THE NEW EU FRAMEWORK OF HORIZONTAL COOPERATION AGREEMENTS

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ABSTRACT: *This Article deals with horizontal cooperation between undertakings, critically reviewing the new EU framework for the competition law scrutiny of such cooperation, as arising from the new 'Guidelines on the applicability of Article 101 of the TFEU to horizontal cooperation agreements' adopted by the European Commission in December 2010, in conjunction with the approval of the new Block Exemption Regulations for research and development agreements and for specialization agreements. While emphasizing some essentially positive developments resulting from this new EU competition law framework of horizontal cooperation agreements, the Article also critically underlines several sensitive areas in which this 2010 review of horizontal restraints could have gone further. That applies in particular, as commented throughout the Article, to the possible design of a more comprehensive analytical model for the assessment of horizontal agreements and to a further degree of assimilation of the more economics based and flexible principles developed in recent precedents of the European Court of Justice and the General Court (while ensuring at the same time as much predictability as possible to undertakings).*

SUMMARY: 1. Introduction. 1.1. General Overview. 1.2. General Perspective on the Analytical Framework adopted in the Horizontal Guidelines. 1.2.3. (a) Restrictions of Competition by Object – In General. 1.2.3. (b) Restrictive Effects on Competition – In General. 1.2.3. (c) Criteria for Identifying the Functional Type of Horizontal Cooperation Agreements. 1.2.3. (d) Competitive Assessment of Information Exchange. 2. Global Perspective of the Application of Article 101 TFEU to Joint Ventures. 2.1. (a) The Notion of Joint Venture. 2.1. (b) The Notion of Joint Venture and Relevant Aspects for its Assessment. 3. Specific Types of Horizontal Cooperation Agreements Covered by the Horizontal Guidelines. 3.1. General Overview. 3.2. Research and Development Agreements. 3.2. Research and Development Agreements. 3.3. Commercialization Agreements. 3.4. Standardisation Agreements.

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1 *A different version of this Article, also under a different Title, will appear as Chapter 2 on horizontal cooperation agreements of* Research Antitrust Handbook*, Edited by Damien Geradin, Ioannis Lianos, ELGAR, Forthcoming 2011 or 2012.*

1. INTRODUCTION

1.1. General Overview

1.1.1. This Article examines the application of article 101 of the Treaty on the Functioning of the European Union (hereinafter 'TFEU')[2] to multiple forms of cooperation between undertakings (covering, as such, agreements between undertakings, decisions by associations of undertakings and concerted practices, that will be here comprehensively referred to as 'agreements'). More specifically, the Article deals with horizontal co-operation between undertakings, that may be characterized, as put forward in the recent 2010 "*Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*" (approved in December 2010 and published in 2011, hereinafter the 'Horizontal Guidelines'[3]), as cooperation involving agreements or understandings "*between actual or potential competitors*"[4] (this type of competitive link conferring to those forms of cooperation its 'horizontal nature').

This area of EU competition law covers, in particular, the establishment and functioning of joint ventures between actual or potential competitors [meaning partial function joint ventures which do not qualify as concentrations and are not accordingly submitted, as such, to the concentration control regime on the basis of Council Regulation N.º 139/2004 on the control of concentrations between undertakings (hereinafter 'Merger Regulation'[5]]. It also covers other looser forms of cooperation between actual or potential competitors which do not involve the organization level and functional

2 As from 1 December 2009, Article 81 of the EC Treaty has become Article 101 of the treaty on the Functioning of the European Union ('TFEU'). The two Articles are in substance identical. In the context of this Article, references to Article 101 of the TFEU should be understood as references to Article 81 of the EC Treaty when appropriate (particularly when case law prior to the entry into force of the Treaty of Lisbon is quoted throughout the text of this Article).

3 We refer to the Communication from the European Commission – "*Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*", approved in December 2010, published in the OJEU, 14/1/2011, C 11/1 (2011/C 11/01). We may also refer in the course of this Article – for reasons of comparison, systematic analysis or to put in context several relevant precedents – to the previous Guidelines – "*Commission Guidelines on the applicability of Article 81 of the EC Treaty to horizontal co-operation agreements*" – OJEC 2001 C3/2 (there will be referred in an abbreviated form as the '2001 Guidelines').

4 See Horizontal Guidelines, point 1.

5 We refer here to the EC Council Regulation No. 139/2004 on the control of concentrations between undertakings, of 20 January 2004 (OJ L 2004 L 24/1).

structures typical of joint ventures, that we shall refer throughout this Article – in an abbreviated manner – as other horizontal cooperation agreements.

While the Horizontal Guidelines do not specifically distinguish between, on the one hand, joint ventures, and, on the other hand, the aforementioned looser forms of cooperation – as stated in its point 6, the Guidelines "*apply to the most common types of horizontal co-operation agreements irrespective of the level of integration they entail* (…)" – we shall cover, in an initial and very brief section of this Article (*infra*, point **2.**), joint ventures as a particularly important form of horizontal cooperation (addressing issues that are specifically related with that form of cooperation and emphasizing the reasons that may justify considering it as an autonomous category within the field of entrepreneurial cooperation).

Notwithstanding those transversal considerations on the category of joint ventures, we shall comprehensively address questions pertaining to the different functional types of cooperation, following to a large extent the framework put forward by the Guidelines, and considering, in each type of cooperation autonomously dealt with, both joint ventures and other cooperation agreements. In that context, we shall successively analyse – albeit in very succinct terms, due to the limited scope of this Article – **(i)** *research and development agreements*, **(ii)** *commercialisation agreements* and **(iii)** *standardisation agreements* and other types of horizontal agreements (bearing in mind that, as regards this last type of agreements, the Guidelines have introduced significant innovations that deserve some critical attention). Also, as regards the first type of cooperation agreements [**(i)**], we shall naturally take into consideration the recent reform of the Block Exemption Regulation for research and development agreements and for [carried out through the approval, in December 2010, of Commission Regulation (EU) No. 1217/2010[6]].

6 We refer to Commission Regulation EU No. 1217/2010, of 14 December 2010 (OJEU L 335/36 of 18.12.2010). We shall not deal '*ex professo*' with the other simultaneously reformed Block-Exemption Regulation covering specialization agreements – Commission Regulation EU No. 1218/2010, of 14 December 2010, (OJEU L 335/43 of 18.12.2010) – due to the limited scope of this Article. *The selection of functional types of cooperation agreements autonomously analysed (aforementioned) has to do, both with their relevance, and with the impact of the adjustments introduced in those types by the December 2010 review of the framework of horizontal cooperation (since a comprehensive analysis of all the functional types covered by the Horizontal Guidelines is not feasible within the limited scope and dimension of this Article).*

1.1.2. Conversely, this Article will not deal with the types of horizontal agreements and concerted practices that are, somehow, considered to be the 'classic' and most serious infringements of EU competition law, corresponding to the so-called *Cartels*.[7] As it is widely recognized, cartels typically involve arrangements between two or more actual or potential competitors which are oriented towards price-fixing, market-sharing and exchange of confidential information or collective boycotts, thus originating hardcore restrictions of competition (that, as such, cannot qualify for exemption under Article 101, par 3 of the TFEU).[8] Our focus is, therefore, on forms of horizontal cooperation which – at least on a potential basis – may involve some type of efficiency (and that, accordingly, do not lead to a straightforward condemnation under Article 101, leading, on the contrary, to a potential or theoretical interplay of pars 1 and 3 of Article 101).

Also, we shall not deal in this Article – *or will only do so incidentally* – with *basic concepts* regarding the prohibition regime of Article 101 of the TFEU, namely the concepts of *undertaking*, of *agreement*, *decision by associations of undertakings* and *concerted practices*, or the concept of *effect on trade between Member States*.

1.2. General Perspective on the Analytical Framework adopted in the Horizontal Guidelines

1.2.1. Horizontal cooperation agreements typically involve agreements and concerted practices that are entered into between actual or potential competitors, which, in turn, are understood as *undertakings active on the same relevant market* and *undertakings that, in the absence of a specific agreement, are likely within a short period of time, in case of a small but permanent increase in relative prices, to make the necessary additional investments or other necessary switching costs to enter the relevant market on which the other company at stake is active*.[9] Conversely, agreements that are entered into between under-

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7 We should also bear in mind that (quite intentionally) the Horizontal Guidelines only contain incidental references to cartels. As stated in its point 9, "*although these Guidelines contain certain references to cartels, they are not intended to give any guidance as to what does and does not constitute a cartel as defined by the decisional practice of the Commission and the case-law of the Court of Justice of the European Union*".

8 Specifically on cartels, see, *inter alia*, Siragusa & Rizza, 2007.

9 See, on these notions, points 10 and following of the Horizontal Guidelines, which refer – as regards potential competitors – to an assessment based on realistic grounds about the likelihood of one of the companies entering the market of the other company, as established in the Commission Notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.97).

takings operating at a different level of the production or distribution chain will correspond in principle to vertical agreements, that are dealt with in Commission Regulation (EU) No. 330/2010, on the application of Article 101(3) of TFEU to categories of vertical agreements and concerted practices (the Block Exemption on Vertical Restraints)[10] and the in the Guidelines on Vertical Restraints.[11]

However, and as explicitly stated in the Horizontal Guidelines, provided certain conditions are met, vertical agreements may produce effects on the market and generate corresponding competition problems that are similar to horizontal agreements (and should be, as such, covered by the Horizontal Guidelines). That will tend to happen with certain cases of vertical agreements between competitors (with the exception of situations in which competitors enter into non-reciprocal vertical agreements and the supplier is a manufacturer and a distributor of goods while the buyer is a distributor and not a competing undertaking at the manufacturing level or the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services).[12]

Depending on the level of integration underlying the horizontal cooperation agreements at stake, and regardless of the fact the Horizontal Guidelines cover – as aforementioned – both joint ventures, and looser forms of cooperation, the substantive parameter for their competition law assessment may vary (and with it may also vary the applicability or not of the Guidelines). In fact, the assessment of horizontal cooperation agreements may be based on Article 101 of the TFEU or on the Merger Regulation, depending on the fact that those agreements may be characterized or not as concentrations with a Community dimension. This implies a fundamental distinction between, on the one hand, the establishment of full-function joint ventures – which should be qualified as concentrations and falling correspondingly under the jurisdiction of the Merger Regulation – and, on

10 See Commission Regulation (EU) No. 330/2010, on the application of Article 101(3) of TFEU to categories of vertical agreements and concerted practices, of 20 April 2010, OJEU L 102, 23.4.2010, p. 1.

11 See Guidelines on Vertical Restraints, OJEU C 130, 19.5.2010, p. 1.

12 See, on this, point 12 of the Horizontal Guidelines, explicitly differentiating these types of vertical agreements between competitors.

the other hand, non full-function joint ventures, which are to be assessed under Article 101 of the TFEU.

These aspects, including a proper understanding of the notion of full-function joint venture (joint venture performing on a lasting basis all the functions of an autonomous economic entity) will be further addressed, *infra*, point **2.**, which specifically deals with the legal category of joint ventures. What is relevant for our current purposes of identifying the basic analytical model underlying the Horizontal Guidelines is to circumscribe the type of arrangements that are at stake. In short, we are dealing here with multiple types of horizontal cooperation agreements – as generically described *supra* – *including joint ventures that do not correspond to concentrations for the purposes of the Merger Regulation*, whose standard of legality is based on Article 101 of the TFUE. In turn, the application of such standard to that global category of agreements (thus circumscribed) involves a two step process, leading to inquire – in first place – if the horizontal agreement falls with the Article 101, par 1 prohibition, and – in second place – provided that is the case, if the agreement may benefit from a block exemption or an individual exemption under Article 101, par 3.

Attention should still be paid to the fact that the basic standard of legality of '*significant impediment to effective competition*', arising from the Merger Regulation is not exclusively applicable to *full-function joint ventures*, qualified as *concentrations.*[13] Cooperative aspects of these entities, involving the relationship between its parent undertakings and its related effects on competition, should be assessed under Article 101 of the TFEU albeit under an hybrid regime (through which that assessment under Article 101 occurs on the basis of the procedural framework, comprehending notably its more expedite timeframe, of the Merger Regulation).

