The Cooperatition Incubator

Helping nurture a co-regulating, responsible economy

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Revised Consultation Response

EU Horizontal Agreements Guidelines 2010

June 2010

Summary

Over several years we have observed many companies struggling with the risks presented by apparent inconsistencies between UK and EU competition law/ guidance. This has given little reassurance that collaboration through voluntary agreements to address climate change-related issues in products and services, for example, will not be viewed as collusion.

Following their initial reports for Business in the Community (BITC) to both the UK Conservative Party Commission on Waste & Voluntary Agreements and the UK Liberal Democrat Consumer Policy Consultation Paper[1], Andrew Dakers (former Head of Public Affairs, BITC) and Tom Linton (Competition Lawyer) identified a precedent for an alternative approach to current UK/ EU competition law. In Australian competition law an "authorisation" process helps reduce the risks in forming voluntary agreements through prior scrutiny and approval, thus encouraging greater public benefit collaboration. We believe this could be a key enabler to the success of a new generation of voluntary agreements that the UK Conservative Party have called 'Responsibility Deals'.

We have recently welcomed the introduction by the UK Office of Fair Trading (OFT) of the 'Short-form Opinion' process which addresses some of our concerns, whilst not going as far as the Australian "authorisation" process we have advocated.[2] We will study the performance of the 'Short-form opinion' process closely, measuring this – and the new EU Horizontal Agreements Guidelines – on how they assist companies in navigating the complexities of Competition Law. Fundamentally we believe competition law must not be barrier to companies co-operating within, and across sectors, where this delivers public benefit — and crucially building in the external social and environmental costs of doing business, where there is an absence of legislation and regulation.

We welcome the draft EU Horizontal Agreements Guidelines 2010[3], and note particularly the extensive commentary on 'General principles on the competitive assessment of information Exchange' (pgs 16-29). Aside from information exchange our response focuses on the "standardisation agreements" guidance (pgs 66-82). We conclude with five recommendations:

[1] BITC response to Conservative Party Commission on Waste and Voluntary Agreements (December 2008), http://www.bitc.org.uk/document.rm?id=9505 and BITC submission to Liberal Democrat Consumer Policy Consultation paper (March 2009) http://www.bitc.org.uk/document.rm?id=9145

[2] OFT issued competition advice under new process, OFT, 27 April 2010, http://www.oft.gov.uk/news-and-updates/press/2010/44-10

[3] Draft Horizontal Agreements Guidelines 2010, European Commission, http://ec.europa.eu/competition/consultations/2010_horizontals/guidelines_en.pdf

1) The need to include best practice guidance and/or examples on what parties to discussions around a potential voluntary agreement should consider "general and aggregated" versus "specific or sensitive" information;
2) The need to include a worked example around a supply chain social voluntary standard, perhaps labour-related, where additional employment costs are passed on to the consumer;
3) The need to include additional, contrasting, worked environmental examples where increased production costs to deliver qualitative benefits may be passed on to the end consumer;
4) The need to include information on where in EU nations' competition authorities groups of companies seeking to form voluntary agreements can get advice, such as the unit responsible for 'Short-form Opinions' in the UK OFT;
5) Consideration needs to be given to how the European Commission encourages national competition authorities (and departments for business) to issue guidance that compliments, rather than undermines EU guidance.

About 'The Cooperatition Incubator'

Work by Business in the Community (BITC) in 2008/9 highlighted that, particularly since changes introduced in the Competition Act 1998/Enterprise Act 2002, many companies have struggled with the risks that competition law presents, treating collaboration between companies through voluntary agreements as potentially collusive (usually until tested in the courts). The law now provides little tangible protection to companies that have put sustainable development and the public interest at the heart of their business model and want to collaborate with competitors in targeted areas in order to achieve progress. This presents a huge barrier to delivering a step change in action on climate change and a new era of capitalism.

Andrew Dakers and Tom Linton, who collaborated on this original work, have now identified a precedent in an "authorisation" process in Australian law that removes this risk through prior due diligence and authorisation of voluntary agreements by competition authorities.[4] It is proposed that this could be applied in the European context.

Why is it worth doing now?

