RESPONSE OF CLIFFORD CHANCE LLP TO THE EUROPEAN COMMISSION'S CONSULTATION ON THE REVISED HORIZONTAL GUIDELINES AND HORIZONTAL BLOCK EXEMPTION REGULATIONS

APRIL 2022

1. EXECUTIVE SUMMARY

1.1 Clifford Chance welcomes the opportunity to respond to the consultation of the European Commission (**Commission**) on the draft revised guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union (**TFEU**) to horizontal co-operation agreements (**Draft Guidelines**), as well as on the draft revised research and development (**R&D**) block exemption regulation (**R&D BER**)[1] and on the draft revised specialisation block exemption regulation (**SBER**)[2].

1.2 Our comments on the Draft Guidelines and on each of the BERs are outlined in the sections below and cover the following points:

1.2.1 **Introduction (Chapter 1 Draft Guidelines):** We submit that the inclusion of further clarifications on the application of Article 101 TFEU to agreements between parents and their controlled joint ventures is commendable and we recommend a number of amendments based on established case law in order to further clarify the wording. In addition, we consider that some of the factors listed in the Draft Guidelines for the assessment of the existence of potential competition would benefit from further explanation, so that businesses do not mistakenly conclude that they might be considered to be potential competitors. Finally, we consider that the guidance on the test for distinguishing object agreements from those that are to be assessed by reference to effects should be amended to more accurately reflect Union Courts' case law by, for instance, recognising that the concept of restriction of competition by object must be interpreted restrictively.

1.2.2 **R&D agreements (Chapter 2 Draft Guidelines):** We generally welcome the changes proposed by the Commission. Nevertheless, in order to ensure that the Draft Guidelines and the R&D BER are easier to apply for market participants, we would propose *inter alia* to further clarify (i) the centre of gravity test applied to R&D agreements; (ii) the joint application of the R&D and SBER to the same cooperation; and (iii) a few definitions in the R&D BER (e.g., "potential competitor"). In addition, we submit that the new requirement to conduct a comparative assessment of competing R&D efforts in order to

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[1] Draft revised version of Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements.

[2] Draft revised version of Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements.

identify three comparable R&D projects competing in innovation is likely to significantly limit the scope of the BER.

1.2.3 **Specialisation agreements (Chapter 3 Draft Guidelines):** We welcome a number of the Commission's changes such as the increase in the number of parties that may participate in a unilateral specialisation agreement, and/or the extension of the safe harbour to all horizontal subcontracting agreements, regardless of whether they are concluded with a view to increase production or not. Nevertheless, we consider that some of the proposed rules remain difficult for market players to apply in practice and we thus propose several changes, such as (i) clarifying or amending the definitions of "product", "reciprocal specialisation agreement", "distribution" and "potential competitor" in the Draft Guidelines or SBER, and (ii) confirming the Commission's position on subcontracting agreements with a view to expanding production.

1.2.4 **Purchasing agreements (Chapter 4 Draft Guidelines):** In relation to purchasing agreements, we would encourage the Commission to (i) consider increasing the market share thresholds below which competition concerns are deemed unlikely to arise, (ii) further articulate the factors to determine whether an arrangement may or may not amount to a buyer cartel (as opposed to a joint purchasing agreement), and (iii) clarify the assessment of joint purchasing agreements whereby the parties agree to no longer purchase products from certain suppliers because such products are unsustainable, and (iv) state more explicitly that threats to abandon negotiations do not amount to an infringement of competition in themselves.

1.2.5 **Commercialisation agreements (Chapter 5 Draft Guidelines):** While Chapter 5 of the Draft Guidelines provides some helpful guidance, we consider that there is still room for further clarifications on a number of points. This is particularly the case for bidding consortia (Section 5.4) regarding which it should be made explicitly clear that bidding consortium agreements, even where they should be assessed as commercialization agreements and not as production agreements, do not necessary lead to a by object restriction under Article 101(1) TFEU. We also propose several additional changes, such as (i) providing further guidance as to when reciprocal commercialization agreements do not pose a risk of market partitioning, (ii) clarifying the situations in which commercialisation agreements do not normally pose competition concerns (e.g., when the parties lack market power), and (iii) examples and further guidance about the degree of information exchange that will normally be deemed necessary for the purposes of implementing a joint commercialisation agreement.

1.2.6 **Information exchange (Chapter 6 Draft Guidelines):** In relation to Chapter 6, we propose to (i) clarify that the exchange of raw data may be less commercially sensitive where each party is likely to adopt their own proprietary / non-public approach to processing the relevant data, (ii) refine the existing test applied to "by object" information exchanges (i.e., those which involve individualised data regarding intended future prices or quantities) rather than departing from the existing approach, and (iii) clarify the wording in the Draft Guidelines concerning hub and spoke information exchanges.

1.2.7 **Standardisation agreements (Chapter 7 Draft Guidelines):** In relation to the chapter concerning standardisation agreements, we commend the Commission on the inclusion of additional factors that can be considered to analyse standardisation agreements that do not restrict competition by object. We recommend a few changes, including to amend the wording regarding the possibility to restrict participation in standard development activities.

1.2.8 **Sustainability agreements (Chapter 9 Draft Guidelines)**: We welcome the Commission's initiative in seeking to clarify when agreements between competitors that genuinely pursue one or more sustainability objectives would comply with Article 101 TFEU. Providing comfort from a competition law perspective in respect of such agreements can act as a catalyst for undertakings seeking to improve their industry's sustainability by limiting their competition law concerns. While Chapter 9 offers some useful guidance, we consider that several elements still require further clarification, such as (i) clarifying whether the Commission will consider all sustainability objectives on an equal footing and (ii) clarifying the appropriate analysis to conduct for an agreement with a sustainability objective.

2. INTRODUCTION - CHAPTER 1 DRAFT GUIDELINES

(a) Agreements between parents and joint ventures (paragraphs 12-14)

2.1 As indicated in our responses to previous consultations, uncertainties over the question of whether Article 101 TFEU applies to agreements between parents and their controlled joint ventures have led to businesses incurring substantial amounts of unnecessary compliance costs and foregone business opportunities. We therefore commend the Commission for including this long-overdue clarification.

2.2 However, we query two points:

2.2.1 The statement that the Commission will "typically" not apply Article 101 TFEU to agreements and concerted practices between parents and controlled joint ventures, concerning their activity in the relevant market(s) where the joint venture is active, implies that it might sometimes do so. However, the case law cited in this paragraph is clear that where a parent exercises decisive influence over its joint venture the two entities form part of the same undertaking, such that there is no scope at all for applying Article 101 TFEU. If the Commission considers there to be some exception to this rule it should explain when such exceptions might apply. If it does not, it should remove the word "typically". In particular, we do not consider that the CJEU created any legal uncertainty on this point when it stated in Case C-179/12 *Dow Chemical Company*[3] that a joint venture and its parents could all be considered to form a single undertaking

[3] ECLI:EU:C:2013:605, paragraph 58.

"*only for the purposes of establishing liability*". The context of that statement[4] makes it clear that the CJEU was clarifying that *parent companies* can only be considered to form part of the same undertaking for the purpose of attributing liability, as that would otherwise lead to paradoxical results.[5] It was not casting doubt on the proposition that a joint venture forms part of the same undertaking as its parent, for all purposes, including the intra-group exception.