1.2.2.1. As regards the potential submission of horizontal agreements to the Article 101, par 1, general prohibition, it is necessary to assess if the agreements at stake have as their object or effect an appreciable restriction or distortion of competition within the common market and if such restriction is likely to affect trade between Member States. Considering the fundamental

13 We refer here to the standard of legality of '*significant impediment to effective competition*', introduced by the 2004 reform of the Merger Regulation. On the impact of that new standard adopted in such 2004 reform, see, *inter alia*, Cook & Kerse, 2005; Lindsay, 2006.

assessment which is required – oriented towards evaluating if *an agreement appreciably restricts competition* – the Horizontal Guidelines have formally abandoned the previous analytical grid established in the 2001 Guidelines, that divided those agreements into three groups, comprehending, namely: (a) *agreements that do not appreciably restrict competition under Article 101, par 1*; (b) *agreements that almost always appreciably restrict competition under Article 101, par 1*; and (c) *agreements that may not appreciably restrict competition*.[14]

We admit that such tripartite analytical grid was essentially justified by the purpose of ensuring some degree of predictability in the substantive evaluation of cooperation agreements (although these have to be assessed in their economic context,[15] which implies to a large extent a casuistic analysis of the different market situations and a corresponding '*alea*', that, in turn, may leave undertakings in a position of considerable uncertainty about the legality of their understandings, with all the related drawbacks). On the whole, we therefore consider that establishing this tripartite analytical grid as the starting point of a comprehensive model of substantive assessment of cooperation agreements had been a correct methodological option. The fundamental underlying idea here was to delineate a preliminary level of analysis of horizontal cooperation agreements, in which – through a more succinct of perfunctory analysis – could be identified *types of situations related with such agreements that should be normally regarded as non prohibited under Article 101, par 1*, *types of situations that would normally be prohibited* under that regime and, finally, *types of situations that would require a more developed evaluation of the market conditions at stake* (which could hypothetically lead, in the end, to the conclusion that the agreements at stake should not be prohibited). Specifically on this third type of situations, the 2001 Guidelines, in conjunction with the Block-Exemption Regulations on Research and Development and on Specialization Agreements, established subsequent and more elaborate levels of substantive analysis, comprehending, namely, a second predominantly structural level of analysis (based in the market shares

14 See points 20 *et seq* of the Horizontal Guidelines. This *tripartite analytical grid* had been adopted in the 2001 Guidelines – points 17 *et seq.*, especially 24 *et seq.*

15 About that guiding principle of evaluating cooperation agreements taking into consideration their *economic context*, see both the Horizontal Guidelines, points 25 *et seq*, and also the 2001 Guidelines (points 20 *et seq*), which follow overriding criteria set by consistent case law in this area, as *e.g.* the "*Remia BV v Commission*" ruling (Case 42/84) or the "*GlaxoSmithKline Services v. Commission*" (Case T-168/01) (to which we shall return in the course of the present Article).

of the participating undertakings) and a third level of analysis taking into consideration potential risks of distortion of competition particularly related with each functional type of cooperation.

Such tripartite analytical grid has been replaced in the Horizontal Guidelines by a new analytical structure which will tend to identify in connection with each functional type of agreement the *main competition concerns or risks* and – essentially – the (a) *possible restrictions of competition by object* and (b) the *possible restrictive effects on competition*. It should be recognized, however, that this analytical structure has important parallels with the previous tripartite analytical grid of the 2001 Guidelines. In fact, the individualization of, on the one hand, possible restrictions by object and, on the other hand, possible restrictive effects should, to a large extent, correspond to the identification of situations that are normally prohibited under Article 101 and of situations that usually require a more developed evaluation of the market conditions at stake.

Conversely, this new analytical grid has apparently eliminated the previous first category of paradigmatic situations that could be considered as covered by a preliminary presumption of lawfulness (*situations that should be normally regarded as non prohibited under Article 101, par 1*). We refer to an *apparent* elimination of such category, since the Horizontal Guidelines, in the end, do specify that *horizontal cooperation agreements between competitors that, on the basis of objective factors, would not be able to independently carry out the project or activity covered by the cooperation will normally not give rise to restrictive effects on competition within the meaning of Article 101, par 1* (with the proviso, based on a proportionality principle, that the parties could not have carried out the project with less stringent restrictions).[16]

Accordingly, despite the fact that the Horizontal Guidelines do not comprehensively recognize it as an autonomous category, the main bifurcation between restrictions by object (leading normally to prohibition) and by effect (normally requiring a more developed empirical analysis) is actually – albeit somehow implicitly – complemented by the aforementioned type of situations of *cooperation agreements between competitors that, would not be able to independently carry out the project or activity covered by the cooperation*, which, on the whole, should normally be regarded as non prohibited under Article 101, par 1 (this corresponding to one of the principal cases which because

16 See, on this, point 30 of the Horizontal Guidelines.

"*of their very nature*" did "*not imply a coordination of the parties' competitive behaviour in the market*" according to the 2001 Guidelines[17]).

We fundamentally regard as a positive option the fact that the Horizontal Guidelines maintain, on the basis of a preliminary and rather perfunctory analysis, a category of situations – however implicitly these may now be considered – that should be perceived *as normally not prohibited under Article 101* (for reasons of legal security and predictability). However, we admit that the Commission could have gone further in the characterization of such paradigmatic situations. That would imply, namely, more reference examples of cases in which by *objective standards* the parties are not able to independently carry out a certain activity – beside the only example provided in the Horizontal Guidelines concerning the "*limited technical capability*" of the parties.

It would also imply, as far as we are concerned, a further contextualization of this type of situation in order to provide a more clear and complete guidance about situations that may be somehow safely regarded as normally non prohibited. That would entail, in our view, a complementary qualification of the situation at stake, in which competitors would not be able to independently carry out the activity covered by the cooperation agreement, linking it to *two chief relevant contexts* (that would be, as such, decisive to sustain a *prima facie* positive assessment as a kind of *first level safe harbour* for the participating undertakings). We refer here to contexts in which the impossibility of independent action applies to *activities that are decisive to ensure the presence of a further competitor in any given market* or, in subsidiary terms, to *activities which are instrumental to the provision of certain relevant goods or services that otherwise would not be provided to consumers*.

On the contrary, we regard as a correct option the elimination in the Horizontal Guidelines of the previous preliminary indicators (established in the 2001 Guidelines) to ascertain situations normally not prohibited, which had to do with *cooperation agreements concerning activities which allegedly did not influence the relevant parameters of competition*.[18] That indicator struck us, in fact, as too vague and not practical enough in order to individualise categories of situations normally not prohibited.

17 See, about that understanding, point 24 of the 2001 Guidelines.

18 See, also on that analytical factor, points 24, *et seq.*, of the 2001 Guidelines.

Differently, as regards another situation previously identified in the 2001 Guidelines – *cooperation agreements between non-competitors* – we admit that it may still be implicitly construed, on the basis of the condition stated in an express manner in the Horizontal Guidelines (concerning, as aforementioned, competitors that would not be able to independently carry out a certain activity), as *a type of situation corresponding to cooperation agreements normally not prohibited* (provided the participating undertakings do not hold an appreciable market power and that their cooperation will not, somehow, give rise to factors which block or make especially difficult third parties access to the markets at stake). However, if we favour this kind of analytical construction we have, conversely, to recognize that its practicality as a first level and transversal safe harbour to undertakings has been affected by the lack of an express reference to it in the Horizontal Guidelines and, in that context, by the lack of an operative market share threshold that would apply in general to all types of horizontal cooperation and could be situated at an intermediate level between the *de minimis* threshold[19] and the specific market shares thresholds contemplated in the Horizontal Guidelines and in the relevant Block-Exemption Regulation for the various types of functional cooperation.

1.2.2.2. To sum up, on the whole, we consider that the previous tripartite basis of preliminary analysis of cooperation agreements (designed in the 2001 Guidelines) could have been somehow retained, even if streamlined and somehow adjusted in pursuit of further clarity, in the Horizontal Guidelines. This change of the analytical structure of the various Chapters of the Horizontal Guidelines removing – at least apparently – a first level presumption of lawfulness, while maintaining, albeit in a less systematic manner, some elements that provide the basis for a possible preliminary positive evaluation of cooperation agreements, may lead to unintended consequences in a context of decentralisation (also bearing in mind that the less abundant case law on horizontal cooperation at national level, comparatively with vertical restraints, may lead to a fundamental lack of guidance in this field). In short, it would have been adequate to retain an autonomous analytical section (corresponding to a first level of analysis) that would allow for a preliminary

19 Naturally, we refer here to the *de minimis* market share threshold contemplated in the "*De Minimis Notice*" of the European Commission, OJ 2001 C 368/13.

scrutinizing of the agreements in search of possible compatibility presumptions, based in the type of competitive relationship between the participating undertakings and also on a general market share threshold, and in search of incompatibility presumptions as well.

Therefore, we consider that beside the essentially positive developments arising from the December 2010 review of the Horizontal Guidelines – particularly focused in the introduction of new or expanded sections related with *information exchange between competitor undertakings* and with the *category of standardization agreements*[20] such review could have gone further in terms of (i) designing a truly comprehensive analytical model for the assessment of horizontal agreements (not excessively focused in some particular parameters in connection with specific functional types of horizontal cooperation) and also in terms of (ii) incorporating the more economics based and flexible principles that have been recently developed by the European Court of Justice and by the General Court in fundamental precedents, such as the "*GlaxoSmithKline*", the "*Barry Brothers*", the "*Meca-Medina*" and the "*O2 v. Commission*" rulings[21] (particularly as regards the analytical bifurcation between the par 1 and par 3 rules of Article 101 in the field of '*by effect*' restrictions of competition). In the context of this bifurcation between the pars 1 and 3 regimes, it is especially striking the scarce (and in some cases null) reference to this more innovative and economics based line of case law. In particular, we note that the "*Métropole Television (M6)*" case – explicitly referenced in the Horizontal Guidelines – [22] with its more rigid division between assessments to be conducted under par 1 or 3 of Article 101 and with its strict limits on the weighting of the pro and anticompetitive aspects

20 Understandably this has led to the fact – acknowledged by the Commission in its "*Overview of the Feedback Received from Stakeholders in the Public Consultation on the Draft Texts Published in 2010*" (concerning the Public Consultation on the revised rules for the assessment of horizontal agreements that took place between 4 May and 25 June 2010 – that, in the course of that extensive consultation process on the review of the block-exemption Regulations (R&D and specialization) and of the 2001 Horizontal Guidelines, *most of the analytical contributions for that discussion put a particular emphasis on the issues of information exchange and of standardisation agreements*.

21 We refer here to the "*GlaxoSmithKline*" ruling (already quoted), the "*Barry Brothers*" ruling (Case C-29/07), the "*Meca-Medina*" ruling (Case C-519/04 P) and the "*O2 v. Commission*" ruling (Case T-328/03). In this line of case law attention should also be paid to the widely known and debated "*Wouters*" ruling (Case C-309/99), despite some peculiarities this latest case may present and which are specifically related with regulatory issues of public interest (a point to which we shall turn our attention infra, 1.2.3. (b.3.1.).

22 See the "*Métropole Television (M6)* " ruling, of the then Court of First Instance – case T-112/99, which is explicitly referenced in footnote 8 of the Horizontal Guidelines (emphasizing the considerations developed by the Court in paragraphs 69 *et seq.* of its ruling).

of a restriction of competition (circumscribed to the specific framework of par 3), should have been counterbalanced with explicit and more developed references to the "*Barry Brothers*", the "*Meca-Medina*" and the "*O2 v. Commission*" rulings.

Furthermore, and considering here aspects to which we shall return in the context of our analysis of the various functional types of cooperation, we also admit that the Horizontal Guidelines could have developed a more ambitious approach as regards the *structural criteria* it uses to assess market power of the participating undertakings (in the course of what may be regarded as a *second stage of analysis*, if after a first and perfunctory evaluation of the agreements, a more detailed assessment of potential effects of restriction of competition is required). In fact, the Guidelines, in conjunction with the Research and Development and Specialization Block Exemptions, continue to contemplate different market share thresholds as indicators of more serious risks of restriction of competition in connection with different functional types of cooperation, while a common market share threshold could possibly have been considered[23] (combined with complementary criteria that would, in turn, be specifically related with the particular risks for the competition process that are intertwined with each functional type of cooperation).

