concept of "decisive influence" suggested above

1.3 Relationship with ancillary restraints

The principle set forth in the Draft Guidelines would appear to lead to a distinction between the applicability of Article 101(1) to agreements between parent companies and their joint ventures depending on whether these constitute full-function joint ventures.

On the one hand, for the creation of non full-function joint ventures all agreements between the parents and the joint venture would henceforth be exempt from Article 101(1). On the other hand, for the creation of full-function joint ventures, Article 101(1) does not apply to agreements between the parent companies and the joint venture insofar as they constitute ancillary restraints. This leaves a lacuna regarding agreements between parent companies and full-function joint ventures that do not amount to ancillary restraints, as well as diverging

1 CFI, Case T-314/01 *Avebe v. Commission*, para 136.

2 Commission decision of 31 May 2006, case n° COMP/F/38.645 – *Methacrylates,* §248.

3 Commission decision of 13 July 1987, case n° IV/31.741 – *Sandoz*, §33.

4 Commission decision of 13 July 1994, case n° IV/C/33.833 – *Cartonboard,* §143.

5 Commission decision of 20 October 2004, case n° COMP/C.38.238/B.2 – *Raw Tobacco Spain*, §376.

standards of proof since ancillary restraints under the Merger Regulation require self-assessment whereas for joint ventures assessed solely under Article 101(1) there would be a presumption of inapplicability.

The APDC requests that the Commission clarify whether the principle set forth in the Draft Guidelines be interpreted so as to cover all agreements between parent companies and joint ventures regardless of whether they are full-function. If yes, what impact does this have on the assessments of ancillary restraints under the Merger Regulation?

2 PASS-ON TO COSUMERS

The APDC regrets the statements made regarding market power contained in each of the Draft Guidelines chapters' on "pass on to consumers" which in essence state that the higher the market power of the parties involved, the less likely it is that efficiency gains would be passed on to consumers.

Indeed, such statements appear to create a presumption that if participants in the agreement represent a significant part of the market, consumers will not get their share of the benefits, without giving any consideration to, *inter alia*, the buying power of distributors as the case may be, the existence of significant actual or potential competitors which are not party to the agreement and will exert a constraint to pass-on benefits to consumers, the genuine objective pursued by the participants to improve service and benefits to consumers to enhance their brand image etc.

The APDC requests that the Commission remove the reference to market power in assessing pass-on to consumers

3 INFORMATION EXCHANGE

3.1 The use of exceptional examples reduces the practical utilisation of the Guidelines

The Draft Guidelines set forth general criteria on market characteristics and type and frequency of information exchanged which may lead to anti-competitive effects, yet they then systematically state that in some circumstances these criteria do not need to be satisfied for the anti-competitive effect to exist (§ 71, 86, 73, 76, 77, 78, 85, 87), notably using *T-Mobile Netherlands* as a rule rather than the exception. The reference to exceptional cases proves to be extremely confusing as it sends a somewhat contradictory message to companies which in turn complicates their analysis, despite the fact that the Draft Guidelines intend to provide actual practical guidance.

The APDC invites the Commission to either (i) abandon the references to exceptional cases and systematic caveats to the general criteria for anti-competitive effects, or to (ii) explain in greater detail the specificities of the context in which the exceptional rule or caveats could apply as opposed to the general rule and general criteria

3.2 Restrictions based on object should be removed

The Draft Guidelines set out a list of information exchanges that are considered to be restrictive by object (§67-68) which appears to be left open to include other restrictions. The APDC regrets that that such a restrictive approach has been adopted.

National Competition Authorities may well rely on the resulting Guidelines to justify the automatic prohibition of information exchanges on prices and promotions (and potentially other information exchanges), with no further justification than that they should be considered as restrictive by object. Thus no further analysis of the actual restrictive effects on competition would be undertaken nor would any analysis of their potential efficiencies.

As such, the APDC invites the Commission to consider how these information exchanges should be dealt with when they are not the basis or tool of a cartel and to use a case-by-case analysis to assess the possibility of such agreements being licit and even pro-competitive in nature.

The APDC invites the Commission to consider deleting paragraphs 67 and 68 which create a rigid framework that appears to be incompatible with the Commission's expression of intention to practically assess each situation on the basis of its pro and anti-competitive effects and of potential efficiencies.

3.3 The Commission must not associate information exchange with cartels in a perfunctory manner

The APDC notes that in §9 of the Draft Guidelines the Commission states that they should not be read so to give any guidance as to what does and does not constitute a cartel. However, §59 seems to be contrary to this spirit in that it states that anti-competitive information exchanges run the risk of being ultimately fined as cartels and may facilitate the implementation of a cartel. This would appear to create an inextricable – and highly prejudicial – link between information exchange and cartels. As such, it is submitted that the Commission delete §59 which adds nothing to the analytical framework the resulting Guidelines are supposed to se out.

The APDC invites the Commission to delete §59 in that it has no analytical purpose and serves only to stigmatise information exchange

3.4 The assessment must be practical and concrete

The APDC considers that the effects of an information exchange on competition should be assessed concretely and practically, and that the competition authorities should not consider the test satisfied by a mere analysis of "likely" effects (§69). Absent such demonstrated effects, the information exchange should not be deemed anti-competitive. Indeed, the mere analysis of "likely" effects would in practice reduce the test to a level close to restrictions by object.

