Co-operation agreements between competitors
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This Quickguide summarises the competition law assessment of co-operation agreements between competitors under EU competition law.

Topics covered include:

- Joint production, specialisation and sub-contracting
- Joint purchasing
- Joint sales and marketing
- Licensing of intellectual property rights
- Joint research and development
- Standardisation agreements
- Exchange of information

For further information on any of these areas please speak to one of the contacts listed on the final page of this Quickguide, or your usual Ashurst contact.
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1. Introduction

Short of mergers, strategic alliances and similar transactions, there are many ways in which competitors can collaborate within the bounds of competition law. Article 101 of the Treaty on the Functioning of the European Union (TFEU), together with its equivalents under the national laws of the EU Members States, is the key EU competition law provision in this context. Broadly, it prohibits agreements which, by object or effect, restrict, distort or prevent competition (Article 101(1) TFEU). However, agreements which can be shown to generate pro-consumer benefits which outweigh the anti-competitive impact may qualify for exemption, provided that the relevant conditions of exemption are met (Article 101(3) TFEU). The EU Commission has identified certain categories of horizontal agreement which can benefit from automatic exemption where they fall within the parameters set by the various "block exemption" regulations described in this Quickguide.

If not exempted (individually or automatically under a block exemption), an anti-competitive agreement is unenforceable and can give rise to the normal penalties under competition law (including potentially heavy fines and the risk of third party damages claims).

In December 2010, the EU Commission published updated guidelines on the application of Article 101 to horizontal co-operation agreements (the Guidelines). At the same time, revised "block exemption" regulations were issued providing for automatic exemption under Article 101(3) for certain types of "specialisation agreements" and "research and development agreements".

This Quickguide provides an overview of the areas covered by the Guidelines, together with horizontal co-operation in the context of the licensing of intellectual property rights between competitors (which benefits from a separate block exemption with accompanying guidelines). It will commence with an overview of key legal points for the assessment of agreements between competitors, before considering the following types of co-operation between competitors:

- joint production (e.g. two competitors source an input for their products from a jointly owned production facility rather than producing independently), "specialisation" (where one party ceases to produce, or reduces production of, a certain product and purchases it from the other) and sub-contracting (where parties do not cease or reduce production, but buy additional volumes from a competitor);
- joint purchasing;
- joint sales/marketing/distribution (referred to in the Guidelines as "joint commercialisation");
- licensing agreements, whereby a business grants a licence to an actual or potential competitor to further develop and/or exploit an existing intellectual property right (IPR);
- research and development agreements, whereby competitors agree to share and/or sub-contract R&D initiatives with each other;
- standardisation agreements, whereby competitors will come together to design a common standard for inter-operability between competing products and/or minimum quality/safety thresholds; and
- exchange of information.

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2. What is "horizontal co-operation?"

"Horizontal co-operation" means agreements or arrangements between businesses which operate at the same level of the supply chain, i.e. actual (or potential) competitors, for example a joint R&D project between competing technology businesses or a sales and marketing joint venture between competitors. By contrast, "vertical" arrangements are agreements between businesses which operate at different levels of the supply chain, for example, a supply contract from a raw materials supplier to a manufacturer or a distribution arrangement between a manufacturer and a retailer.4

Where vertical arrangements are entered into between competitors, the key issue is to identify whether there remains a horizontal element to the agreement. For example, an agreement between two manufacturers of a particular product, whereby the second manufacturer agrees to distribute on behalf of the first manufacturer, is strictly speaking not at the same level of the supply chain (i.e. it involves the provision of "vertical" distribution services to a manufacturer). However, given the competitive relationship of the two parties in the upstream manufacturing market, it will fall to be assessed as a horizontal arrangement. Even "vertical" arrangements between competitors will therefore fall in most circumstances to be assessed as horizontal co-operation.

The potential for arrangements between competitors to engage Article 101 TFEU is high, reflecting the key principle, restated in the Guidelines, that competing undertakings must determine their competitive strategy independently of each other. The legitimate forms of horizontal co-operation discussed in this Quickguide operate as carefully controlled exceptions to that general rule. If the conditions for these exceptions are not met, then there is a high risk that the co-operation will breach Article 101 and may even be categorised as a form of cartel. Any formal agreement between actual or potential competitors which, however indirectly, potentially affects the way they compete with each other therefore requires careful legal assessment.