1.2.2.3. Bearing in mind the previous considerations, and prior to our brief analysis of the *joint venture category* and of some *particular functional types of cooperation* (respectively dealt with *infra*, points 2. and 3.), some attention should be paid, in the course of this general overview of the global analytical framework adopted in the Horizontal Guidelines, to the somehow traditional distinction between *restrictions by object* and *restrictions by effect* in which those Guidelines are still rather strictly anchored, and, in rapid succession, to the competitive issues related with *information exchange between competitors*, considered on a transversal basis as regards the various functional types of cooperation, that are now autonomously dealt with in Section 2 of the same Guidelines (such issues being covered *infra*, points 1.2.3., (a), (b) and (c)).

23 Also for that possible common market share threshold a systematic comparison with the substantive guidance retained on horizontal merger analysis could be useful (we refer here to the Commission "*Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings*" (OJ 2004 C 31/5).

1.2.3. (a) Restrictions of Competition by Object – In General

1.2.3. (a.1) As mentioned in the preceding points, the Horizontal Guidelines seem to maintain the traditional analytical division between *restrictions by object* and *restrictions by effect* as the basic and paramount reference for the assessment of horizontal cooperation agreements. Furthermore, the Guidelines also seem to combine this traditional division with an apparently rigid evaluation of the analysis to be conducted either under par 1 or under par. 3 of Article 101 (sustaining strict limits on the weighting of the pro and anti-competitive aspects of a restriction of competition as aspects to be dealt only in the specific framework of par 3, thus repeating the analytical construction delineated in its 2004 "*Guidelines on the Application of Article 81(3) of the Treaty*"[24] and corroborating the analytical line pursued in the aforementioned "*Métropole Television (M6)*" ruling).[25]

As regards specifically the treatment of *restrictions by object*, the Horizontal Guidelines emphasize as the three chief aspects for its assessment the (i) "*content of the agreement*", the (ii) "*objectives it seeks to attain*", and (iii) the "*economic and legal context of which it forms part*". Conversely, following the reasoning developed by the Court of Justice in its "*Barry Brothers*" ruling,[26] the Guidelines clearly underplay the relevance of the parties' intention, stating that the Commission may take such aspect into account in its analysis but without considering it "*a necessary factor in determining whether an agreement has an anti-competitive object*".[27]

This characterization of the treatment of restrictions *by object* in the context of horizontal cooperation between undertakings is undoubtedly in line with the general analytical framework developed in the more recent European jurisprudence. However, being too schematic, it provides very limited effective guidance to undertakings in this field. In fact, what seems to result from the

24 2004 "*Guidelines on the Application of Article 81(3) of the Treaty*", OJ 20045 C101/97.

25 See, on this, the final part of point 20 of the Horizontal Guidelines in which it is peremptorily stated that "*the* balancing *of restrictive and pro-competitive effects is conducted* exclusively *within the framework laid down by Article 101(3). If the pro-competitive effects do not outweigh a restriction of competition, Article 101(2) stipulates that the agreement shall be automatically void*"(emphasis added).

26 We refer here to the aforementioned "*Barry Brothers*" ruling, in which the Court clearly stated that "*the parties' intention* [would not be] *a necessary factor in determining whether an agreement has an anti-competitive effect* (...)" (par. 17 of the ruling).

27 See, on such understanding and characterization, point 25 of the Horizontal Guidelines, which, curiously, quotes the undoubtedly relevant ruling "*GlaxoSmithKline*" (aforementioned, footnote 14), but omits the fundamental "*Barry Brothers*" precedent (quoted in our precedent footnote).

"*Barry Brothers*" precedent – especially if compared with the reasoning used in previous rulings -[28] is that even in situations where the content and purpose of agreements look *prima facie* particularly pernicious to competition, a sort of preliminary inquiry will be required (albeit conducted in a rather succinct manner) for the purposes of actually ascertaining its anticompetitive impact in a given economic and market context.

1.2.3. (a.2) That does not override, as such, the presumption of anticompetitive impact as regards certain *prima facie* more serious restrictions of competition. More accurately, it means these kinds of presumptions are not to be applied in a formalistic and almost automatic manner. Its application will involve, at least up to a minimum extent, a brief evaluation of the market context in which the agreement will be inserted. It is uncontroversial that a long and somehow consolidated experience arising from case law has led to the identification of certain restrains which carry in themselves a *particularly serious risk to competition*. Typically, and considering here horizontal cooperation situations, the case law has identified as such the *agreements between competitors to fix prices, limit output or share markets* (*e.g.*, in the landmark "*European Night Services*" ruling[29]) or *cooperation involving information exchanges directly or indirectly creating the conditions to fix purchase or selling prices* (*e.g.*, in the "*T-Mobile Netherlans BV v Raad van beestuur van de Nederlandse Mededingingsautoriteit*" ruling[30]).

However, and contrary to the more formalistic approach still followed in the 2004 "*Guidelines on the Application of Article 81(3) of the Treaty*",[31] the more recent jurisprudence clearly seems to imply that the substantive legal and economic context in which the competitive restraint operates should somehow be assessed, albeit through a quick-look test (while full blown market analysis continues only to be justified in connection with restraints that, after such preliminary quick look test, are not identified as particularly serious competition infringements and whose possible 'restrictive effects'

28 We bear in mind here precedents such as the "*European Night Services*" ruling of the then Court of First Instance – Cases T-374, 375, 384 and 388/94 (especially in its par. 136).

29 We refer to the "*European Night Services*" ruling of the then Court of First Instance (already quoted in the precedent footnote).

30 See the "*T-Mobile Netherlans BV v Raad van beestuur van de Nederlandse Mededingingsautoriteit*" ruling – Case C-8/08.

31 See the 2004 "*Guidelines on the Application of Article 81(3) of the Treaty*", especially par. 21.

have to be assessed through that more developed analysis). Therefore, in light of these considerations, it may be argued that the Horizontal Guidelines represent, somehow, a missed opportunity to provide specific guiding criteria for the *confirmation* of the more serious nature of competition infractions related with certain restraints established in horizontal agreements on the basis of succinct assessments of any given legal and economic context in which those restraints operate.

1.2.3. (b) Restrictive Effects on Competition – In General

1.2.3. (b.1) A more flexible approach and more in line with the recent economic-based jurisprudence seems to have been followed in the Horizontal Guidelines as regards '*by effect*' restrictions of competition (implying a qualitative hermeneutical progress in comparison with the 2004 "*Guidelines on the Application of Article 81(3) of the Treaty*", although the new hermeneutical input in this field could still have been more clarified).

In this field – which will be more extensively dealt with *infra*, point **3.**, in the context of the analysis of specific functional types of horizontal cooperation – the Horizontal Guidelines, while considering as in the case of '*by object*' restrictions the nature and content of the agreements, particularly stress the relevance of market power of the participating undertakings (in connection with other market characteristics). For that purpose, the Guidelines take into consideration as a "*starting point*" the "*position of the parties on the markets affected by the co-operation*", relying on the assumption that "*if the parties have a* low combined market share, *the horizontal co-operation agreement is unlikely to give rise to restrictive effects on competition within the meaning of Article 101(1) and* normally no further analysis will be required".[32] (emphasis added)

However, the Guidelines, after asserting this market share indicator as a general parameter for an intermediate stage of assessment of cooperation agreements go on to sustain that "*it is not possible to give a general market share threshold above which sufficient market power for causing restrictive effects on competition can be assumed*" (since it would be necessary to take into consideration the different effects that various horizontal agreements may cause in different market situations). Accordingly, the analytical methodology established in the Guidelines relies on a segmented approach to the market share criteria, meaning that the relevant market share threshold established

32 See Horizontal Guidelines, points 43 and 44.

by the same Guidelines will vary depending on the specific type of functional cooperation at stake.

To sum up, the Guidelines consider a first or preliminary stage of analysis – even if vaguely delineated as we have stressed *supra*, 1.2.3. (a.1) – in order to identify, as the case may be, '*by object*' restrictions (which in principle will be immediately ascertained as prohibited), or '*by effects*' restrictions (that require a more in-depth asessement), which, on the whole and as this later category of situations is concerned, will be followed by a second (general) fundamental stage of analysis, pondering the degree of market power of the parties This second stage of the analytical model used for the assessment of horizontal agreements involves a market share threshold at least marginally higher then the one considered for the purposes of application of the '*de minimis*' criteria (that imply in principle an immediate judgement of non prohibition of the agreements at stake), but the Horizontal Guidelines contend that such market share threshold has to vary according to the functional type of horizontal cooperation (thereby refusing the concept of a *general market share threshold* marginally higher then the '*de minimis*' horizontal market share threshold).

Accordingly, the *comprehensive framework of horizontal agreements reviewed in December 2010* – comprehending the Guidelines and the Block Exemption Regulations on Research and Development and Specialization – relies on a series of diverse market share thresholds varying from 15% to 25% of the markets at stake[33] (depending on the type of functional cooperation pursued by the parties). As far as we are concerned, for reasons of simplification, predictability and also bearing in mind the '*acquis*' in terms of treatment of precedent cases, a single market share threshold could have been considered in the context of a revised global analytical model for the assessment of horizontal agreements (thereby corresponding to a truly general second stage of assessment of those agreements). This general second stage of analysis – oriented towards the pondering of market power through market share criteria – would, in turn, be counterbalanced by complementary stages of analysis of the '*by effects*' potential restrictions, involving factors or analytical tools specifically connected with each type of functional cooperation.

We believe that *a better systematisation of the global analytical model by and large delineated in December 2010 reviewed framework of horizontal agreements would involve* – beside the general market threshold we here envisage as a

33 As it will be described in more detail *infra*, point 3.

second general stage of analysis – *two complementary stages of analysis* (whose intensity or thoroughness would depend on the fact of the agreements at stake having surpassed or not, and to what extent, the market share threshold). Those *two complementary stage of analysis* – which could either confirm or correct the preliminary assessment of competition risks related with the parties' indicative market power – would involve, on the one hand, further structurally oriented criteria, namely through the pondering of the market share of the parties in conjunction with the global *degree of concentration* of the markets at stake,[34] and, on the other hand, a set of residual analytical tools whose assessment would, to a large extent, be conducted under the specific conditions related with each type of functional cooperation.

This set of analytical tools corresponding to a *last stage of analysis*, largely conducted on the basis of specific considerations related with the competitive relationship and dynamics of *each functional type of cooperation* (research and development, production, commercialisation or other) would comprehend, namely the *stability of market shares over time*, *entry barriers* and the likelihood of market entry, the *countervailing power of buyers or suppliers* and a pondering of the *nature of the goods or services at stake* (as homogeneous or differentiated products or services and considering also the degree of maturity of such products). Again, by and large, most (albeit not all) of these analytical tools are duly referred in the Horizontal Guidelines,[35] but would gain to be systematically organised and interwoven in the manner considered in the multistage analytical grid that we are hereby proposing (and which we believe to be consistent with the more recent and economics oriented case

34 A pondering of the *degree of concentration* that could involve namely the application of the Herfindahl-Hirshman Índex (HHI) (as already considered under the Commission "*Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings*" and bearing in mind also the *proximity and interconnections existing between the substantive tests applied for the assessment of horizontal full function joint ventures, under the Merger Regulation, and horizontal agreements in general, under Article 101*, but taking into consideration structural criteria of growing importance; a proximity between those substantive tests which is recognized in the Horizontal Guidelines).

35 See, in particular, about the analytical tools we have considered in the last (aforementioned) stage of analysis of horizontal agreements, Horizontal Guidelines, points 44 and 45. For a more developed perspective on the systematic construction we are hereby proposing, while bearing in mind the factors indicated in the December 2010 Horizontal Guidelines, and considering especially the assessment of joint ventures but with relevant corollaries also to the assessment of horizontal cooperation agreements in general, see our Morais, 2011.

law and also better adapted to the purposes of practical self-assessment of agreements by the participating undertakings[36]).

1.2.3. (b.2) As aforementioned (*supra*, 1.2.1.), the Horizontal Guidelines characterize the assessment of horizontal agreements as a *two step process*, leading, firstly, to inquire if these fall with the Article 101, par 1 prohibition, and, if that happens to be the case, whether such agreements may benefit from exemption under Article 101, par 3. As it is widely recognized on the basis of that provision of par 3 and of the corresponding case law, this '*second step*' relies on the assessment of possible *pro-competitive effects of restrictive agreements* (arising from some variable degree of *substantial economic efficiencies* underlying the agreement).

