RE: TEXTILE SERVICES ASSOCIATION

GUIDANCE ON POTENTIAL COLLABORATION BETWEEN TEXTILE SERVICE PROVIDERS TO THE HOSPITALITY SECTOR

I. Background and purpose of document

1. The UK textile services sector currently employs around 23,000 people and generates annual sales of some £1.3 billion. The hospitality industry (hotels, serviced apartments, restaurants) account for some 56% of the UK value of sales of textile services. Textile services to hospitality businesses are typically delivered by a single textile services provider under long term (3-4 year) contracts.

2. The majority of UK hospitality businesses are currently shut down or heavily restricted in their trading as part of the UK government's "lockdown" response to the global Covid-19 pandemic. As a result, the vast majority of textile services providers to the UK hospitality sector have also shut down their physical operations (e.g. closed laundries) and placed most staff on furlough.

3. It is envisaged that, following the easing of Covid-19-related restrictions, business in the hospitality sector will begin to re-open, albeit likely facing significantly weakened demand – for example, as a result of legal restrictions on hotel occupancy rate or restaurant covers and/or a continuing reluctance on the part of the public to travel and socialise outside the household. It is expected that demand for hospitality services will "ramp up" gradually but may not reach pre-lockdown levels for some time.

4. This post-lockdown outlook for the UK hospitality creates challenges for textile services providers to the hospitality sector – as demand under both existing and new contracts is likely to be suppressed for a period of time after the lifting of lockdown, but increasing over time.

5. The Textile Services Association ("**TSA**") is conscious that all textile services providers to the hospitality sector will be carefully considering how to manage re-commencing operations at reduced capacity once lockdown restrictions are eased – and that many will be considering options for collaboration amongst textile services providers as a way of

ease the pressures on individual business in the immediate aftermath of lockdown.

6. Certain types of collaboration amongst competitors do, however, give rise to competition law concerns. This document sets out some the key principles of EU and UK competition law as well as some simple "dos" and "don'ts" to ensure that you can stay on the right side of the line where collaboration is concerned.

7. The TSA is not requiring or encouraging its members to pursue any particular collaborative strategy in emerging from lockdown; or, indeed, any collaborative strategy at all. The aim of this Guidance is to give you the essential legal information you need to make your own business judgment and undertake effective contingency planning.

8. This Guidance has been prepared by an experienced competition law Barrister on the instruction of the TSA. It is aimed in particular at textile services providers in the hospitality sector.

II. Relevant competition laws

9. Article 101(1) of the Treaty on the Functioning of the European Union ("**TFEU**") and section 2 of the Competition Act 1998 ("**CA98**") prohibit agreements or concerted practices between undertakings that have the object or effect of restricting, preventing or distorting competition.

10. Article 101(3) TFEU and section 9 CA98 provide that anti-competitive agreements may nevertheless be justified, and thus lawful, if they (i) give rise to technical or economic efficiencies, (ii) provide a fair share of benefit to consumers, (iii) are indispensable to delivering those efficiencies and (iv) do not afford the possibility of eliminating competition entirely.

11. A breach of Article 101 TFEU and/or section 2 CA98 may lead to:

    a. **investigation** by the European Commission or the UK Competition and Markets Authority ("**CMA**") – which can be a costly and time-consuming process for your business;

    b. financial penalties of up to **10% of the business' worldwide annual turnover**;

c. **legal claims for damages** by persons who claim to have suffered loss as a result of the anti-competitive conduct (e.g. customers who claim that they were overcharged following a price-fixing agreement); and

d. in certain cases, **Director Disqualification Orders**; and

e. in particularly serious cases, **criminal prosecution**.

III. Prohibited agreements: things you must not do

12. Certain types of agreements/concerted practices between competitors are considered restrictions of competition "by object". This means that they are presumed to have anti-competitive effects (of increasing price, restricting output, reducing innovation), are unlikely to be justified under Article 101(3) TFEU/section 9 CA98, are likely to attract the highest financial penalties and give rise to the greatest risk of director disqualification or criminal prosecution.

13. To avoid those consequences, **you must not do any of the following under any circumstances**:

a. **Pricing fixing** – you must **not** agree with a competitor on the retail prices that you will charge your customers for textile services.

b. **Resale price maintenance** – you must **not** require a person that buys services from you to sell them on at a fixed or minimum price.

c. **Exchanging information about future prices** – you must **not** communicate your intended future prices to your competitors in any way, whether formal or informal. This means avoiding all discussions about customer charges with other textile service providers – **even where you have a sub-contract or joint production agreement!**

d. **Agreed output restriction** – you must **not** agree with a competitor to limit the number of hours that your laundry operates per week or the number of orders that you will accept in a week/month or the number of new contracts you will take on each year.

e. **Market sharing** – you must **not** agree with a competitor not to compete for specific customers or not to compete in a particular geographical area. For example, you cannot agree that "*I'll take the hotels in the City of London and you take the ones in the West End*".

f. **Bid rigging** – you must **not** discuss or agree with your competitor on the contents of any separate, individual bids that you submit for a customer contract (see Section V below on joint bidding).

