**26 April 2022**

To
**The European Commission**
Directorate-General for Competition – Unit A1
Antitrust Registry
1049 Bruxelles /Belgium

**Ref.** Public consultation regarding the draft **R&D Block Exemption Regulation, the draft Specialisation Block Exemption Regulation and the draft Guidelines on horizontal cooperation agreements**

Dear Sir/Madam,

We have great pleasure in enclosing a submission on behalf of the Unilateral Conduct and Behavioural Issues Working Group, the Cartels Working Group and the Sustainability Working Group of the Antitrust Committee of the International Bar Association (IBA).

The Co-chairs and representatives of the Antitrust Committee would be delighted to discuss the enclosed submission in more detail with the representatives of the Hon'ble Commission.

Yours sincerely,

Daniel G. Swanson
Co-Chair Antitrust Committee

Thomas Janssens
Co-Chair Antitrust Committee


**IBA ANTITRUST COMMITTEE COMMENTS ON THE DRAFT R&D BLOCK EXEMPTION REGULATION, THE DRAFT SPECIALISATION BLOCK EXEMPTION REGULATION AND THE DRAFT GUIDELINES ON HORIZONTAL COOPERATION AGREEMENTS**

## I. INTRODUCTION

The International Bar Association ("IBA") is the world's leading international organization of legal practitioners, bar associations and law societies. As the "global voice of the legal profession", the IBA contributes to the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 individual lawyers from over 170 countries, and it has considerable expertise in providing assistance to the global legal community. Further information on the IBA is available at http://ibanet.org.

The IBA's Antitrust Section includes competition law practitioners with a wide range of jurisdictional backgrounds and professional experience. Such varied experience places it in a unique position to provide a comparative analysis for the development of competition laws, including through submissions developed by its working groups on various aspects of competition law and policy. The comments set out in this document have been prepared by the Unilateral Conduct and Behavioural Issues Working Group, the Cartels Working Group and the Sustainability Working Group of the IBA's Antitrust Committee (jointly referred to herein as the "Working Groups") and draw on that combined experience.

This submission is made to the European Commission ("Commission") on behalf of the Antitrust Section of the IBA. The IBA Antitrust Section welcomes the opportunity to comment on the Commission's public consultation regarding the drafts of the R&D and specialisation block exemption Regulations ("BERs") and Horizontal Guidelines ("HGL").

Below we offer our comments and suggestions in the hope that they will assist the Commission in the

development of the draft revised guidelines.

## II. INTRODUCTION

The Working Groups commend the Commission's extensive work in reviewing the BERs and the HGL and giving the legal community the opportunity to engage with the Commission in an open and constructive dialogue towards better regulations and guidelines.

The present comments are essentially directed to suggesting clarification of some provisions that may cause uncertainty to undertakings when applying the BERs and/or the HGL, and additional guidance that could be included for a more complete approach, enhancing transparency, predictability and legal certainty on the topics covered in the documents.

## III. COMMENTS ON THE DRAFT REVISED HGL

### General Comments

Before presenting comments on specific sections of both the BERs and the HGL, the Working Groups would like to provide some general comments on the drafts for the Commission's consideration.

Firstly, the Working Groups observe that the draft HGL do not deal with agreements regarding employees, such as wage-fixing or no-poach agreements, despite the significant international attention such agreements have garnered in recent years. Even if these are the subject of guidance elsewhere, it would be useful to reiterate any position on such agreements in the HGL, perhaps in the section on "Purchasing Agreements". If such guidance cannot be provided, then making that clear would also be welcome.

The Working Groups also highlight that at paragraphs 13 and 14 of the draft HGL, the Commission clarifies that the EU Courts' case-law regarding the application of parental liability to the parent companies of a joint venture applies equally to the application of Article 101 TFEU. As a result, the Commission will typically apply Article 101 TFEU only to agreements (i) between the parent companies to create the joint venture or alter its scope, (ii) between the parent companies and the joint venture outside the scope of activity of the joint venture and (iii) between the parent companies without involvement of the joint venture. The Working Groups welcome clarification in this respect but encourage the Commission also to confirm some of the implications of this approach, which would mean that:

(i) the ancillary restraints notice[1] regarding joint ventures (paragraphs 36 and following) is

[1] Commission Notice on restrictions directly related and necessary to concentrations, Pb. C 5 March 2002.

effectively no longer of any use in this context; and

(ii) parents can freely exchange competitively sensitive information with their joint venture (relating to the activities of the joint venture) without the need for e.g. information barriers, as well as impose various restrictive covenants in vertical agreements between the parents and the joint venture (resale price maintenance, exclusivity, passive sales restrictions, etc.).