The pondering of such *pro-competitive effects* of horizontal agreements and of the related efficiencies is based on the identification and assessment of "*complementary skills and assets*" that each party brings to a certain agreement. Such perspective about substantive economic efficiencies being derived from particular *combinations of skills and assets* is somehow the cornerstone of the Block Exemption Regulations on Research and Development and on Specialization, but, beside these two functional types of horizontal cooperation, the Horizontal Guidelines clearly consider those factors as fundamental in terms of the possible detection of relevant efficiencies for purposes of individual exemptions concerning other functional type of cooperation agreements.[37] Conversely, while admitting that horizontal cooperation agreements not involving the combination of complementary skills or assets may still generate efficiencies that are susceptible of being passed on to consumers (as specifically required by one of the four conditions established under par 3 of Article 101) – namely by reducing duplication of certain costs – the Horizontal Guidelines ascertain that those types of

36 *Self-assessment of horizontal agreements by the participating undertakings* that results from the 2003 reform of EU competition law. However, the end after such 2003 reform of the mandatory notification procedure for the purposes of application of the exemption regime would not be incompatible with a *business review procedure* of situations of horizontal cooperation with the Commission, in parallel terms, *mutatis mutandis*, with the review procedure conducted by the US Department of Justice (a procedure that would be advantageous and would enhance the patterns of legal safety given the frequency of cases in which horizontal cooperation has predominantly positive consequences for competition).

37 See, on those aspects and following that line of reasoning, points 50 to 52 of the Horizontal Guidelines.

cost savings are "*in general less likely to result in benefits for consumers*"[38] (and, therefore, less likely of sustaining individual exemptions under par 3).

In the past, relevant case law of the Commission has associated such overriding idea of deriving economic benefits construed as efficiencies passed on to consumers from *combinations of skills and assets* in situations of horizontal cooperation characterised, *e.g.*, by the development and introduction in the market on new products in a reduced time-frame,[39] by allowing for the profitability of the manufacture of intermediate products to be used by the parents with favourable repercussions for the final products,[40] by more efficient use of energy sources,[41] by accelerating or streamlining the qualitative and sometimes uncertain transition from the research stage of certain technologies to wide and intense industrial application of those technologies,[42] or by diversifying the type of capital intensive and technologically demanding equipments susceptible of being produced at competitive prices and affordable to a wider group of users.[43] Complementarily, and despite being placed under a much less favourable light in the Horizontal Guidelines, the idea of *reducing the duplication of certain costs* has also been more or less clearly envisaged in previous case law in connection with situations characterised, *e.g.*, by the reduction of overcapacity[44] or, up to a certain extent, by the reduction of transport costs.[45]

1.2.3. (b.3.1) However, despite widely recognizing an *intrinsic potential of horizontal cooperation agreements to generate substantial economic benefits, that may be construed as pro-competitive effects* – since these typically involve the combination of complementary activities that in numerous cases the parti-

38 See on that assessment of the possible – alternative – sources of economic efficiencies, point 52 of the Horizontal Guidelines.

39 See, on the pondering of such factors, the decisions "*British Interactive Broadcasting/Open*" (OJ 1999 L 312/1) and "*GEAE/P&W*" (OJ 2000L 58/16).

40 See, on the pondering of such factors, inter alia, the situations described in the *Seventh Report on Competition Policy*, points 117 to 119.

41 See, on the pondering of such factors, the aforementioned decision "*GEAE/P&W*" and the decision "*BP/Kellogg*", OJ 1985 L369/6.

42 See, on the pondering of such factors, the decision "Carbon Gas Technology", OJ 1983 L 376/17.

43 See, on the pondering of such factors, the decision "*Alcatel Espace/ANT*", OJ 1990, L 32/19.

44 See, on the pondering of such factors, the decision "*Bayer/BP Chemicals*", OJ 1988 L 150/35.

45 See, on the pondering of such factors, the decision "*Enichem/ICI*" (OJ 1988 L50/18).

cipating undertakings would not be able either to develop separately or to develop separately with the same optimal level of output (in terms of new ranges of products, quantity or quality of products or services rendered available to consumers) – the *Horizontal Guidelines have maintained a rather rigid and clear-cut line between the pondering of effects that may be conducted under par 1 or par 3 of Article 101*.

In fact, as tersely stated in point 20 (*in fine*) of the Horizontal Guidelines, "*the* balancing of restrictive and pro-competitive *effects is conducted* exclusively *within the framework laid down by Article 101 (3)*". (emphasis added) This peremptory characterisation is, of course, in line with the hermeneutical construction previously delineated in the 2004 "*Guidelines on the Application of Article 81(3) of the Treaty*"[46] and with the reasoning put forward in the widely quoted "*Métropole Télévision (M6)*" ruling of the then Court of First Instance (not coincidentally also quoted in the aforementioned point 20 of the Horizontal Guidelines).[47] Conversely, it may strike us that after important and groundbreaking developments of the European jurisprudence, subsequent to the "*Métropole Télévision (M6)*" case, which seem to attenuate the more rigid analytical bifurcation of the restrictive effects and pro-competitive effects assessment, respectively under the pars 1 and 3 of Article 101, underlying that former precedent, the Horizontal Guidelines persist – with no apparent change – in such strict bifurcation.

The limited framework of this Article does not allow us an extensive consideration of the complex hermeneutical problems raised by the *integrated assessment of anti-competitive and pro-competitive effects of cooperation agreements* and its interplay with the dual normative structure of Article 101 (comprehending the general prohibition rule of par 1 and the exemption rule of par 3). In the context of EU competition law those problems have been frequently related with a theoretical controversy concerning the hypothetical application of a *rule of reason* evaluation for purposes of a global assessment of cooperation agreements under Article 101, which, as far as we are concerned, has most of the times been misplaced.[48] Without entering into the details of

46 See, in particular, points *11 et seq.* of the 2004 "*Guidelines on the Application of Article 81(3) of the Treaty*".

47 See, in particular, paragraphs 69 *et seq.* of the "*Métropole Télévision (M6)*" ruling, quoted in point 20 of the Horizontal Guidelines.

48 For a critical perspective on that theoretical discussion see, *inter alia*, Manzini, 2002; Odudu, 2002, p. 100. For a comprehensive analysis of the principal issues underlying that some discussion, with a focus

such controversies, *suffice is to refer* – for the purposes of assessing the option of the Horizontal Guidelines of maintaining an apparent rigid separation between the evaluation of restrictive effects under par 1 and the weighting of potential pro-competitive effects of a given horizontal agreement under par 3 of Article 101 – *that an important line of judicial precedents have, somehow, blurred what seemed to be a clear diving line*.

Beside other relevant case law, three precedents stand as particularly important to rekindle on a new basis this hermeneutical discussion. We refer to the "*Wouters*", "*Meca-Medina*" and "*O2 v. Commission*" cases (which, to a certain extent, seem overlooked in the December 2010 revised Horizontal Guidelines).[49]

In the "*Wouters*" case, the Court of Justice somehow seems to have admitted that, up to a certain extent, potentially beneficial or positive effects of cooperative links, which involve in themselves elements of restriction of competition, may be taken into consideration under the framework of par 1 of Article 101. Such reasoning means that a finding of restrictive elements of competition in certain cooperative behaviours, which do not correspond to '*prima facie*' serious offences, should not translate automatically into an application of the general prohibition rule that would be afterwards be hypothetically counterbalanced through the assessment of the specific conditions established in par 3 (as the only succession of hermeneutical judgments allegedly allowed by the bipartite normative structure of Article 101, and according to a traditional view that the Horizontal Guidelines seem to corroborate).

On the contrary, the need to assess horizontal cooperation and its elements of restriction of competition in its *substantive market context* (economic and legal context) tends to require – to a certain degree, the extension and depth of it being debatable – a *counterbalancing analytical exercise* of, on the one hand, those restrictive elements and, on the other hand, of some potentially beneficial elements arising from cooperation, that are to be seen and put into perspective in light of the way the markets at stake actually operate, before determining that the cooperation ultimately infringes the general

on joint ventures, considering these entities represent paradigmatic cases of entrepreneurial cooperation with potential elements of efficiency requiring a balancing exercise with possible effects of restriction of competition see our Morais, 2011 (especially its final Part).

49 These three precedents have already been singled out, *supra*, point 1.2.2.2. and therein referred (see footnote 21).

prohibition rule of par 1 of Article 101 (meaning here that the aforementioned *counterbalancing analytical exercise* should, on the whole, comprehend an objective assessment of *what the competitive situation would have been in any given market in the absence of the agreement at stake*, in the sense already envisaged in earlier precedents like, *e.g.*, the "*Société Minière et Technique*" case,[50] but now leading to further corollaries in terms of evaluation of *global effective impact of the agreement in the market* that may, as such, include some positive factors).

The factual and legal background in "*Wouters*" is widely known, given the extensive commentaries it arose[51] (and we shall not enter into its details nor into the specifics of the other referenced case law). The Court examined a 1993 regulation adopted by the Bar of the Netherlands that conditioned the formation of multi-disciplinary partnerships and concluded such regulation had "*an adverse effect on competition*" and might "*affect trade between Member States*". However, it also came to admit that "*not every agreement between undertakings which restricts the freedom of action of the parties* (…) *necessarily falls within the prohibition laid down in Article 85(1) of the Treaty* [currently Article 101(1) TFEU]" because for its application "*to a particular case, account must first be taken of the* overall context *in which the decision pf association of undertakings was taken or produces its effects*". In that case the Court admitted that the 1993 regulation of the Bar of the Netherlands did "*not infringe Article 85(1) of the Treaty since that body could reasonably have considered that that regulation despite the* effects restrictive of competition that are inherent *in it, is* necessary *for the proper practice of the legal profession, as organised in the Member State concerned*." [52] (emphasis added)

This reasoning in the "*Wouters*" ruling seems to indicate that the Court took a further analytical step on the basis of preceding cases, such as, '*inter alia*' the "*Remia BV v. Commission*" case,[53] towards reinforcing the idea that *agreements containing competition restraints may* – in a given legal and economic context in which they enhance positive factors translating in an ultimate impact favourable to the competitive conditions of a certain market,

50 See "*Société Minière et Technique*" ruling (Case 56/65).

51 As regards such extensive commentary of the "*Wouters*" case, see, '*inter alia*', Townley, 2009; O'Loughlin, 2003.

52 See the "*Wouters*" ruling, especially par. 73.

53 We refer here to the "*Remia BV v. Commission*" ruling – Case 42/84 (especially pars 17-19).

to be balanced against the restraints at stake – *be regarded as lawful and non prohibited under par 1 of Article 101* (those positive factors with a favourable impact for the functioning of the market either corresponding to essentially commercial purposes or to public interest objectives as it happens largely in the "*Wouters*" case with the requirements of proper practice of the legal profession and sound administration of justice[54]).

The "*Meca-Medina*" ruling, in turn, seems to pursue the analytical line of the "*Wouters*" jurisprudence, according to which competitive restraints undoubtedly limiting the economic freedom of certain entities may, however, be regarded as not caught by the general prohibition rule of par 1 of Article 101 through a balancing exercise that takes into consideration the protection or safeguard of a certain given interest. In fact, while the Court of Justice recognized in this case that decisions of the International Olympic Committee related with antidoping rules and its application excluding professional athletes from sporting events corresponded in principle to "*a decision of an association of undertakings limiting* (…) *the freedom of action*" of undertakings (the professional athletes at stake), such an element of restriction of competition could be considered "*justified by a legitimate objective*" related with the "*organisation and proper conduct of competitive sport* (…) *to ensure healthy rivalry between athletes*"[55] Accordingly, such type of restraints should not be considered as prohibited under par 1 of Article 101, taking into consideration the "*overall context*" and an *implicit balancing evaluation* ascertaining that "*the consequential* effects restrictive of competition *are* inherent *in the pursuit of* (…) objectives" of public nature safeguarding healthy rivalry in sports "*and are* proportionate *to them* [to the objectives]".[56] (emphasis added)

1.2.3. (b.3.2) Nevertheless, it could be somehow construed, that in these cases the balancing exercise was systematically connected with the particularities involving the safeguard of public interests in certain markets through cooperative interventions and inherent restraints of competition related with

54 See the "*Wouters*" ruling, *e.g.* par. 107.

55 See "*Meca-Medina*" ruling, pars 45 *et seq*.

56 See, in that sense, par. 42 of the "*Meca-Medina*" ruling, which, significantly, includes the aforementioned considerations as an express quotation of the "*Wouters*" case, thus emphasizing the analytical continuity between the two cases.

regulatory instruments[57] (*eg*. the statutory rules for the exercise of a liberal profession or the regulations adopted by bodies which provided the framework for certain sporting events).