In the aftermath of the financial crisis many have called for a new form of responsible capitalism, but struggled to define the fundamental changes required. Academics and policy-makers have said for many years that the climate crisis demands greater collaboration between companies and other stakeholders, whilst there have also been questions raised as to whether Corporate Responsibility has hit a glass ceiling. From these concerns and uncertainty a growing consensus is emerging that increased collaboration – and the changes in competition law/ guidance necessary to make it happen – is at the heart of a new approach to capitalism that will help rebuild trust and confidence in business.

In March 2008 the Conservative Party proposed a new generation of voluntary agreements: 'Responsibility Deals'. These are now conceived as being championed by ministers working with sector specific NGOs (e.g. the Soil Association). The Conservatives have also recognised the role of more independently driven 'Private Voluntary Initiatives' (PVIs). The potential impact of the

[4] Guide to authorisation (May 2007), Australian Competition and Consumer Commission http://www.accc.gov.au/content/index.phtml/itemId/788405

Australian approach, which would be a key enabler to more Responsibility Deals/ PVIs by businesses, is still to be explored by the Conservatives and other political parties.

Since December 2008 BITC has done the only research and lobbying in this area, but does not intend to develop this into a more substantial campaign, instead opting for continued collaboration with Andrew Dakers and Tom Linton. Andrew and Tom are continuing to develop their research programme independently, working in close partnership with BITC, under the banner of *The Cooperatition Incubator*. *The Cooperatition Incubator* is managed on a not-for-profit basis by Sensonido Ltd.

In July 2009 the report of the Conservative Party instigated Public Health Commission concluded:
"One of the problems of encouraging co-operation among businesses to achieve social goals is the approach taken by the competition authorities to any evidence or suggestion of cartels or collusion. What business requires is a clear steer from Government that co-operation to address health issues can take place in a carefully regulated forum.

"Recommendation 6.4: Government attention must be given to competition issues that arise from actual and potential industry voluntary agreements. Where businesses can work together to deliver health improvements, Government should find a way of providing a safe haven for companies to discuss solutions that would otherwise risk contravening competition law."[5]

In March 2010 Philip Collin, Chairman of the UK Office of Fair Trading announced that the OFT will offer 'Short-form Opinions' (SFO). Introducing the new process the OFT acknowledged:
"Concerns have been expressed that uncertainty about how competition law in particular might be applied has led to some forms of potentially beneficial collaborative work between businesses not going ahead. In some cases, it may not be clear how the competition rules may be applied to collaborative conduct, for example with regard to some government-led initiatives.

"As a result, we are proposing to trial a 'short-form' opinion procedure. This would allow us, in a limited number of cases, to provide prompt guidance where there is a novel or unresolved issue of wider interest arising in the context of a specific prospective collaborative initiative. We would like to hear from you and your members about issues that you or they think would benefit from clarification through means of such a 'short-form' opinion."[6]

In April 2010 – when they published their first SFO – the UK Office of Fair Trading added:
"Under the Short-form Opinion process the OFT aims to provide guidance, within a prompt timetable, to businesses seeking clarity on how the law applies to prospective collaboration agreements between competitors which raise novel or unresolved competition issues....

"During its analysis, the OFT identified a concern that certain exchanges of information between the firms could potentially lead to a reduction in competition. However following OFT advice, the parties have agreed to ensure the data they supply to each other is general and aggregated, preventing either company from extrapolating specific or sensitive information.

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[5] Public Health Commission report, July 2009, http://www.publichealthcommission.co.uk/pdfs/AboutPHC/PHCReport+Summary.pdf, pg 19

[6] 'Compliance: a key role for Trade Associations in helping business understand and meet their legal obligations', Speech to the Trade Association Forum annual conference, Philip Collins, Chairman, Office of Fair Trading, 4 March 2010 http://www.oft.gov.uk/shared_oft/speeches/689752/spe0210.pdf

"The new process is being trialled in response to feedback from business that some potentially beneficial collaboration between companies is not proceeding due to concerns about infringing competition law, which carries civil and in some circumstances criminal sanctions."

This may be sufficient to address the business community's concerns, however it is worth noting that it *"will only be available for a limited number of cases per year in order to avoid a return to a notification regime"* and *"the OFT will provide guidance in response to specific questions asked by the requesting parties in order to facilitate their self-assessment of the compatibility of the proposed agreement with the relevant provisions of the Chapter I prohibition in the CA98 and/or Article 101 TFEU."*[7] We hope it works but believe the new process, its take-up and application needs to be watched closely.