The APDC suggests that the Commission delete the term "likely" in paragraph 69 and specify that it bears the burden of proving (for instance through a "but for" analysis) that an information exchange has had concrete effects on prices, quantities etc.

3.5 Further guidance on the nature of information would be helpful

First of all, the APDC would welcome further clarification in the Guidelines on the circumstances under which the information listed in paragraph 81 will be considered as sensitive. Absent such explanations, the list cannot be used pragmatically to advise companies. For instance, information on turnover is often published by market research

companies, in many sectors, including very recent data, and this can serve as a useful tool for companies to benchmark themselves against competitors, assess the impact of their competitive actions and accentuate competition to regain market shares.

Secondly, The APDC considers that there is a difference in degree between information which is "readily accessible to competitors" on the one hand and information that is not more costly to obtain for buyers and companies unaffiliated to the exchange system than for the companies exchanging the information (§82).

Indeed, information may be readily available for all operators in the market, but at cost. In such cases, the information exchange, which is designed to reduce such costs for the participants in the exchange, should not necessarily be considered as having anti-competitive effects, unless the costs to access such information for other operators are so high that the information exchange significantly disadvantages the operators which are not part of the information exchange.

Thirdly, it should be noted by the Commission that Example n° 6 provided in §103 contains facts which were the precise object of a case brought before the French Competition Council (case 03-D-17 of 31st march 2003) which was overruled by the Paris Court of appeal. On identical facts, the Competition Council had considered the information exchange to be anti-competitive (because the exchange made the information more easily accessible at lower costs for petrol stations).

However the Paris Court of appeal, on 9 December 2003, annulled the Competition Council's decision, considering that the information exchange system on prices of gasoline between petrol stations on highways, although it favoured a more rapid implementation of individually determined commercial strategies, did not amount to collusion between the companies designed to restrict competition. The APDC considers it extremely unfortunate that the Draft Guidelines draw upon a case which was considered as not being anti-competitive upon appeal.

The APDC invites the Commission to (i) include examples of information that is deemed to be sensitive in paragraph 81; (ii) clarify the degree of cost at which information ceases to be readily available in paragraph 82; (iii) delete the example provided in paragraph 103

3.6 Issues relating to efficiency gains

It is unclear whether the examples provided in §91 actually refer to exchanges of information or rather to the individual publication by companies of their results in terms of market shares, in which case the exchange should not even fall within the scope of Article 101(1). Likewise, §92 refers to cases of "Information exchange that is genuinely public", i.e. to information exchanges which should not be considered as falling within the scope of Article 101(1);

The APDC regrets the focus in footnote 59 on "practices such as price matching or price beating guarantees as these could deter competitors from lowering their price". Indeed, these comments seem to assume that such pricing commitments have negative effects on competition and should be prohibited, although they clearly can have positive effects for competition.

The APDC invites the Commission to (i) elaborate on the examples contained in paragraphs 91 and 92

3.7 Pre-merger information exchanges

From a practical standpoint, information exchanges undertaken in a pre-merger context should be dealt with in a separate manner in order to entitle the parties to a merger to accomplish necessary due diligences and to prepare their future integration. Provided that appropriate confidentiality agreements are entered into and that the information exchanges do not give rise to any anticipated implementation of the merger, such exchanges should generally be considered as having no anti-competitive object or effect, considering that their only goal is to prepare the merger.

The APDC invites the Commission to include guidance on permissible information exchanges in the context of pre-merger contacts

4 RESEARCH AND DEVELOPMENT AGREEMENTS

The APDC welcomes the Commission's overall efforts to clarify and rationalise this section of the current Guidelines. In particular the APDC appreciates the addition of:

- clarifications regarding the definition of the relevant market and the method of calculation of market shares in the technology market (paragraph 119);

- a clear reference to the need to "*take into account the initial sunk investments made by any of the parties and the time needed and the restraints required to commit and recoup an efficiency enhancing investment*" when applying Article 101(3) TFUE to R&D agreements (paragraph 139);

- an explanation regarding the time of the assessment of R&D agreements under Article 101(3) TFUE, in particular where *"the restrictive agreement is an irreversible event*" (paragraph 140).

4.1 Areas requiring further guidance

The APDC notes that while the R&D sections of the (current and draft) Guidelines provide useful guidance for the general assessment of a R&D agreement under Article 101(1) and 101(3) TFUE, it provides very little guidance as to the practical application of the R&D BER except with regards to the definition of the relevant market and the application of the market share threshold.

In this respect, for the benefit of legal certainty, the APDC would welcome further guidance by way of additional examples on situations which most commonly arise in practice and/or give rise to difficulty in self assessment. Such examples could notably deal with:

- - as the case may be, where this provision remains unchanged, the conditions of the "equal access" to the results of the joint R&D and the *rationale* for such requirement;

- another situation where, in the Commission's view, the agreement would be considered an irreversible event; and

- an application of the methodology for the calculation of market shares in technology markets.

The APDC suggests that the Commission includes further examples illustrating common difficulties in self assessment

The APDC notes that the draft Guidelines tend to adopt a more restrictive approach towards R&D agreements. In particular regarding the potential competition concerns raised by R&D co-operation (§121), the deletion of the reference to the fact that, as a general rule, R&D agreements reduce du reduce duplicative, unnecessary costs (§40 of the current Guidelines) as well as the the deletion of any reference to the potential benefits of R&D co-operation for small and medium-sized enterprises (§41 of the current Guidelines). Further examples are the limitation of the acknowledgement of efficiency gains to those R&D agreements which combine complementary skills and assets (see §135 of the Draft Guidelines compared to §68 of the current Guidelines) and the introduction of a presumption that if the parties to an R&D agreement have very similar skills and assets, they will be unlikely to pass on the benefits of the co-operation on to consumers (§137 of the draft Guidelines).