Conversely, it could be admitted, following the same line of reasoning, that for other types of competition restraints – namely those involving forms of cooperation pursuing purely commercial goals of the participating undertakings as opposed to goals of public interest – no justification for those restraints could be envisaged outside the framework of par 3 of Article 101 (as per the traditional bifurcation of the general prohibition rule of par 1and the exemption regime of par 3). Further developments of the European jurisprudence, however, deprived of a sustainable basis such intermediary hermeneutical perspective.

Those developments arise essentially from the "*O2 v. Commission*" ruling of the then Court of First Instance. In this case, the Court examined a "*framework agreement*" between O2 (Germany) GmbH & Co. OHG ('O2') and T-Mobile Deutschland GmbH ('T-Mobile'), which clearly corresponded to a horizontal cooperation agreement between two competitors that did not have the *object* of restricting competition but that the Commission had scrutinized as an agreement which could have such an *effect*.[58] The agreement concerned, '*inter alia*' infrastructure sharing and national roaming for the third generation of GSM mobile telecommunications ('3G'). Considering that O2 intended through the agreement to obtain the conditions to function in a German market largely developed on the basis of infrastructure controlled by the incumbent operator (Deutsche Telekom of which T-Mobile was a wholly owned subsidiary), the agreement provided, beside other aspects, for the supply of 3G national roaming by T-Mobile to O2 in several areas of the German market. In short,[59] the Commission had treated the horizontal aspects of the agreement at stake as competition restraints subject to the prohibition rule of par 1, but exempted under par 3 of Article 101 (an assessment disputed by O2 in an appeal that originated the ruling of the Court of First Instance).

57 Pursuing the possible line of reasoning see, *inter alia*, Whish, 2008: 130-131.

58 See "*O2 v. Commission*", points 17 *et seq*.

59 Again, as with preceding referenced cases, we have no room in the context of this Article to go into the details of the case.

Particularly striking in the context of the case was the allegation by the Commission that the main objection of the applicant undertaking (and its underlying reasoning), concerning what it construed as a requirement to examine "*the competition situation in the absence of the agreement amounts to applying a rule of reason to the provisions of Article 81(1) EC* [now Article 101(1) TFEU], *in contradiction to the case law*".[60] On the contrary, the Court essentially dismissed that tentative analytical association by the Commission and, as far as we are concerned, thereby contributed to remove one of the chief fallacies in the theoretical discussion concerning a more flexible and economic oriented hermeneutical reading of par 1 of Article 101. In fact, the idea of assessing agreements and its restrictive effects in their *substantive market context* and of primarily ascertaining their *overall actual impact for the functioning of the affected markets*, taking into consideration for such assessment the *competitive situation that would exist in the absence of the agreement* (thereby implicitly taking into consideration factors that may lead to a ultimately more favourable situation in terms of competition in the markets at stake) has been frequently associated with an hermeneutical assimilation of the *rule of reason* (which, conversely, had inevitably to be ruled out because it was incompatible as such with the bifurcated normative structure of Article 101, different from that of *Section 1* of the Sherman Act).[61]

That (in our view) fallacious association of a more in-depth analysis of the competitive impact of agreements in their global market context – going beside the mere identification of elements of restriction of competition in order to conclude an assessment that the agreement contravenes the general prohibition rule of par of Article 101 – with an alleged application '*mutatis mutandis*' of a *rule of reason* judgement has heavily contributed to a persistent rigid bifurcation of the regimes of par 1 and par 3 (difficult to reconcile with the gradually more economics oriented and flexible analysis arising from the European jurisprudence). The Court's reasoning in the "*O2 v. Commission*" case has represented a powerful contribution in the opposite sense (thereby contributing to a hermeneutical realignment that we deem as fundamentally correct and long due). As the Court has peremptorily put it, the elements

60 See "*O2 v. Commission*", points 60 *et seq.*

61 On the literature concerning the debate about the possible transposition of the *rule of reason* to the interpretation and application of Article 101 TFEU, see, *inter alia*, Manzini, 202. That debate is extensively and critically analysed in our Morais, 2011 (especially in its final Part).

of restriction of competition that may arise from an agreement have to be "(…) *understood within the actual context in which it would occur in the absence of the agreement in dispute; the interference with competition may in particular be doubted if the agreement seems really necessary for the penetration of a new area by an undertaking*". From that basis, the Court goes on to assert, no less clearly, that "such a method of analysis*, as regards in particular the taking into account of the competition situation that would exist in the absence of the agreement,* does not amount to carrying out an assessment of the pro and anti-competitive effects of the agreement and thus applying a rule of reason *which the Community judicature has not deemed to have its place under Article 81(1) EC*".[62] (emphasis added)

Considering the situation at stake in the "*O2 v. Commission*" case, the Court ruled that the Commission decision in so far as it applied the prohibition of par 1 of Article 101 (then Article 81) "*suffered from insufficient analysis*", since it contained no objective discussion of what the competitive situation would have been in the absence of the horizontal agreement at stake. That omission – prematurely leading to an unsubstantiated assessment of application of the prohibition rule of par 1 (Article 101) – was all the more serious considering several indicia in the case that pointed to the probability of the roaming agreement concluded between T-Mobile and O2, "*instead of restricting competition between network operators*(…)" being, *"(…) on the contrary, capable of enabling, in certain circumstances, the smallest operator to compete with the major players* (…) *or even with dominant operators, as T-Mobile on the wholesale market*"[63] (whereas the Commission had somehow taken for granted the conditions for a continued presence of O2, the weaker operator, in the German 3G communications market, and had assumed that the very content of the roaming agreement brought about a restriction of competition in the sense of par 1, that could only be justified under par 3 of Article 101; contrary to that, the Court emphasized that an *examination* of the conditions for O2 presence in the market "*was necessary not only for the purposes of granting an exemption, but prior to that,* for the purposes of the economic analysis of the effects of the agreement on the competitive situation *determining the applicability of Article 81 EC*"[64]). (emphasis added)

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62 See *"O2 v. Commission"* ruling, pars. 68 and 69.

63 See *"O2 v. Commission"* ruling, pars. 109 *et seq.*, and 114-115 *et seq*.

64 See *"O2 v. Commission"* ruling, pars 78-79.

In short, a fundamental analytical corollary that, as far as we are concerned, may be construed form the aforementioned reasoning of the General Court in the "*O2 v. Commission*" ruling (in connection with other relevant precedents), is that the requirements of economic analysis of effects of horizontal agreements for assessing their overall impact in a given market context imply not a full blown balancing assessment of restrictive and pro-competitive effects of those agreements (which pertain to the exemption regime of par 3) but some minimum degree of pondering the possible restrictive effects against other positive factors that may ultimately lead to a global impact of the agreement not unfavourable to competitive conditions in the market at stake. As such, we argue that the required analysis under par 1 of Article 101 is oriented towards the assessment of what we may qualify as *global, integrated, effects* of horizontal agreements in the affected markets (putting identifiable restrictive effects of the agreements in context with other more favourable aspects arising from it and involving the minimum degree of global substantive economic evaluation we refer to *supra*).[65]

On the whole, this represents, indeed, a major hermeneutical realignment in terms of understanding of the application of Article 101 to horizontal agreements and, although the newer jurisprudential trends may be regarded as not yet consolidated in this domain, it is difficult to accept that the December 2010 reviewed Horizontal Guidelines have completed omitted such new hermeneutical perspectives.

1.2.3. (c) Criteria for Identifying the Functional Type of Horizontal Cooperation Agreements

Considering that the Horizontal Guidelines – as *supra* referred – identify specific risks for competition arising from different functional types of cooperation agreements and, accordingly, delineate some particular analytical criteria for the assessment of those various types of agreements, comprehending different safe harbours, it is of paramount importance to properly identify reliable parameters for the functional qualification of horizontal cooperation

65 For an *ex professo* analysis of this crucial hermeneutical crossroad and an extensive discussion of the relevant aspects for that discussion, particularly centred in joint ventures which tend to represent paradigmatic cases of cooperative entities leading to positive factors that have to be counterbalanced with restrictive effects (but with possible corollaries also to many other horizontal agreements), identifying in that process the aforementioned *global, integrated, effects on competition* of these agreements, see our Morais, 2011, especially Part I, Chapters 2 and 3.

agreements. In fact, we have argued in preceding Sections of this Article that a larger part of the analytical criteria identified in the multi-stage assessment model delineated by the Guidelines could be common to all types of cooperation agreements notwithstanding its combination with complementary criteria that would, in turn, be specific in connection with each functional type of cooperation. This reasoning would apply, in particular, to the second predominantly structural stage of analysis of agreements which raise doubts concerning its possible restrictive effects on competition – the combined market share of the participating undertakings, that tends to be the basis of safe harbours.

However, as that hermeneutical perspective has not been followed in the Horizontal Guidelines there is an undoubtedly accrued relevance of the parameters used in the functional qualification of horizontal agreements for purposes of application of the Guidelines. Such relevance is even greater bearing in mind that, in practice, many cooperation agreements may combine different stages and economic functions. In those cases it is important to assess if the cooperation agreement as a whole should be subjected to a specific functional chapter or section of the Guidelines (with significant practical implications, *maxime* as regards the application of the different safe harbours).

In this context, the Horizontal Guidelines rely on an analytical parameter which is identified as the "*centre of gravity*" of a cooperation agreement. According to the Guidelines, "*two factors are in particular relevant for the determination of the centre of gravity of integrated cooperation: firstly, the starting point of the cooperation and, secondly, the degree of integration of the different functions which are combined*."[66] Although that is not entirely clear in the Guidelines, we understand that it results from the examples provided therein that ultimately the prevailing factor will be the degree of integration (although we consider that will tend to happen even more acutely in the case of joint ventures as a particularly important subcategory of cooperation agreements[67]).

Furthermore, we believe it would have been relevant to identify as a relevant parameter to assess the prevailing functional type of an horizontal

66 See Horizontal Guidelines, points 13-14.

67 See, for that characterization, our *Joint Ventures and EU Competition Law*, Hart Publishing, forthcoming, 2012, especially Part I, chapter 2.

cooperation agreement combining several functions – in conjunction with the two precedent criteria – the dominant entrepreneurial goal leading the parties to enter into a process of horizontal cooperation (a parameter especially valued, *e.g.*, by several US authors to qualify joint ventures[68]).

1.2.3. (d) Competitive Assessment of Information Exchange

As previously referred one of the major innovations of the Horizontal Guidelines has consisted in the introduction of a whole new analytical section devoted to exchanges of information (Section 2 – "*General Principles on the Competitive Assessment of Information Exchange*"). That corresponds to a sensitive and difficult area – frequently interconnected with horizontal agreements – since, on the one hand and as duly acknowledged in the Horizontal Guidelines, information exchange "*is a common feature of many competitive markets and may generate various types of efficiency gains*"[69] and, on the other hand, it "*may also lead to restrictions of competition, in particular in situations where it is liable to enable undertakings to be aware of market strategies of their competitors*", as underlined, *e.g.*, in the "*John Deere*" ruling.[70]

Understandably, given those analytical difficulties, the 2001 Guidelines already anticipated the need or relevance of producing in the future guidance in such domain,[71] something which is now fulfilled in the Horizontal Guidelines (although, contrarily to what appeared *´prima facie*' to be the case, these Guidelines do not correspond to the first Commission document providing guidance on the assessment of the compatibility of information exchanges with EU competition law since the 2008 "*Guidelines on the Application of Article 81 of the EC Treaty to Maritime Transport Services*"[72] already included some considerations on that field). As such, this represents an essentially positive development of the Horizontal Guidelines because it is of paramount importance to reduce, as much as possible, the levels of

68 Pointing in that direction, see, *inter alia*, Piraino, 1991/1992.

69 See point 57 of the Horizontal Guidelines,

70 See point 58 of the Horizontal Guidelines which make express reference to the "*John Deere*" ruling – Case C-7/95 P, par. 88.