Our research programme

1. Research to clarify how to minimise or avoid anti-competitive effects: Voluntary agreements need to be carefully structured so that harmful anti-competitive effects are not encouraged. We would suggest that voluntary agreements in 'non-win-win' situations[8] would typically extend only to the action to be taken, rather than the specific cost details. These would be worked out individually by companies unless special measures were required for companies of different sizes and efficiencies. This would maintain competitive innovative and creativity around the detailed design of a product or service whilst establishing a collaborative agreement regarding the timing of higher social or environment standards. The WTO has encouraged agreements to focus on Non-Product Related (NPR) Process or Production Methods (PPMs) to avoid anti-competitive dialogue and unnecessary barriers to international trade.[9]

Within a company risks could be dealt with by channelling employee initiatives for cooperation through a designated individual with some level of detachment from the business (such as the director responsible for corporate responsibility performance) and putting in place training programmes to ensure competition law compliance.

2. Develop and then apply a framework to determine which issues are appropriate for cooperative action as a means to incorporating external costs: Our proposals would see greater clarity around the different types of interactions in the marketplace. The two sides of the economy being:

- one where delivering environmental and social sustainability objectives is deemed more important than efficiency-focused competition and therefore subject to cooperation between entities where necessary; and
- another where normal competition runs its course retaining the benefits of price efficiency that is so valuable within the current system, but social/ environmental standards are always at risk of neglect.

[7] Short-form Opinions – The OFT's Approach, Office of Fair Trading, April 2010, http://www.oft.gov.uk/shared_oft/press_release_attachments/SFO.pdf

[8] 'Non-win-win' situations occur where external social/ environmental costs cannot be absorbed by improvements in the efficiency of business processes and result in increased costs of production being passed onto the consumer. By contrast in 'win-win' situations there is a social/ environmental benefit that benefits the community/ individual consumer and also the company, with no increase in product or service costs.

[9] Trade as an environmental policy tool (2003), John Polak, WTO Public Symposium, http://www.wto.org/english/tratop_e/dda_e/symp03_gen_ecolab_e.doc

A useful distinction can be drawn, on the one hand, between relatively uncontentious implementation of voluntary agreements for greater sustainability in situations where consumers will, if they are sufficiently aware of the issues and confident that they would be acting collectively, support a price increase. This might be the case, for example, with workplace conditions in the supply chain (for example child labour). On the other hand, where consumers would not support a price increase, the ability of business-led voluntary agreements to override this preference needs to be more closely examined. For example, pubs and bars whose clientele binge drink may object to voluntary agreements between licence holders that removed 'happy-hour' pricing, even though pubs and bars without the dependence and fearful of heavier regulation may favour the change.

It may be that the consent and support of Government would be appropriate for controversial voluntary agreements (i.e. where higher standards demand more significant price rises). Thus in such cases it could be possible or mandatory for the Office of Fair Trading (OFT) to refer a voluntary agreement to the Government for decision.

The work of the Better Regulation Task Force should also be considered in developing this framework: 'Imaginative regulation' (2003)[10]; and 'Alternatives to regulation' (2004)[11].

The 2005 research on policy options and resource flows in the economy of the 'One Planet Economy Network' should be considered when developing the environmental element of the framework.[12]

3. Map – and if necessary supplement – existing tools to assess priority areas (i.e. climate change) where regulation or other market mechanisms are needed, whilst voluntary agreement capacities are being expanded: It might be that in some areas short-term regulation or other mechanisms (e.g. cap and trade) would be a more practical solution before businesses becomes more experienced in designing and applying voluntary agreements to the best effect, and before they had the full benefit of support from enabling institutions such as trade bodies, that will also need to build their capacities. This may particularly be the case with respect to climate change, in light of time constraints.

Regulatory responses should be formulated in such a way to facilitate replacement by voluntary agreements brokered by governments & businesses, when deemed appropriate.

Tools such as REAP[13] from the Stockholm Environment Institute (SEI) may provide the evidence base for risk assessment and prioritisation. Social development indicators collated by Defra might provide a similar social sustainability evidence base[14]. Business and other stakeholders may also be able to contribute to the prioritisation process.

4. Address conflicting signals by introducing new guidance: There appears to be a problem with rather contradictory guidance. Broadly it appears the EU is more amenable to voluntary agreements (for example, environmental) than is reflected by the UK competition authorities/ Department for Business, Innovation & Skills (BIS).