3. The assessment of agreements between competitors

All agreements between competitors are likely to raise the following common issues:

- **Cartel risk**: competitors must always be very careful not to stray into cartel territory as the penalties are severe (in addition to fines of up to 10 per cent of aggregate worldwide group turnover and potential liability for private damages actions, criminal sanctions may be imposed in some jurisdictions including the UK and France). Any arrangement between competitors which involves co-operation resulting in joint price setting, output limitations, market or customer sharing, or bid-rigging is at risk of being categorised as a cartel, subject to the very limited exceptions set out below.

- "Spill-over" effects: caution must be exercised to ensure that the negotiation and/or implementation of legitimate co-operation agreements do not spill over into illegal liaison with a competitor. Practical controls will include:
  - keeping agendas and minutes for all meetings;
  - putting in place strict controls to govern the exchange and use of confidential information;
  - exercising discipline to keep the co-operation strictly limited by the boundaries of the formal agreement between the parties; and
  - giving competition law compliance training to the personnel responsible for implementing the co-operation arrangement.

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These steps should help to ensure not only that the "wrong" things are not discussed but also that the parties can demonstrate their good faith compliance.

- **The "counterfactual"**: where the arrangements do not clearly have an anti-competitive objective (such as a cartel), the competitive impact of an agreement is measured by reference to what would have happened in the absence of the agreement – known as the "counterfactual". Thus, if competitors could not undertake the project unilaterally because, for example, the co-operation draws on complementary not overlapping skills, or because the project would be too costly or risky for one party alone, then there may be good arguments that there is no restriction of competition which might otherwise have taken place.

- **The market positions of the parties (and their rivals)**: the lower the market shares of the parties, the less impact the arrangement will have on competition. In addition to the general 10 per cent *de minimis* threshold, the block exemptions and the Guidelines set out "safe harbour" thresholds below which an agreement is assumed not to generate competition concerns (discussed further below).

- **The level of efficiencies generated**: the greater the costs savings which the parties can demonstrate, the greater the likelihood that the arrangements will be regarded as pro-competitive, but on condition that the parties can demonstrate that such cost savings will be passed through to customers (which the Guidelines indicate is less likely if the parties have strong market positions). Efficiencies which merely increase margins and profits for the parties are not pro-competitive efficiencies.

- **Remaining scope for competition**: as a general principle, the closer the arrangement is to the end user/customer, the greater care is required, because there is less scope for competition between the parties outside the agreement. Accordingly, pure production or purchasing arrangements, where there will still, for example, be competition on the price of the end products, are less likely to run into difficulties than joint sales/marketing, where end prices may be set jointly. The proportion of costs (in particular, variable costs) which the parties have in common as a result of the co-operation will often be important. If the joint activities constitute a relatively small part of their variable costs (for example, joint production of just one of a number of component parts of an end product), considerable scope for competition downstream should remain on price, quality, related services, etc.

- **Indispensability of any restrictions**: any proposed restrictions in the collaboration arrangements should always be assessed to consider whether they are necessary to achieve the intended benefits of the co-operation. If they are not, there is a significant risk that they will be unenforceable (and could potentially lead to fines/damages actions). Similarly, any exchange of commercially sensitive information should be limited to whatever is strictly necessary to achieve the co-operation (both in terms of content and in terms of who receives it).

- **Key effects of the self-assessment regime**: the EU competition regime is based on self-assessment (as are many national regimes), i.e. the parties must reach their own conclusions on whether the agreement breaches Article 101(1) and if so, whether the Article 101(3) exemption applies. This has important implications. First, an incorrect analysis as to infringement/exemption can give rise to an agreement being entered into which is subsequently found to be illegal, unenforceable and which carries a risk of fines and private litigation challenges. Secondly, it is not possible to obtain a permanent "exemption" or the legal certainty of a formal clearance. Indeed, since the analysis is based on market conditions, the legality of the agreement can change over time as markets develop. The original self-assessment conclusions may therefore require regular reappraisal. Thirdly, the self-assessment regime means that there are relatively few recent agreements which have a very low impact on the market will fall outside the competition rules under the de minimis rules, subject to certain exceptions (such as cartel-like arrangements which have as their object the prevention, restriction or distortion of competition). Short of "object" infringements, agreements between competitors with a combined market share of less than 10 per cent will not normally be caught by Article 101(1) on the basis that the competitive impact is too small to be of concern.