It follows that the Draft Guidelines tend to show increased suspicion by the Commission towards R&D agreements. In this respect, the APDC would welcome a more balanced approach by the Commission as it is evident that *bona fide* R&D co-operation is pro-competitive and contributes to promoting technical progress.

The APDC invites the Commission to reconsider its apparent policy shift which may unnecessarily stigmatise R&D agreements

5 PRODUCTION, COMMERCIALISATION AND PURCHASING AGREEMENTS (GENERAL ISSUES)

5.1 Further guidance on the commonality of costs would be helpful

The Commission emphasises the concept of "commonality of costs" in order to distinguish problematic from unproblematic cases with respect to production agreements (where the production costs constitute an important part of the overall costs), purchase agreements and commercialisation agreements (where commercialisation constitutes significant costs). Yet, the guidelines neither elaborate on the risk of collusion which is ascribed to commonality of costs, nor do they determine a quantitative threshold of commonality. Companies will thus have difficulties in asserting under what circumstances and to what extent commonality of costs are problematic. The language used in the draft guidelines ("level which enables them to collude" (§168), "large proportion" (§173), "major part" (§181), "high degree of commonality of costs" (§208), "high proportion" (§237)) offers insufficient guidance and does not provide for sufficient legal certainty.

The APDC suggests that the Commission introduce a commonality threshold, and/or elaborate in more detail on the relationship between commonality of costs and the risk of a collusive outcome (for example, by giving concrete examples on collusion as a consequence of communality of costs) and/or refer to case law and past decision-making practices.

5.2 Further guidance on market access would be helpful

An important concept in distinguishing problematic and unproblematic forms of horizontal cooperation is market access. Where cooperation is necessary for market access, it should in principle not come under Article 101(1). Yet, market access is only addressed in very general terms or by way of examples (§28, examples in §180, 218, 232).

The APDC suggests that the guidelines address the concept of market access in a wider context and to set forth the standard of proof under which to evaluate whether cooperation is necessary for market access

6 PRODUCTION AGREEMENTS (SPECIFIC ISSUES)

6.1 Issues relating to commonality of costs

The draft guidelines appear to induce, from commonality of costs, a price increase of the input product (§ 172). However, where undertakings achieve economies of scale via joint production, they become individually and collectively more competitive vis-à-vis their competitors. Whether a high commonality of costs leads to collusion essentially depends on the competitive constraints from "outside" the production agreement. The APDC feels that this must be reflected in the Guidelines assessment; moreover, in markets with workable competition, economies of scale should be expected to be passed on despite high commonality of costs.

Given that the commonality of costs of joint production and distribution is typically higher than in cases of joint production or joint distribution, the competitive assessment of such forms of cooperation is more problematic (§160). Yet, example 7 (§186) suggests a somewhat more lenient approach to joint production and distribution than to situations where the parties cooperate solely on production. Clarification as to the approach to joint production and distribution would therefore be helpful in order to give businesses and their advisors a framework of analysis, and in particular to help them decide on whether they shall proceed by way of concentration or through cooperation below the threshold of full functionality.

The APDC suggests that (i) the relevance of external factors should be include in the Commission's assessment of commonality of costs and (ii) further guidance be provided regarding joint production and distribution agreements

6.2 The dichotomy between examples 2 and 9 must be addressed

The combined reading of examples two and nine leaves the reader somewhat perplexed. It is not clear why the assessment of the ninth example is less optimistic than the assessment of the second example. The analysis paragraph does not clarify the respective importance of the differences between the two examples, nor does it even make clear whether they exist. It also creates significant legal uncertainty as to the ninth example, in that the Commission will withdraw the benefit of the block exemption even though the joint market share of the parties is below the 20% threshold.

The APDC suggests that Commission elaborate more specifically on the pertinent criteria and their respective weight in its analysis, and in particular (i) capacity utilisation rate in the industry; (ii) market structure (Market share, market concentration, barriers to entry, buyers' countervailing power); and (iii) possibility of building the production facility individually

6.3 The Commission must elaborate on the meaning of "integrating the production and distribution functions of the agreement" in §155

The draft guidelines authorise price fixing in the context of joint production and distribution, if necessary for "integrating the production and distribution functions of the agreement" (§155 161). Given the importance of drawing a line between illegal price fixing and permitted horizontal cooperation, it is important that the Commission elaborate on the precise meaning of "integrating the production and distribution functions of the agreement". Moreover, it is questionable whether joint production and distribution should benefit from a more favourable treatment vis-à-vis selling prices than agreements limited to joint production.

7 PURCHASING AGREEMENTS (SPECIFIC ISSUES)

7.1 The analysis of multiple stage cooperation agreements should be clarified

There is no reference to the framework of analysis of agreements that combine different stages of cooperation in addition to purchasing. It would be useful to insert a paragraph explaining how the concept of "most upstream indispensable building block" (as opposed to the former "centre of gravity") applies to purchasing agreements which are part of a wider cooperation encompassing for example, joint production. Can such agreements be analysed under the "safe harbours" applicable to production agreements or do they always have to be analysed separately under the rules laid down in the section of the Draft Guidelines devoted to purchasing agreements?

