Freshfields Bruckhaus Deringer

Public consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines

Response from Freshfields Bruckhaus Deringer LLP

1. Introduction and summary

1.1 Freshfields Bruckhaus Deringer LLP (***Freshfields***) welcomes the opportunity to comment on the Commission's draft guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union (***TFEU***) to horizontal cooperation agreements (***Guidelines***).

1.2 This response is submitted on behalf of Freshfields and does not necessarily represent the views of our clients or the personal views of every partner of Freshfields.

1.3 Our comments are based on our significant experience and expertise in advising on the application of Articles 101(1) and 101(3) of the TFEU, and equivalent rules under national laws and competition laws in other jurisdictions, to a wide variety of horizontal agreements.

1.4 We welcome the Guidelines as they will improve legal certainty across a broad range of horizontal agreements, particularly in light of the many economic, technological, social and environmental developments which have taken place since the current guidelines were adopted. We have confined our comments to those parts of the Guidelines which we believe are most significant in terms of maximising legal certainty for businesses pursuing legitimate and often pro-competitive horizontal arrangements. Absence of comment from us on other parts does not necessarily mean that we agree with all the content of those other parts. Our key suggestions include:

(a) further clarity on the concept of "*restrictions of competition by object*" and express recognition that this concept needs to be applied narrowly;

(b) raising the safe harbour market share threshold for joint purchasing agreements to at least 25% in the upstream and downstream markets, and providing a specific, more generous, safe harbour for situations in which the cooperating purchasers are not active on the same selling market(s);

(c) more clarity on the obligations of undertakings engaging in information exchange mandated by the law, and on the legal limits on the use of algorithms as a tool of information exchange; and

(d) concerning sustainability agreements, further refinement, and in some cases additional flexibility, in the following areas:

(i) the soft safe harbour for standardisation agreements;

(ii) the guidance on assessment of sustainability agreements under Article 101(3); and

(iii) possible inconsistencies with other chapters of the Guidelines.

2. Restrictions of competition by object and effect[1]

2.1 The Guidelines aim to distinguish "*restrictions of competition by object*" from "*restrictive effects on competition*", a distinction which is then developed when discussing individual types of cooperation throughout the Guidelines. While we welcome guidance on these two different degrees of competitive impact, the descriptions in Sections 1.2.4 and 1.2.5 make them difficult to tell apart. This is particularly apparent when juxtaposing the list of relevant criteria taken into account in paragraphs 32-33 (object) to the very similar list in paragraph 37 (effects). It would be helpful to enhance the distinguishing characteristics of these concepts and ideally:

(a) acknowledge the case law whereby "*the concepts of restriction of competition by object must be interpreted restrictively*"[2]; and

(b) highlight the importance of the counterfactual as an assessment of realistic possibilities in the absence of the agreement at issue, as reflected in the more recent case law[3].

2.2 We suggest the Commission reflects more visibly in the sections dealing with restrictions of competition by object that this concept needs to be applied narrowly. One example of a statement possibly to be reconsidered is "*in order to find that an agreement has an anti-competitive object, there does not need to be a direct link between the agreement and consumer prices*"[4], which is further explained in footnote 25 but without reference to the case law. This stands out as an example of the rather expansive reading of this concept in the Guidelines and perhaps here again, the *Visma Enterprise* case could be an interesting reference whereby object restrictions are cases where "*experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers*"[5].

2.3 This proper balancing between cases of restriction by object as interpreted "*restrictively*" would then be a suitable guiding principle in how the concepts are developed in the individual chapters of the Guidelines. By way of example, the Guidelines label an exchange of commercially sensitive information among competing buyers as a "*buyer cartel*"[6] and therefore most likely a restriction by object. However, in the absence of market power[7], we query why the mere secrecy of information exchange in this context should lead to an unrebuttable presumption of harm, when closer alignment on more transparent terms may be acceptable.