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decisions of the competition authorities from which guidance can be drawn – hence the importance of the Guidelines.

- **Collaborative agreement or merger?** Finally, some co-operation arrangements may go so far as to create a stand-alone business, in which case it might constitute a merger, and be subject to the merger control regime rather than Article 101. There are key competition law advantages to adopting a merger structure. In particular, the tests applied are generally less onerous than under Article 101 and a permanent and formal clearance decision is obtained for the lifetime of the joint venture. As such competition law considerations may influence the structure of the co-operation arrangement.

4. **Joint production/specialisation/sub-contracting**

Defined types of joint production and specialisation agreements fall within the revised specialisation agreement block exemption (SBE).6 Otherwise guidance is provided in the Guidelines. Specialisation is where one party ceases to produce, or reduces production of, a certain product and purchases it from the other (this may be done on a reciprocal basis, where each manufacturer withdraws from a market and sources the products from the competitor, or on a unilateral basis).

Other types of sub-contracting between competitors (described by the Commission as sub-contracting with a view to expanding production, for example, contract manufacturing agreements) are not covered by the block exemption, but similar principles apply as a result of the Guidelines. The Commission’s Sub-contracting Notice7 may also be relevant.

The SBE exempts all joint production and specialisation agreements (including associated ancillary intellectual property licences and exclusive purchasing and supply obligations, as well as associated joint distribution) provided:

- the parties' combined market share on the relevant markets does not exceed 20 per cent; and
- there are no "hardcore" restrictions (i.e. price fixing, output limitation, customer/market allocation), save that the parties are permitted to:
  - to agree the prices to be charged to immediate customers where the arrangements also involve joint distribution;
  - to agree provisions on the agreed amount of products in the context of specialisation; and
  - to set capacity and production volume in the context of a joint production agreement.

Note that distribution in this context includes sales to downstream customers and that joint distribution is defined to include not only where the parties carry out sales through a joint team or organisation/entity, but also where they jointly appoint a third party distributor (provided that the third party is not an actual or potential competitor of the parties).

Sub-contracting with a view to expanding production is not covered by the SBE, but the Guidelines provide that the 20 per cent market share cap also applies.

In circumstances where the 20 per cent market share cap is exceeded (or hardcore restrictions are included), most of the generic issues listed in section 3 above are likely to be relevant in determining whether the co-operation restricts competition contrary to Article 101(1), and if so, whether an Article 101(3) exemption is merited. Where hard-core restrictions are included, exemption is unlikely.

With specific reference to joint production/specialisation arrangements involving joint sales/distribution, the Guidelines make clear that they may still be exemptible even above the 20 per cent cap, but provided that the joint sales are a necessary element in the overall scheme: in other

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7 Commission Notice concerning its assessment of certain sub-contracting agreements in relation to Article 101(1) of the TFEU, OJ (1979) C1/2.
words, the parties would not otherwise have entered into the joint production arrangement (the parties would also need to demonstrate that the arrangement generates significant efficiencies that will be passed on to consumers). The Commission also comments that while production agreements involving commercialisation functions, such as joint sales/marketing, carry a higher risk of restrictive effects, such arrangements are generally less likely to restrict competition than stand-alone joint sales/marketing arrangements.

5. Joint purchasing

The Commission recognises that joint purchasing arrangements can often be pro-competitive because they allow smaller rivals to achieve similar purchasing economies to larger competitors, which can lead to enhanced competition, for example, in the form of lower prices and/or better quality products or services.