2.2.2 Paragraph 13 states that the Commission will typically apply Article 101 TFEU to agreements "*between the parents and the joint venture outside the product and geographic scope of the activity of the joint venture*". It seems to us that this must be a reference to the *Sumal* judgment of the Court of Justice of the EU (**CJEU**).[6] If so, that judgment should be footnoted. However, we do not consider that case law, which relates to the circumstances in which a subsidiary can be liable for an infringement committed by a parent, to be relevant in this context. In particular, any agreement that a joint venture enters into with a parent should be considered to be within the scope of its activities, by definition: if a JV agrees to do something then it must be within the scope of its activities. The alternative is a formalistic approach by which a parent and joint venture might be found to have infringed EU competition law simply because they had omitted to formally amend the joint venture agreement to enlarge the scope of activities that are set out in the agreement. In our view that would be inconsistent with the focus of EU competition law on substance over form. Consequently, we recommend omitting this statement from paragraph 13.

2.3 Also, the statement in paragraph 14 misleadingly implies – through the reference to parents being "*independent on all other markets*" (emphasis added) - that parent companies would themselves be considered to form part of the same undertaking as each other on the markets where the JV is active. We suggest amending this to reflect the judgment of the CJEU in Case C-179/12 *Dow Chemical Company*[7] which, as noted above, made it clear that parent companies remain independent of each other for the purposes of the intra-group exception in all circumstances, including those in which a parent retains activities in the same market as the JV.

(b) **Assessing potential competition (paragraph 17)**

2.4 We recognise that the list of factors that are relevant to the assessment of the existence of potential competition are drawn from the case law of the Union Courts but consider that some of them would benefit from further explanation, so that businesses do not mistakenly conclude that they might be considered to be potential competitors. In particular:

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4 In particular the appellant's arguments that are summarised at paragraph 34 of that judgment.

5 For example, it would mean that parent companies could legally cartelise activities that they carry on outside the joint venture.

6 Case C-882/19 *Sumal* ECLI:EU:C:2021:800.

7 ECLI:EU:C:2013:605, paragraph 58.

2.4.1 the third bullet point could usefully include the statement of the CJEU that a finding of potential competition also cannot be based on the "mere wish or desire" of an undertaking to enter the market;[8]

2.4.2 the penultimate bullet point suggests that a party may be found to have infringed the Article 101 TFEU prohibition purely on the basis of the perception of the other party to a cooperative arrangement. While we recognise that a perception of potential competition can act as a competitive constraint, if that perception is wrong – e.g., because the other party has no intention or ability to enter the market - it cannot serve as a basis for liability of the (non-)potential competitor. The guidelines should therefore clarify that the question of whether potential competition exists is an objective question to be determined on the basis of the facts, and that while the perception of one party may be a relevant fact in this regard, it will not, on its own, be determinative; and

2.4.3 the statement in the final bullet point is taken out of context and does not, in isolation, offer meaningful guidance. We suggest rephrasing it to explain that, in certain circumstances, the very presence of an agreement between undertakings that operate at the same level of the production chain may indicate that they are potential competitors, because the agreement would have been unnecessary or lacking in purpose if they were not potential competitors.

(c) **Restrictions of competition by object (paragraphs 28-35)**

2.5 The Union Courts have come up with numerous formulations of the test for distinguishing object agreements from those that are to be assessed by reference to effects. Paragraph 29 of the Draft Guidelines cherry picks the broadest and most meaningless of those formulations and consequently does not accurately reflect the Union Courts' case law in this area. In particular, characterising object restrictions as those that are merely "capable" of restricting competition has never been a useful test, as the category of agreements that are capable of having anticompetitive effects must (on any natural meaning of the word capable) include those that are assessed by reference to their effects and are recognised by the Union Courts as not being object infringements. Indeed, in *Cartes Bancaires* the CJEU faulted the General Court for defining and applying the concept of 'by object' restrictions in this way.[9]

2.6 A more accurate summary of the Union Courts' case law in this area would, in our view, include the following statements (in addition to those in paragraphs 32-35):

2.6.1 the concept of restriction of competition by object must be interpreted restrictively and can be applied only to certain types of coordination between

[8] Case C-307/18, *Generics (UK)*, EU:C:2020:52, paragraph 38.

[9] Case C-67/13, *Cartes Bancaires*, ECLI:EU:C:2014:2204, paragraphs 57 and 69.

undertakings which reveal a sufficient degree of harm to competition, such that it is not necessary to assess their effects;[10]

2.6.2 there should exist "sufficiently general and consistent experience" for the view to be taken that the harmfulness of an agreement justifies dispensing with any examination of the specific effects of that agreement on competition;[11] and

2.6.3 the presence of strong indications capable of demonstrating that an agreement has pro-competitive effects, or, at the very least, contradictory or ambivalent evidence, must be taken into account.[12]

3. R&D AGREEMENTS – CHAPTER 2 DRAFT GUIDELINES AND R&D BER

3.1 Clifford Chance generally welcomes the additional clarifications made by the Commission in relation to R&D agreements, both in the related chapter in the Draft Guidelines and in the R&D BER. Nevertheless, we consider that some of the proposed rules remain difficult for market players to apply in practice when they are seeking to engage in often costly R&D projects. In particular, this concerns the Commission's addition of the 3-plus-1 rule for assessing R&D innovation markets, as further detailed below.

3.2 We include below our comments as regards the text of Chapter 2 and of other provisions related to R&D agreements in the Draft Guidelines, as well as regards the R&D BER:

(a) Centre of gravity of R&D agreements (paragraph 7)

3.3 We welcome the changes brought to paragraph 7 of the Draft Guidelines, which now provides further guidance on the evaluation of the centre of gravity of R&D agreements. In particular, the paragraph now emphasises that, for arrangements involving both R&D and subsequent production where the subsequent production will only take place if the joint R&D is successful, "*it is possible to consider in general*" that the R&D is the relevant centre of gravity of the arrangements. In this regard, we would welcome the addition of a clarification that the same consideration applies to arrangements involving both R&D and subsequent joint commercialisation.

(b) Joint application of R&D BER and SBER (paragraph 8)

3.4 Paragraph 8 of the Draft Guidelines indicates that "[t]*he centre of gravity test only applies to the relationship between the different chapters of these Guidelines, not to the relationship between different block exemption regulations. The scope of a block exemption regulation is defined by its own provisions*". In this regard, we would

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[10] Case C-67/13, *Cartes Bancaires*, ECLI:EU:C:2014:2204, paragraphs 57 and Case C-228/18 *Budapest Bank,* ECLI:EU:C:2020:265, paragraph 54.

[11] Case C-228/18 *Budapest Bank,* ECLI:EU:C:2020:265, paragraph 79.

[12] Case C-228/18 *Budapest Bank,* ECLI:EU:C:2020:265, paragraphs 82-83.

welcome a clearer statement that the R&D BER and the SBER can both be applied to the same overall cooperation. Alternatively, the Commission might consider combining the two BERs into a single Horizontal BER.