3. Purchasing Agreements[8]

3.1 We broadly welcome Chapter 4 of the Guidelines on purchasing agreements. In particular we are pleased to see that the chapter:

(a) brings enhanced clarity to the distinction between a buyer cartel and legitimate joint purchasing and incorporates case law emerging from recent cases;

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1 Guidelines, para 28-38
2 Budapest Bank, Case C-288/18, para 54; Visma Enterprise, Case C-306/20, para 60
3 Generics, Case C-307/18, para 120; Visma Enterprise, Case C-306/20, para 76
4 Guidelines, para 30
5 Visma Enterprise, para 58; Generics, para 64
6 Guidelines, para 318
7 Guidelines, paras 329-337
8 Guidelines, paras 311-405 (Chapter 4)

(b) provides guidance on the exercise of negotiating power between retail purchasing alliances and suppliers around the issue of temporary purchasing and supply stops, confirming that these are "*typically part of a bargaining process*"[9]; and

(c) includes some new and helpful examples of specific fact scenarios and how these are to be analysed. In fact we would suggest supplementing these with other examples set out by Whish and Bailey in their report (pp 60-62), in particular those which help explain where exactly the border lies between "*object*" and "*effects*" restrictions in situations not clearly covered by the guidance preceding the examples (e.g. Examples 4 and 5).

Safe harbour market share threshold

3.2 However, in our view the current safe harbour market share threshold for joint purchasing agreements of 15% in the upstream and downstream markets should be increased to at least 25%. The European Commission's Horizontal Merger Guidelines (paragraph 18) provide a presumption that concentrations where the combined market share of the undertakings concerned does not exceed 25% are not liable to impede effective competition. Given that joint purchasing involves less coordination than a full merger, it is unlikely to have any anti-competitive effect below a 25% market share threshold[10].

3.3 Alternatively, we ask that, at a minimum, an increase of the market share threshold to 20% be considered. This would be in line with the threshold for using the simplified Form CO procedure under the EU merger control regime, and well below the Horizontal Merger Guidelines' threshold.

Separate threshold where cooperating purchasers are not competitors on their selling market(s)

3.4 In addition, we suggest that specific guidance, and in particular an appropriate safe harbour, be given for situations in which the purchasers that are cooperating are not active on the same selling market(s). The purchasers might, for example, be retailers which are active in different geographic markets and cannot be regarded as potential competitors, or manufacturers that use the purchased input to produce different and non-competing products.

3.5 The Guidelines[11] recognise that in this situation "*the joint purchasing arrangement is less likely to have restrictive effects on competition in the selling market*" and that such arrangements are only likely to lead to restrictive effects on competition "*if they have such a significant position in the purchasing markets that it may harm the competitive process for other players in the purchasing markets*". We consider that this reference to "*such a significant position*" suggests that in cases where the undertakings involved are not downstream competitors, a safe harbour market share threshold should be set at a level significantly higher than the currently proposed 15% threshold. We consider that, absent any overlap on the downstream markets, a separate higher level of market share for the safe harbour (e.g. 30% or even higher if the threshold ultimately chosen for paragraph 329 is set at 25%) should be set, to reflect the fact that joint purchasing between non-competing businesses on the downstream markets will only lead to restrictive effects on competition in exceptional circumstances on the upstream markets where

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9 Guidelines, para 343

10 Also see the short form opinion issued by the UK's Office of Fair Trading (predecessor to the Competition and Markets Authority) in P&H/Makro, 27 April 2010 (link).

11 Guidelines, para 337

the joint purchasing arrangement would create significant buyer power vis-à-vis small and/or weak suppliers.

Purchasers exchanging information about sources of supply

3.6 In relation to the exchange of information among purchasers, the guidelines on purchasing agreements should not adopt a narrower approach for legitimate arrangements with sustainability goals than the guidelines on sustainability agreements. In particular, we note that the Guidelines suggest a buyer cartel may exist if purchasers exchange information about "*sources of supply (both in terms of suppliers and territories)*"[12] whereas "*the creation of a database containing information about suppliers that have sustainable value chains …*"[13] will in general not raise competition concerns under Article 101. Any such potential conflicts in policy should be clarified in the final guidelines (see further paragraphs 5.27-5.31 below).

4. Information exchange[14]

4.1 We note that Chapter 6 (information exchange) has been expanded significantly and we welcome further guidance on the Commission's approach and the case law on this important topic. As a general comment, we recommend a more cautious approach to this issue as competition authorities may overestimate the usefulness of data on competitors' strategic decision making. In particular:

(a) not every item of information which may go beyond a range will actually be relevant to the outcome of the competitive process: the fact that a competitor in the preceding year had a market share of x% may often be a completely irrelevant piece of information for the product manager in charge;

(b) moreover, in today's data economy many items of information about other companies are freely available in the public domain: often information that may have been received from a competitor will actually be less sensitive than data that is available in the public domain or which a supplier may have received from a competitive negotiation with a customer.