The analysis of joint purchasing arrangements is relatively complex in two respects:

- **they involve both horizontal and vertical elements**: the horizontal arrangements between the competitors which are purchasing jointly, and the vertical supply arrangements between the suppliers and the co-operating purchasers' group, and in some cases the downstream supply arrangements between the purchasing group and its members. The Guidelines indicate that the horizontal elements must be analysed and if this analysis suggests there are no horizontal concerns, the vertical agreements should then be considered under the Vertical Agreement Block Exemption and the Guidelines on Vertical Restraints; and

- **there are two types of market that need to be considered**: the purchasing market(s) on which the parties purchase the relevant products, and the selling market(s) on which they sell their own products. If the relevant input products/services are used for a variety of different purposes/uses and/or across a different geographic area than the collaborating purchasers are active on, the parties’ market positions on the purchasing market(s) and the selling market(s) may be very different. The Guidelines make clear that, whilst both markets are relevant, the parties’ positions on the selling markets are more important. Competition concerns are less likely when the parties do not have market power on the downstream markets.

The Guidelines indicate that in most cases it is unlikely that competition concerns will arise if the parties have a combined market share of not more than 15 per cent on both the purchasing market(s) and the selling market(s). This assumes of course that the arrangements do not involve any hardcore restrictions. In this context, an agreement between the parties to the joint purchasing arrangement on the purchase prices to be paid under the arrangement is not viewed as a hardcore restriction.

If the 15 per cent market share cap is exceeded, most of the generic issues referred to in section 3 above will again be relevant. The Guidelines also make a number of other points of specific relevance to joint purchasing arrangements, including:

- if the co-operating purchasers are active in different selling markets, for example, the purchase market is international, but the selling markets are national or local and the parties are active in different geographic selling markets (and cannot be regarded as potential competitors in each other’s markets), the arrangements are unlikely to be problematic even if the parties have significant market shares in their respective selling markets;

- the Commission suggests that concerns regarding the exchange of commercially sensitive information (such as purchase prices and volumes) can be minimised where the data is collated by a joint purchasing agency which does not pass on the information to its members; and

- the Guidelines recognise that obligations to purchase exclusively through the co-operation may sometimes be indispensable to generate sufficient volumes and hence buying power, but this needs to be assessed in each case.

Finally, it is worth noting that in its April 2010 short-form opinion on a joint purchasing agreement between Palmer & Harvey McLane and Makro Self-Service Wholesalers, the UK Office of Fair Trading
(the predecessor to the UK Competition and Markets Authority) arguably adopted a more benign approach to joint purchasing. In particular, it commented that:

- in the absence of parallel networks of similar joint purchasing agreements, such agreements are "unlikely" to cause harm where the parties have no downstream market power. This compares with the statement in the Guidelines that concerns are "less likely" in such circumstances; and
- it would generally only be concerned about a high level of cost commonality in circumstances where a merger between the two parties would be regarded as problematic. This is helpful given that, as noted above, the tests applied in a mergers context are less onerous.

6. Joint sales/marketing/distribution

The Commission describes such agreements generically as "commercialisation" agreements. This covers joint selling, where the parties agree on all commercial aspects related to the sale of the product, including the price. However, it also covers more limited forms of co-operation, such as agreements relating to distribution (e.g. one party appoints its competitor to distribute its products in a particular territory), after-sales services, advertising or logistics.

In this area, where the arrangements do not involve joint sales, the Guidelines indicate that competition concerns are unlikely to arise where the combined market share of the parties does not exceed 15 per cent.

However, arrangements limited to joint sales (as opposed to joint sales as part of a co-operation involving joint production/specialisation, described above) are regarded as having the object of restricting competition under Article 101(1) and therefore always need to be considered under Article 101(3). This also applies even if the arrangement is non-exclusive (i.e. where the parties can sell outside the co-operation), as long as it can be concluded that the agreement will lead to an overall co-ordination of prices. The Commission states that price fixing (i.e. joint sales) can generally only be justified if it is indispensable for the integration of other marketing functions and this integration will generate substantial efficiencies.

In assessing commercialisation agreements, most of the generic issues referred to in section 3 above will be relevant. A few other points from the Guidelines are worth highlighting:

- if competitors agree to distribute each other’s products on a reciprocal basis on different geographic markets, the agreement may be analysed as effectively an illegal market-sharing arrangement. Similar concerns can arise in relation to non-reciprocal agreements;
- a commercialisation agreement is unlikely to create concerns if it is objectively necessary to enter a market the parties could not have entered individually, e.g. because of the costs or risks involved; and
- in relation to commonality of costs, pure commercialisation agreements will not give rise to a high degree of commonality of costs for homogeneous products for which the highest cost factor is production. However, they may do if they concern products which entail high distribution/transport and/or marketing (e.g. advertising) costs.