(c) **Competition in innovation (Recital 17 and Article 6(3) R&D BER)**

3.5 Recital 17 of the R&D BER stipulates that R&D agreements "*where there would remain less than three competing R&D efforts in addition to and comparable with those of the parties to the R&D agreement*" will be excluded from the safe harbour of the R&D BER. The requirement to compare the efforts of the parties to the R&D agreement with those of competing efforts around new products and technologies, and to identify three comparable projects, will be extremely difficult to apply in practice and has the potential to significantly limit the scope and application of the BER's safe harbour. The development of new products and technologies tends to be highly commercially sensitive and few – if any – details about such innovation products are generally known or accessible in the public domain. As a result, an assessment of comparability of competing R&D efforts "made on the basis of reliable information" and at a very early stage of R&D efforts (when the markets concerned do not yet exist) is likely to be very challenging for market players.

3.6 In light of the potential to significantly limit the scope of the BER, the Commission may thus wish to reconsider the inclusion of the requirement to conduct a comparative assessment of competing R&D efforts. As an alternative, the Commission may consider providing further guidance - in addition to the elements cited in Article 7(2) - on how companies envisaging an agreement for the development of new products or technologies should complete the assessment of this requirement and provide concrete examples of the types of information that undertakings should use. At minimum, the Guidelines should make it clear that if parties to an R&D cooperation reasonably believe – on the basis of the factors set out in Article 7(2) of the R&D BER - that a third party is "able and likely" to independently engage in a competing R&D effort,[13] then the condition in Article 6(3) of the R&D BER will be met, even if that third party has in fact decided not to pursue such efforts.

(d) **Definition of "exploitation of the results" (Article 1(1)(9) R&D BER)**

3.7 The R&D BER or the Draft Guidelines should clarify that the different forms of joint exploitation by the parties to an agreement can be combined (*e.g.,* in the case of production of the contract products by a third party and a joint distribution by the parties to the agreement).

(e) **Definitions of "potential competitor" and "undertaking competing in innovation" (Articles 1(1)(17)(b) and 1(1)(18) R&D BER)**

3.8 Article 1(1)(17)(b) requires assessing whether an undertaking would "*on realistic grounds and not just as a mere theoretical possibility*" supply a given technology or process "*within not more than 3 years*". As this requirement is difficult to apply in

[13] As per the definition in Article 1(19) of the R&D BER.

practice and thus results in an overly cautious application of the R&D BER, we would suggest to the Commission to clarify the circumstances in which realistic grounds may be considered to arise. In addition, we would suggest limiting the definition of Article 1(1)(17)(b) to entry within two years and to reflect the same two-year time limit in the definition of Article 1(1)(18) by adding "*(...) would be able and likely to independently engage, within not more than 2 years, in R&D efforts which concern (...)*".

(f) **Access to the final results of paid-for R&D (Articles 3(1) and 3(2) R&D BER)**

3.9 Given that paid-for research does not involve significant cooperation between the parties (other than commissioning the research), we consider that the requirement in Article 3(1) for full access to the final results of paid-for R&D is unduly restrictive and should be removed.

3.10 Furthermore, it would be useful to obtain more guidance in the Draft Guidelines on objective methods to safely determine that compensation for the purposes of Article 3(2) is not so high as to effectively impede access.

(g) **Duration of the exemptions (Article 6(4) R&D BER)**

3.11 We would welcome a clarification in Article 6(4) that, if the R&D results in a number of different contract products or technologies, the seven year period starts from the moment *each* contract product or contract technology is first placed on the market within the internal market (as opposed to a single period for all contract products or technologies running from the date on which any resulting product or technology is first put on the market).

(h) **Application of market share thresholds (Article 7 R&D BER)**

3.12 In light of the difficulties in obtaining "*reliable market information"* in relation to technology markets and of the high fluctuations of market shares in many innovation markets, we suggest that the Commission should consider raising the 25% market share threshold, and increasing the time period during which the parties still benefit from the safe harbour exemption under the BER following the year in which the 25% threshold was first exceeded.

4. SPECIALISATION AGREEMENTS – CHAPTER 3 DRAFT GUIDELINES AND SBER

4.1 Clifford Chance generally welcomes the additional clarifications made by the Commission in relation to specialisation agreements, both in the related chapter in the Draft Guidelines and in the SBER. We note that the SBER only covers certain forms of cooperation in production that need to fulfil strict conditions. This may determine that the SBER is not applied in practice as frequently as other block exemptions (i.e., the VBER). For this reason, we welcome the increase in the number of parties that may participate in a unilateral specialisation agreement and the extension of the safe harbour to all horizontal subcontracting agreements, regardless of whether they are concluded with a view to increase production or not. Nevertheless, we consider that some of the

proposed rules remain difficult for market players to apply in practice and we have thus included a few comments on Chapter 3 and the Specialisation BER below:

(a) **Joint application of R&D BER and SBER (paragraph 8)**

4.2 As stated in paragraph 3.4 above, paragraph 8 of the Draft Guidelines indicates that "[t]*he centre of gravity test only applies to the relationship between the different chapters of these Guidelines, not to the relationship between different block exemption regulations. The scope of a block exemption regulation is defined by its own provisions*". In this regard, we would welcome a clearer statement that the R&D BER and the SBER can both be applied to the same overall cooperation. Alternatively, the Commission might consider combining the two BERs into a single Horizontal BER.

(b) **Scope of production agreements and horizontal subcontracting agreements**

4.3 The Draft Guidelines now refer to "products" rather than to "goods" (i.e., paragraphs 206, 207, 208). However, there is no definition of "product" in the Draft Guidelines. In the SBER, product is defined as "good or service" (Art. 1.1(c)) so that preparation of services is also covered by the SBER. In order to keep consistency and to guarantee the necessary legal certainty, it is recommended that the Draft Guidelines: (a) cross-refer to the definition of product in the SBER; or (b) otherwise clarify that the preparation of services is also included in the scope of the Draft Guidelines when they refer to "products".

(c) **Agreements to expand production (paragraph 232)**

4.4 The revised paragraph 232 of the Draft Guidelines now states: "***Safe harbour.*** *For horizontal subcontracting agreements, which fall outside the definition of specialisation agreement of the Specialisation BER (Article 1 paragraph 1(a)), it is, in most cases, unlikely that market power exists, if the parties to the agreement have a combined market share not exceeding 20%."* In our view, the safe harbour is highly relevant in the Section of production agreements because not all agreements fulfil the strict conditions included in the SBER and therefore do not benefit from an exemption. In view of this, we first welcome the inclusion of all subcontracting agreements (and not only subcontracting agreements with a view to expanding production, see current paragraph 169 of the Horizontal Guidelines) within the scope of the 20% safe harbour. This provision brings more uniformity and legal certainty for all subcontracting agreements between competitors. However, we would add that if the Commission has not identified any competition concerns arising from subcontracting agreements to expand production, these should be included within the scope of the SBER. In that regard, we are aware that Article 1.1(c) of the enabling Regulation 2821/71 of the Council of 20 December 1971 on application of Article 85 (3) of the Treaty to categories of agreements, decisions and concerted practices only refers to "specialisation" agreements. However, the current SBER also exempts joint production agreements, so there may be some room for consideration.