Moreover, the Working Groups welcome the Commission's consolidation of the case-law in relation to some of the elements of analysis of Article 101 TFEU. However, the Working Groups would suggest the following to ensure that the HGL are as closely aligned with the EU Courts' case-law as possible to ensure their optimal usefulness:

- At paragraph 19, the draft HGL indicate that the balancing of restrictive and pro-competitive effects is conducted exclusively within the framework laid down by Article 101(3) TFEU. This is of course correct. However, in order to prevent a too expansive application of Article 101(1) TFEU, the Working Groups encourage the Commission to also clarify (i) that not every agreement that restricts the freedom of action of the participating undertakings, restricts competition[2] and (ii) that for the purpose of applying Article 101(1) TFEU an overall analysis of the actual or potential anti-competitive effects is required taking into account both negative and positive elements.[3] Indeed, the Commission already refers in paragraph 34 of the draft HGL to such overall analysis as regards the by object analysis in light of the ECJ's Generics (UK) Judgment.

- At paragraphs 28 and following of the draft HGL, the Commission sets out the indicia for qualifying an agreement or practice as anti-competitive by object. In light of the relevant EU Courts' case-law, the Working Groups encourage the Commission to add that (i) the concept of by object restrictions should be interpreted strictly and applied restrictively[4], (ii) the concept of by object restrictions applies only to obvious anti-competitive restrictions[5] and (iii) experience must show that the behaviour in question leads to anti-competitive effects.[6]

The Working Groups suggest that the Commission explicitly confirm at paragraph 45 of the draft HGL that horizontal cooperation agreements that meet the two conditions set out there are also not covered by Article 101 TFEU when they contain hardcore restrictions (which would of course not prevent the application of national competition law to such agreements).

[2] T-111/08, Mastercard, Inc. And Others v European Commission, paragraph 61.
[3] C-309/99, J.C.J. Wouters and others v Algemene Raad van de Nederlandse Orde van Advocaten, paragraph 94.
[4] C-307/18, Generics (UK), paragraph 67 ; C-67/13 P, CB, paragraph 58.
[5] T-374/94, European Night Services Ltd (ENS) and others v European Commission, paragraph 136
[6] C-307/18, Generics (UK), paragraph 67 ; C-67/13 P, CB, paragraph 64.

At paragraph 50, the draft HGL state that they are not intended to give any guidance as to what does and does not constitute a cartel. The Working Groups note however that such definition already exists in EU law. Both the Damages Directive[7] and the ECN+ Directive[8] define the concept of a cartel as "*an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors.*" The Working Groups encourage the Commission to confirm that it does not plan on deviating from this – non-exhaustive – definition.

## IV. COMMENTS ON SECTION 2 – RESEARCH AND DEVELOPMENT AGREEMENTS

As a general comment, the section dedicated to Research and Development Agreements contains a number of clarifications which will make it easier to assess whether the Research and Development BER is applicable. The Working Groups welcome the Commission's initiative to stimulate research institutes to enter into collaborative R&D, as indicated by paragraph 58 of the draft HGL, according to which "*R&D agreements may be concluded by large undertakings, SMEs, academic bodies or research institutes or any combination of them*". The Working Groups suggest, however, considering whether it might be preferable just to clarify the definition of competing undertakings rather than introduce a specific category of R&D and specialisation agreements that may benefit from the BERs.

Also in the interests of consistency, the Working Groups consider that the relaxation of the two conditions for exemption under the draft Research and Development HGL – access to the final results and access to pre-existing know-how – should not apply only to research institutes and similar entities.

More specifically, on R&D in the innovation area, the draft HGL attempt to provide clarification (i.e. paragraphs 79, 88 and 141), indicating that when companies are competitors, exemption only applies if – in addition to the joint R&D - at least three other competing R&D efforts, comparable to the one at issue, remain active. This requirement seems particularly difficult to verify as companies at the beginning of their R&D efforts will try to keep their innovation efforts strictly confidential. This would leave the companies in uncertainty as to whether the exemption can apply, and even more so as they would have to consider whether the other R&D efforts remaining on the market can be considered as comparable to their own.