[10] http://archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/imaginativeregulation.pdf
[11] http://archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/alternative.pdf
[12] http://www.wwflearning.org.uk/data/files/open-technical-report-a-406.pdf - note policy options pgs 26-7
[13] http://resource-accounting.org.uk/
[14] http://www.defra.gov.uk/sustainable/government/progress/data-resources/sdiyp.htm

The 'EU Guidelines on horizontal cooperation agreements' (2007)[15] are fairly positive with regards to collaborative agreements/standards:
"Agreements on standards - Standardisation agreements have as their primary objective the definition of technical or quality requirements with which products, production processes or production methods must comply. From the competition viewpoint, it is necessary to check that agreements of this type are not used for other purposes, i.e. to restrict competition on the market."

On environmental agreements, the EU guidelines states:
"Environmental agreements - Environmental agreements are agreements by which the parties undertake to reduce pollution, as defined in environmental law, or to achieve environmental objectives. In general, the Commission is favourably disposed towards the use of agreements of this type to achieve environmental aims. However, where cooperation does not truly concern environmental objectives but serves to conceal anti-competitive practices, the competition rules apply."

In contrast higher profile publications in the UK context make limited reference to this reasonably supportive guidance from the EU. BERR (now BIS) Advice for officials of Government and devolved administrations: 'Competition law: issues which arise for business when the government or lobby groups seek to encourage businesses to work together to deliver desired policy outcomes' (2008)[16] states:
"Recently businesses in various sectors, including retail, have shown concern over pressure being applied to them to enter into voluntary agreements or concerted practices to deliver public policy outcomes. This is often in response to a particular issue that maybe in the public eye through high profile media campaigns. Examples of such engagement include the delivery of environmental or public health policy objectives.

"This may, in part, be a result of Government departments seeking to reduce the number of regulations which they make or bring about quick outcomes. However, although the encouragement of voluntary agreements is often done with the best intentions, Government officials should avoid putting pressure on businesses to behave in a way which would result in the business being in breach of competition law. There are heavy penalties for infringements. Offenders can be fined, disqualified from being a director and, in some cases, even sent to prison. In addition, firms could be sued for damages by third parties who consider they have suffered loss as a result of the infringement.

"There is potential reputational risk to officials and Ministers, in particular if an adverse judgment against a company cites the Government's role in the infringement. Businesses may refuse to take part in business to government dialogue in case it strays into sensitive competition areas. This could cause relationship breakdown and be detrimental in policy areas where the business government partnership currently delivers wider benefits.

"…The onus on demonstrating that the conditions are all met falls upon the parties to an agreement. ….Examples of improvements in production and distribution may include lower costs from longer production runs, or from changes in methods of production or distribution; improvements in product quality and the ranges of products or services offered. Examples of the promotion of technical or economic progress include efficiency gains from economies of scale and specialisation in R&D.

[15] http://europa.eu/legislation_summaries/competition/firms/l26062_en.htm
[16] http://www.berr.gov.uk/files/file45711.pdf

"…Agreements are generally considered bad for consumers and productivity because they undermine the need for businesses to reduce their costs and increase their quality to succeed. Hence, if evidence shows there is a valid reason to phase out a product or behaviour, then it is best to consider whether other proportionate, but not illegal, options are available. This may include an appropriate legislative vehicle. This may seem disproportionate to the issue that is being addressed but will give legal certainty and may, in the final analysis, be less costly for business.

"Alternatively, if voluntary action is the most desirable approach, officials should consider whether the agreement part of the voluntary action being proposed is indispensable to delivering the policy. Often it won't be."

The section underlined reflects a generally oversimplified analysis of the value/ risks of voluntary agreements and neglects the earlier work of the Better Regulation Task Force (previously cited).

'Agreements and concerted practices - Understanding competition law' (OFT, 2004)[17] states:
"Examples of agreements which might appreciably restrict Competition - 3.3 The types of agreements discussed in this part are agreements which have the object or effect of:… setting technical or design standards.

"An agreement on technical or design standards may lead to an improvement in production by reducing costs or raising quality, or it may promote technical or economic progress by reducing waste and consumers' search costs. Some such agreements will, however, be likely to infringe Article 81 and/or the Chapter I prohibition if they are, in effect, a means of limiting competition from other sources, for example by raising entry barriers. Standardisation agreements which prevent the parties from developing alternative standards or products that do not comply with the agreed standard may also infringe Article 81 and/or the Chapter I prohibition. In assessing standardisation agreements, the OFT has regard to the European Commission's 'Guidelines on Horizontal Cooperation Agreements'."