4.2 All of these aspects are addressed in the chapter discussing the sensitivity of information, the aggregation level, the age of the information and of course the competitive environment of the market. Yet, in enforcement practice, we observe that competition authorities are sometimes too concerned about exchange of information or unilateral disclosure which, in the view of the companies in question, may not have influenced their strategic decision making at all.

4.3 We are not commenting exhaustively on this chapter but wish to highlight our view on some key paragraphs.

4.4 In paragraph 411, the Guidelines state that an information exchange can infringe competition law if the exchange is mandated by the law (even as a result of EU regulation). While it may be possible to implement precautionary measures in some instances (also mentioned in paragraph 411), in other situations this may not be possible[15]. In such situations, we would

[12] Guidelines, para 318
[13] Guidelines, para 553
[14] Guidelines, paras 406-461 (Chapter 6)
[15] For example, a legal requirement for all hospitals in a country to notify each other of vacant beds or capacity overloads could not be satisfied through a third party, as the hospitals themselves would have to know where to send patients.

submit, the State action defence should remain applicable and, as a result, there should be no violation of the rules if precautionary measures are not provided for in the applicable EU regulation. Also, information exchange may be mandated as a result of EU competition law, for instance when in the context of interoperability requirements data must be provided by a dominant company or where the exchange of data with a competitor is part of a remedy package authorised by the Commission as a result of a merger approval. We suggest this could be clarified in the Guidelines to aid legal certainty.

4.5 Furthermore, we note the new guidance on the use of algorithms as a tool of information exchange[16]. Again, in the interests of legal certainty, we would welcome further clarification of the examples provided:

(a) in paragraph 418, the case example provided in the box discusses "*the use of algorithms by competitors*". Here, it would be helpful to know whether the Commission is considering an agreed use of the same algorithms by competitors or simply the parallel use of different algorithms but which somehow communicate with each other. This issue is likely to be important to a number of users, together with the definition of collusion by code in footnote 206;

(b) similarly, in the box below paragraph 432, further explanation would be welcome as to what the use of "*a shared algorithmic tool*" means in terms of who would be sharing this tool, what types of tool are covered, and what "sharing" means.

5. Sustainability agreements[17]

The notion of "sustainability objective" and how to resolve potential disagreements

5.1 We welcome the "*broad*" [18] definition of sustainability adopted in the Guidelines, which is consistent with standards of public international law and resolutions of the United Nations. However, while there may be wide ranging agreement on the suitability of many of these goals to further sustainable development, in individual cases, there may be significant disagreement.

5.2 This was apparent in the debate on whether nuclear power should be recognised as sustainable energy in the EU but there are other examples. The Commission, for example, has referred to replacing a plastic toy with a wooden toy. Whilst this example is certainly intuitive, it is conceivable that there could be disagreement among experts and producers about whether it is appropriate. Producers of plastic toys might, for example, point to water consumption required to grow a tree, transportation costs in the distribution of wood, the kind of wood used and the varnish while at the same time, in the plastic industry there may be eco-efficient methods of production, extrusion and waste recycling which make the plastic toy just as sustainable as a wooden toy. It is conceivable that in many other areas similar disagreement may exist between different producers of raw materials needed for a certain end product.

5.3 We would welcome the Commission addressing such issues, for example by way of a safe harbour (in paragraph 559) for agreements where there is a bona fide agreement as to the arguments militating in favour of a certain product or input being sustainable and where the arguments from an ex-ante perspective are respectable even though in hindsight, other arguments may have been relevant too. We note that, although the Commission's delegated

[16] Guidelines, paras 418 and 432
[17] Guidelines, paras 541-621 (Chapter 9)
[18] Guidelines, para 543

acts under the Taxonomy Regulation[19] are very detailed in terms of dealing with different industries, they may not help in making this assessment.

Sustainability standardisation agreements: soft safe harbour[20]

5.4 We welcome the Commission setting out the cumulative conditions for a sustainability standardisation agreement to be unlikely to produce appreciable negative effects on competition and to fall outside Article 101(1). However, the conditions raise a number of questions on which we would appreciate clarification.

5.5 With regard to the first and fourth conditions, we would welcome guidance on how parties should structure a procedure for developing a standard in a way which would avoid scrutiny for unlawful exchange of competitively sensitive information (see further paragraphs 5.27-5.29 below). We suggest that commonly used safeguards such as clean team measures may be applied. However, we see uncertainties remaining for undertakings, in particular, as expert advice is often required on who would (and would not) be suitable clean team members. In order to encourage parties to engage in sustainability standard procedures, further clarification on these procedures would be helpful.

