Independent Retail Europe

REVISION OF THE HORIZONTAL GUIDELINES
- COMMENTS OF INDEPENDENT RETAIL EUROPE -

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COMMENTS OF INDEPENDENT RETAIL EUROPE ON THE REVISION OF THE HORIZONTAL GUIDELINES

Independent Retail Europe welcomes the consultation on the draft revised Horizontal Guidelines (HGL). Overall, we consider that the draft revised HGL are a positive step forward to adjust the Guidelines to new market realities marked by fast digitisation, the new data economy and the transition towards a more sustainable supply chain.

However, we believe that certain aspects of the draft revised guidance deserve your specific attention and should be further enhanced to be truly fit for purpose in the new market reality.

1. General Issues – centre of gravity (para 6-8)

We support the draft revised HGL paras 6-8 which explain that agreements combining different types of cooperation should be evaluated on the basis of their centre of gravity (i.e. based on the starting point of the cooperation and the degree of integration of the different functions).

A clarification is still required that where joint purchasing involves also joint R&D and/or the joint production of private label products, the centre of gravity is generally joint purchasing.

2. Purchasing agreements (Chapter IV)

We welcome the overall approach of the draft revised HGL concerning purchasing agreements. Such agreements exist in many sectors of the economy and help to achieve significant pro-competitive efficiencies. The recent examples of the EU's joint buying of vaccines and possible future joint buying of gas by EU Member States show unambiguously that such pro-competitive efficiencies can arise from joint purchasing agreements in all sectors. It is therefore essential to ensure that chapter IV on purchasing agreements provides a clear horizontal framework applicable to all sectors of the economy, as per the approach proposed in the draft revised HGL.

a) Types of purchasing agreements

We welcome the clarification in para 312 that there are different types of purchasing agreements, and that both the joint negotiations (of terms and conditions, e.g. of the price, certain elements of the price, or of other terms and conditions) and pooling of actual purchases are legitimate forms of purchasing agreements. Indeed, in both types of agreements, there is no difference in the negotiations over the full net price or parts of the price and terms and conditions. They should not be treated differently. This is also in line with current practices of national competition authorities.

We also very much welcome the reference in para 312 to the terminology used in the JRC Report on Retail Alliances in the Agricultural and Food Supply Chain, and the explicit recognition of groups of independent retailers as a factual operator in the internal market. This reference should be kept in the final HGL.

Furthermore, additional guidance should be included concerning purchasing alliances limited to the joint negotiation of only specific terms and conditions, payments only for specific services and T&C for a limited portion of their members' portfolio. The guidance should explicitly recognise that such forms of joint purchasing provide clear pro-competitive effects.

Joint distribution, quality control and warehousing are listed as examples of activities that can also form part of joint purchasing agreements. Since they are only included as examples, this does not seem to limit the scope of joint purchasing agreements to these additional activities. Accordingly, joint

purchasing should be open to also cover joint production and / or joint R&D especially of private label products. Thus, it would be beneficial to include an additional clarification (e.g. in a footnote) that para 312 does not in any way modify or preclude paras 6-8 of the HGL.

Our suggestions in para 312:

- **Keep the recognition that joint negotiations of T&C are a legitimate form of purchasing agreements.**
- **Keep the reference to groups of independent retailers and to the JRC report on retail alliances.**
- **Provide additional guidance recognising explicitly that purchasing alliances that jointly negotiate only specific terms and conditions, payments only for specific services, terms and conditions only for a limited portion of the member's portfolio provide clear pro-competitive benefits.**

b) Pro-competitive effects of purchasing agreements

Joint purchasing can have significant pro-competitive effects for the members to the agreement, for consumers and also for suppliers upstream. It is important that such pro-competitive effects be recognised for all actors concerned.

We caution against the specification in para 313 that joint purchasing 'usually' aims to create buying power "*vis-à-vis large suppliers".* Any reference to suppliers' size, and the possible market effect, should only be referred to in para 330, which deals specifically with market power, as part of the 'effect' analysis of a joint purchasing agreement. Including such a reference in para 313 may be misinterpreted as meaning that joint purchasing is only legitimate if meant to negotiate with "large suppliers". We would strongly disagree with such an interpretation.

Similarly, para 313 also suggests that individual members of a joint purchasing agreement cannot attain the necessary degree of buyer power on their own to generate the positive effects listed. Such a specification should not be placed in para 313, which describes joint purchasing in generic terms, but rather in para 330, which deals specifically with market power, as part of the 'effect' analysis of a joint purchasing agreement, and together with other circumstances which deals with the effect of purchasing agreement.