[7] Directive of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, PB.L 5 December 2014.
[8] Directive of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, PB.L 14 January 2019.

## V. COMMENTS ON SECTION 3 – PRODUCTION AGREEMENTS

The draft revised HGL provides a complete overview on the scope and the competitive assessment of production agreements that fall under Article 101(1), identifying when such agreements might adversely affect competition and underlining potential competition concerns that might arise.

The Working Groups also welcome the Commission's efforts to provide illustrative practical examples that assist understanding by users of the HGL of the relevant factors in analysing production agreements.

Particularly with respect to paragraph 234, the Working Groups respectfully suggest that the Commission provides further parameters for when a market is considered "concentrated". Given how specific and detailed the draft HGL are, the Working Groups submit that further guidance on this definition would provide a more complete understanding of when a production agreement might lead to restrictive effects on competition.

In the draft Specialisation BER, distribution is exempted when the parties cease their existing separate distribution of the contract products while entrusting distribution to a joint venture or a third party that is not a competitor (Articles 1(1)(l) and 2(4)). However, the Working Groups consider that this outcome is not different from the case in which one party entrusts the other party with the distribution of the contract products (case which falls outside the Specialisation BER as it does not qualify as "joint distribution"), given that in both cases the result for customers is identical: they will face a single supplier where two suppliers were active prior to the agreement. It is, therefore, not clear why only where distribution is entrusted to a joint venture or a third party is covered by the Specialisation BER. The Working Groups respectfully consider that this matter could be further elaborated by the Commission.

## VI. COMMENTS ON SECTION 4 – PURCHASING AGREEMENTS

In paragraphs 316 and following of the draft HGL, the Commission sets out the difference between a genuine joint purchasing arrangement that would not qualify as a by object restriction and buyer cartels. The Working Groups in particular welcome the clarification given at paragraph 319 by providing factors – i.e. transparency and a written agreement – that help undertakings to conclude that the agreement to which they are party does not amount to a buyer cartel.

The Working Groups note, however, that it may be helpful to also clarify that joint purchasing arrangements in general cannot in any event constitute buyer cartels if the jointly procured product does not relate to the "core input" of the business, e.g. undertakings jointly procuring energy, trade

associations procuring industry studies. This would of course not mean that such joint purchasing arrangements cannot have an actual or potential anti-competitive effect (e.g. if they lead to a high commonality of costs).

In paragraph 329 of the draft HGL, the Commission sets out the safe harbour which applies where a 15% market share is not exceeded either on the purchasing market or the selling market. The Working Groups appreciate the continuity from the current horizontal guidelines in this respect. Nevertheless, considering that a concentration notified under the EU Merger Regulation between competitors that have a combined market share of less than 20% would likely be approved by the Commission – and would have at least the same impact on the market as a joint purchasing arrangement – it may make more sense to also set the safe harbour threshold as 20%.

In this context, the Commission may equally consider that mere ad hoc joint purchases are generally unlikely to restrict competition. The same is true of joint purchasing arrangements regarding products that do not relate to the "core input" of the business. In such cases, it may not make sense to also require the 15% safe harbour threshold to not be exceeded on the selling market or markets. Indeed, by way of example, the acquisition of catering services by a trade association covering almost all undertakings active in the sector concerned is highly unlikely to restrict competition in any market in that sector or in the market for catering services.

In relation to joint purchasing at paragraph 329 et seq. of the draft HGL, the Commission discusses the buying power of a joint purchasing arrangement. While the HGL already refer at paragraph 332 to the relevance of the supplier's size for the assessment, it may be good for the Commission to explicitly confirm that a joint purchasing arrangement *vis-à-vis* a dominant supplier would in any event be unlikely to restrict competition.

In the context of the evaluation under Article 101(3), the Working Groups recommend setting out in paragraph 348 the requirements for avoiding the elimination of competition, e.g. by providing a combined market share threshold, and by cross-referencing to the technical or practical confidentiality protection measures at paragraph 341.

Finally, the Working Groups would welcome the Commission's views on joint procurement of shares, bonds and other financial instruments. Reference can be made for instance to the report on EU loan syndication and its impact on competition in credit markets.[9]

## VII. COMMENTS ON SECTION 5 – COMMERCIALIZATION AGREEMENTS

[9] https://op.europa.eu/en/publication-detail/-/publication/89f81e74-7b75-11e9-9f05-01aa75ed71a1/language-en/format-PDF

The Working Groups note that the Commission continues to have a stricter approach towards joint commercialisation than it has towards joint purchasing. While this is understandable considering the direct impact on the downstream market, the Working Groups suggest adopting as far as possible a similar approach towards joint commercialisation as for joint procurement. In particular, the Working Groups encourage the Commission to not consider agreements limited to joint selling and agreements that include the joint setting of prices to constitute by object restrictions if they are done in a sufficiently transparent way. Such agreements should in particular not constitute a by object restriction if done on only an ad hoc basis.