8 COMMERCIALISATION AGREEMENTS (SPECIFIC ISSUES)

8.1 The notion of "indispensability" needs to be reviewed

One of the very few exceptions under which agreements on commercialisation can be considered as unlikely to create competition concerns relates to agreements which are indispensable to enter a market. Given the restrictive approach set out in the Draft Guidelines (see infra Section 11), the APDC suggests that more situations in which such agreements do not raise concerns be envisaged and described (such as example 3). In practice, it will often be extremely difficult to ascertain to what extent cooperation is necessary or indeed indispensable to access the market, and when it is simply useful. On the basis of the first and second examples in the guidelines, we see a risk in a retroactive review of the necessity of cooperation (see examples 1 & 2).

In addition, and more specifically, we suggest that §233 mentions, among the cases of penetration of a market, the specific situation of a consortium set up to meet the selection criteria of a tender (public or private) where the parties to this consortium could not reply to the tender alone.

The APDC suggests that (i) more examples of unproblematic situations relating to indispensability to enter a market be added, and (ii) the Guidelines provide guidance on the particular case of bidding consortiums

8.2 Joint promotion should be addressed

Joint promotion is not specifically addressed, despite the fact that it is of great practical importance, for example in the pharmaceuticals sector. There is only a general reference to

the concept of commonality of costs (§238), which seems to suggest that joint promotion is not problematic as such under competition law. Clarification on this point would be helpful.

9 STANDARDISATION AGREEMENTS

The ADPC welcomes the shift in the Commission's position concerning standardisation agreements, which can be inferred the combined reading of §169 and §258, towards a greater acknowledgement of their pro-competitive and positive effects on the economy as a whole. For analytical purposes §277 is a welcome addition in that it states in a clear manner the conditions under which all standard-setting agreements may fall outside the scope of Article 101 (1). Moreover, §290 signals a clear affirmation of the minor importance played by market shares in the assessment of standardisation agreements.

9.1 Standard setting organisation should not be held accountable for their failure to prevent an abuse of dominance occurring

It is understandable that the Commission addresses unilateral behaviour such as "patent ambush" under Article 102. However it is not sure whether it is really appropriate to assign responsibility under Article 101(1) to standard-setting organisations, in cases where these organisations have not implemented rules and principles considered by the Commission as suitable to prevent the occurrence of abuses of dominance (§280, 281). Indeed, these organisations will not benefit from the safe harbour provided by the draft Guidelines when they do not implement the principles and guarantees set out in §280 and §281, and may, consequently, find themselves in a situation where they could be held to infringe Article 101 (1) (§276).

The ADPC considers that the draft Guidelines should be clearer on the fact that whereas standardisation organisations can set up rules concerning IPR, their responsibility should not be sought under Article 101(1) when these rules have not been capable to prevent abuses of dominance by certain of its members. The draft Guidelines should not be construed as acknowledging some kind of collective responsibility for abuses of dominance. Abuse of dominance has to remain an issue of individual responsibility and should not be transferred to standard-setting organisations which are not equipped to prevent infringements and fight against abuses

The APDC suggests that the Commission rephrase paragraphs 280 and 281 so as to exclude any reference to liability being bestowed upon the standard setting organisations for failure to prevent an abuse of dominance

9.2 The *per se* approach regarding the discussion of licensing terms will hinder effective *ex ante* disclosure

The Guidelines seem to be in favour of unilateral *ex ante* disclosure of licensing terms (287, 267). However, by considering all forms of discussion between members of an organisation regarding licensing terms as a restriction by object, the Commission may discourage standard-setting organisations and their members from adopting *ex ante* disclosure rules, given the risk of automatic infringement related to discussions – whether limited or even accidental – regarding the conditions which have been disclosed. If the Commission wishes to encourage the development within standard-setting organisations of *ex ante* disclosure mechanisms of licensing terms concerning essential patents, such a restrictive approach should be abandoned.

Indeed, in the United States, although the FTC seems to have a more flexible position about talks between members on licensing terms disclosed *ex ante*, for which it applies the rule of reason, there are only a few standard-setting organisations which have implemented such *ex ante* disclosure rules. It is to be feared that such rules will not be successful in Europe if the Commission maintains the current *per se* approach to discussions between members regarding licensing terms. This would be regrettable as the *ex ante* disclosure of the most restrictive licensing terms is without doubt preferable to a simple commitment to contract on FRAND terms, given the lack of clear definition concerning FRAND terms and the difficulty to punish any failure to comply with these terms.

The APDC suggests that the Commission adopt a less strict approach regarding object based restrictions so as to enable companies to undertake* ex ante *disclosure without risking an infringement of Article 101(1)

10 RECOURSE TO OBJECT BASED RESTRICTIONS

The information contained in the Draft Guidelines pertaining to object based restrictions for each of the categories do not provide much additional guidance to what is contained in the general guidelines. Rather, they merely state the most common categories of agreements that are restrictive by object without providing any additional guidance on the factors that should be taken into account. Moreover the Draft Guidelines draw heavily on the judgement of the European Court of Justice ("ECJ") in *T-Mobile Netherlands* which held that for agreement to be restrictive by object it is sufficient that it is capable in a single case of restricting competition within the common market and that no link must be established between the practice and consumer prices. It follows that the approach envisaged by the Draft Guidelines is strict and consequentially the standard of proof necessary for establishing an object based restriction is low.