We welcome the recognition in para 313 that purchasing agreements can also lead to more product variety, on top of already previously recognised efficiencies (e.g. lower prices, better quality). Indeed, purchasing agreements such as those pursued by retail alliances can help to provide consumers access to new products or to a wider product choice. For instance, they may help retailers in small/remote markets to get access to products normally only available in other larger/less peripheral Member States. Vice-versa, they can enable smaller suppliers to access wider geographic markets (e.g. an Italian producer gaining access to Finnish stores through a purchasing cooperation). Importantly, they also help small operators (e.g. groups of independent SME retailers) to attain the same market power as their larger competitors, therefore contributing to maintaining a high degree of competition on the downstream selling market.

Purchasing agreements can also generate other efficiencies for upstream suppliers. As recognised in para 344, such agreements induce suppliers to innovate and provide more choice, given that the pooling of the retailers' market power enables the latter to be more demanding, and to require products more likely to satisfy the needs of increasingly demanding consumers. They therefore induce suppliers and manufacturers to innovate, as it reduces price pressure. They also allow suppliers to

benefit from administrative simplification due to a reduced number of contact points, leading to lower transaction costs (as recognised in para 344).

We wish to point out that purchasing agreements can also benefit smaller suppliers by providing them increased economies of scale due to access to a wider network of buyers and increased sales volumes. This should also be recognised explicitly in para 344.

Overall, we invite the Commission to include a clear statement in the HGL that joint purchasing agreements have pro-competitive benefits as long as there is vivid competition downstream.

Our suggestions:

- **Remove from para 313 "*vis-à-vis large suppliers, that individual members of the joint purchasing arrangement would not attain if they acted separately instead of jointly*", as this could be misinterpreted as a generic restriction to the admissibility of purchasing agreements, and instead refer to these aspects in para 330 which deals with the 'effect' analysis.**
- **Para 313: we support the recognition that purchasing agreements can lead to more product variety (on top of lower prices/better quality). Moreover, it should recognise that such agreement can help smaller operators to attain the same market power as their larger competitors not party to the agreement, therefore contributing to more competition on the downstream selling market.**
- **Para 344: We support the list of efficiencies mentioned. However, the list should also include potential efficiencies for small suppliers through increased sales volumes and increased network of buyers.**
- **Clearly state in para 344 that joint purchasing generates pro-competitive benefits whenever the parties act independently downstream and competition is vivid downstream.**

c) Distinction between buyer cartels and joint purchasing agreements (para 316-319)

We welcome the guidance on the distinction between buyers' cartels (which are restrictions of competition by object) and purchasing agreements, which may create pro-competitive benefits and need an effect assessment. Paras 316-319 seem to provide a good analytical framework that allows for a clear distinction between the two. From these provisions it appears clearly that existing retail alliances are legitimate forms of purchasing agreements and should never be confused with a buyers' cartel. Moreover, the guidance should state clearly that buyer cartels as restrictions by object occur when there is no legitimate reasons for the purchasing cooperation.

We have one comment concerning para 319(b), with regards to the existence of a written agreement between competitors defining the form of their cooperation for joint purchasing purposes. We consider that para 319 should be clarified with a (non-exhaustive list) of examples of such admissible written agreements. Such a list should include the statutes or by-laws of the jointly owned company (which is in charge of the negotiation/agreement with suppliers), or the franchise contracts (in cases where the franchisor organises the joint buying also for its franchisees). In the case of groups of independent retailers, these instruments (statutes, by-laws, franchise contract) are very often used precisely to allow the central organisation (of a group of independent retailers) to manage the joint purchase on behalf of its member retailers, and will regulate in detail how and on which conditions the joint purchasing may take place. In the absence of such an explicit recognition, the reference to a "written agreement" may be understood as requiring the conclusion of an individual contract with

every member of a group of independent retailers (which is highly cumbersome if the group is made up of many independent retailers).