The Working Groups refer to their comment above regarding the safe harbour threshold.

The Working Groups welcome the introduction of a section dedicated to bidding consortia aimed at clarifying the difference between joint bids and bid rigging. The Working Groups in particular support the Commission's view that joint bids of undertakings that could have participated individually, do not necessarily constitute by object restrictions. However, the Working Groups would encourage the Commission to:

(i) Provide more clarity as to when such joint bids constitute by object restrictions and when they do not. Indeed, at paragraph 394, the draft HGL currently cross-refer only to the paragraphs regarding joint commercialisation in general. However, these paragraphs indicate that any joint commercialisation that involves the joint setting of prices – i.e. also including joint bids – constitute by object restrictions. In other words, as the draft HGL are currently drafted, they indicate that joint bids are possibly by effect restrictions and at the same time say they are by definition by object restrictions;

(ii) In cases in which they do not constitute by object restrictions, provide more clarity as to the conditions under which they may actually or potentially restrict competition. The HGL should in this respect explicitly confirm that the safe harbour in paragraphs 378-379 of the draft HGL applies to joint bids as well (unless of course the joint bid concerns a disguised bid rigging cartel).

Finally, the Working Groups would welcome the Commission's views on joint selling of shares, bonds and other financial instruments. Reference can in this respect be made for instance to the report on EU loan syndication and its impact on competition in credit markets.[10]

## VIII. COMMENTS ON SECTION 6 – INFORMATION EXCHANGE

[10] https://op.europa.eu/en/publication-detail/-/publication/89f81e74-7b75-11e9-9f05-01aa75ed71a1/language-en/format-PDF

The information exchange section of the HGL is key to all industry sectors since access to information is a decisive competitive factor in the present day. Information exchange is also a relevant when entering into production agreements, joint purchasing arrangements or even when conducting due diligence prior to any commercial deal. In view of this, the Working Groups submit that this section of the HGL should provide for as much legal certainty as possible, allowing an appropriate self-assessment by market players.

In line with this general comment, the Working Groups consider that the following sections of the HGL should be complemented in order to increase legal certainty:

**a)** In paragraph 429, the Commission indicates that collection and publication of aggregate market information (such as sales data, data on capacities, costs of inputs and components) should not raise concerns unless it takes place between relatively small numbers of undertakings with a sufficiently large market share.

Market studies are very common in almost all industry sectors and thus more precise guidance on how to assess if they violate competition regulation would be welcomed. It would be useful to have more objective guidance on how many companies would be considered a "small number of undertakings" and the market share threshold that would be considered "sufficiently large" in case of market studies prepared by third parties. A more objective definition of the terms "small number of undertakings" and "sufficiently large" would increase legal security for companies and trade associations involved in the preparation of those market studies.

**b)** In paragraphs 430 and 431, the description of the criteria that will be used to determine whether information is historic leaves much room for interpretation. Even though the Commission says that "*the older the information, the less useful it tends to be for timely detection of deviations and thus as a credible threat of prompt retaliation*" and gives examples of Commission's past cases that "*considered the exchange of individual data which was more than one year old as historic and as not restrictive of competition within the meaning of Article 101(1), whereas information less than one year old has been considered as recent*(…)[11]" (emphasis added) in footnote 226, it would be useful to have more objective parameters on how to assess the timeframe required for information to be considered historic.

While exchange of future strategic information (e.g., prices) should be considered problematic, the Working Groups believe the HGL's current "bright line" for when data becomes "historic" (and, thus, presumably exchangeable) should be reconsidered. It should be noted that in some

[11] Commission Decision in Case IV/31.370, UK Agricultural Tractor Registration Exchange, recital 50; Commission Decision in Case IV/36.069, Wirtschaftsvereinigung Stahl, OJ L 1, 3.1.1998, p. 10, recital 17.

markets, historical data from companies has no value at all and, therefore, its exchange cannot be considered problematic. There are also cases in which the exchange of historical data can be pro-competitive, and thus more legal certainty with respect to when it is legitimate to share historical information could bring more efficiency to markets that benefit from this efficiency.