Although a finding of a restrictive object does not preclude the fact that the agreement can be caught by Article 101(3) – and indeed the Draft Guidelines do provide substantial guidance on the application of this provision – it does imply a shift in the burden of proof which rests solely on the relevant undertaking to prove that the conditions of Article 101(3) are fulfilled. Because of this burden that undertakings must bare as soon as the Commission – or a national Competition Authority for that matter – qualifies an agreement as restrictive by object, such a finding should require a more strenuous analysis than that set out in the Draft Guidelines. Indeed, in order to assess the anti-competitive object of an agreement, "regard must be had *inter alia* to the content of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms a part" and the analysis must reveal a "sufficient degree of harm to competition".[6]

Overall, the approach set out in the Draft Guidelines seems to be a step back from the general policy shift towards a more effects based approach of antitrust enforcement as set out for example in the Guidance Paper on the Application of Article 82 EC. Although the latter does not relate to the application of Article 101(1), it nonetheless serves as an indication of the Commission's general policy. Equally, in the guidelines on vertical restraints the Commission also applies a more effects based approach to the analysis of hardcore restrictions providing that where the undertakings substantiate that likely efficiencies result from the hardcore restriction and demonstrate that in general all the conditions of Article 101(3) are fulfilled, the

[6] ECJ, joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services v Commission*, paras 55, 58.

Commission will be required to effectively assess the likely negative impact on competition before making an ultimate assessment of whether the conditions of Article 101(3) are fulfilled.[7]

the APDC feels that the Commission should provide further guidance as to how object based restrictions are analysed, in order to avoid too heavy a reliance on precedent which sets a very low standard of proof for such a finding and proportionately increases the burden placed on undertakings to prove that the agreement satisfies the conditions set out in Article 101(3).

11 THE CONSULTATION PROCEDURE IS FLAWED

11.1 The organisation of the consultation does not allow for debate

The Commission has not provided stakeholders with an orientation document that would explain the Commission's priorities in revising the existing legislation. Even though stakeholders have had the opportunity to make their voice heard on what the major changes should be, there has been no reporting on how the different contributions were taken into account by the Commission. The resulting difficulties in determining the exact scope of the debate, implies that the input of the interested parties risks being less meaningful that it could have been with better communication on part of the commission.

The process adopted is unlike the Commission's usual approach regarding the revision of EU legislation in general and of competition law in particular. In most cases, such as the revision of the Merger Regulation or the adoption of Regulation No. 1/2003, the Commission chose to resort to an effective consultative approach beginning with the publication of a comprehensive report setting forth the current situation, the stakes of the revision and prospective ideas on how the existing legislation could be improved. All stakeholders and the general public could then comment on the report.

Even for informal guidance, the Commission has previously adopted a consultation process more conducive to real debate. Regarding the Article 82 review, the Commission's three-year reflection was opened by a speech by Neelie Kroes, stating the major issues that would be assessed by the Commission, shortly followed by the publication of a Staff Discussion Paper summarising the Commission's orientations on the matter. After a consultation period, the Commission conducted a public hearing, followed by more public debate, before eventually adopting its Guidance on the enforcement priorities in applying Article 82 (EC) to abusive exclusionary conduct by dominant undertakings.

No such process has been resorted to in the present case. The first consultation was launched without the support of any written document and the second one is based on revised texts, the ins and outs of which have never been specified. The Commission did not even circulate a blackline of the documents, which would have allowed the interested parties to clearly see the changes made to current legislation.

In order to improve the quality of the debate, the APDC requests that the Commission publish an orientation document as soon as possible that would set forth the options retained by the Commission and summarise the main issues open for discussion.

[7] European Commission Guidelines on vertical restraints, OJ 2010/C 130/01, §47.

11.2 The Commission must assert what changes are merely stylistic

The textual changes brought about by the revision seem to be mostly stylistic. This induces three main comments. First of all, purely formal changes in such an important piece of legislation may not be welcome insofar as they may undermine the legal certainty of the market players. Secondly, it could be difficult for undertakings to distinguish between changes that imply a real modification of the rules and changes that should be considered as mere wording clarifications. It is all the more problematic that these rules will also be implemented by national jurisdictions, which may come up with diverging interpretations of the modifications. Thirdly, as mentioned above, no blackline of the changes have ever been circulated, which means that stakeholders are forced to appreciate by themselves the modifications of the texts.

If the Commission persists in applying minor modifications to the wording of the guidelines and block exemption regulations, then it should make it clear that they are not intended to modify the existing rules nor the decisional practice of the Commission. On the other hand, real changes should be clearly marked for discussion.

The APDC suggests that the Commission clearly differentiate between stylistic and veritable changes in the final Guidelines

11.3 The prior consultation of the ECN is problematic

It may be assumed that the real consultation has already taken place between the national competition authorities and the Commission. Whereas it is natural that national competition authorities should be consulted on the revision of EU competition law, it must be deemed problematic that the national bodies have a chance to comment on the actual drafts before they are published for open debate. Indeed, national competition authorities are no different from other stakeholders and should not be given a prominent voice in the discussion.