We also have a generic suggestion to improve this section: it would be useful if the HGL could list in a separate paragraph (prior to paras 317-319) the specific criteria used to delineate between buyers' cartels and joint purchasing. For instance:

- Coordination of purchasing strategy in respect of individual, separate negotiations with suppliers (buyer cartel) vs. joint negotiations, collective bargaining (joint purchasing)
- Exchange of commercially sensitive information on individually and separately conducted negotiations with suppliers (buyer cartel) vs. exchange of commercially sensitive information in the context and within the scope of joint negotiations, collective bargaining (joint purchasing)
- Distortion of competition as a consequence of a blurred picture of market conditions, i.e. suppliers and other market participants outside the purchasing cartel get misleading indications of the market conditions, e.g. demand in relation to available supplies, purchasing strategies and prices. (buyer cartel) vs. pro-competitive effects and efficiency gains typically brought about by joint negotiations (moderate market/countervailing power, reduced search and transaction costs, more efficient logistics, reduced prices, enhanced quality, etc.). (joint purchasing)

Our suggestion:

➔ **Para 319: list (non-exhaustive) examples of admissible written agreements, including statues and by-laws (commonly used in many groups of independent retailers) or franchise contracts.**

➔ **Introduce a new paragraph which lists the main criteria to delineate between a buyers' cartel and a joint purchasing agreement (see proposal above).**

d) Restrictive effects and effect of market power

The revised chapter on purchasing agreements provides an updated guidance on possible anti-competitive effects of such agreements on upstream suppliers when the buyers have a significant joint market power.

Para 325 states that exclusive purchase obligations in a purchasing agreement may create anti-competitive effects. However, such obligations might be ancillary to such joint purchasing agreements, because the efficiencies of scale sought by such agreements may decrease in the absence of such clauses jeopardizing the existence of the joint purchasing agreement.

In para 329, we invite the Commission to consider raising the safe harbour threshold on the upstream purchasing market above the 15% currently foreseen (e.g. to 30%). However, the safe harbour for the downstream market should be kept unchanged.

Paras 331 and 332 broadly cover correctly potential negative effects that must be assessed on a case by case basis, but they overstate some potential negative effects on upstream suppliers, as they neglect some pro-competitive benefits on suppliers.

In particular, we strongly support the explanation (in para 332) that anti-competitive harm is less likely to occur if suppliers have a significant degree of countervailing seller power (not necessarily amounting to dominance) on the purchasing market (e.g. when selling must-have products). We believe that para 332 should be kept in the final HGL and completed with a reference to products which are difficult to

substitute (e.g. products identified as the flagship product of the moment after a consumer survey and products which are the subject of rarity due to their success, etc.) which are also a major source of countervailing power

Our suggestion for para 332: *"[…] Restrictive effects on competition are less likely to occur if suppliers have a significant degree of countervailing power […] because they sell products or services* ***that are difficult to substitute or*** *which purchasers need to have in order to compete on the downstream selling market.*

In addition, concerning the effect on small suppliers referred on 332, we believe it is important to clarify what is meant by 'small suppliers', especially as being 'small' does not necessarily equate to low bargaining power (e.g. an SME supplier of highly demanded non-substitutable product will benefit from important countervailing power in any negotiation). "Small supplier" should therefore be understood as a small or micro-enterprises within the meaning of EU recommendation 2003/361 which provides substitutable products or products which are not essential for competition downstream (absence of countervailing power).

Furthermore, even small suppliers can benefit from pro-competitive effects of joint purchasing, such as access to large sales volumes and a larger network of buyers. This is especially true when they deal with groups of independent retailers operating under a common brand (see the JRC report on retail alliances already mentioned in the draft revised HGL) who will often jointly negotiate with many smaller regional suppliers to distribute their products through a large network of shops across the territory of a Member State (therefore expanding the sales volume of these regional/local suppliers to reach a national dimension). Such increased commercial opportunity is likely to incentivise them to invest to boost and expand their production and provide new products likely to meet a national demand (rather than a purely local one). Similar positive effects occur with international alliances (granting access to an even broader network of buyers).

Moreover, joint buying by small and medium sized retailers (who collectively may hold a certain buyer power) allows them to obtain purchasing conditions similar to large integrated retail chains, therefore helping them to stay competitive versus these very large operators. This is beneficial for suppliers (and especially small suppliers) who benefit from additional sales channels thanks to the preserved competitiveness of these small operators pooling their buying power.

We therefore invite the Commission to reconsider the presumption contained in para 332 that joint purchasing may discourage investments or innovation benefitting consumers when the joint buyers deal with small-scale suppliers.