Thus, companies and legal advisers would benefit from having clearer and more objective guidance on when the exchange of historical information can raise competitive concerns. In fact, paragraph 424 of the HGL lists information considered "*particularly commercially sensitive and the exchange of which was qualified as a by object restriction*", and all of the information listed could be classified as predictive information on competitors' future intentions, with no reference to historical information.

**c)** Paragraph 432 describes how the "acceptance" of unilaterally disclosed sensitive information from a competitor can constitute a concerted practice. It goes on in examples to say that (1) participation in a meeting where a competitor unilaterally discloses its prices; and (2) introducing a pricing rule in a shared algorithmic tool are likely to be caught. But, on the other hand, the same paragraph says that "*the dispatch of an email message to personal mailboxes does not in itself indicate that the recipients ought to have been aware of the content of that message. It may, in the light of other objective and consistent indicia, justify the presumption that the recipients were aware of the content, but those recipients must still have the opportunity to rebut that presumption*".

Despite the practical examples provided, there is not much discussion on what "acceptance" might mean, especially when a competitor might "accept" information unilaterally disclosed and then use it to out-compete the discloser. Thus, companies and legal advisers would benefit from having clearer and more objective guidance on what would be considered "acceptance" of competitively sensitive information.

**d)** In paragraph 434, the Commission indicates that a unilateral announcement that is also genuinely public, for example, through a post on a publicly accessible website generally does not constitute a concerted practice but that this could be the case if there are only a few competitors present and high barriers to entry. In this case, unilateral public announcements could be interpreted as an indicative of a concerted practice in the absence of another plausible explanation or apparent benefit to consumers.

The Working Groups submit that, as drafted, the HGL leave room for authorities to treat unilateral disclosure of information as amounting to a collusive practice, particularly when one considers the broad guidance on what would be considered "acceptance" of competitively sensitive information by a competitor.

The Working Groups respectfully submit that the HGL should make it clear that a concerted practice

requires more than one company in the market engaging in unilateral public disclosures with similar frequency and level of details, and evidence that the effects of such disclosure in the marketplace are negative. Absent those additional factors, efficient unilateral disclosures in markets that benefit from information exchange could be deemed collusive practices and companies and legal advisers would find it hard to assess when it is legitimate to make public announcements from a competition law compliance perspective.

## IX. COMMENTS ON SECTION 9 – SUSTAINABILITY AGREEMENTS

**Introduction**

The Working Groups welcome the reintroduction of a chapter on sustainability agreements. They consider that this represents a significant step forward in unlocking the benefits of sustainability collaborations for society and consumers. It sends a signal to businesses that the Commission encourages cooperation which some may not yet have contemplated due to perceived antitrust concerns.

In particular, the Working Groups recognise several important policy advances, as follows:

- A broad definition of sustainability which extends to social objectives (e.g. labour and human rights) (paragraph 543 of the draft HGL). This makes sense for businesses for whom the goals are often connected: projects that pursue social or economic objectives can make it easier to achieve green objectives, and the impact of climate change can disproportionately affect those in disadvantaged areas.

- Explicit recognition that cooperation agreements may be necessary to fill the gap which remains when residual market failures are not solved by public policy and regulation (paragraph 546).

- Recognition that first-mover concerns can restrain individual action (paragraph 585).

- The internalisation of sustainability-related negative externalities as benefits in the sense of Art. 101 (3) TFEU (paragraphs 578 and 579) and the taking into account of the collective impact of those benefits (in principle) in the Article 101 (3) assessment (Section 9.4.3.3 of the draft HGL).

- Consideration of whether an agreement genuinely pursues a sustainability objective when determining whether or not a restriction is anti-competitive by object (paragraph 559).

While the Working Groups suggest the following areas for further consideration and extra guidance, the Working Groups think the chapter is a laudable contribution to the debate and hope it will inspire other antitrust authorities outside the EU to provide guidance under their own national laws.

**Specific comments and suggestions**

More examples are needed of the types of cooperation that fall outside Article 101(1) or which are de minimis.

**When an agreement will have no impact on competition**

The draft HGL contain a reminder that sustainability agreements will not be anti-competitive if they do not affect parameters of competition such as price, quality, quantity, choice or innovation (paragraph 551). However, the subsequent examples (e.g. relating to internal conduct or industry-wide awareness raising) are relatively narrow.