As in the case of the vertical package, it is likely here that the Commission chose to handle the matter internally within the European Competition Network, where a compromise leading to the recently published draft documents was probably found. Under such an hypothesis, the main negotiations would already have taken place between the competition authorities; it is therefore hard to imagine that the present consultation would lead the Commission to change its mind and go back on a compromise that was certainly not easy to reach. Also bearing in mind that no real debate has been organized, with no issues identified and no specific fields open for discussion, it may be feared that the current consultation process is mostly formal and will not lead to any significant modification of the draft guidelines and block exemption regulations.

The APDC suggests that future public consultations be organised prior to the internal ECN debate in order to make sure that all voices will be equally heard

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PART II: THE DRAFT R&D REGULATION

The APDC sets out below its main comments regarding the draft Commission Regulation on the application of Article 101(3) TFUE to categories of research and development agreements (the draft "**R&D BER**").

1. NEW DEFINITIONS (ARTICLE 1)

1.1 Contract product (Article 1(7))

In order for the definition of "Contract product" to clearly include the goods and services arising out of the joint R&D, the APDC recommends to refer in this definition as well as throughout the R&D BER to a Product (with a capital P).

1.2 Specialisation in R&D / specialisation in exploitation (Article 1(12) and (13))

The APDC welcomes the addition of these new definitions which, in combination with Article 1(11), provide useful clarification as to the situations where the Commission considers that R&D is carried out jointly by the parties. However, certain comments can nonetheless be made.

First of all, the APDC notes that pursuant to these definitions the following agreements are now expressly excluded from the scope of the joint R&D so that they may not benefit from the exemption awarded by the R&D BER:

- agreements providing that one party carries out all the R&D and the other party merely finances these activities or exploits the results;

- agreements providing that only one party produces and distributes the contract products on the basis of an exclusive licence granted by the other parties.

The APDC considers that there is no policy reason that would justify the exclusion of such agreements from the scope of the exemption in so far as they may also be pro-competitive.

Secondly, the APDC notes that there is a contradiction between the exclusion of these agreements from the scope of the joint R&D and Article 1(11)(b) pursuant to which R&D or exploitation are considered to be carried out jointly where the work involved is jointly entrusted to a third party. Indeed, in practice:

- if two parties jointly entrust a third party to carry out the R&D, the third party will carry out all the R&D while the other parties will merely finance these activities or exploit the results; and

- if two parties jointly entrust a third party to carry out the exploitation, the third party will produce and distribute the contract products on the basis of an exclusive licence granted by the other parties.

Under Article 1(11)(b), these two scenarios will be included in the definition of joint R&D so that they will be covered by the exemption in so far as a third party is involved.

The APDC recommends that the definitions of specialisation in R&D and specialisation in exploitation be modified to expressly include these scenarios.

1.3 Potential competitors (Article 1(16))

The APDC welcomes this new definition as it provides greater guidance as to the agreements which are subject to the market share cap. However, the APDC does have two issues with the current definition which generally coincide with the comments on potential competitors in the Specialisation BER:

First of all, the definition should make it clear that the three-year period corresponds to the necessary time to supply the relevant product, technology or process on the market rather than the necessary time to undertake the investments aiming at supplying such product, technology or process.

Secondly, in any event, the three-year time period appears too long[8] as virtually any undertaking may fall into this category, all the more so if the criterion is to undertake the investments rather than actually supplying the products on the market (cf. above 1.1). Practically, such an extension of the notion of competing undertaking would considerably limit the benefit of Article 4.1 whereas this article is central to the R&D BER.

2. ANCILLARY RESTRAINTS (ARTICLE 2)

The APDC notes that the draft R&D BER has deleted Article 1.2 of the current R&D BER which expressly provides that the exemption covers "provisions contained in research and development agreements which do not constitute the primary object of such agreements, but are directly related to and necessary for their implementation".

While it stems from Article 2.1 of the draft R&D BER, that R&D agreements are exempted in their entirety subject to Articles 3, 4 and 5, the APDC considers that the express reference to the exemption of ancillary restraints provides greater legal certainty to the parties.

As regards specific ancillary restraints, the APDC acknowledges (from an *a contrario* interpretation of Article 5(a)) that non-compete obligations which prevent the parties from carrying out competing R&D during the agreement are covered by the exemption. In this respect, the APDC would also find it useful for the R&D BER to expressly authorise non-compete clauses whereby the parties commit not to sell any products competing with those resulting from the R&D co-operation for the duration of the joint exploitation of the results by the parties. Such clauses are indeed indispensable in order for the co-operation to be successful and allow the parties to recoup their investments.

Finally, if as the APDC believes, the aim of Article 2.2 of the draft R&D BER is to set out the rules to determine whether an agreement falls within the scope of the R&D BER or other block exemption regulations (such as the TTBER), the APDC suggests that the wording of this provision be clarified.

3. DISCLOSURE OF INTELLECTUAL PROPERTY RIGHTS (ARTICLE 3.2 AND RECITAL 12 OF THE PREAMBLE)

The APDC understands that this provision has been added in order to prevent "patent ambush" from one of the parties to the R&D agreement in line with the latest case law of the

[8] As a comparison, the technology transfer block exemption regulation (the "***TTBER***") (article 1(j)) refers to a "timely" entry in the market while the guidelines on vertical restraints (§27) refer to "a short period of time normally not longer than one year".

