Volkswagen welcomes the possibility to comment on the Draft Horizontal Guidelines ('**DHG'**) and would like to bring the following points to the attention of the European Commission:

1. Group privilege / joint ventures (recitals 13, 14 DHG)

   Recitals 13, 14 DHG relate to how the so-called group privilege is applied in the context of joint ventures and its shareholders. In principle, the European Commission's guidance in this regard is highly appreciated against the background of the growing practical importance of joint ventures in many industry sectors. Profound legal certainty in this field is the basis of not only companies' compliance measures but also their strategic decisions regarding the formation and establishment of joint ventures.

   Therefore, VW AG first notes that the limitation of the rules established in recitals 13, 14 DHG by the words 'typically' in recital 13DHG reduces significantly legal certainty that, however, is essential with a view to the severe consequences of non-compliance with antitrust provisions. Further, VW AG would be grateful if it would be confirmed that 'parent' in the sense of recitals 13, 14 DHG means the whole single economic unit, i.e. the Group of companies in the sense of EU case law, and not only the respective holding entity of the joint venture.

   In addition, VW AG suggests that the following aspects of recitals 13, 14 DHG could be further clarified by the European Commission:

   a) Scope of the group privilege: joint venture and 1 shareholder vs. joint venture and both / all co-controlling shareholders?

      According to the judgements referred to in footnote 7 DHG, all three entities, i.e. the two shareholders jointly controlling the joint venture and the joint venture itself, can be considered to form a single economic unit. However, recitals 13, 14 DHG itself could be interpreted in two ways insofar as

      i. either, as in the judgements referred to in footnote 7 DHG, all three entities, i.e. the two shareholders and the joint venture, can be considered to form a single economic unit and therefore, e.g., exchange competitively sensitive information such as business plans, prices, costs, etc.;
      ii. or, that rather one shareholder and the joint venture can be considered to form such a single economic unit and the other shareholder and the joint venture form another single economic unit whereas, e.g., an exchange of competitively sensitive information is only possible within one economic unit.

Would that also include business plan information of the joint venture relating to the other shareholder?

Generally, would it make a difference if (1) the two shareholders are active in the same market or (2) the two shareholder and the JV are active in the same market? And, in case it would make a difference insofar as information exchange would only by covered by the group privileged if (2) the JV and (all of) its co-controlling shareholder were all active on the same market(s) and all parties would always participate in the information exchange, could this not incentives the foundation of more JVs between competitors to "legalize" the otherwise forbidden exchange of competitively sensitive information?

b) Possible inconsistencies as to the calculation/estimation of market power/shares

VW AG notes that, for the purpose of establishing market power/market shares, e.g., in merger control proceedings or with regard to the estimation/calculation of 'safe harbor' rules/guidance (e.g., for purchasing agreements), the market power/market share of a jointly controlled joint venture could theoretically be attributed to

i. only one shareholding economic unit;

ii. both shareholding economic units;

iii. both shareholding economic units pro rata[1]; or

iv. rather insofar as all entities, the joint venture and the two shareholding economic units, could be considered one single economic entity?

VW AG notes that, if ii) or iii) applies, market strength/market shares would either be 'counted double' (which leads to an artificially bigger market size) or would not reflect the actual strength of the business. Consequently, with regard to ii) an 'artificial' market size would be even bigger, if a joint venture would have more than two co-controlling shareholders.

c) 'Scope' vs. 'market'

VW AG notes that recitals 13, 14 DHG use different terminology. Whereas, according to recital 13 DHG, the group privilege seems to depend on the

[1] See recital 181 Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01).

'product and geographic scope of the activity of the joint venture', in recital 14 DHG reference is made to 'markets'. A joint venture's scope could be smaller than a market defined by EU case law. Example: Group A and Group B are active in the market x and they form a joint venture C with the scope x1 which represents only parts of a market, e.g., the segment x1. Does the group privilege apply with regard to the whole market x or only segment x1?

d) 'Sister' joint ventures and single economic unit

VW AG notes that it is possible that companies can form joint ventures with different partners belonging to different groups, e.g. Group A forms a joint venture C with Group B and another joint venture E with Group D. If above scenarios 1. a) i) and 1. b) iv) apply, Group A, B and D would form one single economic unit.

e) Market/scope of the joint venture: are all markets/activities captured?

VW AG notes that joint ventures as well as their shareholding companies are typically active on several markets and their scope/activity is plentiful. Example: The principle focus of a joint venture is the production and sale of a certain product on the selling market. However, the joint venture itself also purchases certain input products on purchasing markets and may also hire employees on the labor market. Is also the activity of the joint venture on the purchasing and labor market captured by the group privilege?

2. Information Exchange

While VW AG welcomes certain clarification regarding the Commission's view on antitrust law infringements through the exchange of competitively sensitive information, one significant part needs – from our point of view – significant further clarification:

VW AG would welcome more precise information in recital 429 DHG what the Commission deems to the be sufficiently aggregated ("rule of five" / "rule of ten").

Recital 434 DHG relates to information published by companies, which is normally as "purely public information" not competitively sensitive. However, the clarification of the Commission that this may not apply, in individual cases where "*the future intentions that may not materialize and do not bind the undertaking towards its customers*", seems too far reaching. While the cited case law refers only to future pricing announcements for container shipping, the

cited passage is broader and would, in conjunction with Recital 424 DHG e.g. also include announcement re future products. Such announcements, however, cannot be binding for companies, if they do not want to run i.a. product liability risks, while they form at the same time an important corner stone of the marketing and brand image strategy. Thus, putting especially innovative players in the markets at risk, since not every announcement of new plans, initiatives or products may at the end be binding and fulfilled also within the envisaged timeframe. VW AG would like to underline that the current wording (*"[…] depending on the facts […] a concerted practice cannot be excluded."*) is too vague and unclear and requires more precise guidance.

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