5.6 With regard to the third condition, there is a potential misalignment between the Commission's draft text and Example 2[21] and an ambiguity. It would be helpful to clarify whether agreements allowing parties to apply an even higher sustainability standard while compelling them to comply with the minimum conditions agreed would still be likely to fall outside Article 101(1). In practice, mandatory standards are often necessary in order to reach sustainability goals. It is therefore important that the Guidelines are clear that the existence of a mandatory requirement (with the option of outperforming that standard or choosing not to participate in the standard) will not take an agreement outside the soft safe harbour. We would expect this to be in line with the Commission's thinking, given the seventh condition requires companies to set in place an adequate monitoring system to ensure compliance with the relevant standard.

5.7 With regard to the sixth condition, we note that the Commission considers that higher sustainability standards may create higher costs, which may partially be borne by the parties to the agreement ("*to cover the fixed costs*"[22]) but may also translate to some extent into higher prices for consumers. We query whether a condition requiring a standard to "*not lead to a significant increase in price*" is realistic and whether it will in fact exclude most sustainability standards from the outset. By analogy, we note that the German FCO recently declared the introduction of a new label in the milk industry that included a surcharge on milk products paid by grocery retailers to producers (which is presumably at least partially passed on to consumers) to be compliant with competition law.[23] The same is true of the requirement that a "*significant reduction in the choice of products*" be avoided, given that a sustainability agreement often aims to change the range of products on offer and replace the less sustainable products with more sustainable ones. We suggest the Commission reconsiders the feasibility of these conditions in practice and, if retained, provides further guidance on what they would consider "*significant*" in this context.

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19 For example, Regulation 2021/2139
20 Guidelines, paras 572-574
21 Guidelines, para 618
22 Guidelines, para 585
23 Press release (link)

5.8 With regard to the seventh condition, we would appreciate further guidance on who would ideally perform such monitoring mechanisms without raising further competition law concerns. Examples of such mechanisms and or monitoring systems would help undertakings set up lawful processes and avoid any pitfalls, for example, with regard to creating a platform for unlawful information exchange.

Assessment of sustainability agreements under Article 101(3)

5.9 We welcome the guidance on the criteria parties should use when self-assessing whether a sustainability agreement satisfies the four cumulative conditions under Article 101(3) TFEU. We also appreciate the Commission clarifying the relationship between the "*indispensability*" and the "*consumer fair share*" conditions. However, in relation to both of those conditions, we suggest some aspects are too restrictive, and therefore risk having a chilling effect on bona fide sustainability initiatives, and/or require further clarification.

Indispensability[24]

5.10 Firstly, we are concerned that the statement that "*where there is demand for sustainable products, cooperation agreements are not indispensable for the attainment of the sustainability benefits themselves"*[25] is too narrow and contradicts later statements in the Guidelines:

(a) the mere fact that consumers demand a sustainable product does not mean that cooperation is not necessary either to meet that demand or to meet demand more effectively. At a minimum, the proviso that cooperation may be indispensable "*for reaching the goal in a more cost-efficient way*" should be broadened to enable parties to cooperate in order to achieve a goal sooner or more effectively[26]; and

(b) the statement appears inconsistent with the requirement for parties to be able to demonstrate that consumers are willing to pay more for sustainable products in order to show that consumers receive a fair share of the claimed benefits (see paragraphs 5.20-5.21 below)[27].

5.11 Secondly, we are concerned that the statement that "*where EU or national law requires undertakings to comply with concrete sustainability goals, cooperation agreements and the restrictions they may entail, cannot be deemed indispensable*"[28] is too restrictive and would render many initiatives too risky to pursue:

(a) many laws and regulations governing sustainability goals exist, but they are often insufficient or too patchy internationally. The existence of a law or regulation which governs the same broad goal should not be a reason to prohibit collaboration agreements which fill legislative gaps or deficiencies, or enable goals to be reached more effectively;

(b) as the Guidelines themselves recognise, "*cooperation agreements may become necessary if there are residual market failures that are not fully addressed by public*

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[24] Guidelines, paras 580-587
[25] Guidelines, para 582
[26] For example, the ACM in its draft guidelines recognises that "*Another example is a situation where one or more undertakings are only able to realize the objective to a demonstrably less efficient degree, because of a lack of expertise or scale. In that case, the sustainability agreement promotes innovation, and allows sustainable products to be introduced sooner or more effectively*" (link).
[27] Guidelines, paras 594-600
[28] Guidelines, para 583

policies and regulations"[29]. The position in paragraph 583 appears inconsistent with this statement. To the extent that the Guidelines recognise that "*cooperation agreements may be indispensable only for reaching the goal in a more cost efficient way*", this fails to consider that, besides cost efficiency, time efficiency should also be taken into account as a relevant factor; and

(c) there may be unintended and undesirable effects as a result of companies' responses to new legislation which requires them to ensure environmental compliance throughout their supply chain. It might be that, because they consider the compliance and monitoring costs too onerous, they terminate their relationships with suppliers, whereas if they were permitted to collaborate with their competitors on this it might become commercially feasible to continue operating there.