4.5 In addition, we recommend that the safe harbour is not only limited to horizontal subcontracting agreements but to all forms of cooperation in production, thus also covering looser forms of cooperation which are not strictly qualified as subcontracting. In that regard, we note that the analysis of mobile infrastructure sharing agreements

(paragraphs 296-305) of the Draft Guidelines does not make any reference to the 20% safe harbour. The same applies to Example 5, relating to a swap agreement, where no reference is made to the safe harbour either. However, we do not see any reasons why the safe harbour should not apply to these forms of cooperation in production. This may provide additional uniformity and legal certainty to cooperation in production in general regardless of its specific form.

(d) **Exchanges of information in the context of production agreement**

4.6 Paragraph 250 of the Draft Guidelines states that information exchanges in the context of a production agreement should be analysed under Chapter 6 of the Draft Guidelines and that any negative effects arising from those exchanges of information need to be assessed in light of the overall effects of the production agreement. This would only apply to information exchanges in agreements which are out of the scope of the SBER. Regarding information exchanges in agreements benefitting from the SBER, we recommend including an explicit statement that those exchanges should be covered by the SBER to the extent they are necessary to implement an arrangement which in turn benefits from the SBER. Alternatively, we would at least suggest to quote information exchanges explicitly as an example in paragraph 265 of the Draft Guidelines, which states that other provisions included in specialisation agreements that constitute ancillary restraints would also benefit from the exemption foreseen in the SBER as long as the conditions defined in EU case law are met. We consider that the reference should be explicit regarding information exchanges in order to bring clarity and legal certainty to such exchanges when the agreement is covered by the SBER.

(e) **Definition of "reciprocal specialisation agreement" (Article 1(1)(a)(2) SBER)**

4.7 Reciprocal specialisation agreements are defined as agreements between two or more parties which are active on the "*same product market*" and by virtue of which two or more parties, on a reciprocal basis, agree to fully or partially cease or refrain from producing "*certain but different products*". We recommend to expand in this last notion; "*certain but different products*" and, in particular, to confirm that these products do not need to pertain to separate product markets from a competition law perspective. A source of confusion may be Example 4 (paragraph 309) which refers to a reciprocal specialisation agreement by stating that the agreement is concluded between two manufacturers of products "*that belong to separate product markets*" instead of just referring to an agreement between manufacturers "*of different products*". Given that the application of the SBER depends on this notion, this should be further clarified.

(f) **Definition of "distribution" (Article 1(1)(l) SBER)**

4.8 The definition of "distribution" in Article 1(1)(m) of the SBER should make it clearer that some forms of joint distribution are excluded. In particular, in the *DONG/DUC* case, the Commission denied the application of the SBER on the basis that the joint distribution of the parties' jointly produced natural gas did not give rise to sufficient efficiencies and was therefore considered to fall into a separate category of "joint co-ordination of sales" (*see* Competition Policy Newsletter Number 2, Summer 2003).

(g) **Definition of "potential competitor" (Article 1(1)(i)(2) SBER)**

4.9 Article 1(1)(i)(2) requires assessing whether an undertaking would "*on realistic grounds and not just as a mere theoretical possibility*, *be likely to undertake, within not more than 3 years, the necessary additional investments or other necessary costs to enter the relevant market*". As this requirement is difficult to apply in practice and thus results in an overly cautious application of the Specialisation BER, we suggest that the Commission clarifies the circumstances in which realistic grounds may be considered to arise.

4.10 In addition, we would suggest limiting the definition of Article 1(1)(i)(2) to entry within two years.

5. PURCHASING AGREEMENTS – CHAPTER 4 DRAFT GUIDELINES

5.1 Clifford Chance welcomes the additional clarifications proposed by the Commission in relation to purchasing agreements, as set out in the related chapter of the Draft Guidelines. A number of areas would however benefit from further amendments and clarifications, as detailed below:

(a) Market share threshold (paragraph 329)

5.2 We note that the relevant market share threshold below which competition concerns are deemed unlikely to arise (i.e., 15%) has remained aligned with the current regime. In this respect, we would encourage the Commission to reconsider its position and increase the threshold to at least 20%, if not 25%, in line with the approach adopted with respect to other types of horizontal agreements, and indeed in other areas of competition law (notably, merger control).

(b) Distinction between buyer cartels and purchasing agreements

5.3 We welcome the additional clarifications introduced in the Draft Guidelines as regards the distinction between buyer cartels and joint purchasing agreements. We note that the Draft Guidelines now include a description of whether a practice may amount to a buyer cartel, and therefore to an object infringement; as well as a non-exhaustive list of factors to determine whether an arrangement falls outside such category, thereby requiring an analysis of its effects. It would be helpful, however, if the latter factors were further articulated to distinguish systematically between the key elements of joint purchasing, including the meaning of 'purchasing' and purchasing 'jointly', as well as the different types of buyer groups that might exist, as noted elsewhere.[14]

(c) Interplay with sustainability

5.4 Paragraph 333 of the Draft Guidelines considers the case of joint purchasing agreements whereby the parties agree "*to no longer purchase products from certain*

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[14] Whish-Bailey, *Horizontal Guidelines on purchasing agreements: Delineation between by object and by effect restrictions*, paragraph 5.5 *ff*.

suppliers because such products are unsustainable", and decide instead to buy only sustainable products. In this respect, the Guidelines note that such agreements do not "*in principle have the object to exclude suppliers producing unsustainable products from the purchasing market*". The latter statement however is somewhat ambiguous; it would be helpful if, despite the lack of precedents in the field of collective boycott by purchasers, the Commission could more clearly state that arrangements of this type of sustainability-driven arrangements are in principle unfit to qualify as restrictions by object,[15] unlike horizontal collective boycott (and a cross-reference to the relevant paragraph where the latter is addressed might also be helpful). Moreover, the Guidelines state that the restrictive effects of such arrangements should be assessed on the basis of criteria such as "*the nature of the products, the market position of the purchasers and the market position of suppliers*". In particular, the Guidelines note that it will be relevant to consider whether the excluded suppliers can sell to customers other than those participating in the sustainable joint purchasing arrangement, or can easily decide to start also producing sustainable products. It would be helpful, however, to further articulate the circumstances in which harmful effects on competition are less likely to arise even if some suppliers of unsustainable products are excluded, and also to clarify the scope of 'sustainable products' in this context. For example, the latter might include an input that is produced in a more sustainable manner, which in turn would contribute to produce products that are more sustainable; or it could otherwise relate to final products that may be preferred over others for their positive contribution to sustainability objectives.

(d) **Negotiation tactics**

5.5 Paragraph 343 of the Draft Guidelines acknowledges that threats to abandon negotiations occur frequently in the context of negotiations between suppliers and customers. The Draft Guidelines also note that "*such threats do not usually amount to a restriction of competition by object and any negative effects arising from such collective threats will not be assessed separately but in the light of the overall effects of the joint purchasing arrangement*". It would be helpful however if the Draft Guidelines stated more clearly that such tactics do not amount to an infringement of competition in themselves, and that any potential negative effects would rather arise as a result of the buyer group's conduct (i.e., the decision to cease purchasing products, as opposed to the threat of doing so).