71 See, in that sense, par 10 of the 2001 Guidelines.

72 We refer here to the "*Guidelines on the Application of Article 81 of the EC Treaty to Maritime Transport Services*", 2008 OJ C 245/2, which include a rather extensive section on information exchanges (points 38 to 59).

uncertainty of undertakings when dealing with exchange information issues that may be frequent in their reciprocal relationship and may also be beneficial to the competition process. Conversely, it may be argued that the guidance provided by the Horizontal Guidelines, after the gradual consolidation of some significant case law in this domain, could have been more thorough and assertive. A less positive feature which is all the more significant given the frequency of information exchanges in the everyday *praxis* of undertakings is the actual lack of safe harbors, based on objective and foreseeable indicators, to undertakings concerning the application of Article 101 to those exchanges (although this omission is somehow mitigated by the practical examples included in points 105-110 of the Guidelines).

Clearly, as results from the already commented global analytical model envisaged in the Horizontal Guidelines, the information exchanges are also subject to a basic – and perhaps too schematic – distinction between situations that have the *object* of restricting competition and situations that may produce *effects* of restriction of competition. As regards the first category of situations, it should be stressed as a positive feature the acknowledgment in the Guidelines of the need to pay attention to the *legal and economic context* in which the information exchange takes place (even when scrutinising situations that "*by its very nature*" seem to lead to a restriction of competition, but whose actual impact in such substantive context has to be, to a minimum degree, assessed, as per the reasoning of, *e.g.*, the "*GlaxoSmithKline*" ruling which is specifically taken into consideration in this part of the Guidelines[73]). In fact, we would argue, going beyond the too succinct considerations produced in the Guidelines, that typically information exchanges as current or widespread entrepreneurial conducts should be predominantly evaluated on the basis of its specific and widely varying repercussions in different market contexts and that, therefore, the restriction by *object* perspective is not particularly adequate for purposes of competition law scrutiny of those same practices. On the contrary, such practices should be assessed through a prevailing perspective of possible *effects* of restriction of competition which does not cope well with the apparent relevance given in the Guidelines to *by object* restrictions hypothetically arising from information exchanges.

With the proviso that the evaluation should take into consideration the legal and economic context at stake in each relevant situation, the Horizontal

73 See point 72 of the Horizontal Guidelines.

Guidelines in principle assess as restrictions of competition *by object* and, accordingly, '*quasi per-se*' violations of par 1 of Article 101 "*information exchanges between competitors of individualised data regarding intended future prices or quantities*" (although the Guidelines also recognize that "*public announcements of intended individualised prices may give rise to efficiencies and that the parties to such exchanges would have a possibility to rely on Article 101(3)*"[74]).

1.2.3. (d.2.) Conversely, as regards possible restrictive *effects* on competition of information exchanges these should be assessed on a case-by-case basis, taking into consideration two chief parameters corresponding, on the one hand, (i) to *market characteristics* and, on the other hand, (ii) to the *characteristics of the information exchange* itself. Such assessment is intended to verify the likelihood of the exchanges of information producing an adverse impact on one or various of the key parameters of competition, namely price, output, product quality, product variety or innovation.

As regards relevant *market conditions* to be taken into consideration (i), the Horizontal Guidelines sustain that collusive outcomes are easier to achieve in markets "*which are sufficiently transparent, concentrated, non-complex, stable*" (particularly markets in which innovation is not an important factor) and "*symmetric*" (*maxime*, involving homogeneous products).[75] However, the Guidelines also specify that those particular features, identified as important analytical parameters, do not represent "*a complete list of relevant market characteristics*" and that "*there may be other characteristics of the market which are important in the setting of certain information exchanges*".[76] While it may be understood that the Commission may want to preserve, up to a certain extent, some margin of appreciation of heterogeneous casuistic situations, this tends also to represent a significant limitation on the guidance provided (leaving an undesirable margin of uncertainty to undertakings).

As to the pondering of the *characteristics of the information* exchange (ii), the Guidelines particularly take into consideration the exchange of the so called "*strategic information*" – a crucial notion in the process of assessing possible

74 See on that pronouncement which is difficult to reconcile with a *by object* restriction of competition perspective footnote 5 in point 74 of the Horizontal Guidelines.

75 See Horizontal Guidelines, points 77-82.

76 See footnote 2 to point 77 of the Horizontal Guidelines.

restrictive effects of information exchange – comprehending essentially data that "*reduces the strategic uncertainty*" in the market and, as such, appreciably reduces the incentives of the several competing undertakings to compete against each other (attention should be paid here to the fact that this notion of strategic information, as construed in the Guidelines, is rather wide in its scope, covering other data beside the information strictly commercially driven as prices and quantities; conversely, while other complementary data, *e.g.* information on demand and costs, are also relevant, the most strategic information will undoubtedly remain the information directly related with prices and quantities).

As other relevant aspects concerning the *characteristics of the information* exchange the Guidelines consider that the undertakings involved in the information exchange have to cover a sufficiently large part of the market for the exchange to be likely to lead to restrictive effects of competition, that the exchanges of historic data are not likely to lead to collusive results,[77] that the degree of frequency of information exchanges enhance the risk of collusive outcome, and that exchanges of aggregated information, meaning "*where the recognition of individualised company level information is sufficiently difficult*" is much less likely to be problematic than "*exchanges of company level data*".[78]

Furthermore, the Guidelines, based on previous case law also refer to the usual presumption that the exchange of *public information* does not infringe the prohibition rule of Article 101 but, somehow, qualify that admission in terms that are stricter than such previous case law and that may lead to undesirable uncertainty. In fact, the Guidelines distinguish between what is qualified as "*genuinely public information*" and "*information in the public domain*" stating that the favourable presumption only applies to the former. However, beside restricting too severely that presumption, such evaluation proves somehow contradictory since when information is "*genuinely public*", meaning, as it is construed in the Guidelines, information equally accessible (in terms of costs of access) to all competitors and customers, there is

77 The idea that exchange of *historic* data is unlikely to lead to a collusive outcome already resulted from previous and rather consolidated case law, but the Horizontal Guidelines somehow fail to consider a predictable threshold to indicate when the data may be regarded as historic (in comparison with the threshold frequently considered in the such previous case law according to which information tended to be qualified as historic if the individual data at stake *were more than one year old*.

78 See points 86-94 of the Horizontal Guidelines.

ultimately no autonomous relevance of information exchange in itself (there is, in short, no autonomous competition legal issue to be considered as such).

2. GLOBAL PERSPECTIVE OF THE APPLICATION OF ARTICLE 101 TFEU TO JOINT VENTURES

2.1. (a) The Notion of Joint Venture

As aforementioned, (*supra,* 1.1.1.) the Horizontal Guidelines do not confer any autonomous treatment to the category of joint ventures, being applicable to the most common types of horizontal cooperation agreements irrespective of the level of integration they entail. In short, this means that joint ventures are to be treated, according to the "*centre of gravity*" parameter (which we have already briefly commented, *supra*, 1.2.3. – (c)), and taking into consideration the prevailing economic function of each joint venture, under the specific chapters of the Guidelines that deal with each functional type of cooperation agreements, *e.g.* research and development joint ventures being treated in the chapter covering research and development agreements in general, and so on).

While that methodological option in the Horizontal Guidelines may be understood, we believe there are strong arguments for an autonomous assessment of joint ventures that do not qualify as concentrations (notwithstanding the close analytical interconnections existing between horizontal joint ventures and horizontal cooperation agreements in general). That should imply an analytical model which follows largely the model established in the Horizontal Guidelines but will entail certain specific traits. There is no room, given the limited scope and dimension of this Article, to elaborate on those specificities, as that would require an '*ex professo*' and in-depth analysis of the competition law assessment of joint ventures.[79] However, we considerer that a greater role for structural criteria of analysis and for analytical parameters or indicators oriented towards the more rigorous assessment of several dimensions of economic efficiency underlying the establishment of joint ventures are to be counted among those specificities of the evaluation of the effects of joint ventures on competition.

79 For that *ex professo*' and in-depth analysis of the competition law assessment of joint ventures see our Morais 2012, especially Part I, Chapters 2 and 3.

The Horizontal Guidelines go somehow close to recognize that specificity which is related with a particularly active interplay between the *substantive criteria used for the evaluation of joint ventures*, on the one hand under Article 101 and, on the other hand, under the substantive tests of the Merger Regulation.[80] In fact, the Guidelines acknowledge that the potential restrictive effects of "*full function joint ventures that fall under the Merger Regulation and non-full function joint ventures that are assessed under Article 101* (…) *can be quite similar*".[81] We would argue that such similarity justifies an accrued role of the structural criteria for the evaluation of joint ventures under Article 101 (by proximity with the structural elements involved in the substantive test of evaluation of joint ventures qualified as concentrations under the Merger Regulation), as referred in our precedent considerations. As a corollary of that hermeneutical perspective we also consider that the idea which we have put forward [referred *supra*, 1.2.3. – (b.1)], concerning the possible advantage of a *common market share threshold* for the analysis of horizontal cooperation agreements – to be counterbalanced by complementary criteria specific to each functional type of cooperation which may confirm or infirm and adjust the preliminary indications arising from the structural parameters – is especially pertinent in the context of horizontal joint venture analysis.

Leaving aside this proximity between the substantive criteria of assessment of joint ventures under Article 101 and of joint ventures qualified as concentrations – whose corollaries are only implicitly touched in the Horizontal Guidelines – the dividing line which is taken into consideration in the Guidelines in accordance with the normative bifurcation long established in the Merger Guidelines (albeit with adjustments in the course of successive reforms of merger control rules since 1989 and also on the basis of the related teleological criteria)[82] is between those two categories of joint ventures depending on their qualification or not, as the case may be, as concentrations. As widely agreed, the criteria for such division are *functional* and *operational*. On the basis of Article 3 of the Merger Regulation,[83] joint ventures performing on a lasting basis all the functions of an autonomous economic entity ('*full-*

80 We refer here to the basic standard of legality of '*significant impediment to effective competition*', as results from the 2004 reviewed Merger Regulation.

81 See point 21 of the Horizontal Guidelines.

82 On those adjustments see our Morais, 2011, especially Introduction and Part I, Chapter 1.

83 See, in particular, Article 3(4) of the Merger Regulation.

function joint ventures') are to be qualified as concentrations and are to be controlled under the Merger Regulation; conversely, joint ventures which do not perform all those functions of an economic entity (and that, accordingly are auxiliary entities of the parent undertakings, providing research and development, productive inputs or other to the parent undertakings, which are the ones that assume a direct role as players in any given market and in the competitive relationship in those markets) are to be qualified as cooperative entities and treated under Article 101 (these being the ones directly relevant here for the purposes of analysis of horizontal cooperation agreements in this Article).

Attention should also be paid to the fact that beside the *functional dimension* involved in this dual categorization of joint ventures there is also a relevant *operational factor*. This has to do with the particular way in which the idea of *autonomy* is apprehended in the context of this categorization. Such *autonomy* – as an attribute of an *economic entity* with all the corresponding normal economic functions related with a direct presence in the market – is considered in the *operational* sense which has to do with that complex of typical economic functions. It must not be confounded with *autonomy*, in a *substantive* sense, as opposed to the notion of entrepreneurial control. In fact, a full function joint venture is by definition subject to *joint or common control* of its parent undertakings, which exert a determinant influence over its strategic decisions and, in that sense, it does not enjoy *autonomy* from its parents.[84]

2.1. (b) The Notion of Joint Venture and Relevant Aspects for its Assessment

Defining the concept of joint venture for the purposes and in the context of the application of competition law – particularly as regards *joint ventures to be treated as cooperative entities under Article 101 that we take into consideration in this Article* – corresponds to a first and fundamental legal problem as regards a proper understanding of such category in this area of law. It corresponds, in fact, to an *a priori* complex legal problem, which precedes the level of substantive assessment of joint ventures (meaning here the assessment of the *effects* of joint ventures on the competitive conditions in any given market). A critical review of the EU and US competition law doctrine may indeed lead us to apprehend either **(i)** extremely broad definitions of joint ventures,

84 See on this, footnote 2 to point 6 of the Horizontal Guidelines.

either (ii) broad definitions or (iii) more restrictive definitions of joint ventures (such definitions varying across a range of all sorts of intermediate realities in the field of entrepreneurial cooperation, situated between situations corresponding, on the one hand, to cartels and, on the other hand to mergers or concentrations).[85]

Given this rather elusive nature of the concept of joint venture, we propend to an *intermediate perspective of antitrust definition of joint ventures* situated between what we have referred to as *broad* and *more restrictive* definitions [*supra*, (ii) and (iii)] of these entities. According to this perspective, the unifying substantive idea on the basis of which the *category of the joint venture* may justify its autonomy in the field of competition law arises from the *need* – experimented by certain undertakings – *to combine various productive resources* on the basis of which the parent undertakings contribute to a *new business entity*, in a way that represents a '*maius*' when compared with the economic reality that could result from the mere aggregate activities or productive resources that would be individually developed by each parent undertaking on its own initiative.