14. **Remember**: what is prohibited in each of the above cases is the **agreement** to do something. It does not matter whether this agreement is formal or informal, spoken to unspoken. **It does not matter that you later decide not to honor the agreement; the legal consequences are the same**.

IV. Permissible collaboration: things you can do

15. An agreement/collaboration between competitors that does restrict competition "by object" as described in Section IV above may be considered anti-competitive "by effect" if, on detailed factual and economic analysis, it is likely to have the effect of increasing price, reducing output or stifling innovation. Such analysis of competitive *effects* will often depend on the market shares of the parties involved.

16. The following types of collaboration are permitted under Article 101 TFEU and section 2 CA98, provided that the combined market shares of the parties involved are suitably low.

a. **Sub-contracting –** agreeing to pay a competitor to provide the laundry and/or delivery services necessary to fulfil your contract with a customer **provided that your combined share of the relevant market is no higher than 20% and**:

i. You do **not agree on prices** that either you or the competitor will charge to retail customers.

ii. You do not agree to restrict output. This means that you do not **agree** to suspend or limit your own laundry or delivery operations; although you may decide to do this for a limited time on a unilateral basis if it makes business sense for you.

iii. You do **not agree to share market or customers**. In particular, you do not agree to prevent your sub-contractor

from bidding on contracts with your existing customers when these expire.

iv. You do **not exchange information** about intended future pricing or current pricing to individual customers. **Be careful here** that you do not do this inadvertently – for example, by agreeing to pay the sub-contractor a percentage of the price paid by your customer, which allows the sub-contractor to work out the price to the customer.

v. You are careful about what other information you exchange (see Section V below).

b. **Joint production** – conducting laundry operations or delivery operations jointly with your competitor and sharing costs **provided that your combined share of the relevant market is no higher than 20% and you respect points (i)-(v) above**. Joint product can include, for example, using your laundry facilities and some of your competitors' staff.

c. **Joint purchasing** – purchasing required inputs (e.g. linens, chemicals; spare parts) jointly with your competitors provided that **your combined share of the relevant market is no higher than 15%** and you do **not** agree on or discuss retail prices to your own customers.

d. **Sharing general market insights and analysis** – without specific reference to your prices, production capacity or business strategy.

V. Grey areas

17. In addition to the above, there are a number of "grey areas" where the competitive "effects" of collaboration are unclear – so there is uncertainty around the lawfulness of that collaboration. For example:

a. Sub-contracting, joint production and joint purchasing with a competitor where your combined market shares exceed those set out in Section IV above.

b. **Joint bidding for customer contracts** with a competitor – generally, this is only permissible where you and your competitor would not be capable of meeting the customer's requirements on

an individual basis. Even where that is that case, you should make appropriate arrangements to ensure that you do not inappropriately share commercially sensitive information with your competitor.

c. **Exchange of commercially sensitive information** on matters other than future price/strategy – for example, exchange of information about current retail prices, costs, production capacity and business strategy. The exchange of this type of information may be problematic depending on (i) the age of the information, (ii) the frequency of the information exchange, (iii) whether it is exchanged on an individualized or an aggregated basis and (iv) whether it is exchange privately or via a public platform.

18. In each of the above cases, you should seek more detailed legal advice. Alternatively, you may seek informal guidance from the Competition and Markets Authority, which has indicated a greater willingness to provide such guidance in relation to issues arising out of the current Covid-19 crisis.

VI. Sales of business

19. Sales of a business or customer book are not subject to the competition rules in Article 101 TFEU or section 2 CA98. However, they may amount to "*relevant merger situations*" that must be notified to, and approved by, the Competition and Markets Authority under the Enterprise Act 2002 where:

a. The annual UK turnover of your business is more than £70 million; **or**

b. The purchaser of the business either (i) acquires a share of the supply of textile services in the UK or a substantial part of the UK that exceeds 25% or (ii) increases its shares of supply of textile services in the UK or a substantial part of the UK further above 25%.

20. IF you think a relevant merger situation might arise, you should seek legal advice.

VII. A note on market definition

21. Section IV above describes certain types of collaboration that are permissible provided that combined market shares are below certain thresholds. In order to calculate market share, it is critical to define the correct relevant product and geographic market.

22. Where market definition is in issue before a court, the European Commission or the Competition and Markets Authority, they will seek the input of expert economists. For the purposes of self-assessment, the key questions are:

    a. **Product market definition:** What types of goods or services are readily substitutable from the perspective of the customer and from the perspective of suppliers. For example:

        i. Are textile services provided to the hospitality industry different from those provided to the health or manufacturing sectors? Are different cleaning techniques and machines used? If so, this might suggest that textile services to the hospitality industry are in a separate market from other textile services.

        ii. Could textile services providers in the health or manufacturing sector adapt their business processes relatively quickly to meet the need of hospitality sector customers? If so, this might suggest that all textile services are in the same market.

    b. **Geographic market definition:** How far afield are customers prepared to source and suppliers prepared to provide the services in question? For example, UK grocery retailers may be looking to source bananas from anywhere in the world, suggesting a global wholesale market for bananas; whereas consumers will only be willing to travel a few minutes' drive or walk to purchase their bananas, suggesting a very local retail market for bananas.