6. COMMERCIALISATION AGREEMENTS – CHAPTER 5 DRAFT GUIDELINES

6.1 Clifford Chance welcomes the additional clarifications made by the Commission in relation to commercialisation agreements and greatly appreciates the Commission's efforts to include specific guidance on bidding consortia. Bearing this in mind, and while Chapter 5 of the Draft Guidelines provides some helpful guidance, we consider

[15] Ibid, paragraph 2.32 *ff*.

that there is still room for further clarifications on a number of points, as further detailed below. This is particularly the case for bidding consortia (Section 5.4) regarding which it should be made explicitly clear that bidding consortium agreements, even where they should be assessed as commercialisation agreements and not as production agreements do not necessary lead to a by object restriction under Article 101(1) TFEU.

6.2 We include below our comments as regards the text of Chapter 5 of the Draft Guidelines:

(a) **Distribution agreements between competitors (paragraph 356)**

6.3 Paragraph 356 of the Draft Guidelines specifies that if competitors agree to distribute their substitute products, - and in particular, if they do so on different product markets - "*there is a risk in certain cases that the agreements have as their object or effect the partitioning of markets between the parties or that they lead to a collusive outcome*". According to the Commission, this can be true both for reciprocal and non-reciprocal agreements between competitors. It would however be helpful to provide more guidance as to when reciprocal commercialisation agreements do not pose a risk of market partitioning.

(b) **Non-exclusive commercialisation agreements (paragraph 366 read in conjunction with paragraphs 365 and 367**)

6.4 The Commission rightly recognises in paragraph 367 of the Draft Guidelines that the risk of output limitations is more limited in case of non-exclusive commercialisation agreements, provided that the agreement will not lead to a coordination of the supply policy of the parties. However, this same reference is missing as regards to price fixing in the immediately preceding paragraph of the Draft Guidelines (paragraph 366), which merely states that the assessment that commercialisation agreements including joint pricing are likely to restrict competition by object does not change if the agreement is non-exclusive (i.e., where the parties will keep on competing in the relevant market for other bids or contracts) "*as long as it can be concluded that the agreement will lead to a coordination of prices charged by the parties to all or part of their customers*".

6.5 We submit that the Guidelines should expressly clarify that the risk of joint commercialisation agreements that include joint pricing leading to price coordination between the parties in respect of products sold outside the commercialisation arrangement is more limited in case of non-exclusive commercialisation agreements (as is the case for output limitations). This could be particularly the case, for instance, where only a small percentage of the parties' total sales are affected by the commercialisation agreement, since customers that purchase the jointly-commercialised products can freely purchase products from the parties that are not subject to joint commercialisation and/or provided that certain safeguards are adopted (e.g., information barriers). In these circumstances, the fact that joint pricing may affect "part of" the customers of the parties should not necessarily imply that the agreement is anticompetitive by object. In this respect, we encourage the Commission to keep the wording of current paragraph 235 of the Horizontal Guidelines in the sense that non-exclusive commercialisation agreements generally lead to the coordination of the pricing policy of competing players "*as long as it can be concluded that the agreement will lead to an overall coordination of the prices charged by the parties*".

(c) **Commercialisation agreements which do not normally pose competition concerns (paragraph 372, read in conjunction with paragraph 371)**

6.6 The Commission rightly indicates in paragraph 371 of the Draft Guidelines that a commercialisation agreement is normally not likely to give rise to competition concerns if it is objectively necessary to allow one party to enter a market that it could not have entered individually or with a more limited number of parties than those that are effectively part of the cooperation. In this regard, and while we fully agree with this statement, it would also be helpful to clarify that when a specific commercialisation agreement is not objectively necessary to allow one party to enter a specific market, it is still possible that the agreement in question does not fall under article 101(1) TFEU by effects, if for instance, the parties lack market power, as per paragraph 371 of the Draft Guidelines.

(d) **Exchange of sensitive commercial information (paragraph 376)**

6.7 Paragraph 376 of the Draft Guidelines expressly recognises that for most commercialisation agreements, some degree of information exchange is required in order to implement the agreement. It is however unclear which degree of information exchange will normally be deemed necessary for the purposes of implementing a joint commercialisation agreement, and hence not risky under article 101(1) TFEU. We would welcome an amendment to the Draft Guidelines that include further detail and/or examples in this regard.

(e) **Market share threshold safe harbour (paragraph 378**)

6.8 The Draft Guidelines do not change the current safe harbour (i.e., 15% market share) for commercialisation agreements. However, we submit that the threshold should be higher (e.g., 20% as it is the case for other cooperation agreements; 25%, the threshold below which horizontal mergers are presumed unproblematic; or even 30%, along the lines of the vertical agreements exemption).

(f) **Bidding consortia (section 5.4, paragraphs 386 to 397)**

6.9 As specified above, we welcome the Commission's efforts to provide comprehensive guidance on the assessment of bidding consortium agreements under Article 101 TFEU. While the proposed section is, to a large extent, helpful, there remain a number of points for which further clarifications would be welcome:

a. **Subcontracting agreements between tenderers (paragraphs 386 and 388**)

6.10 While the Commission rightly recognises that there is not a general presumption that subcontracting by the successful tenderer to another tenderer in the same procedure amounts to collusion, it then concludes that "*the parties concerned may demonstrate the opposite*". This statement appears to impose a sort of additional burden on the parties to prove that their conduct, although not presumptively anticompetitive, does not constitute collusion. Paragraph 388 of the Draft Guidelines should be amended to clarify that, absent a general presumption, it should be for the competition authority to prove the existence of an anticompetitive agreement according to relevant procedural rules and applicable case law. Along the same lines, it should also be clarified that, as

well as covering jointly-tendered bids, the definition of bidding consortia in paragraph 386 also covers situations of cooperation whereby one party submits the bid, as prime contractor, with one or more other parties openly participating as subcontractors.

b. **Assessment of bidding consortium agreements under Article 101 TFEU (paragraphs 393 and 394 read in conjunction with paragraphs 389, 390 and 391)**

6.11 Paragraph 389 of the Draft Guidelines makes clear that when the centre of gravity of the consortium lies in the production activity so that the competitive assessment shall be carried out in accordance with the rules for joint production, price fixing is generally not considered a restriction by object and a by effect assessment will be necessary. Conversely, paragraph 390 of the Draft Guidelines specifies that consortium agreements that mainly or exclusively include joint commercialisation shall be considered as commercialisation agreements and shall be assessed under the principles set out in Chapter 5 of the draft Guidelines. Paragraph 391 then goes on to state that joint bidding consortium agreements between parties which are not either actual or potential competitors (i.e., where the agreement allows the undertakings involved to participate in projects that they would not be able to undertake individually) do not restrict competition irrespective of its legal qualification. We fully agree with the Commission's assessment up to this point.

6.12 However, it is not clear from the following paragraphs of the Draft Guidelines whether joint bidding between actual or potential competitors falling outside the scope of joint production agreements - and involving joint pricing - are to be considered anti-competitive by object, or, instead, it is necessary to assess whether they will cause restrictive effects. In this respect, on the one hand, the Commission seems to suggest in paragraph 393 that when the parties are competitors (even if they are so for only part of the tender) there would be a sort of presumption that the consortium agreement would in any case infringe Article 101(1) TFEU, since it expressly states that the possible efficiencies derived from the joint bid "*have to be assessed on the basis of the principles of Article 101(3)*". On the other hand, it expressly recognises in the subsequent paragraph that a consortium agreement may restrict competition by object or by effects, depending on the content of the agreement in question and on the specific circumstances of the case (paragraph 394). This creates legal uncertainty as to the proper analysis companies must undertake when assessing the possibility of joining forces for the tendering of a given project or contract and may have a deterrent effect on legitimate and procompetitive ways of collaboration in public or private bids.