5.12 Thirdly, we believe the approach towards mandatory minimum standards should be clarified:

(a) we understand that parties are allowed to agree certain minimum requirements for a common label or standard in order to achieve sufficient economies of scale to amortize the fixed costs incurred by establishing such label or standard[30]. We understand further that such label or standard should leave room for participants to individually apply a higher sustainability standard than the commonly agreed standard;

(b) however, Example 2[31] suggests that such a label would also have to allow the parties to apply a lower standard than the agreed one. In fact, Example 2 suggests that such agreement may only be a "*voluntary and non-exclusive*" label or standard. This seems to contradict the idea that parties should be able to cover the fixed costs incurred by establishing the common label or standard. Requiring both the possibility to apply a higher and a lower standard renders application of the actual agreed label/standard requirements somewhat arbitrary; it also entails a significant risk of greenwashing (i.e. companies marketing a certain green label while selling non-sustainable products / brands in parallel), as well as a risk of deterring others to commit to the relevant standard/label in the first place if it can be undercut by its participants. We doubt that such voluntary and non-exclusive criteria (as suggested by Example 2) would provide a sufficient incentive for parties to invest time and money to establish such sustainability standard/label at all.

5.13 We suggest the Commission clarifies whether allowing parties to over-perform is sufficient for an agreement to satisfy the criteria (preferable in our view) or whether both options (to over- and to under-perform) would need to be available to the parties. In our view, a requirement that parties should be able to both over- and under-perform the agreed standard would be overly restrictive and limit use of the Guidelines in practice.

5.14 The Guidelines also suggest that under certain circumstances it may be acceptable that the agreement obliges parties not to operate outside of the label or standard[32]. The parties would, however, have to prove why merely establishing the label or standard would not be sufficient. We suggest the Commission provides further guidance on the standard of proof that parties would need to meet and the types of criteria that could be taken into account. An overly

[29] Guidelines, para 546
[30] Guidelines, para 585
[31] Guidelines, para 618
[32] Guidelines, para 585

restrictive approach with a high evidential burden in cases where mandatory obligations are necessary to achieve the desired goals will again limit use of the Guidelines in practice.

Pass on to consumers[33]

5.15 We welcome the Commission's proposed approach to taking into account a wider set of benefits brought about by sustainability agreements by recognising not only individual use value benefits but also collective benefits and benefits to indirect users. However, we have a number of concerns with some aspects of this approach which could limit use of the Guidelines in practice.

The need for quantifiable evidence

5.16 Firstly, when describing the type of evidence that parties should bring forward to substantiate benefits, we believe it is vital that the Guidelines clearly state that, in some cases, the evidence will be qualitative. Economic tools have evolved in recent years and made good strides to measure environmental effects and quantify the benefits of eliminating externalities. That said, some agreements may lead to benefits that are difficult and costly for companies to quantify precisely and, moreover, the restrictive effects of the agreement will be clearly outweighed by those benefits. In such instances, a more qualitative analysis should be available to companies.

5.17 Such an approach would be consistent with:

(a) the statement in the Guidelines that, in cases where the "*competitive harm is clearly insignificant*"[34] a detailed assessment of the potential benefits may not be needed, although a later statement suggests that evidence of a positive impact on consumers in such cases must be "*clearly identifiable*"[35];

(b) the approach taken by the Dutch Authority for Consumers and Markets (***ACM***) in its second draft version of guidelines on sustainability agreements: "*it is usually possible to conclude that an agreement meets the second criterion of paragraph 3 without quantifying the effects of an agreement [where]: (i) the undertakings involved have a limited, combined market share*[36]*; (ii) the harm to competition is, based on a rough estimate, evidently smaller than the benefits of the agreement*"[37]; and

(c) the new Austrian law,[38] where the legislative materials recognise that, if the negative effects on competition resulting from the agreement are minimal, while the environmental contribution is clearly material, an exact calculation of the environmental benefits will not be required.