Commission.[9] While the APDC perfectly understands the legitimate purpose of this provision, it considers that it should be made clear that the scope of the disclosure obligation only applies to the "existence" of intellectual property rights and not to the subject matter of such rights. To this end, the APDC suggests to amend the wording of Article 3.2 as follows:

> "The parties must agree that prior to starting the research and development all the parties will disclose **the existence of** all their existing and pending intellectual property rights in as far as they are relevant for the exploitation of the results by the other parties."

In addition, the current drafting of recital 12 of the preamble of the draft R&D BER differs slightly from Article 3.2 as it provides that the exemption is only available "if prior to starting the research and development the parties agree that all the parties will disclose in an open and transparent manner all their existing and pending intellectual property rights in as far as they are relevant for the exploitation of the results by the other parties." In order to avoid any ambiguity as to the scope of disclosure prior to the start of the R&D, the APDC recommends that this paragraph should be amended and mirror the wording of Article 3.2.

4. EQUAL ACCESS TO THE RESULTS OF THE JOINT R&D (ARTICLE 3.3 AND RECITAL 11 OF THE PREAMBLE)

First of all, for the avoidance of doubt, Article 3.3 should make it clear that the access to the results of the joint R&D is without prejudice of the possibility for the parties to allocate the exploitation rights between themselves by way of specialisation in exploitation.

Secondly, the APDC would also welcome further clarification as to the scope of the mandatory "access" to be granted by the parties to the results of the joint R&D. In particular, the R&D BER should clarify that such access may be granted subject to the payment of royalty fees and/or certain restrictions such as sublicensing restrictions.

Thirdly, as regards the addition of a requirement for equal access to the results, the APDC considers that it may give rise to a great level of uncertainty as to its interpretation. In this respect, the draft R&D BER should clarify whether the equality requirement applies to the scope of the results or to the conditions of access in terms of royalty fees for instance.

More generally, the APDC considers that the requirement for such equal access would not be justified in situations where the parties to the R&D agreement have committed unequal resources to the R&D efforts and would act as a disincentive for the parties to enter into R&D co-operation in such situations as they would not benefit from the safe harbour offered by the R&D BER.

Finally, the APDC submits that the parties (all the more so when they are non-competitors) should remain free to decide whether or not they wish to exploit the result of the joint R&D according to their respective business interests. This possibility should not be reserved to research institutes, academic bodies and undertakings which supply R&D as a commercial service without normally being active in the exploitation of the results and should be offered to any party without risking to lose the benefit of the R&D BER.

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[9] Commmission decision of 9 December 2009, case n° COMP/38.636 – *Rambus*.

5. ACCESS TO PRE-EXISTING KNOW-HOW (ARTICLE 3.4 AND RECITAL 13 OF THE PREAMBLE)

The APDC considers that the general requirement for the parties to an R&D agreement which does not include joint exploitation to grant reciprocal access to their pre-existing know-how if it is "indispensable for the purposes of its exploitation of the results" is too extensive.

The APDC submits that such a requirement:

(i) is not necessary when one party to the agreement undertakes not to exploit the results of the joint R&D (cf. our comment in section 4 above);

(ii) should be limited to the pre-existing know-how which has been contributed to the joint R&D; and

(iii) should be subject to any third party rights on this pre-existing know-how.

In addition, the possibility for the parties to charge a license fee in exchange for the access to their pre-existing know-how should also be included in Article 3.4 (it is only mentioned in recital 13 of the preamble).

6. MARKET SHARE THRESHOLD (ARTICLE 4.2)

The APDC considers that the 25% market share threshold is unduly low with regards to (i) the pro-competitive impact of the vast majority of R&D agreements and (ii) the extensive definition of potential competitors. Indeed, as mentioned above, under the draft definition of potential competitors most R&D agreements would qualify as agreements between competitors and thus be subject to the market share cap of Article 4.2.

The APDC encourages the Commission to take the opportunity of the revision of the current regulation to increase this threshold to at least 30% as such level of market share does not normally give rise to competition law concerns.

7. LIMITATION OF THE EXEMPTION TO A 7-YEAR TIME PERIOD (ARTICLES 4.1, 4.2 AND 4.3)

As a general remark, the APDC notes that there is no justification to the limitation of the exemption to a 7-year time period in case of R&D agreements involving joint exploitation of the results. On the contrary, given that R&D agreements are often long-term agreements involving high level of risks and investments for the parties, such a limitation to the duration of the exemption does not appear adapted. Besides, it introduces uncertainty into the continued viability of the R&D co-operation beyond the 7-year period thereby creating disincentive to the co-operation in the first place.

The APDC suggests that this time period should be extended to the full duration of the IP rights on the contractual products. Such amendment would be consistent with (i) the deletion of the reference to the 7-year period in the hardcore restrictions (see below) and (ii) the Commission's amendment in the draft Guidelines where it has deleted all reference to the 7-year period (contained in §73 of the current Guidelines) and replaced it by the following statement (§139 of the draft Guidelines):

"The risk facing the parties and the sunk investment that must be committed to implement the agreement can thus lead to the agreement falling outside Article 101(1) or fulfilling the

conditions of Article 101(3), as the case may be, **for the period of time needed to recoup the investment**. Should the invention resulting from the investment benefit from any form of exclusivity granted to the parties under rules specific to the protection of intellectual property rights, the recoupment period for such an investment will generally be unlikely to exceed the exclusivity period established under these rules." (emphasis added)

For the sake of clarity and consistency, the APDC finally recommends that Articles 7.2 and 7.3 be moved and included just after Article 4.3. Besides, these articles should make it clear that the exemption should only expire where the relevant markets shares exceed 25% (or 30% as the case may be) during at least one full year.