7. IPR licences between competitors

The technology transfer block exemption (TTBE)\(^8\) provides for an automatic Article 101(3) exemption for licence grants between competitors of patent, knowhow, and software copyright IPRs provided that the combined shares held by the competing companies of the relevant technology or product market do not exceed 20 per cent.\(^9\) Where the shares of the parties exceed 20 per cent, the TTBE will not


\(^9\) The TTBE also covers IPR licences between non-competitors, not discussed in this note.
apply and it will be necessary to carry out an individual assessment to determine whether the licence would restrict competition and potentially infringe competition law.

The TTBE also recognises that, in order to effect the grant of the IPR licence, it may be necessary to impose certain restrictions upon the subsequent commercial activities undertaken by the parties. An example would include limiting the technological field of use in which the licensee may exploit the technology, where the licensor wished to reserve particular fields for its own benefit (and if it were not able to do so, would not grant the licence in the first place). In summary, such ancillary restrictions concerning the sale and purchase of products are likely to be permissible providing that they do not constitute the primary object of the agreement (which must be the IPR licence), are directly related to the production of contract products with which the licence is concerned, and do not involve any of the so-called "hardcore" restrictions (see below).

In this regard, great care is required to ensure that the licence does not include any of the hardcore competition restrictions set out in the TTBE. The presence of such restrictions is extremely difficult to justify under Article 101(3) and is likely to render the whole licence void and potentially expose the parties to the risk of fines and third party damages actions. The hardcore restrictions in an IPR licence between competitors under the TTBE include:

- any restriction of a party's ability to determine its resale prices to third parties;
- output limitations (with the exception of limitations on output in a non-reciprocal agreement or limitations imposed upon one of the licensees in a reciprocal agreement);
- the allocation of markets and customers – although this restriction is itself subject to a large number of exceptions which will be permissible, sometimes depending on whether the license agreement is reciprocal or not, including:
  - an obligation on the licensor and/or the licensee, in a non-reciprocal agreement, not to produce within the exclusive territory, or not to sell actively or passively to the customer group, reserved for the other party;
  - in a non-reciprocal agreement only, a restriction on the active (but not passive) sales by the licensee into the exclusive territory or to the exclusive customer group of another licensee, provided the protected licensee was not a competitor of the licensor at the time of the conclusion of its own licence;
  - an exclusivity obligation on the licensee to produce contract products solely for its own use, provided that the licensee is not restricted in selling the contract products actively and passively as spare parts for its own products;
  - an exclusivity obligation on the licensee, in a non-reciprocal agreement, to produce the contract products only for a particular customer, where the licence was granted in order to create an alternative source of supply for that customer;
- restrictions on the licensee's ability to exploit its own technology rights or a restriction of the ability of any of the parties to carry out R&D, unless such restriction is necessary to prevent the disclosure of the licensed know-how to third parties.

In addition, the following restrictions will not be exempted by the TTBE and will be void if not individually justified, but will not render the whole licence void:

- any direct or indirect obligation on the licensee to grant an exclusive licence or to assign rights, in whole or in part, to the licensor (or to a third party designated by the licensor) in respect of its own improvements to, or its own new applications of, the licensed technology (such a limitation is considered to discourage the licensee from conducting R&D); and

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10 Reciprocal licences are cross-licensing agreements where the licensed technologies are competing technologies or can be used for the production of competing products. Non-reciprocal licences are where only one of the parties is licensing its technology rights to the other party or where, in the case of cross-licensing, the licensed technologies rights are not competing technologies and the rights licensed cannot be used for the production of competing products. The TTBER treats reciprocal agreements more strictly (i.e. less favourably) from a competition perspective.
• any direct or indirect obligation on a licensee not to challenge the validity of IPRs held by the licensor or, in the case of a non-exclusive licence, clauses that allow the licensor to terminate in the event of a challenge.

The duration of the exemption lasts for as long as the IPR in the licensed technology has not expired or, in the case of knowhow, when the knowhow becomes publicly known. The exception to this is that where the market share thresholds are not reached at the outset of the agreement but are subsequently exceeded, the exemption will continue to apply for a period of two consecutive calendar years following the year in which the 20 per cent threshold was first exceeded.