Competing fairly - An introduction to the laws on anti-competitive behaviour (OFT, 2005)[18] states in its opening:
"These laws prohibit anti-competitive agreements between businesses…"

Yet it goes onto acknowledge:
"Competition law may not apply to some categories of agreement and conduct. Agreements or conduct may be excluded from investigation under the Act or Articles 81 or 82 of the EC Treaty because they are instead subject to examination under other laws."

However a fundamental problem/ risk remains since the repeal of the Restrictive Trade Practices Act 1976 by the Competition Act 1998:
"It is for businesses themselves to determine whether or not their agreements and/or conduct comply with competition law."

New guidance should address these apparent discrepancies and mixed signals to the business community. Clearer advice and guidance is also needed on how to ensure agreements do not restrict market entry – or measures that mitigate against these problems.

[17] http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft401.pdf
[18] http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_mini_guides/oft447.pdf

5. Research and then reintroduce an authorisation process for agreements – 'Agreements and concerted practices - Understanding competition law' (OFT, 2004)[19] sets out the end of the previous UK exemptions process:
"Each individual exemption granted by the OFT prior to 1 May 2004 has been time limited. All such individual exemptions are valid until their expiry, although the OFT retains the power to cancel such exemptions. After expiry, individual exemptions will not be renewed."

It has been suggested that a solution to business concerns may be that the existing Competition Act provides for a 'public policy exclusion'. If there are 'exceptional and compelling reasons of public policy' the Secretary of State may make an Order to disapply the statutory prohibition. The Labour government (1997-2010) employed this extremely infrequently, for example, concerning agreements between companies involved in manufacturing and designing nuclear submarines[20]. It is a matter of Government discretion what is considered "exceptional and compelling reasons of public policy".

However our comparative research suggests that Australia, and to a lesser extent New Zealand, may offer an alternative model for a new exemption/ authorisation process in the UK, EU and further afield. In Australia, through the prior authorisation of voluntary agreements, businesses are given the comfort they need to collaborate when there is demonstrable public benefit. The "authorisation" process in Australian law removes the risk from a company perspective through prior due diligence and authorisation of voluntary agreements by competition authorities. The Portman Group Code of Practice was authorised through a similar process under the previous UK competition law framework[21] - the Restrictive Trade Practices Act 1976.[22]

We propose that the Australian system could be applied in the European context (as an enabler to Voluntary Agreements with more clout and a greater number of signatories). This would demand changes to the competition framework.

It is worth noting that the OFT already operates a process for approving Consumer Codes of Practice which we believe could be extended.[23]

For further information on the Australian system read:

- The public interest in The Trade Practices Act 1974 – Prof Allan Fels – July 2001[24]

[19] http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft401.pdf
[20] SI 2008 No. 1820
[21] The OFT approved the Portman Group Code of Practice under the Restrictive Trade Practices Act 1976 (RTPA). The Act required agreements to be registered that included arrangements (and non-binding "gentlemen's" agreements) under which two or more companies carrying on business in the UK agreed on the way in which they would market their goods or services, or the prices at which goods/services would be supplied, or similar matters. The RTPA also required registration of certain trade association codes of practice. The Portman Group Code of Practice was registered with the OFT on 28 March 1996 both as an agreement among member companies and also as a trade association code of practice. The RTPA required all agreements which had been registered to be tested in the Restrictive Practices Court unless the Director General of Fair Trading and the Secretary of State were satisfied that the agreement was not of such significance as to warrant investigation by the Court. In general, this occurred in cases where the DGFT and the Secretary of State could be satisfied under Section 21(A) of the RTPA that the agreement would not significantly restrict competition in the UK. The RTPA was replaced by the Competition Act.
[22] http://www.opsi.gov.uk/acts/acts1976/pdf/ukpga_19760034_en.pdf
[23] http://www.oft.gov.uk/advice_and_resources/resource_base/approved-codes/
[24] http://www.accc.gov.au/content/item.phtml?itemId=255465&nodeId=3a08785d8fbb217538091dc68f51a187&fn=Fels_NCC_Workshop%5B1%5D.pdf