5.18 We note the statement in the Guidelines that the Commission "*will be able to provide further guidance*" [39] on quantitative analysis after accumulating experience of concrete cases. However, we suggest that the Guidelines also clearly acknowledge the types of cases where a quantitative analysis of sustainability benefits is not necessary and the circumstances where

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33 Guidelines, paras 588-609

34 Guidelines, para 589

35 Guidelines, para 608

36 We would, however, caution against a policy which is overly focused on parties' market shares, as this could disincentivise larger companies from taking part in collaborations when participation by those companies is vital in order to achieve change.

37 ACM Guidelines, para 54 (link)

38 Austrian law (link; law gazette) and (link; section 2 Austrian Cartel Act)

39 Guidelines, para 608

parties are able to demonstrate that consumers are receiving a fair share of the benefits (for the purposes of the second condition of Article 101(3)) without ascribing some monetary number to those benefits[40].

5.19 In various contexts outside the scope of this consultation the Commission itself has taken a practical approach and recognised the need for a value judgement. For example, in relation to the quantification of damages for breaches of competition law the Commission has recognized that that there are "*considerable limits as to the degree of certainty and precision that can be expected*" and that that this may mean "*best estimates relying on assumptions and approximations*". This is necessary in the light of the EU law principle of effectiveness so that the right to damages is "*not made practically impossible or excessively difficult*"[41].

Individual non-use value benefits – demonstrating consumers' willingness to pay

5.20 Secondly, the Guidelines recognise that individual non-use value benefits[42] may be taken into account when weighing the benefits derived from an agreement with the competitive harm, but only if the parties "*provide cogent evident demonstrating the actual preferences of consumers*" by assessing "*consumers' willingness to pay*" for those non-use value benefits. We agree that there needs to be some evidence that consumers appreciate the sustainability of a product. However, we believe that this focus on "*willingness to pay*" raises a number of problems which will undermine the usefulness of the Guidelines in practice:

(a) conflict with the principles of indispensability: as already mentioned, the Guidelines state that "*where there is demand for sustainable products, cooperation agreements are not indispensable for the attainment of sustainability benefits themselves*"[43]. This appears to conflict with the principle that consumers must be willing to pay more for a sustainable product in order to demonstrate that consumers value the product and are receiving a fair share of the benefits. These two concepts should be reconciled in the final guidelines;

(b) willingness to pay for mitigating negative externalities: the Guidelines recognise the inherent challenge involved in sustainable development in that the negative effects of unsustainable production (e.g. pollution) are not sufficiently taken into account by the economic operators or consumers that cause them. In other words, there are "*market failures*" which need to be corrected because the price of a product does not necessarily reflect its true cost. If the Commission accepts that consumers often do not value sustainability benefits as much as they should do, "*consumers' willingness to pay*" is an inappropriate measure of the true value consumers will derive from sustainability agreements (particularly if parties are required to prove that consumers are willing to pay the full price difference between the sustainable product and less sustainable alternative);

(c) measuring willingness to pay for non-use value benefits: the Guidelines also recognise that consumers' stated preferences[44] for sustainable products may differ significantly

[40] See Austrian legislative materials, p. 10 (link)
[41] Commission Staff Working Document on "Practical Guide on Quantifying Harm in Actions for Damages based on Article 101 and 102"
[42] The benefits consumers derive from a product because of the product's impact on other consumers or broader society (i.e. independent from the value consumers derive from direct consumption).
[43] Guidelines, para 582
[44] Assessing consumers' willingness to pay by use of surveys.

from their revealed preferences[45]. Parties therefore need to ensure any surveys to measure non-use value benefits are extremely well designed:

(i) consumers must be properly informed of the relevant benefits and costs of the sustainable product or service, even when those products or services may not yet be available and when consumers are being asked to value benefits that they will not directly experience; and

(ii) the questions must be framed properly in order to solicit accurate responses and avoid well-known behavioural biases (e.g. consumers saying that they will pay more for sustainability benefits than they actually would).

Moreover, it is unclear how consumer surveys to measure willingness to pay should be used in different sectors, such as industrial manufacturing rather than consumer-facing businesses.

5.21 Given these difficulties, we believe the Guidelines adopt an overly narrow and prescriptive focus on performing willingness to pay analysis when assessing the value of individual non-use benefits. A more flexible approach which reflects the relative benefits and harms of an agreement would be welcome, particularly as experience develops. Where quantification is considered necessary, the Guidelines should also acknowledge the availability and appropriateness of alternative methods available such as attitudinal surveys and voting patterns. They should also encourage reciprocal exchanges between the Commission and industry to assist all stakeholders in developing their knowledge and expertise of the tools available and the skills required to perform such analysis.