8. R&D agreements between competitors

Competition law recognises that co-operation between competitors to jointly undertake and subsequently exploit R&D may promote technical and economic progress, particularly where the companies contribute complementary skills.

Accordingly, the revised R&D block exemption (R&DBE) provides an automatic exemption for joint research and development of products or technologies, together with the joint exploitation of those results, providing that the parties' combined market share in the relevant product and/or technology markets does not exceed 25 per cent.

Where the R&D agreement provides only for joint R&D, the agreement must stipulate that the parties be given access to each others' pre-existing knowhow (payment for access is permissible). However, in most other circumstances the Commission recognises that the issue of pre-research disclosure may be left to negotiation between the parties. Both parties are to be given equal access to the results of the R&D, save in circumstances where the parties agree to limit their areas of exploitation (i.e. to specialise in the exploitation of some areas of the results only). Any joint exploitation must be limited to results which are protected by IPRs or knowhow and which are indispensable for the manufacture of contract technologies.

Whilst the provisions governing the duration of the exemption are complex, in practice the exemption will be valid for as long as the parties' combined market share remains below 25 per cent. If the market share exceeds 25 per cent, the exemption will last for a further two years following the year in which the threshold was exceeded. If the market share exceeds 30 per cent, the exemption will persist for one further year only.

The agreement must also not contain specified hardcore infringements, which are set out in detail in the R&DBE. However, the block exemption is notable for the freedom it confers on the parties to restrict each others' activities. As such, permissible limitations include:

• an agreement to fix the price of the contract products charged to immediate customers where joint exploitation of the products includes joint distribution (it is important to note that no other form of "price fixing" is permitted);

• a requirement to grant an exclusive licence of the results to a third party; and

• setting up an exclusive distribution system for contract products under which other distributors cannot actively seek sales in other distributors' exclusive territories (but must be free to respond to passive sales requests from outside their territory).

9. Standardisation agreements

Standardisation agreements are described by the Commission in the Guidelines as agreements which "have as their primary objective the definition of technical or quality requirements with which current or future products, production processes, services or methods may comply". In other words, they are common industry standards designed and agreed by officially recognised standards bodies,

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associations or simply agreements between independent businesses which set out common requirements for services or products in circumstances where compatibility and interoperability with other products and systems is essential or minimum quality marks are required.

Common examples include approved standards for computer chip components used in a wide range of different operating appliances or – possibly one of the earliest standards – a common specification of screw thread to ensure that camera tripods produced by one manufacturer could couple with a camera produced by a third party manufacturer. Common examples of quality standards, often made obligatory by national legislation, include the various "Quality ISO" standards for quality management systems produced by the British Standards Institution (BSI), and BSI minimum requirements for fire safety equipment (BS EN). Various industries may also decide to design and implement standard terms to provide customers with certainty and consistency of product scope and specification and/or terms of dealing.

There is no block exemption of general application to standardisation agreements, although standard-setting activities in specific sectors, such as insurance, have benefited from automatic exemption under industry-specific block exemptions in the past. Helpful guidance is, however, provided by the Guidelines which recognise that standardisation agreements may benefit consumers and be pro-competitive through, in particular, encouraging the development of new and improved products or markets, lowering output and sales costs, enhancing and maintaining quality or ensuring interoperability and compatibility.

However, standardisation arrangements are not without competition risk. The following four particular negative effects are identified in the Guidelines:

- anti-competitive discussions taking place between competitors in the context of standard setting procedures;
- the production of technical specifications that are too detailed and may limit technical development and innovation by excluding alternative technologies;
- closing out certain industry participants by excluding them from the standard setting process; and
- the limitation of product choice and innovation through the use of standard terms.

A specific issue of concern to the competition authorities is the failure by participants in the standard-setting process to disclose their ownership of IPRs which will eventually form part of the standard until after the standard has been de facto agreed (so called "patent ambushing"), with the result that the holder of the IPR effectively secures a guaranteed royalty stream because all users of the standard have no option but to pay for it.