We also invite the Commission to specify that anticompetitive effects upstream may arise only if the parties have a significant degree of market power. There is no evidence that joint purchasing in the retail and wholesale sector, has been detrimental to innovation upstream. To the contrary, economic theory suggests that pricing pressure on existing assortments exerted by joint purchasing is likely to motivate sellers to innovate, because innovative and new products face less pricing pressure (also from consumers).

Furthermore, para 334 explains that there is a risk of foreclosure of competitors that are not party to the purchasing agreements. We would like to stress that this is a theoretical risk that indeed needs to be assessed on a case by case basis. However, the JRC study on retail alliances found no empirical

evidence of the presence of the 'waterbed' and 'spiral' effects on competing retailers/wholesalers not party to retail alliances. Moreover, another study, on the contrary, found positive effects of joint purchasing on other retailers not party to the agreement[1]. We therefore encourage the Commission to simply refer in para 334 to risks of such effects that need to be assessed on a case by case basis.

We support the clarification in para 337 (which existed already in para 212 of the current HGL) that if parties to a joint purchasing agreement are not active on the selling market, the agreement is less likely to have restrictive effects.

Finally, concerning 'sustainability boycotts' (para 333), more detailed guidance should be included that a sustainability boycott requires that the members of the joint purchasing agreement decide to source unsustainable products neither jointly nor individually. Although para 333 seems to suggest this (e.g. as it refers to alternative customers and switching production to sustainable products as options left for unsustainable suppliers), further clarification is needed.

Our suggestion for para 329:

- **Raise the upstream safe harbour threshold.**

Our suggestions for para 332:

- **Keep the reference to the countervailing power of suppliers, especially when they sell 'must-have' products and add that countervailing power also exists when the suppliers sell products which are difficult to substitute.**
- **Define clearly the notion of 'small suppliers' (i.e. small or micro companies which sell substitutable products or products not essential for competition on the downstream market).**
- **Reconsider the presumption that joint purchasing agreements with large buyers may have a negative effect on investment/innovation of small suppliers – examples in groups of independent retailers show that such groups (which can be large buyers when pooling the buying power of their individual SME members) may offer significant commercial opportunities to small scale regional/local suppliers through increased sales volume and granting them access to a national market, which actually induce them to invest more to produce more.**
- **Do not overstate the negative effect of buying power (especially when pooling the buying power of SME retailers in a group of independent retailers) – the draft revised HGL should make clear that the main potential competition concerns arise in the case of highly concentrated downstream markets.**

Our suggestion for para 333:

- **Clarify that a sustainability boycott requires that the members of the joint purchasing agreement decide to source unsustainable products neither jointly nor individually.**

Our suggestion for para 334:

- **Refer to the risk of foreclosure of competitors not party to the agreement without inferring that this is likely to be present.**

Our suggestion for para 337:

1 See Chambolle / Molina (2019)

➔ **Keep unchanged the explanation that anti-competitive effects are less likely if the parties to a purchasing agreement are not competitors on the relevant downstream selling market.**

e) Collusive outcome – Stopping orders/delisting of products – para 343

We strongly support the observation in para 343 that threats of stopping orders or delivery stops are "typically part of a bargaining process" and may be carried out by both sides of a purchasing agreement. We support as well that this approach is also reflected in the example provided in para 350.

We agree that such threats are not to be considered as a restriction by object and that their effect should not be assessed separately but in light of the overall effect of the purchasing agreement.

These clarifications are essential to dispel any misconception about such bargaining techniques that may be exerted by both suppliers and purchasers. We invite the Commission to clarify in para 343 that this approach does not only cover threats to stop negotiations or temporarily stop orders (and vice-versa supplies), but also to any coordinated approach taken by the joint buyers during negotiations.

Our suggestions for para 343:

➔ **Keep the clarification in para 343 that bargaining techniques such as temporary stops are not a restriction by object and must be assessed in light of the overall effect of the purchasing agreement.**

➔ **Clarify that para 343 covers any coordinated approach used by the parties to the agreement as a manifestation of their collective bargaining.**

f) Pass-on of lower prices to consumers

This section of the draft revised HGL should also include provisions on the market position of competitors to a joint purchasing agreement (i.e. on market structure). In cases where competitors exist and enjoy more or less the same level of market power on the downstream selling market as the combined market power of the parties to the joint purchasing agreement, and where they fiercely compete with the parties to the joint purchasing agreement, it is very likely that lower prices are passed on, and exclusive supply obligations typically do not restrict but enhance competition. In this regard, the guidance should also include examples of what is permissible and not only focus on potential risks. This is important to avoid scenarios where market participants avoid making use of pro-competitive cooperation because of legal uncertainty, which also has a negative impact on competition.