Collective benefits[46]

5.22 We welcome the guidance provided by the Commission which recognises that the impact of environmental initiatives often goes beyond the direct consumers, targeting wider society. Whilst it is an important step to introduce a section on "*collective benefits*", we believe that the current framework needs to be accompanied by clear guidance for businesses to ensure the highest level of legal certainty and to encourage businesses to enter into meaningful sustainability initiatives on this basis.

5.23 In the Guidelines, the Commission indicates that the parties should "*describe clearly the claimed benefits and provide evidence that they have already occurred or are likely to occur*"[47]. Firstly, the environmental benefits of many sustainability initiatives occur in the long-term and are felt only by future generations (e.g., improving air quality) which is beyond the timeframe for the competitive assessment typically undertaken by the Commission. We would welcome more clarity in relation to this point, and flexibility around the timeframe for businesses to show the future likely occurrence of the environmental benefits. This has been acknowledged, for example by the new Austrian law on sustainability cooperations.

5.24 Secondly, the Guidelines are unclear whether the businesses will be able to rely on global benefits or just the share of the benefits for the EU consumers (with the appropriateness of any such differentiation not being apparent), and whether any consideration will be given for the future users' benefit arising from the sustainability initiative. We believe that limiting the

[45] Assessing consumers' willingness to pay by inferring how much they value a product's attributes given observed behaviour.

[46] Guidelines, paras 601-608

[47] Guidelines, para 606

benefits to the current or near-future consumers or setting geographic boundaries to determine the consumer groups would contradict the purpose of many environmental initiatives. The traditional definition of sustainable development in fact concerns the improvement of the ecosystem and preservation of natural resources for future generations[48]. Whilst the Guidelines make a reference to the positive externalities that can be "*enjoyed by the society today or in the future*"[49], the section on collective benefits lacks any guidance on this point, or any references to the future users' benefit.

5.25 Thirdly, the Guidelines are unclear about the way collective benefits will be measured and how businesses can determine if these benefits are "*significant enough*" to fall within the relevant framework. Specifically, significant challenges may arise for businesses when assessing certain environmental initiatives where the measurement is less standardised. The Guidelines provide an example on the use of less polluting fuel which results in cleaner air. While it may be more standard to measure carbon emissions, it may not be the case for some other sustainability initiatives such as loss of biodiversity. This example underlines the inherent contradiction we are facing: it is often the consumption decisions of affluent consumers that cause negative externalities elsewhere (e.g. in low-cost production countries). A policy that requires those consumers to be fully compensated is not therefore an appropriate measure of the benefits gained.

5.26 The Commission acknowledges the challenges of conducting such a quantitative analysis for the benefits involved, noting that the Commission "*will be able to provide further guidance on this matter after accumulating experience in dealing with concrete cases, which could allow the development of methodologies of assessment*"[50]. We recognise that the Commission needs further experience to adapt the level of quantification required to prove the extent of benefits. However, absent clear guidance on how to prove these benefits fall within the framework, businesses will be deterred from entering into environmental initiatives. We therefore believe that the Commission should provide further detailed guidance on the application of the framework and in particular on the quantitative analysis.

Possible inconsistencies with other Chapters of the Guidelines

The need for substantial information exchange

5.27 In order to prove compliance of a sustainability agreement with Articles 101(1) and 101(3) TFEU, the Guidelines require parties to bring forward significant evidence regarding future effects of the agreement on customers, pricing and on the market. For example:

(a) under the soft safe harbour for standardisation agreements, parties will need to show that a sustainability standard "*should not lead to a significant increase in price or to a significant reduction in the choice of products available on the market*";[51]

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[48] By analogy, the under Austrian legislation: (1) The environmental benefits do not need to be granted to consumers on the relevant market where a given product/service is offered, or lead to better, more innovative, cheaper or more sustainable products. Rather, the benefits can be completely unrelated to the market where the relevant measure (eg in form of a collaboration agreement) is implemented. It is sufficient if there is an environmental benefit for the broader society. (2) It is not required that environmental benefits materialise immediately or in the short term – it is sufficient if a "future generation" will benefit from the ecological advantages of the cooperation.