6.13 It is therefore necessary to clarify the methodology to be followed in relation to bidding consortia falling outside the scope of joint production agreements and confirmation that even where joint bidding agreements between competitors are to be analysed as commercialisation agreements (beyond the cases in which they serve as a tool to engage in a disguised cartel) the fact that such agreements include joint pricing does not necessarily imply that they restrict competition by object. To the contrary, an effects analysis should be carried out in order to determine whether the agreement infringes Article 101(1) TFEU. This would be in line with paragraph 365 of the Draft Guidelines, which, as explained above, should be amended to clarify that joint pricing in non-exclusive commercialisation agreements (as it is normally the case for joint consortia)

only leads to pricing coordination as long as it can be concluded that the agreement will lead to an overall coordination of the prices charged by the parties.

c. **Assessment of efficiencies under Article 101(3) TFEU (paragraph 397)**

6.14 According to paragraph 397 of the Draft Guidelines, the criteria of Article 101(3) will be fulfilled if the bidding consortium agreement (i) allows the parties to submit a more competitive offer compared to the bids that they would have submitted separately; and (ii) the benefits arising from the agreement for the consumers and the contracting entity outweigh the restrictions to competition. However, a more competitive coordinated bid already benefits consumers/the contracting entity to a greater degree than a series of less competitive uncoordinated bids. Hence, the fact that the bid would be more competitive should be sufficient to prove that the benefits outweigh the restrictions to competition for Art.101(3) to apply, to the extent that the agreement does not include restrictions that are not indispensable for the bid to be more competitive.

7. INFORMATION EXCHANGE – CHAPTER 6 DRAFT GUIDELINES

(a) Raw, unprocessed data (paragraph 428)

7.1 Paragraph 428 states that "*Depending on the circumstances, the exchange of raw data may be less commercially sensitive than an exchange of data that was already processed into meaningful information. Similarly, raw data may be less commercially sensitive than aggregated data, while it may allow undertakings to obtain more efficiencies by exchanging it*." It seems to us that if the act of converting raw data into processed data is relatively straightforward or standardised then this distinction will not be relevant and could create false comfort for parties to an information cooperation. We therefore suggest clarifying that the exchange of raw data may be less commercially sensitive where each party is likely to adopt their own proprietary / non-public approach to processing the relevant data.

(b) Definition of information exchanges as object infringements

7.2 The Draft Guidelines depart from the approach in the existing Guidelines, which define 'by object' information exchanges as those which involve individualised data regarding intended future prices or quantities. This test has the substantial advantage of being relatively clear, objective and straightforward to apply. While we recognise there have been rulings of the Union Courts during the past decade which need to be reflected in the revised Guidelines, our view is that this can be done by refining the existing test (see paragraph 7.7 below).

7.3 The Draft Guidelines, however, appear to abandon this approach, or at least to obscure much of its clarity and objectivity. In particular, paragraph 488 now takes the concept of "commercially sensitive information" (**CSI**), and the examples of CSI that are listed in paragraph 424, as the foundation for the definition of a by object information exchange. A number of those examples concern exchanges of information relating to an undertaking's current pricing, "state", production capacities and demand, and

consequently give the impression that the Commission intends now to treat all exchanges of CSI relating to current pricing or quantities as by-object infringements.

7.4 We consider the list of out-of-context statements from case law of the Union Courts in paragraph 422 to be misleading. In particular, all of the cases that are the sources for the list in paragraph 422 involved (or also involved) disclosures or receipt of information regarding a party's intended future market conduct. Consequently, none of those cases supports the proposition that an exchange of current information, on its own, should be treated as a by object infringement.

7.5 Moreover, treating exchanges of current data as by object infringements does not meet the requirements set out by the Union Courts (see paragraph 2.6 above), i.e., that the concept of restriction of competition by object must be interpreted restrictively, can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition, that there should exist "*sufficiently general and consistent experience*" to justify treatment as an object restriction and that the existence of pro-competitive efficiencies must be taken into account. As the Commission's own examples in Section 6.4 of the Draft Guidelines show (Example 1 relating to current pricing and Example 2 relating to current costs), [16] such exchanges can and frequently do have pro-competitive effects and do not reveal a sufficient degree of harm to competition to justify categorisation as an object infringement.

7.6 While the Draft Guidelines do state in paragraph 448 that exchanges of CSI will only be considered to be by object restrictions where they are "*capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market*", our view is that they need to take better advantage of this once-in-a-decade opportunity to elaborate a clear and unambiguous framework or set of principles that can be used to make sense of the case law in this area, in particular with regard to exchanges of current data.

7.7 In our view, this could be achieved by explaining that:

7.7.1 the key concept for distinguishing between by object and by effect exchanges of information is whether the information discloses a party's intended future market conduct - such as future pricing (including costs that form a decisive element of such pricing), future production/sales volumes, or future product characteristics in respect of which competition takes place – or reduces uncertainty in respect of such conduct.

7.7.2 Information on existing pricing, production volumes or sales will not usually disclose or reduce uncertainty in relation to a party's intended future market conduct, unless it is combined with other information that does. A useful case

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[16] The example notes that *"[u]nless it is a disguised means of exchanging information on future intentions, this exchange of information would not constitute a restriction of competition by object because the hotels exchange present data and not information on intended future prices or quantities.*"

to cite in this respect would be Case T-105/17, *HSBC*[17], in which the GC held that the disclosure of confidential information relating to a trader's portfolio and trades did not have the object of restricting competition because it was neither precise nor detailed, such that it was not possible to read into that conversation the explanation of a 'strategy'. If the Commission considers there to be scenarios in which the exchange of current pricing or production information can, on its own, disclose intended future conduct this would be a good candidate for a specific example in Section 6.4 of the Draft Guidelines.

7.7.3 In contrast, CSI relating to existing volumes of spare capacity and capacity utilisation rates can give indications of a party's likely future conduct, as limited spare capacity will often lead a business to maintain or increase its prices in the future.[18]

7.7.4 Similarly, disclosures of a party's proprietary information that it uses when setting its future pricing or production volumes, such as forecasts of demand in the market, may reduce uncertainty regarding its future conduct.[19] In this respect, however, it is important that the Guidelines set out principles to help market participants distinguish between by object information exchanges and discussions of "market colour" (e.g., regarding the general state of the market, including as to actual or possible developments, news, events and trends) that fall to be assessed by reference to their effects.[20] This is of particular relevance for markets in which undertakings often have customers or counterparties that are also their competitors (e.g., certain financial markets).

7.8 If, however, the Commission does retain the list of examples in paragraph 424, we have the following specific comments on that list (in addition to the general comments above)

7.8.1 as regards the fourth example, neither the text of the Draft Guidelines nor the supporting judgment that is cited in the footnote allow the reader to understand what is meant by an "arrangement relating to demand". The Guidelines should explain what this is, and why it is liable to disclose a party's future market conduct;

7.8.2 the fifth bullet point should refer instead to exchanges of "projections of future sales", as opposed to exchanges of the sales themselves;

7.8.3 the reference in the sixth bullet point to "current state" could give the misleading impression that disclosures by an undertaking relating to its general financial

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17 ECLI:EU:T:2019:675, paragraphs 186-195.