This combination of productive resources ('*lato sensu*') involves the building of an *organisation*, that may be based on various legal instruments or vehicles (which may be merely contractual and not involving, as such, the establishment of a corporation or of other new legal entities, *e.g.* partnerships or others). The relevant factor here has to do with the fact that such an *organisation*, considering its building elements and functional program, should be situated in an intermediate area (somehow a middle ground between the entrepreneurial *cooperation* phenomena, on the one hand, and the entrepreneurial *integration* phenomena, on the other hand). This particular mix of *cooperation* and *integration* elements tends, in turn, to be connected with an *intrinsic dimension of economic efficiency*. These efficiency benefits – that may coexist with some anti-competitive effects, in a critical tension that has to be globally evaluated – comprehend, '*inter alia*', the conduct through joint ventures of activities that the parents could not perform individually and involving no serious restrictions on other competitive activities of the

85 On that wide range of definitions, some of them we deem as *analytically irrelevant* because they do not really circumscribe the joint venture category in systematic confront with other types of cooperative situations, see our Morais, 2012, especially Part I, Chapter 1. See also Chavez, 1999.

joint ventures or the development, under better conditions, of new products and services or the qualitative upgrade of such products or services.

In this context and in connection with the precedent considerations, we may regard the creation of *some form of new enterprise capability* as a truly distinctive feature of joint ventures. Another distinctive element of these entities, strictly interconnected with it, should be here emphasized. We refer to the development of a joint activity that requires the intermediation of an *organisational structure* with some degree of *autonomy* from the entrepreneurial organisations of each parent undertaking (albeit a relatively limited *autonomy* and with a prevailing operational nature, as already briefly noted *supra*, considering that such structure is subject to *joint control* by those parent undertakings). As already remarked, that type of new organisational structure may be based on multiple (alternative) legal instruments or vehicles but, in principle, it should, in itself, be close to correspond to a new *undertaking* (bearing in mind the wide notion of *undertaking* which has been construed in the field of competition law and considering some peculiarities as well in that assimilation to the idea of undertaking, because in the case of joint ventures the new organizational structure established by the parties has a limited degree of autonomy).[86]

Curiously, the final version of the reviewed December 2010 Horizontal Guidelines does not include major new considerations on the treatment of joint ventures, although in the Draft of the new Guidelines put out to public consultation, the Commission had proposed a *specific point of guidance* considering that "[*a*]*s a joint venture forms part of one undertaking with each of the parent companies that jointly exercise decisive influence and effective control over it, Article 101 does not apply between the parents and such a joint venture* (…)".[87] This specific point was ultimately left out of the final version of the Horizontal Guidelines established in December 2010, possibly as a consequence of various hermeneutical doubts and issues that were raised during the consultation period. In fact, stating in generic and rather vague terms that *Article 101 would not apply to agreements between a joint venture and each of its parent undertakings* that jointly exercise decisive influence and

86 For a more elaborate analysis of these key aspects for a competition law definition of joint ventures see our Morais 2012, especially, Part I, Chapter 1.

87 We refer here to point 11 of the Draft Horizontal Guidelines put out to public consultation in 2010 and referring to non full function joint ventures.

effective control over it, provided that the agreement setting up the joint venture would not infringe EU competition law, would imply a change of policy on the part of the European Commission, giving rise – if such broad terms would have been adopted – to considerable legal uncertainty as well. For a start, it should be stressed that such idea of inapplicability as a whole of Article 101 to the relationship between a joint venture and each parent undertaking, conveyed by the Commission in the Draft Horizontal Guidelines, would not be really supported in previous case law.

As a matter of fact, in relevant precedents like, *e.g.*, the "*Avebe v. Commission*" and the "*Akzo Nobel v. Commission*" rulings,[88] it has been made clear that *the idea of the so called parent-subsidiary single undertaking presumption* – according to which it could be presumed that the parent company actually exerted a decisive influence over its subsidiary's conduct and could therefore be held liable for such conduct (and that, conversely, the understandings between the parent and the subsidiary would not be relevant for purposes of Article 101 enforcement) – *only applies to specific cases of a parent company holding 100% of the capital of a subsidiary (without being extended, as such, to joint venture undertaking scenarios)*.

In that hermeneutical context, and in light of the existing precedents, it would involve some appreciable risks to sustain in general about the *extremely variable situations of establishment and functioning of partial function joint ventures* (covered by Article 101) the idea that the understandings and relationship between each of the parent undertakings and the joint venture would not be relevant in principle for the application of Article 101 (as it was done in the Draft Horizontal Guidelines). In fact, considering the variable and potentially very complex geometry of relationship and links arising from the functioning of a partial function joint venture, we may not entirely rule out that through some agreements between the joint venture and each parent company the joint venture is indirectly and instrumentally used as a tool to coordinate market relationship between the parents.

That does not invalidate what we take as a fundamentally rigorous assertion for the purpose of competition law assessment of joint ventures the idea that the key effects on competition arising from joint ventures – to be duly scrutinized – are the ones which have to do with *actual or potential competition*

88 See the "*Avebe v. Commission*" and the "*Akzo Nobel v. Commission*" rulings, respectively Case T-314/01 (especially par. 136) and Case T-112/05 (especially, par. 60).

between the parent undertakings themselves (meaning that the *competitive relationship between parents*, and not the relationship between each parent and the joint venture, is primarily relevant in order to ascertain possible *restrictive effects for competition* arising from the establishing of joint ventures). In short, we would argue that the key potential effects of restriction of competition to be assessed in the context of antitrust scrutiny of joint ventures are what we may qualify as (i) *lato sensu spill over effects of joint ventures* – effects arising from the establishment and functioning of a joint venture spilling over to the competitive behaviour of parent undertakings in the markets of final goods or services related with the joint venture's activities and in which these parents operate and (ii) *stricto sensu spill over effects of joint ventures* – effects arising from the establishment and functioning of a joint venture spilling over to the to the competitive behaviour of parent undertakings in markets which are neighbouring to the markets of final goods or services directly related with the joint venture's activities.[89]

3. SPECIFIC TYPES OF HORIZONTAL COOPERATION AGREEMENTS COVERED BY THE HORIZONTAL GUIDELINES

3.1. General Overview

As aforementioned, the Horizontal Guidelines, beside establishing common analytical patterns for the assessment of horizontal cooperation agreements in general, specify – in conjunction with the new Commission Regulation (EU) N.º 1217/2010 and Commission Regulation (EU) N.º 1218/2010 – specific hermeneutical parameters to particular functional types of horizontal cooperation, therefore covering in separate chapters (i) research and development agreements, (ii) production agreements, (iii) purchasing agreements, (iv) agreements on commercialisation and (v) standardisation agreements (this later type corresponding to an area where major new analytical input has been introduced by the new Guidelines).[90] Due to limitations of space

89 For further elaboration on these types of effects and their global characterisation in comparison with a *stricto sensu* structural effects assessed under the Merger Regulation as regards full function joint ventures (concentrations) see our *Joint Ventures and EU Competition Law*, Hart Publishing, forthcoming, 2012, especially Part I, Chapter 3.

90 See on this analytical structure point 54 of the Horizontal Guidelines. As regards the five functional types of horizontal cooperation agreements see the five different chapters of the Horizontal Guidelines, respectively comprehended in points 111-149, 150-193, 194-224, 225-256 and 257-335.

which do not allow an extensive analysis in this Article of these various functional types of horizontal cooperation we shall particularly focus our attention – however briefly – on the *research and development, commercialisation and standardisation* areas (treated *infra*, points 3.2. to 3.4.).

This analytical selection in the Horizontal Guidelines of the *supra* referred five functional types of cooperation agreements, in accordance with the prevailing economic function of each agreement [identified through the already commented *centre of gravity test*, *supra*, 1.2.3. (c)], is based not only in the practical relevance and frequency of such types of cooperation, but also on the paradigmatic nature of certain elements or factors potentially conditioning competition that tend to arise from those same types. In fact, a comprehensive and systematic overview of the possible risks of anti-competitive impact of horizontal cooperation agreements may lead us to identify three major risk categories concerning (a) *risks of competitive behaviour coordination* (mainly related, as we have observed, with parent undertakings' behaviour and their reciprocal competitive interplay) *concerning prices and the levels of output*, (b) *risks of competitive behaviour coordination concerning product or services quality* and (c) *risks of foreclosure of certain markets to third competitors* (not justified or counterbalanced by economic efficiency factors). These risks typically materialise in different forms and with a different intensity in the context of each functional type of cooperation (although other casuistic factors specific to the actual markets at stake in each given situation may also lead to different evaluations of the economic effects of horizontal agreements).

It, therefore, makes analytically sense, to ponder those different categories of risk according to analytical grids that take into consideration the paradigmatic factors which are recurrently at play in each functional type of cooperation. In a very schematic perspective, we could construe as guiding principles for the assessment of horizontal cooperation agreements the idea that the category of (a) *risks of competitive behaviour coordination concerning prices and the levels of output* will be relatively more significant the more close the cooperation agreements are to the commercialisation of products or services involving its final users (which does not mean that research and development agreements do not bear those types of risks, depending on their specific configuration and on their particular market context). Conversely, as regards (b) *risks of competitive behaviour coordination concerning product or services quality* these may tend to intensify in connection with research and development agreements and with production agreements as well. Finally, (c)

risks of foreclosure of certain markets to third competitors may somehow intensify in the context of research and development, production and purchasing agreements.[91]

3.2. Research and Development Agreements

3.2.1. Research and development agreements are broadly characterised under Commission Regulation (EU) N.º 1217/2010 (hereinafter '2010 R&D BER') and under the Horizontal Guidelines as agreements between two or more undertakings which relate to the conditions under which those parties pursue activities of "*acquisition of know-how relating to products, technologies or processes and the carrying out of theoretical analysis, systematic study or experimentation, including experimental production, technical testing of products or processes, the establishment of the necessary facilities and the obtaining of intellectual property rights for the results*".

The scope of this new 2010 R&D BER has been extended – in comparison with the former Regulation EC No. 2659/2000 – in order to cover the so called 'paid-for research' agreements, where one party finances the research and development activities carried out by the other party[92] (in the previous 2000 Block-Exemption Regulation the exemption only covered situations in which the parties were actually working together). On the whole, the 2010 R&D BER retains the normative structure and options of the previous 2000 Block-Exemption Regulation. Accordingly, it establishes a safe harbour based on a market share threshold of the participating undertakings. Agreements are presumed not to produce anticompetitive effects if the parties' combined market share does not exceed 25% of the relevant product and technology markets at stake ('*ex vi*' Article 4 of the 2010 R&D BER, which maintains the market share threshold previously established).

This decisive market share threshold is to be confronted with the assessment of possible hardcore restrictions ('*ex vi*' Article 5 of the 2010 R&D BER). These have been, up to a certain extent, made more flexible, since at least two competition restrictions that were treated as hardcore, and automatically leading to the withdrawal of the benefit of the Block-Exemption for the

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91 See our Morais 2011, especially Part I, Chapter 2. Despite the analytical grid we delineate in that book is especially addressed to joint ventures, a significant number of relevant corollaries may also be inferred, *mutatis mutandis*, to horizontal cooperation agreements in general.

92 See Article 1, (a) (vi) of Commission Regulation (EU) No. 1217/2010.

whole agreement, are under the new Regulation treated as merely not exempted (this applying namely to prohibitions on challenging, after the completion of the research and development, the validity of intellectual property rights and to obligations not to grant third parties licences to manufacture contract goods or to apply the contract technologies, as per Article 6, a) and b) of the 2010 R&D BER). Furthermore, another element of the framework which been made more flexible has to do with the freedom of the participating undertakings to jointly exploit the results of a research and development agreement, which has been significantly widened, namely in order to contemplate the application of the BER to situations where only one party produces and distributes the contract products in the EU as may be provided in exclusive licenses granted by the other party (as results, *e.g.*, from Article 3(5) of the BER).