The Working Groups therefore encourage the Commission to take a more expansive approach to the scope of sustainability collaboration that falls outside Article 101(1), and to the extent possible, provide more guidance on collaboration which will fall outside Article 101(1).

For example, the HGL could make a more general statement that, when the agreement has no impact on the parties' market conduct, either because there is no individual obligation placed on the parties, or because the parties are only loosely committed to contributing to the attainment of a sector-wide environmental target, the agreement is not caught by Article 101(1). That is because of the full discretion that is left to the parties as regards the means technically and economically available to attain the joint objective, and the agreement has no impact on the market. This would be in line with the example set out in paragraph 553, according to which sustainability agreements for the mere creation of databases of suppliers or distributors that operate sustainably will not raise competition concerns under Article 101(1) if they do not require the parties to sell to or purchase from these third parties.

In addition, the scope of sustainability agreements that fall outside Article 101(1) could be further expanded based on case law. The HGL could reference and identify the key element of illustrative cases: *ACEA, JAMA/KAMA* [12] and *CEMEP* [13] where the Commission concluded that horizontal commitments agreed by a sector did not fall within Article 101(1). These are particularly on point – e.g. JAMA relates to commitments to reduce carbon dioxide emissions from new passenger cars.

[12] Case COMP/37.634 JAMA and Case COMP/37.612 KAMA (1999), Commission Press Release IP/99/922, 1 December 1999

[13] CEMEP (2000), Commission Press Release IP/00/508, 23 May 2000.

Guidance is needed on when sustainability efforts will not have an appreciable effect on consumer price competition and will therefore fall outside Article 101(1). In particular, it would be helpful to focus on when an increase in cost would not be expected to result in a price increase to consumers, whether because of its size or because highly competitive conditions in the upstream market mean that any price increase would be unlikely to be passed on to consumers. This guidance could also explain when cooperation would not be expected to have an appreciable impact on competition because of a low degree of commonality of costs.[14]

**Compliance with legal / regulatory norms**

The HGL should confirm that where compliance with sustainability goals set by the government is not self-evident (e.g. due to a lack of effective oversight and enforcement, corruption) cooperation agreements among direct or indirect importers in Europe aimed at local compliance would not fall within Article 101(1) (consistent with the idea that competition law does not seek to protect illegal competition).

**Public interest considerations**

While paragraph 548 (footnote 315) refers to the *Wouters* line of case law, the text suggests that the Commission interprets this case law very restrictively ("legitimate objectives pursued by certain professions"). The Working Groups consider that there are strong parallels between sustainability and the legitimate objectives protected in this line of cases.[15] Further, Advocate General Mazak's opinion in *Pierre Fabre* stated that 'private voluntary measures' may fall outside the scope of Article 101(1) pursuant to the *Wouters* doctrine, provided the limitations imposed are appropriate in the light of a legitimate objective sought and do not go beyond what is necessary in accordance with the principle of proportionality.

It is true that the Advocate General added that the legitimate objective sought must be of a public law nature and therefore be aimed at protecting a public good. However, it would seem reasonable for *Wouters* to be expanded to situations where firms enter into sustainability agreements pursuant to a clearly articulated public policy.[16]

---

[14] See for example the arguments contain in this Opinion: https://api.fairwear.org/wp-content/uploads/2016/06/OpiniontoFWF- TheApplicationofEUCompetitionLawtoFWFLivingWageStandardfinal1.pdf

[15] In *Meca-Medina*, the rules were to safeguard "equal chances, […] the integrity and objectivity of competitive sport and ethical values in sport". The concept of "ethical values in sport" is analogous to the values inherent in sustainability objectives.

[16] In any event, even under a more restrictive interpretation, query why a business organisation such as one under a UN charter whose remit is to combat climate change should not be treated any less favourably that the Dutch bar or a 'mere' sporting organisation such as the IOC or International Skating Union.

The Working Groups therefore encourage the Commission to at least indicate that it will consider if legitimate sustainable considerations exclude the application of Article 101(1) on a case-by-case basis.