18 Case T-758/14 RENV, *Infineon Technologies* ECLI:EU:T:2020:307, paragraphs 85 and 96.

19 Case T-588/08, *Dole Food Company* ECLI:EU:T:2013:130.

20 See, for example, Statement of Good Practice of the FICC Markets Standards Board for "Information & Confidentiality for the Fixed Income and Commodities markets", available at https://fmsb.com/wp-content/uploads/2019/10/Information-Confidentiality-SGP_V6.4-FINAL.pdf. See also in this regard Case T-105/17, *HSBC*, ECLI:EU:T:2019:675, paragraph 193.

state are by object infringements. However, the case cited [21] related to a disclosure that an undertaking was experiencing financial difficulties *within a particular market* and the GC was careful to clarify that the highly concentrated nature of the market was relevant to its finding that such a disclosure was capable of influencing the conduct of the recipient competitor.

(c) **Hub and spoke information exchanges (paragraphs 435-437)**

7.9 Paragraph 435 of the Draft Guidelines states that an anticompetitive information exchange can take place through various different types of third parties, including customers. This creates a significant risk that the Guidelines themselves will have anticompetitive effects. In particular, we have on a number of occasions encountered employees of businesses operating in procurement roles who have had the mistaken impression that competition law prevents them from disclosing one supplier's pricing offer to another, with a view to securing a lower price from the other. As this is the very essence of the competitive process, it is vital that the Guidelines do not facilitate or perpetuate such misapprehensions.

7.10 Consequently, we submit that the Commission should remove the reference to "customers" in paragraph 43. Failing that, the revised Guidelines should recognise that:

7.10.1 anticompetitive information exchanges through a customer will be extremely rare (if indeed they ever happen at all), as customers have every incentive not to facilitate collusion between their suppliers; and

7.10.2 for that reason, disclosure by a customer of one supplier's prices to another will not typically be considered to infringe competition law unless there is compelling evidence that the customer had actual (not just constructive) awareness of anticompetitive collusion between its suppliers and knowingly intended to contribute to it.

7.11 A similar concern arises in relation to the test expressed in paragraph 437, whereby an undertaking may commit an infringement if it "could reasonably have foreseen" that a third party would share its commercial information with its competitor. Again, it is normal (and indeed beneficial) commercial conduct for a purchaser to negotiate with a supplier by disclosing pricing offers of other suppliers, so it will always be the case that those other suppliers could reasonably foresee that happening. Here too, the Guidelines should clarify that, in the context of price negotiations with customers, it is not enough that the passing on of a pricing offer by a customer is reasonably foreseeable and that the supplier must also intend to contribute to some wider anticompetitive collusion with its competitor(s), relating to other customers.

7.12 Paragraph 437 also gives rise to two additional concerns:

7.12.1 it states that a discloser of information through a third party would meet the conditions for liability under Article 101 if it " *expressly or tacitly agreed with*

[21] Case T-758/14 RENV, *Infineon Technologies* ECLI:EU:T:2020:307, paragraph 70.

the third party provider sharing that information with its competitors". This fails to recognise that there will be no infringement if the putative third party recipient is not pursuing any anticompetitive objective to which the discloser can contribute, either because it rejects receipt of the information,[22] or is unaware (and could not reasonably have foreseen) that its competitor intended for the third party to pass on the information to it; and

7.12.2 the final sentence does not accurately reflect the CJEU's judgment in *VM Remonts*.[23] In particular, that judgment set out the two tests for attributing liability to a discloser – the first involving intention or agreement for the third party to pass on the information and the second involving reasonable foreseeability of pass-on – and clarified that the first of these tests will not be met if the third party passes on that information to a competitor without informing the discloser. The second "reasonable foreseeability" test, however, could still be met, contrary to what is implied in paragraph 437.

7.13 In our view, a clearer and more useful elaboration of the test for a hub-and-spoke infringement can be found in the case law of the UK courts. That formulation of the test - which is based on EU competition law and is, in our view, consistent with subsequent the case law of the Union Courts - explains that it is necessary to establish that:[24]

7.13.1 retailer A discloses to supplier B its future pricing intentions;

7.13.2 A may be taken to intend that B will make use of that information to influence market conditions by passing that information to other retailers (of whom C is, or may be, one);

7.13.3 B does, in fact, pass that information to C;

7.13.4 C may be taken to know the circumstances in which the information was disclosed by A to B; and

7.13.5 C does, in fact, use the information in determining its own future pricing intentions (the last of these being subject to a presumption, in line with the case law on concerted practices).

8. STANDARDISATION AGREEMENTS – CHAPTER 7 HGL

8.1 Clifford Chance welcomes the additional clarifications made by the Commission in relation to standardisation agreements. Bearing this in mind, and while Chapter 7 of the

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[22] As noted in paragraph 434 of the Draft Guidelines, a unilateral disclosure of information does not amount to an infringement if rejected by the recipient.

[23] Case C-542/14, *VM Remonts,* ECLI:EU:C:2016:578, paragraphs 30 and 31.

[24] *Tesco vs. OFT* [2012] CAT 31, paragraphs 57-86 and 350-354.

Draft Guidelines provides some helpful guidance, we consider that there is still room for further clarifications on a number of points, as further detailed below.

8.2 We include below our comments as regards the text of Chapter 7 of the Draft Guidelines:

(a) **Consumer benefit of standardisation agreements (paragraph 465)**

8.3 Paragraph 465 of the Draft Guidelines rightly indicates that "[s]*tandards may maintain and enhance quality, security, provide information and ensure interoperability and compatibility (thus increasing value for consumers)*". We would welcome additionally recognising in the Draft Guidelines that, by ensuring interoperability, consumers also benefit from standards through the reduction of redundancy and waste.

(b) **Adoption of an evidence-based approach (paragraph 474)**

8.4 We welcome the addition of the factors that can be considered to analyse standardisation agreements that do not restrict competition by object, such as "*the nature of the goods or services affected, the real conditions of the functioning and the structure of the market or markets in question*." We note and welcome that this inclusion demonstrates a desire to adopt an evidence-based approach with regards to this analysis.

(c) **Restricted participation in standards development (paragraph 496)**

8.5 We note that paragraph 496 of the Draft Guidelines now includes the possibility to restrict participation in standard development activities "*(iii) if the restriction on the participants is limited in time and with a view to progressing quickly (for example at the start of the standardisation effort) as long as at major milestones all competitors have an opportunity to be involved in order to continue the development of the standard*". We would recommend that the text of this provision should be amended to require all competitors to "*have an opportunity for effective participation in the development of the standard*" instead of restricting such participation only to the major milestones of the standard development.

9. SUSTAINABILITY AGREEMENTS – CHAPTER 9 HGL

9.1 Clifford Chance welcomes the Commission's initiative in seeking to clarify when agreements between competitors that genuinely pursue one or more sustainability objectives ("**Sustainability Agreements**") would comply with Article 101 TFEU. Providing comfort from a competition law perspective in respect to such agreements, can act as a catalyst for undertakings seeking to improve their industry's sustainability by limiting their competition law concerns.