Furthermore, we agree with the assumption in para 347 that companies have an incentive to pass on to consumers the reduction of variable costs resulting from the purchasing agreements.

However, we invite the Commission to reconsider the second part of para 347 which puts a negative light on lump-sum payments in all circumstances. First of all, such lump-sum payments may produce positive effects passed on to consumers if they are comparable to promotional activities. For instance, the lump sum may be linked to the allocation of shelf space. In such a case, the lump-sum payments help retailers identify the optimal allocation of shelf space and suppliers benefit from higher sales prices if the sales of their product outperform the sales figure underlying the calculation of the lump sum and suppliers will only accept lump-sum payments that offer such chances. In consequence, these payments enhance inter-brand competition. Only if buyers enjoy a high degree of market power and

charge extensive lump-sum payments will these restrict competition among retailers, since they generate profits from the lump-sum payments and not from product sales (see in this sense the existing Vertical Guidelines para. 205 et seq.). If these payments are made for new products they also help suppliers introduce such products to the market and provide consumers with better access to product innovations. It should be clarified that this kind of lump-sum payment is no "pure reduction in fixed costs". This is in line with the current guidance in the Vertical Guidelines (para 207 et seq.) and also with guidance in the draft Vertical Guidelines (para 357 et seq).

Moreover, economic studies on joint purchasing do not make a distinction on pass-on of lower prices between agreements with lump-sum payments and other price-related payment[2].

Finally, the HGL should reflect that the pass-on to consumers of lower prices is less likely if the members of the joint purchasing agreement have significant **joint** market power on the selling market.

We therefore invite the Commission to amend para 347 in this sense, and to refine its approach to lump-sum payments.

Our suggestions:

- **Amend para 347, as lump-sum payments, in some cases may have pro-competitive effects which are passed on to consumers (see example above).**
- **Include provisions about the market position of the competitors to a joint purchasing agreement (i.e. on market structure).**
- **Clarify that the pass-on to consumers of lower prices is less likely if the members of the agreement have significant joint market power on the selling market.**

g) New example of joint purchasing and European retail alliances (para 350)

We fully support the example provided in para 350 of a European retail alliance that jointly negotiates terms and conditions for the purchases of its members in compliance with article 101 TFEU.

We consider that the example provided, including in terms of market shares, actual negotiations of conditions and hard bargaining techniques, fully reflects the guidance on purchasing agreements provided by the draft revised HGL and should be kept unchanged. This example is particularly relevant concerning the negotiations by alliances of rebates in exchanges of promotional services linked to the procurement of branded products by individual members of the alliance. This example provides more legal certainty and dispels any misconceptions about European retail alliances and how (and under which conditions) they fall into the scope of the chapter on purchasing agreements.

Our suggestion for para 350:

- **Keep unchanged the example provided (a European retail alliance negotiating additional T&C for its members active in different selling market, including through the use of hard bargaining techniques). Such an example will provide legal certainty.**

2 see Chambolle/Molina - 2019

3. Commercialisation agreements (Chapter V)

a) Groups of independent retailers and joint internet platforms with a common price

We fully support the explicit reference in para 380 of the draft revised HGL that mentions that joint distribution can generate significant efficiencies "*especially for groups of independent retailers, for instance in the case they take advantage of new distribution platforms in order to compete with global or major operators".* Indeed, the fast development of omni-channel retail and of digitalisation has led to very strong competition online driven by large integrated retail chains and pure online players. In order to cope with this competition from global and major operators and challenge them online, groups of independent retailers have no choice but to build a common platform under a common brand of the group, so as to effectively allow their members (independent retailers) to be visible/accessible to consumers online. This is also beneficial to consumers, who benefit from increased competition and from more choice on the retail market. The positive effect on consumers of joint distribution by groups of independent retailers should also be mentioned in para 380.

Concerning para 400 of the draft revised HGL and the example of a common platform with fixed prices, we support the explicit recognition that price fixing generates efficiencies resulting from the common branding online of the joint platform and of their member shops. However, to be fully relevant and useful, this example should be slightly amended, so as to recognise the possibilities and efficiencies offered by 'click & collect' schemes, which require the consumers to be able to choose the shop where the product will be picked up. Moreover, as like other retailers, independent shops using such a joint platform will in the near future offer both delivery and collect services, the example should not rule out the possibility for the consumer to choose in all circumstances the most convenient shop.