**The soft safe harbour for sustainability standards requires some clarifications**

The Working Groups' reading of paragraph 572 – second indent is that a standard that is binding on the parties can still benefit from the safe harbour (i.e. that companies can agree not to manufacture or buy outside of a label, subject to the other conditions of the safe harbour). However, the HGL should clarify that this is the intended meaning so as to avoid any perceived ambiguity. The current drafting also leaves room for confusion when it says that companies are "*free to also operate outside the label*" as a reason why a collaboration may lack appreciable anti-competitive effects (paragraph 575), and when stating that the "*non-exclusive*" nature of a sustainable label is one of the factors making appreciable negative effects unlikely (para 618). Therefore an explicit recognition that a binding sustainability standard whereby companies that participate in the agreement commit not to manufacture or buy outside of a label falls outside Article 101(1) would be very helpful for firms wanting to pursue sustainability goals through standards but concerned about first-mover disadvantage.

**'By object' analysis**

The draft HGL identify as a 'by object' restriction an "*agreement between the parties to the sustainability standard to put pressure on third parties to refrain from marketing products that do not comply with the sustainability standard*" (paragraph 571). The Working Groups respectfully do not consider this to be inherently anti-competitive:

(a) If by "third parties" the Commission is referring to competitors, the Working Groups point out that having market-wide standards is not necessarily harmful where parties can compete on other elements of competition (as is clear from the soft safe harbour). Free-riding can occur where sustainable and non-sustainable standards co-exist.

(b) If "third parties" is a reference to distributors or suppliers, the Working Groups would argue that it can be imperative for companies to ask those parties to comply with the standard in order for the sustainability benefits of the agreement to arise.

Consequently, the Working Groups consider that the last sentence of paragraph 571 should be removed (i.e. "*Similarly, an agreement between the parties to the sustainability standard to put pressure on third parties to refrain from marketing products that do not comply with the sustainability standard restricts competition by object"*). Failing that, the Working Groups recommend that the Commission clarify what is meant by pressurising or obliging third parties to comply with a standard and how this will be assessed.

**Benefits**

The Working Groups commend the Commission for recognising and describing three categories of benefits. However, the draft HGL use the term "*benefits*" as well as "*efficiencies*". The Working Groups consider "*benefits*" to be more accurate because this corresponds to the wording of the TFEU, and allows a wider range of improvements in the sustainability context to be more readily recognised as relevant. This includes cleaner technology, less pollution and water contamination (paragraphs 577 and 578).

It would also be helpful for the Commission to emphasise in paragraph 576 that the Chapter 9 Article 101(3) framework applies to all agreements that pursue sustainability as one or more of their objectives, even if the agreement is covered by another chapter of the HGL pursuant to the "centre of gravity' approach set out in paras. 6 et seq of the HGL.

The Working Groups also welcome the Commission's recognition (consistent with the 2004 exemption guidelines) that it is not always necessary to carry out a detailed assessment where "*the competitive harm is clearly insignificant compared to the potential benefits*" (paragraph 589). This will often be the case particularly in relation to cooperation to fight climate change (see, for example, paragraphs 53 to 56 of the ACM draft guidelines[17]).

Collective benefits

The Working Groups commend the fact that the Commission has included collective benefits as a concept worthy of exemption under Article 101(3). However, the Commission's apparent requirement that full compensation of the direct users in the relevant market is required (paragraph 603) is in practice extremely limiting.

This approach would be inconsistent with the "polluter pays" principle and effectively introduces a "polluter-must-benefit" requirement - which is highly undesirable from a policy perspective and not supported by Treaty provisions. It disregards the protection of those who must pay the cost for unsustainable consumption but cannot reduce it. The restrictive notion of collective benefits adopted by the HGL would result, in many cases, in geographic and social boundaries being drawn around issues for which collective responsibility should be taken.

The Working Groups agree with the ACM's conclusion in its Legal Memo[18] that out of market benefits

[17] See https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf,

[18] ACM Legal Memo, 27 September 2021, What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context?

are relevant and full compensation of directly affected consumers is not required in all cases – and not supported by the text of Article 101(3) TFEU (which requires only "fair", not "full" share to consumers) and the case law of the Court of Justice in *Mastercard* requiring no more than "*appreciable objective advantages*" for the affected consumers. The Working Groups strongly encourage the Commission to consider this and refer to fair compensation or the wording of *Mastercard* in the HGL.

The Working Groups also suggest that the Commission provide further clarification as to what will count as "collective benefits" and how they will be measured. The more benefits that are taken into account, the greater the chance of a positive environmental impact, so it is hoped that the Commission will take into account all global benefits that objectively occur – i.e. that accrue to society as a whole.