8. HARDCORE / EXCLUDED RESTRICTIONS (ARTICLES 5 AND 6)

The APDC welcomes the removal of the restriction on active sales after a 7-year period from the list of hardcore restrictions and its replacement by the restriction on active sales into territories or to customers which have not been exclusively allocated to one of the parties.

As regards Article 5(a), the APDC refers the Commission to its comments above in section 2.

Furthermore, the APDC also welcomes the creation of Article 6 and the incorporation into the excluded restrictions list of (i) the prohibition to challenge the parties' relevant IP rights and (ii) restrictions relating to the licensing of the results to third parties.

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PART III: THE DRAFT REGULATION ON SPECIALISATION AGREEMENTS

1. MARKET SHARE TEST

The APDC would welcome some guidance from the Commission in the new Regulation on how the market share test should be applied to new markets. If a new product or service is created by virtue of a specialisation agreement and constitutes a market in itself, should the market share threshold provided in the Regulation apply immediately, meaning in essence that the parties will be covered by the Block exemption for two years only according to Article 5 (market shares being by definition equal to zero the calendar year preceding the creation of the new market and equal to 100 % the year of the creation of the new market)? The APDC considers that such a duration could be too short in case of innovation and would welcome some specific provisions in the new Regulation entitling the parties concerned to benefit in such a case from a longer exemption period, considering the benefits which such agreements should normally provide to consumers.

More generally, the APDC would welcome the Commission's confirmation that it would be available to be informally consulted on market definitions on which the parties to a specialisation agreement would rely in order to assess their market shares under the Regulation. Indeed, in practice the assessment of the markets concerned can prove to be a difficult exercise, in particular when there is no previous case law. The safe harbour which the Block Exemption Regulation is intended to provide can therefore only produce its full effects if companies can obtain some form of comfort on the definition of markets on which they are to assess their market shares and determine whether or not they can benefit from the Block Exemption.

2. POSSIBILITY FOR THE COMMISSION TO WITHDRAW THE BENEFIT OF THE BLOCK EXEMPTION REGULATION

The new draft Regulation provides, in point 13 of the preamble, an example of a situation where the Commission could withdraw the benefit of the Regulation: where the relevant market(s) is very concentrated and competition is already weak, in particular because of the individual market positions of other market participants or links between other market participants created by parallel specialisation agreements.

The APDC welcomes this guidance provided by way of examples. In practice however, it could be extremely difficult for a company to appreciate the state of the market and in particular to which extent there are parallel specialisation agreements. The situation could therefore occur where a company entered into a specialisation agreement legitimately thinking that it benefited from the Block Exemption, because it ignored the existence of parallel specialisation agreements, and later on is told by the Commission that it actually could not benefit from such exemption. The APDC would therefore appreciate guidance from the Commission as to whether it would, in such a case, withdraw the benefit of the Regulation for the future only or also for the past, and whether in the latter case it would consider not imposing fines on companies which legitimately thought that they were within the Regulation's safe harbour.

3. PREPARATION OF SERVICES (ARTICLE 1.6)

Where the currently applicable Regulation refers to the provision of services, the new draft Regulation proposes to use instead the term "preparation of services", defined in Article 1.6 as "activities upstream of the provision of services to customers".

The APDC understands in this context that the provision of services itself would no longer be covered by the Block Exemption Regulation, except to the extent that it is treated under Article 2.3.b as a joint distribution in addition to the specialisation agreement on the preparation of such services.

The APDC would however welcome some further clarification/explanations regarding what should in practice be considered as a "preparation of services". Would this concern the planning and elaboration of the services to be provided? All acts accomplished before the offer is effectively launched on the market (appointment of employees and representatives, creation of a dedicated company, conclusion of agreements for the future offer etc)? Would the launch of the offer itself on the market (advertisement etc) be considered as still being upstream of the effective provision of the service to customers?

4. RELEVANT MARKET (ARTICLE 1.7)

The new draft Regulation proposes to consider as a relevant market to assess market shares and therefore determine whether or not the Regulation applies, (i) not only the market to which the specialisation product belongs, (ii) but also, in case the specialisation products are intermediary products "which one or more of the parties fully or partly use captively" for the production of downstream products, the relevant product and geographic market(s) to which the downstream products belong.

The APDC would welcome some guidance from the Commission regarding what is a "full or partial captive use" for the production of downstream products. Is this a situation where a company either uses all the products for its own internal needs to manufacture a downstream product or uses at least a part of the products to that effect and sells the rest on the market?

5. POTENTIAL COMPETITOR (ARTICLE 1.12)

The new draft Regulation provides some further guidance on what should be considered as a potential competitor: it indicates that the investments to enter the market should not be a "mere theoretical possibility" and should occur within not more than three years.

The assessment of whether or not the entry is, not only realistic (current test), but also not "a mere theoretical possibility" could in practice be extremely difficult for companies. This additional requirement increases the burden of proof on companies regarding elements which the parties may actually not be in a position to demonstrate when they enter into the specialisation agreement. The APDC therefore respectfully invites the Commission to reconsider the opportunity of requiring that the companies demonstrate that potential competition is not a "mere theoretical possibility".

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