[49] Guidelines, para. 592

[50] Guidelines, para. 608

[51] Guidelines, para 572

(b) parties may need to show that the agreement is necessary "*to avoid free-riding on the investment*" and that there are indeed "*first mover disadvantages*";[52]

(c) parties may need to demonstrate that a "*label or standard*" needs to be compulsory because without such a requirement it will not be possible to achieve the desired efficiencies or consumers lack sufficient information to make an informed choice about the future benefits of the new (more sustainable) product;[53] and

(d) parties may need to adduce evidence on consumers' "*willingness to pay*" based on a representative fraction of all consumers in the relevant market[54].

5.28 This is not an exhaustive list but some of the more important issues parties will need to be able to discuss in order to self-assess and make their case to the competition authorities and the courts without infringing competition law.

5.29 It is important for there to be consistency between the steps parties need to take to meet the required standard of proof under the Guidelines and the guidance on information exchange. Currently, there appears to be some overlap between the items of information deemed "*commercially sensitive*"[55] and the competitive parameters listed above which are required to show compliance with the guidelines on sustainability agreements. As this may produce legal uncertainty, we suggest the Guidelines specifically spell out that, in the context of setting up a sustainability agreement and engaging in the self-assessment or defence of this agreement, a meaningful exchange of all relevant strategic items of future market behaviour is necessary and therefore ancillary to the agreement (provided such exchanges take place within appropriate safeguards). This would avoid any conflict between the rules on information exchange and the safe harbours provided by the Guidelines. Often, the use of a confidential black box procedure with only independent third parties obtaining knowledge of these individual items of information and strategic thinking may not be practical.

Upstream market behaviour, purchasing sustainable products

5.30 As the Guidelines note, often a sustainability agreement may seek to coordinate the behaviour of participants in their upstream purchasing behaviour[56]. This may either be:

(a) an agreement to truly purchase on a joint basis, where the Guidelines say that the relevant principles are set out in Chapter 4 (Purchasing Agreements)[57]; or

(b) the parties continue to source their upstream inputs and supplies independently but jointly establish a standard or at least entertain an information base which jointly defines which input products are and which suppliers produce sustainably according to a common standard. In this regard, the Guidelines provide that the "*creation of a data base containing information about the suppliers that have sustainable value chains etc.*" will "*in general not raise competition concerns*" when it does not require "*the parties to purchase from those suppliers*"[58].

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52 Guidelines, para 584
53 Guidelines, paras 585-586
54 Guidelines, para 600
55 Guidelines, para 424
56 Guidelines, paras 553 and 557
57 Guidelines, para 557
58 Guidelines, para 553

5.31 Again, in the interests of consistency, we suggest the Guidelines state that any information exchange required to establish the standard or create a database does not conflict with paragraph 318 of the Guidelines which specifies certain patterns of behaviour as features of a "*buyer cartel*". Where the parties to the sustainability agreement do not purchase jointly but remain independent in their sourcing behaviour, an information exchange on the availability and qualities of certain suppliers may fall foul of the ban on an illegal information exchange in a buyer cartel (paragraph 318) which specifically mentions an exchange, amongst others, on "*sources of supply (both in terms of suppliers and territories)*" as a reason for concern.

Policies and procedures to further improve legal certainty

5.32 We welcome the new sustainability chapter in the Guidelines and the Commission's continued focus and leadership in this important area. However, we encourage the Commission to consider a number of additional policies and procedures which would further aid certainty for businesses and facilitate legitimate collaboration agreements to meet vital sustainability goals. For example:

(a) in its draft guidelines, the ACM states that it will not impose fines for joint agreements which have been published and where businesses have followed the guidelines in good faith but which later turn out not to be compatible with Dutch competition law. We suggest that the Commission considers adopting a similar policy, or at the very least uses ex-post commitments rather than fines, given the strong incentives such policies provide for businesses to enter into legitimate arrangements which comply with the Guidelines and ensure full transparency over any arrangements;

(b) we also welcome the Commission's willingness to provide individual guidance, comfort letters or decisions where appropriate[59]. In order to aid transparency and legal certainty for businesses, we would encourage the Commission to publish details on any such experience and developing practice, either as summaries of positions taken on individual cases or as policy updates.

6. Conclusion

6.1 We welcome the opportunity to comment on the Guidelines, which reflect considerable changes in the business environment since the current guidelines were adopted. We would also welcome continued dialogue with the Commission as its policies, practice and experience develops and would be very happy to discuss in further detail any of the points raised in this response.

Freshfields Bruckhaus Deringer LLP
26 April 2022

[59] Executive Vice-President Vestager's keynote speech at the 25th IBA Competition Conference, 10 September 2021 (link)