- An Assessment of the Public Benefit Test in Authorisation Determinations by the ACCC – Vijaya Nagarajan – September 2005[25]
- Authorisations and notifications: A summary – ACCC – January 2007[26]
- Guide to authorisation – ACCC – May 2007[27]

Given the OFT's new 'Short-form opinions' process we now believe the UK Department for Business, Innovation and Skills (BIS) needs to set out:

- how the benefits of this change will be independently assessed;
- how the new process will be communicated across the UK business community;
- the extent to which it will enable voluntary horizontal agreements that pass price increases onto the consumer when required to deliver broader social/ environmental benefits; and
- whether there is the necessary capacity in the UK OFT for resource constraints to not be a barrier to issuing Short-form opinions.

6. Research, and then apply when appropriate, optimal approaches to enforcing voluntary agreements (both for signatories and non-signatory 'free-riders'): The issue of enforcement needs closer examination as it is essential to ensuring the integrity of voluntary agreements and promoting public trust. The EU 'Unfair commercial practices directive' gives legal force to voluntary agreements to which companies are signatories as a consumer would be mislead by a voluntary agreement that a company was not honouring, but advertised through company channels from labels to CR reports. Similar legislation gives force to voluntary agreements that businesses have joined in the US.

The capability of businesses to enforce on their peers using concerted action is an area for further research – both on the effectiveness of the mechanisms available and also the legalities. This would be motivated by a desire to protect the reputation of the sector and voluntary agreement.

One option is to set up an independent system to react to requests from companies and other stakeholders to enable or enforce agreements. It is a principle already applied in the enforcement of some existing voluntary agreements.

It is also vital to deal with the problem of businesses 'free-riding' by not becoming signatories to in a voluntary agreement. This will clearly be a deterrent to other participants. Here the range of different models for voluntary agreements, and particularly the stronger force of a co-regulatory approach, should be examined further. The analysis in 'Models of self-regulation' (National Consumers Council, 2000)[28] is of particular note.

Of course, in the case of industry inertia or extensive free-riding the threat of regulation would provide an important backdrop.

[25] http://cccp.anu.edu.au/projects/VijNagaraganPaperSept05PubBenefit.pdf
[26] http://www.accc.gov.au/content/item.phtml?itemId=776052&nodeId=6a570b34b0d37c0545766f52476ca354&fn=Authorisations%20and%20notifications:%20A%20summary.pdf
[27] http://www.accc.gov.au/content/item.phtml?itemId=788405&nodeId=a5a058536b4672bd5ac26377aed1b2e2&fn=Guide%20to%20authorisation.pdf
[28] http://www.talkingcure.co.uk/articles/ncc_models_self_regulation.pdf

7. Invest in building the capacity of trade associations and other intermediaries facilitating the development of voluntary agreements: Many voluntary agreements come about from the work of trade associations. There is a real risk that this work can fall foul of competition law. Trade associations' and other intermediaries capabilities in relation to competition law need to be enhanced if companies are to engage confidently in raising standards through membership of trade association or other voluntary initiatives.

Work in this area should focus on introducing more legal guidance for facilitators of / participants in these processes. For example the experience of the Cement Sustainability Initiative, which has managed anti-trust/ competition law considerations with respect to the data sharing aspect of the initiative, should be shared more widely.[29] Business in the Community, the ISEAL Alliance and the UK Trade Association Forum may have roles to play in this area.

8. Research and advocate effective international use and application of voluntary agreements: Greater harmonisation in this area of competition law (i.e. exemption/ authorisation) may be required to encourage voluntary agreements on an international basis. This would avoid those jurisdictions making changes to this aspect of the framework having to evaluate possible negative economic impacts (through global competitive pressures) against social and environmental benefits of increased standards. On issues such as climate change, clearly international cooperation is necessary to take collective and therefore effective action.

International research should engage with DG Competition, CSR Europe and ISEAL Alliance.

All these actions would also help address the fear of companies that stand to potentially lose out from a poorly drafted/ designed agreement using whistleblower protection to bring work on developing a new voluntary agreement to a close – also a problem in the UK.