Whilst each standardisation agreement will require careful consideration on its own facts, the Guidelines confirm that providing the following principles are observed the Commission is unlikely to take issue with the standard setting arrangements:

- the standard setting process is open to all to contribute;
- transparency to ensure all stakeholders are aware of ongoing and upcoming work for standards involving IPR;
- rules to facilitate good faith disclosure of all existing and forthcoming IPRs before the standard is agreed (including, in particular, the maximum royalties that would be sought);
- avoiding restrictions that are not indispensable to the objectives of the standard; and
- ensuring that the owners of IPRs which form an essential part of the standard commit to make the IPR available on fair, reasonable and non-discriminatory (FRAND) terms.

Good practice will ensure that the standard is made available to all who wish to use it on non-discriminatory terms, while the standards bodies themselves should have clear rules governing procedure and powers (and, unsurprisingly, the Commission has indicated that it prefers recognised standards bodies to ad hoc fora). Interestingly, the Guidelines provide commentary upon different
methods to assess FRAND terms, indicating that the level of licence fees charged before the standard will be of particular relevance.

10. Information exchange

Information exchange between competitors is an extremely wide topic, ranging from the disclosure of expected future prices or quantities (very high risk) to annual circulation of historical industry-wide market statistics (low risk). The Guidelines confirm that information exchange will be low risk where:

- it is supplied or obtained without any element of express agreement or tacit consensus between competitors, such as unilateral announcements, information gathered through independent specialised publications or via third parties active in market data gathering and/or market studies. In these cases, there is no "agreement" (express or implied) between the competing businesses, so Article 101(1) is not engaged;
- it is not of a "strategic nature", although this is not necessarily straightforward to apply since the Guidelines define strategic information as "information reducing strategic uncertainty";
- it is already publicly available. The Guidelines stress, however, that for information to be considered publicly available, it must be equally as accessible (including as regards cost) to third parties, which arguably removes much of the value of the exchange;
- the participating undertakings do not represent a sufficiently large part of the relevant market. The "market" must be identified using the usual economic parameters and will comprise all products or services which are in the same product/services market and the same geographic market. It must, however, be noted that an exchange restricted to part of the market might be of limited interest to the parties.

At the other extreme, the Guidelines identify two types of information exchange as being very high risk, where there is a presumption that the intention underlying the arrangement is anti-competitive:

- exchange of information about competitors' future prices; and
- exchange of information about competitors' future output.

In competition law terms, such arrangements are likely to be considered to be infringements "by object" and are presumed to be anti-competitive regardless of whether they have any actual anti-competitive effect. In theory, such exchanges could still be justified under Article 101(3), but exemption is unlikely since they are typically linked to price or quantity fixing cartels.

Where the information exchange is not clearly anti-competitive "by object", the competition authorities will focus on whether it has an anti-competitive effect (regardless of whether that was the intention of the parties), and will focus on the following:

- **Is the information exchange likely to be anti-competitive?:** In this context, market characteristics are key. The more "oligopolistic" a market is shown to be, the greater the risk that the exchange of information will be considered to be anti-competitive. An anti-competitive oligopolistic market is one in which there is a limited number of competitors and competitive rivalry is muted, with all players tending to act in a similar, aligned way without having reached express agreement not to compete. In this context, the threat of sufficient, credible and prompt retaliation becomes a key issue because the parties will have a greater incentive to adopt and maintain a common approach if they know that any deviation would be quickly and easily identified and promptly punished. The existence of a retaliatory threat will depend on the characteristics of the relevant market, in particular, the degree of market transparency (increased by the information exchange), a low number of market participants, product homogeneity, stable supply and demand conditions as well as symmetry between the various players on cost, demand, market share, product range, capacity, etc. In such a market, any exchange of information is risky.

It is also essential to consider the nature of the information being exchanged, including the type of information, the extent to which the relevant market is covered by the information exchanged,
whether the information is aggregated or individualised, the frequency of the information exchange, and whether the fact of the exchange is made public to customers and any competitors not party to the agreement. The more the exchange appears extensive in scope, with a wide level of coverage, frequent occurrences, and is detailed and secret, the more it is likely to have significant restrictive impact.