**Indispensability: more examples of indispensable cooperation**

The draft HGL state 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 for the goal to be achieved, unless such coordination is indispensable for reaching the goal in a more cost-efficient way (paragraph 583).[19]

The Working Groups consider that this position is overly restrictive. Many regulations are intended to address sustainability objectives, and the draft HGL's position in paragraph 583 would make it highly risky to collaborate in the same space to achieve higher sustainability objectives. In reality, legislation may be insufficient, especially where regulatory standards reflect the lowest common political denominator achievable at the time of their introduction.

The draft HGL's approach also contradicts the concept of residual market failure that the Commission very helpfully introduces into the draft HGL (paragraph 586). Where neither individual action nor regulation effectively remedies the consequences of unsustainable business and related negative externalities, collaboration should be allowed to fill the gap. In these instances, banning additional standards, notably those more stringent than required the law, could reduce the ability to collectively achieve higher sustainability objectives.

In any event, cooperation may be justified to achieve a concrete goal either more quickly[20] or to go beyond that goal, and not just to achieve the goal more cost-effectively. Therefore, the Working

[19] Example 5 is also relevant in this regard as it contains a sentence that may suggest that CO2 reducing agreements in EU may not be indispensable: "The reduction in electricity consumption leads to less pollution from electricity production and this benefits consumers, to the extent that the pollution-related market failure is not already addressed by other regulatory instruments (e.g. the European Emissions Trading System, which caps carbon emissions).

[20] For example, attaining legally mandated recycling targets (e.g. via plastic taxes) may require industry players to jointly source recycled plastics, thus inciting recyclers to increase currently scarce plant capacities, or to align packaging materials or formats to ensure a more effective national recycling system.

Groups' view is that the HGL should be explicitly extended to include situations where collective efforts ensure that the improvements obtained are more effective or can be delivered sooner, or exceed the goals, as recognised by the ACM.[21]

**State compulsion –more flexibility needed**

The Working Groups consider that the HGL could set forth a more generous approach to the state compulsion defence in relation to sustainability agreements without the risk of giving rise to a too-wide defence. The Working Groups' view is that it should at least be made clear that where corporate action conforms to clear and precise government policy, no resulting coordination will be considered a 'by object' infringement.

**No fines in cases where businesses follow the HGL in good faith**

In its equivalent guidelines, the ACM states that with regard to sustainability agreements that have been notified, and where its guidelines have been followed in good faith, but which later turn out not to be compatible with the Dutch Competition Act, adjustments to such agreements may be agreed on in consultation with ACM, or following an ACM intervention. In such cases of *bona fide* sustainability agreements, the ACM has also said that it will not impose any fines.[22]

The Working Groups consider that it would be very helpful and welcome if the Commission would also provide reassurance to businesses that it will not impose fines in cases where businesses genuinely follow the HGL in good faith to pursue sustainability goals.

**The examples of Sustainability Agreements require refinement**

Although the Working Groups praise the Commission's efforts in providing practical examples of sustainability agreements, they consider that examples 4 and 5, in particular, could be further explored, as per the comments provided below:

Example 4: the Working Groups do not agree with the Commission's analysis/conclusion that the described cooperation would not meet the criteria under Article 101(3):

(a) The analysis recognises that competition between producers has only led to around 20% of the market consisting of furniture grown from sustainable wood. This in itself is strong evidence that an agreement is needed and could be considered to be "indispensable" to achieve

[21] See https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf, Section 5.

[22] See https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf, Section 6.

sustainability goals.

(b) The analysis also relies on a very narrow approach to the "willingness to pay" principle and ignores benefits of such agreement to other consumers (as a result of slowing down deforestation).

Example 5: the Working Groups note that this is a pared-down version of *CECED*. That is because not all machines are being phased out; the net benefit on price/costs on its own is positive (even before the collective benefits are taken into account); and only the collective environmental benefits to these consumers are taken into account. In *CECED*, the Commission held that "the environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers"[23]. the Working Groups therefore consider that the Commission should present an example which reproduces the key elements of *CECED*.

## X. CONCLUSION

The Working Groups appreciate the opportunity provided by the Commission to comment on the R&D Block Exemption Regulation, the Specialisation Block Exemption Regulation and the Guidelines on horizontal cooperation agreements.

The Working Groups would be pleased to respond to any questions that the Commission may have regarding these comments; or provide additional comments or information that may assist the Commission.

[23] CECED 1999 L187/470 OJ 2000.