9.2 We appreciate that Sustainability Agreements are by nature context specific as the objectives they pursue (namely the sustainability of environmental, economic, and/or social development) are complex and underscored by various variables that are oftentimes hard to pin-point *ex ante*. With that in mind, and while Chapter 9 of the Draft Guidelines offers some useful guidance, we consider that it still merits some further

clarification to really achieve its objective of promoting competition law compliant sustainability agreements which can address the negative externalities of production and consumption decisions. We have the following comments:

(a) **Sustainability Agreements outside the environmental context (paragraph 543)**

9.3 As the Commission rightly recognises the concept of sustainability encompasses various activities ranging from those aimed at promoting environmental protection to those aimed at shifting consumption to healthy and nutritious food or ensuring production methods respect human rights. Naturally, given the climate crisis that befalls us the Commission's examples in Chapter 9 of the Draft Guidelines mainly focus upon products and processes tied to environmental issues. We would welcome a clarification from the Commission in the next iteration of the Draft Guidelines, on whether it will ultimately treat all sustainability objectives outlined in paragraph 543 on an equal footing *i.e.*, the process will be 'sustainability objective agnostic' when considering any potential competition issues of future Sustainability Agreements.

(b) **Sustainability Agreements not forming a distinct type of horizontal cooperation agreements (paragraph 547 in conjunction with sections 9.3 and 9.4)**

9.4 Firstly, the Commission makes clear that Sustainability Agreements do not constitute a distinct category of horizontal cooperation agreements (paragraph 547). Secondly, the Commission notes that when Sustainability Agreements take the form of agreements described in previous chapters in the Draft Guidelines then one must follow those chapters when assessing the agreements' compatibility under Article 101 while taking into account the specific sustainability objective pursued (paragraph 547, generally section 9.3). Thirdly, the Commission notes that whether an agreement genuinely pursues a sustainability objective can only impact the assessment of whether the agreement restricts competition by object or by effect – where such an objective genuinely exists, the agreement will be assessed on an 'effect' basis (section 9.3, paragraphs 559 and 560). Finally, the Commission provides distinct sections for the assessment of Sustainability Agreements under Article 101(1) (section 9.3.2, focusing on sustainability standardisation agreements) and Article 101(3) (section 9.4 of the Draft Guidelines). This creates confusion as to the proper analysis one must undertake when dealing with a Sustainability Agreement, and in particular whether the provisions under section 9.4 take precedence over the respective paragraphs for an Article 101(3) analysis for agreements outlined in other chapters of the Draft Guidelines or whether section 9.4 only applies to sustainability standardisation agreements. It is also not clear if section 9.2, dealing with sustainability agreements not raising competition concerns, would apply no matter the form of the relevant agreement.

9.5 At the same time, the fact that an agreement has as its primary goal a sustainability objective should have a more important role in the analysis of competition law compatibility for all sustainability agreements, not simply sustainability standardisation agreements. Indeed, it is unclear why Chapter 9 is necessary in practice if the assessment would simply take place under the preceding Chapters. We consider that where a horizontal cooperation agreement's primary objective is the pursuit of a sustainability objective this should lead to an effects-based analysis no matter the form of the agreement. This should be clarified upfront, for example, in paragraph 547, when

the Commission states that sustainability agreements taking the form of agreements described in previous chapters of the Draft Guidelines should be assessed under those chapters "*while taking into account the specific sustainability objective*", by adding at least a reference to section 9.3 of the Draft Guidelines. This is the logical consequence of the fact that the agreement does not have as its 'object' the distortion of competition since its objective is achieving a sustainability goal and appears consistent with the Commission's considerations in paragraph 560 (provided, always, as the Commission rightly suggests in paragraph 560 that the undertakings concerned have demonstrated this much through appropriate evidence). Once this primary objective is proven, then any analysis should be limited to determining what effects the agreement may have on competition and if any are found, to show that the agreement complies with Article 101(3) as outlined in section 9.4. The current state of the Draft Guidelines creates legal uncertainty as to the appropriate analysis one must undertake, which will only dilute the progress that Sustainability Agreements can achieve in addressing the negative externalities caused by production and consumption methods across different industries.

(c) **Sustainability standardisation agreements (section 9.3.2)**

9.6 We welcome the Commission's endorsement of the stakeholders' view during its initial public consultation that sustainability standardisation agreements warranted a specific section outside the examples given in the standardisation chapter.[25] While the dedicated sub-section is, to a large extent self-explanatory, there remain a few points that require further attention:

a. **It is not clear whether Chapter 7 will have any bearing on a competition analysis of sustainability standardisation agreements**

9.7 The Draft Guidelines recognise in paragraphs 563 to 567 certain differentiating factors between the two types of standardisation agreements although it is not clear whether these are merely examples or are to be taken as key components of what such agreements entail. We appreciate that standardisation agreements will be fact specific, but properly drawing a line in the sand between sustainability standardisation agreements and other standardisation agreements under Chapter 7 is crucial given that the former can benefit from a soft safe harbour.

b. **Specific issues with the soft safe harbour and appreciable anticompetitive effects**

9.8 Overall we welcome the Commission's soft safe harbour section but there are some elements of this section that remain unclear. For instance, as regards the sixth component of the soft safe harbour, it is not clear what a 'significant increase in price' entails and the following paragraph 573 does not offer any further guidance. We would welcome a clarification in the next iteration of the Draft Guidelines as, without it, the soft safe harbour may lose its value in practice given that undertakings will not be able

[25] See "*Factual summary of the contributions received during the public consultation on the evaluation of the two block exemption regulations and the guidelines on horizontal cooperation agreements",* p.8, https://ec.europa.eu/competition-policy/system/files/2021-03/HBERs_consultation_summary.pdf.

to assess with any level of comfort whether any resulting price increases would be 'significant' in the eyes of the Commission. Similarly, more guidance would be welcome in paragraph 575 as to when a standardisation agreement is 'likely to lead to a significant increase in price or reduction in output, product variety, quality or innovation' so that an assessment under Article 101(3) will be necessary.

(d) **Article 101(3) – application to Sustainability Agreements**

9.9 In line with point 9.4 above, we would welcome direct wording in the guidelines that confirms whether one needs to apply section 9.4 to all Sustainability Agreements, or whether this section is only relevant for sustainability standardisation agreements.

(e) **Further examples beyond sustainability standardisation agreements**

9.10 We welcome the examples given by the Commission in section 9.6 of the Draft Guidelines, but we would urge the Commission to provide further examples for Sustainability Agreements outside the standardisation format. It would be extremely beneficial to stakeholders to see how the Commission would approach, for example, an information exchange or common purchase cooperation whose primary goal is a sustainability objective and how the analysis could interact with Chapter 9 and the other relevant chapters in the Draft Guidelines.

(f) **Ensuring consistent legal standards with national guidelines**

9.11 We invite the Commission to ensure consistency with national sustainability guidelines across the ECN network. This is key to ensuring that activities that would not otherwise raise competition law issues at the EU level, do not cause issues (to the largest extent possible) at national level.

Clifford Chance LLP
April 2022