- **Can the information exchange be justified and exempted?** The information exchanged must go no further than necessary to achieve the claimed benefit. Moreover, the Guidelines refer to the established principle that benefits are more likely to be passed onto consumers (a further condition of exemption) where the parties have a lower degree of market power. As to what the benefits of an information exchange might be, the Guidelines have limited suggestions:
  - market participants which are less successful could identify the weaknesses in their competitive offering in terms of product range, quality, cost, distribution techniques, etc, and adapt and improve their business (and competitive threat) as a consequence;
  - market share data could work as a quality signal for consumers; and
  - information exchanged and made available to consumers could significantly benefit them by making them better informed about the choices available to them.

These limited situations which the Commission has suggested might be used to justify an information exchange agreement which *prima facie* infringes Article 101(1) will not always apply (most information exchanged between competitors will not be made public) or will not reflect the sole or principal reason for the information exchange (it seems unlikely that stronger competitors would want to reveal the reasons for their success to their less successful competitors so as to allow them to catch up). In fact, the Commission’s suggestions highlight the difficulties in applying Article 101(3) in this context. Competitors considering an information exchange arrangement are therefore more likely to escape competition concerns by making sure that their arrangement cannot be said to be anti-competitive in the first place, than by seeking to justify it as pro-consumer.

Other key points held by competition authorities and courts in the context of information exchange include the following:

- a one-off exchange of information can be sufficient to infringe Article 101(1);
- the exchange does not need to be reciprocal, unilateral disclosure can be enough;
- where a party has received commercially sensitive information, it can be presumed that that party has used the information.

### 11. Concluding remarks

There is clear scope for legitimate, pro-competitive collaboration between competitors. However, caution is required due to the very real risk that co-operation between competitors will breach Article 101 TFEU and/or be categorised as a cartel.

Notwithstanding that risk, the Commission has provided a relatively clear framework within which arrangements between competitors may be designed involving joint production, purchasing or sales/marketing or co-operation in respect of R&D or IPR licensing. Such arrangements are increasingly used to provide cost-efficient alternatives to mergers and/or otherwise provide effective means to secure business objectives through collaboration and may be designed in a manner where any relevant competition law risk is minimised from the outset.
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If you would like further information on this guide, please speak to your usual contact at Ashurst or one of our contacts listed below.

Gabriele Accardo
Counsel
Milan
+39 02 85423430
gabriele.accardo@ashurst.com

Rafael Baena
Partner
Madrid
+34 91 364 9895
rafael.baena@ashurst.com

Euan Burrows
Partner
London
+44 20 7859 2919
euan.burrows@ashurst.com

Michaël Cousin
Partner
Paris
+33 1 53 53 56 92
michael.cousin@ashurst.com

Neil Cuninghame
Partner
London
+44 20 7859 1147
neil.cuninghame@ashurst.com

Alexi Dimitriou
Counsel
London
+44 20 7859 1191
alexi.dimitriou@ashurst.com

Gil Even-Shoshan
Counsel
Brussels
+32 2 626 1907
ges@ashurst.com

Denis Fosselard
Partner
Brussels
+32 2 641 9976
denis.fosselard@ashurst.com

Maria Held
Counsel
Munich
+49 89 24 44 21 176
maria.held@ashurst.com

Michael Holzhäuser
Partner
Frankfurt
+49 69 97 11 28 50
michael.holzhaeuser@ashurst.com

Christophe Lemaire
Partner
Paris
+33 1 53 53 54 62
christophe.lemaire@ashurst.com

Duncan Liddell
Partner
London
+44 20 7859 1648
duncan.liddell@ashurst.com

Nigel Parr
Partner
London
+44 20 7859 1763
nigel.parr@ashurst.com

Donald Slater
Counsel
Brussels
+32 2 626 1916
donald.slater@ashurst.com

Alexandre Vandencasteele
Senior Consultant
Brussels
+32 2 641 9962
alexandre.vandencasteele@ashurst.com

Steven Vaz
Partner
London
+44 20 7859 2350
steven.vaz@ashurst.com

Annick Vroninks
Partner
Brussels
+32 2 641 9971
annick.vroninks@ashurst.com

Denis Waebbroeck
Partner
Brussels
+32 2 641 9963
denis.waebbroeck@ashurst.com

Ute Zinsmeister
Partner
Munich
+49 89 24 44 21 187
ute.zinsmeister@ashurst.com