3.2.2. Complementarily, the Horizontal Guidelines duly emphasize that one of the decisive questions when assessing possible restrictive effects on competition is "*whether each party independently has the necessary means as regards assets, know-hoe and other resources*" to carry out the research and development activities at stake.[93] Also the Guidelines duly clarify that "*pure R&D agreements* (…) *rarely give rise to restrictive effects on competition within the meaning of Article 101(1)*". In principle, such agreements which do not include the joint exploitation of possible results by means of licensing, production and/or marketing only tend to cause hypothetical competition problems if *competition with respect to innovation* is significantly reduced, "*leaving only a limited number of credible competing R&D poles*".[94]

A particular point in which the Guidance provided in the Horizontal Guidelines could have gone further relates with hypothetical risks of market foreclosure that may arise from R&D agreements (an area where traditionally EU competition law analysis has been somehow limited or even deficient). In fact, the assessment of this type of competition risks in the context of R&D agreements is particularly complex as it frequently requires a prospective evaluation of the results of joint R&D projects (in order to ascertain how and under what terms some of those results, comprehending, *e.g.*, information

93 See point 130 of the Horizontal Guidelines.

94 See point 132 of the Horizontal Guidelines.

on new technologies or know-how processes, may be come to be essential in order to gain or maintain access to certain markets of final products).

3.3. Commercialization Agreements

3.3.1. As referred in the Horizontal Guidelines commercialization agreements involve cooperation between competitors in the selling, distribution or promotion of their substitute products. As duly emphasized in these Guidelines, this type of agreement "*can have widely varying scope, depending on the commercialisation functions which are covered by the cooperation*". In fact, these agreements can vary across a range that covers joint selling – that "*may lead to a joint determination of all commercial aspects related to the sale of the product, including price*" – up to more limited agreements that merely "(…) *address one specific commercialisation function, such as distribution, after-sales service, or advertising*".[95] Accordingly, the potential to generate a negative impact on the competitive conditions of any given markets may also widely vary on the basis of the differing configuration of the commercialisation agreements (an aspect which, as far as we concerned, is not always properly underlined in the Guidelines, which would gain in clarity and legal certainty if they would specify on more elaborate terms that certain common arrangements involving particular commercialisation functions are not especially problematic for purposes of Article 101 application).

In the important domain of more limited commercialisation agreements the Guidelines underline the relevance of a particular subcategory which corresponds to *distribution agreements*, but somehow fail to further elaborate on the potential differences concerning the assessment of *reciprocal* and *non-reciprocal distribution agreements*[96] – these later ones being considered less problematic than the former ones if the parties involved do not hold a particularly high market power. However, the Guidelines fail to clarify the actual reach of such distinctions in terms of the degree of danger to competition underlying those two subcategories. In fact, non reciprocal distribution agreements are not even entirely excluded from the domain of more serious competition infractions (*restrictions of competition by object*), as the Guidelines, while acknowledging that in such cases "*the risk of market partitioning is less pronounced*", reiterate, conversely, that it is necessary, anyway,

95 See point 225 of the Horizontal Guidelines.

96 Reciprocal and non-reciprocal distribution agreements referred in point 227 of the Horizontal Guidelines.

"*to assess whether the non-reciprocal agreement constitutes the basis for a mutual understanding to avoid entering each other's markets*"[97] (reliable and objective indicators allowing some degree of legal safety for identifying the probability of such "*mutual understanding*" in the context of non reciprocal distribution agreements are totally omitted in the Guidelines).

Also, as regards this subcategory of *distribution agreements*, the Guidelines establish that if the assessment of those agreements conducted on the basis of the parameters set out in the chapter concerning commercialization agreements leads to the conclusion that cooperation in the area of distribution would in principle be acceptable, a further assessment will be necessary to examine the vertical restraints included in such agreements (that, in short, will involve two separate assessments, the second of which should be based on the principles set out in the Guidelines on vertical restraints).

3.3.2. Following the methodology used for the assessment of other functional types of horizontal agreements, the Horizontal Guidelines delineate a safe harbour for commercialisation agreements based on a market share threshold. In this case, the Guidelines establish a threshold corresponding to a *combined market share of the participating undertakings not exceeding 15% of the markets at stake* (the same threshold already established in the 2001 Guidelines). Accordingly, it is acknowledged that if the parties combined market share does not exceed such threshold it is unlikely that some degree of market power of those undertakings exists, which, in turn, implies that it is not probable that the agreement between those competitors has restrictive effects on competition.[98] We have already argued that such market share threshold may be considered too strict and that a slightly more permissive common threshold for several functional types of horizontal cooperation agreements could, in our view, have been established, albeit in conjunction with a series of complementary analytical factors, specific to each functional type that would adjust the preliminary indications obtained through the market power-market share indicator.

On the whole, and as regards commercialisation agreements that may raise potential competition law problems (above the aforementioned market share threshold) the Horizontal Guidelines, take into consideration analytical

97 See point 236 of the Horizontal Guidelines.

98 See points 240 and 241 of the Horizontal Guidelines.

factors and criteria that are largely similar to the ones established in the 2001 Guidelines. However, it may be considered that, comparatively with the 2011 Guidelines, there is now a less stark analytical bifurcation between, on the one hand, agreements leading, directly or indirectly, to the fixing of prices, and, on the other hand, supposedly less serious distortions of competition. The Horizontal Guidelines identify as the main risks for competition arising from commercialisation agreements, the possibility of leading to price fixing, the possibility of facilitating output limitation (in a context where the parties decide on the volume of products to be put on the market), the susceptibility of leading to a division of the markets or to allocation of orders and customers and, finally, the susceptibility of leading to exchange of strategic information or to commonality of costs.

In the characterization of *competition concerns* and of reasons that may attenuate or even remove those concerns we may consider that some more emphasis (albeit that is almost barely perceptible in the relevant passages of the Guidelines) is placed on the possible *contribution of certain commercialisation agreements in creating objective conditions for the parties to penetrate in new markets*. However, and considering previous case law on possible market failures making it difficult for some undertakings to penetrate certain novel markets, due to those markets configuration, and on the relevance of joint commercialisation understandings in that context to favour market access – as, *inter alia*, the "*Florimex and VGB*" and the "*VBA v VGB and Florimex*" rulings –[99] some further guidance would have been advantageous in this sensitive domain (although it has to be reckoned at the same time that some relevant practical *examples* concerning "*joint commercialisation necessary to enter a market*" have been provided in the final version of the Horizontal Guidelines[100]).

3.4. Standardisation Agreements

3.4.1. As referred in the Horizontal Guidelines, standardisation agreements, although taking many different forms, are predominantly oriented towards the definition of technical or quality requirements with which current or

99 See *Florimex and VGB*" and "*VBA v VGB and Florimex*" rulings, respectively of the then Court of First Instance and of the Court of Justice (Case T 70 e 71/92 and Case C-266/97P).

100 See points 252 *et seq.* of the Horizontal Guidelines.

future products, production processes, services or methods may comply.[101] The characterization delineated in the Guidelines also covers the terms of access to a particular quality mark or for approval by a regulatory body (excluding, however, standards related with the provision of professional services). Furthermore, standardisation agreements may comprehend as well issues like the standardisation of different grades or sizes of a particular product or technical specifications in product or services markets where compatibility and interoperability with other products or systems is essential.

As already mentioned, the December 2010 revised Horizontal Guidelines set out a much more developed chapter analysing the basic features and competition concerns arising from these standard-setting agreements. This expanded guidance in comparison with the 2001 Guidelines is naturally built on the basis of the significant experience acquired by the Commission in important recent cases, such as, *inter alia*, the "*Qualcomm*" case or the "*Rambus*" case (in which the Commission dealt, *inter alia*, with patents incorporated into standards in terms that were not fair, reasonable and non discriminatory, the so-called un-FRAND terms).[102]

On the one hand, the Horizontal Guidelines recognize that standardization agreements may frequently have favourable economic repercussions, namely by "*promoting economic interpenetration on the internal market and encouraging the development of new and improved products or markets and improved supply conditions*", but, on the other hand, acknowledge that "*in specific circumstances*" they may "*give rise to restrictive effects on competition by potentially restricting price competition and limiting or controlling production, markets, innovation or technical development*".[103] These concerns may materialise "*through three main channels, namely reduction in price competition, foreclosure of innovative technologies and exclusion of, or discrimination against, certain companies by prevention of effective access to the standard*".

101 See points 257 *et seq.* of the Horizontal Guidelines.

102 See "*Rambus*" Decision of 9 December 2009 (Case Comp/38.636), making legally binding commitments offered by the undertaking Rambus to put a cap on its royalty fees for certain patents. In the "*Qualcomm*" case the Commission opened in October 2007 proceedings against Qualcomm for allegedly charging un-FRAND terms in a context of standard-setting processes. For an extensive comment on relevant developments in the area of standard-setting that may have, on the whole, contributed to the analytical criteria set out in this domain in the Horizontal Guidelines see, in particular, Glaeder, 2010.

103 See points 263 *et seq.* of the Horizontal Guidelines.

The two key areas of the chapter on standardisation agreements of the Horizontal Guidelines deal with the *safe harbour exception* for these agreements within Article 101, par 1 (points 280, *et seq.* of the Guidelines) and with an "*effects-based assessment for standard agreements*" that are not covered by such safe harbour (points 292 *et seq.* of the Guidelines).

3.4.2. The Guidelines establish that standardisation agreements, even when they risk creating market power are to be regarded normally not prohibited under par 1 of Article 101, provided four cumulative conditions are met. These four conditions comprehend (a) an unrestricted industry participation in a transparent standard-setting procedure; (b) the inexistence of any obligation to comply with the adopted standard; (c) good faith disclosure of standard-essential intellectual property rights; and (d) the essential requirement concerning access to the standard on fair, reasonable and non-discriminatory terms (the so called FRAND terms).

Conversely, if a standardization agreement does not meet these conditions for the application of the safe harbour and although there is no presumption of illegality the parties will have to assess whether the agreement falls under the prohibition of par 1 of Article 101 and, if that is the case, if it is justified under par 3 of Article 101. For that kind of assessment the Guidelines establish a certain number of parameters which are envisaged as aligned with an *effects-based approach*. In that context, two parameters stand out. The first has to do with the considerations developed by the Commission according to which "*standard-setting agreements providing for ex ante disclosures of most restrictive licensing terms will not, in principle, restrict competition within the meaning of Article 101(1)*". Following that same line, the Commission considers that "*it is important that the parties involved in the selection of a standard will be fully informed not only as to the available technical options an the associated intellectual property rights, but also as to the likely cost of that IPR*" (involving the disclosure of "*the maximum royalty rates* (…)" that the IPR holders at stake would charge).[104]

The second especially important parameter involves the conditions of participation in the standard-setting process. In fact, provided these *conditions are open and undistorted* – meaning that the process "(…) *allows all competitors (and/or stakeholders) in the market affected by the standard to take part in choosing*

104 See points 298 and 299 of the Horizontal Guidelines.

and elaborating the standard" the standardisation agreement will tend to fall outside the prohibition of par 1 of Article 101 (the Guidelines took into consideration in this point the case law arising from the decision "*X/Open Group*" in which the Commission regarded that even when standards adopted were made public, "*the restricted membership policy* [at the standard setting process at stake] *had the effects of preventing non members from influencing the results of the work of the group and from getting the know-how and technical understanding relating to the standards which the members were likely to acquire*").[105]

On the whole, we may observe that the standard-setting chapter of the December 2010 revised Horizontal Guidelines largely seems to recognize a frequent pro-competitive nature of standardization agreements and a set of rather limited or particular conditions that may lead to effects of restriction of competition arising from such agreements (to be evaluated through careful economic analysis of actual competitive effects in any given market contexts). Such global hermeneutical perspective is to be regarded as an essentially positive development. Conversely, the Guidelines may, at certain points, lack clarity or even coherence in light of relevant judicial precedents, particularly as regards the assessment of *unilateral conduct* in connection with situations where one party may, after the adoption of a standard, require terms – namely fees to be charged for access to IPR in a standard-setting context – that the other parties dispute as non compatible with the FRAND requirements.

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