9. Develop a new website to encourage accountability, learning and new voluntary agreements: 'RaceToTheTop.biz' –RaceToTheTop.biz is a provisional name for a concept we are developing for a website that enables comparison (by companies and sectors) of the support and delivery of a range of voluntary agreements and standards. The website would also encourage suggestions for voluntary agreements and standards, and facilitate their implementation. This builds on the suggestion of the 'Conservative Working Group on Responsible Business' report (2008)[30] that with more than 30 Private Voluntary Initiatives (e.g. FSC) in existence a biannual review of their progress should be commissioned to discover the lessons learned.

The website would seek to address concerns (which we believe may be borne out by the Australian example) that, even if such exemptions to competition law were available, businesses/ trade associations would not necessarily take them up to a sufficient extent to address the scale of some social/ environmental changes before us. The short-term economic incentives might still not be there given the 'slow burn' of these crises.

The website would be a responsible business Wikipedia of sorts with added functionality. The information on the site, including references to Fair Trade/FSC accreditation, for example, could also be used to provide the basis for a kind of 'meta' responsible consumerism label.

[29] Site search for 'anti-trust' at http://www.wbcsdcement.org
[30] http://www.ethicalcorp.com/resources/downloads/20084163540_ECI%20-%20Conservative%20Party%20Working%20Group%20On%20Responsible%20Business.pdf

We believe this would enable bottom up, as well as top down, development of Responsibility Deals – and/or trade associations or regulatory agencies (not just Whitehall) to take on more of a leadership role.

Impact of enabling more self-regulation through voluntary agreements

It is difficult to underestimate the impact that these changes, outlined above, could have on the economy, society and the environment. One of the world's largest multinational companies – a company recognised internationally for their commitment to sustainable development goals – advised us that such are the risks arising from current competition law that the company is now rolling out competition law training (a compliance programme) across their business.

This may see the company take an increasingly cautious approach to collaboration. It could also start to see them withdraw from membership of trade bodies and voluntary round tables if their constitutions and chairing practices do not protect participants from accusations of collusion/ price-fixing. Ultimately this barrier could substantially reduce the company's ability to hit climate change / CO2 emission reduction and wider sustainability targets.

The company confirmed that if the proposed change in competition law is achieved, this will be a significant democratic reform enabling increased engagement and action by business in civic issues, providing a new mechanism to achieve social goals. The legislative change has the potential to substantially increase collaboration between businesses and accelerate the investment of significant capital in sustainable business technologies and processes.

Assessment of the draft EU Horizontal Agreements Guidelines 2010

We welcome the draft EU Horizontal Agreements Guidelines 2010 and the improvements this represents over the 2007 guidance[31]. Along with issues regarding information exchange (pgs 16-29), our response focuses particularly on the "standardisation agreements" guidance (pgs 66-82).

We are particularly impressed by the holistic view taken of the range of standardisation agreements in existence today, as well as the contemporary examples. We recognise the sheer diversity of standardisation agreements makes it difficult to produce a short guidelines document.

We welcome the example 315 (pg 76-77), which emphasises the need for carefully drafting of standards that are not so prescriptive as to prevent innovation and an unjustifiable barrier to new market entrants.

Information exchange

The UK Office of Fair Trading recently stated as it launched its 'Short-form opinions' process: *"During its analysis, the OFT identified a concern that certain exchanges of information between the firms could potentially lead to a reduction in competition. However following OFT advice, the parties have agreed to ensure the data they supply to each other is general and aggregated, preventing either company from extrapolating specific or sensitive information."*

[31] Draft Horizontal Agreements Guidelines 2010, European Commission, http://ec.europa.eu/competition/consultations/2010_horizontals/guidelines_en.pdf

We would echo this concern. The concern of companies is that competitors could whistle-blow/ make unfounded accusations of price-fixing to be deliberately disruptive to the formation of a voluntary agreement with public benefit. A clear framework would mitigate this risk.

The examples provided (101 and 102, pg 28) seem most relevant to the scenarios faced by companies that are party to discussions voluntary collaboration agreements. Whilst example 102 (Historic data) is clearly reassuring, example 101 (benchmarking benefits) sounds a strong note of caution. The European Commission could usefully add to the information exchange guidance an example of a voluntary agreement structure that has enabled the sharing of "general and aggregated" versus "specific or sensitive" information, in a way that the UK OFT indicates is acceptable.

The Cement Sustainability Initiative[32] is one of the only international voluntary standards we have identified to explicitly address competition law compliance risk factors on its public website and may offer a case study example. They advise (prospective) members: *"Request GNR system data… The PMC will review all requests to determine, first, if the data is available, and second, if responses to the query would fall within the limits of confidentiality and anti-trust constraints adopted for this system."*[33] and *"Data Confidentiality …PricewaterhouseCoopers also provides a guarantee of non-disclosure of confidential information and compliance with competition law."*[34] The approach requires further investigation.

Recommendation 1: Include best practice guidance and/or examples on what parties to discussions around a potential voluntary agreement should consider "general and aggregated" versus "specific or sensitive" information.

Supply chain social standards

The illustrative examples from 315 to 323 do not include any explicit examples in the area of supply chain social standards, which are a significant aspect of many voluntary agreements in the corporate responsibility field. Voluntary agreements in this area might be considered to include the FairTrade mark[35], Ethical Trading Initiative[36] and Corporate Health and Safety Performance Index (CHaSPI)[37]. Any of these may give rise to an increase in the cost of products to the consumer, but deliver wider qualitative benefits that we welcome. A number of these follow the ISEAL[38] standards setting codes. Is the ISEAL model considered by the European Commission to be competition law compliant?

Recommendation 2: Include a worked example around a supply chain social voluntary standard, perhaps labour-related, where additional employment costs are passed on to the consumer.

[32] Cement Sustainability Initiative, http://www.wbcsdcement.org/
[33] http://www.wbcsdcement.org/index.php?option=com_content&task=view&id=66&Itemid=133
[34] http://www.wbcsdcement.org/index.php?option=com_content&task=view&id=65&Itemid=132
[35] FairTrade, http://www.fairtrade.net/
[36] Ethical Trading Initiative, http://www.ethicaltrade.org/
[37] Corporate Health and Safety Performance Index (CHaSPI), http://www.chaspi.info-exchange.com/
[38] The ISEAL Alliance is the global association for social and environmental standards systems. Working with established and emerging voluntary standards initiatives, ISEAL develops guidance and facilitates coordinated efforts to ensure their effectiveness and credibility and scale up their impacts. Compliance with ISEAL's Codes of Good Practice is a membership condition. www.isealalliance.org

Environmental standards

Only one illustrative example of an environmental standard (319, pgs 78-9) is included. Given the huge range of differing types of standard emerging in this area, it would be useful to have worked examples that provide some contrast. Voluntary standards such as MSC[39] and the Roundtable on Sustainable Palm Oil[40] could be used as a basis of these additional examples. Again it is worth noting that these may give rise to an increase in the cost of products to the end consumer, but deliver wider qualitative benefits that we welcome. A European Commission view on whether the Australia pilot plastic bags agreement authorised by the Australian Competition and Consumer Commission (ACCC) in 2008[41] would also be acceptable in the EU context would also be welcomed.

Recommendation 3: Include additional, contrasting, worked environmental examples where increased production costs to deliver qualitative benefits may be passed on to the end consumer.

Signposting national advice on voluntary standardisation agreements

Until the recent launch of the UK 'Short-form opinions' process it has been difficult for companies, trade associations and more informal round tables to know how to approach the OFT to get advice on voluntary agreements. We believe awareness of this new function of the OFT is still very low within the business community. Where national competition authorities have such processes it would be helpful if they were signposted at the end of the EU Horizontal Agreements Guidelines 2010.

Recommendation 4: Include information on where in EU nations' competition authorities groups of companies seeking to form voluntary agreements can get advice, such as the unit responsible for 'Short-form Opinions' in the UK OFT.

Promotion of EU horizontal agreements guidance at a national level

The publication of *'Competition law: issues which arise for business when the government or lobby groups seek to encourage businesses to work together to deliver desired policy outcomes'* (BERR, now BIS)[42] in 2008 had a particularly disruptive affect in the area of voluntary agreements. We believe this was a fundamentally unbalanced publication. We would encourage the European Commission to work with member states to evaluate such publications and consider whether they might be re-issued to reflect the intentions of the final draft of the EU Horizontal Agreements Guidance 2010.

Recommendation 5: Consider how the European Commission encourages national competition authorities (and government departments for business) to issue guidance that compliments, rather than undermines EU guidance.

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[39] Marine Stewardship Council, http://www.msc.org/
[40] Roundtable on Sustainable Palm Oil, http://www.rspo.org/
[41] http://www.accc.gov.au/content/index.phtml/itemId/839274/fromItemId/621589
[42] http://www.berr.gov.uk/files/file45711.pdf