Suggestion for amendment of para 400:

Situation: A number of small specialty shops throughout a Member State join an electronic web-based platform for the promotion, sale and delivery ***or pick-up in store*** of gift fruit baskets. There are a number of competing web-based platforms. By means of a monthly fee, they share the running costs of the platform and jointly invest in brand promotion. Through the webpage, where a wide range of different types of gift baskets are offered, customers order (and pay for) the type of gift basket they want to be delivered ***or to pick up in store***.

The order is then allocated to the specialty shop ***chosen by the customer for either a delivery or pick-up in store, based on a list of shops*** closest to the address of delivery ***or pick-up most convenient to the consumer***. The shop individually bears the costs of composing the gift basket and delivering it to the client ***or making it available for pick-up in shop***. It reaps 90% of the final price, which is set by the web-based platform and uniformly applies to all participating specialty shops, whilst the remaining 10% is used for the common promotion and the running costs of the web-based platform. Apart from the payment of the monthly fee, there are no further restrictions for specialty shops to join the platform, throughout the national territory. Moreover, specialty shops having their own company website are also able to (and in some cases do) sell gift fruit baskets on the internet under their own name and thus can still compete among themselves outside the cooperation. Customers purchasing over the web-based platform are guaranteed same day delivery ***or pick-up in store*** of the fruit baskets and they can also choose a delivery ***or pick-up*** time convenient to them.

Analysis: Although the agreement is of a limited nature, since it only covers the joint selling of a particular type of product through a specific marketing channel (the web-based platform), since it involves price-fixing, it is likely to restrict competition by object. The agreement therefore needs to

be assessed under Article 101(3). The agreement gives rise to efficiency gains such as greater choice and higher quality service and the reduction of search costs, which benefit consumers and are likely to outweigh the restrictive effects on competition the agreement brings about. Given that the specialty stores taking part in the cooperation are still able to operate individually and to compete one with another, both through their shops and the internet, the price-fixing restriction could be considered as indispensable for the promotion of the product (since when buying through the web-based platform consumers ~~**do not know where they are buying the gift basket from and**~~ do not want to deal with a multitude of different prices) and the ensuing efficiency gains, as well as considering the common online branding. In the absence of other restrictions, the agreement fulfils the criteria of Article 101(3). Moreover, as other competing web-based platforms exist and the parties continue to compete with each other, through their shops or over the internet, competition will not be eliminated.

Our suggestions:

- **In para 380: keep the positive reference to the efficiencies generated by groups of independent retailers, especially when they make use of new distribution model to compete with large/global operators AND add that such efficiencies benefit consumers through increased choice and stronger competition.**
- **In para 400: amend the example so as to make it work with a combination of delivery and 'pick-up/collect' services. For this purpose, customers must be able to choose the shop that will take care of the order – see our proposal above.**

b) Bidding consortia

The principles established in the guidance on bidding consortia (para 391) should be broadened in their scope to cover all sales activities the parties cannot pursue effectively without the cooperation that is set up. This would provide coherence/consistency with para 372 of the draft revised HGL.

Our suggestion:

- **Broaden the scope of the principles in para 391 to make it fully consistent with para 372**

4. Information exchanges (Chapter VI)

a) Ancillary restraint (para 409)

Para 409 primarily concerns ancillary restraints. It should therefore clarify that they do not restrict competition if they are essentially required for the implementation of a cooperation which is compliant with competition law. This means that such ancillary restraints, as such, are not caught by Art. 101 (1) TFEU, and Art. 101 (3) TFEU is irrelevant.

Our suggestion for para 409:

- **Make clear that art 101 (1) TFEU is not applicable to ancillary restraints that are part of a broader cooperation which is not infringing competition law.**

b) Information exchanges required by law (para 411)

Concerning information exchanges required by law, para 411 does not provide sufficient legal certainty for companies, which may undermine compliance with legal obligations stemming from other regulatory initiatives.

As sustainability has become a top priority for (EU and national) public authorities in Europe, companies are facing a strong increase in regulatory initiatives which require them to disclose publicly detailed information about their activities/products/production processes/etc., and to also exchange some of this information in the supply chain. Para 411 should make clear and unambiguous that any disclosure of information required by law does not fall into the scope of Art 101 in so far as it is strictly limited to what is actually legally required. Moreover, unilateral disclosure of information required by law (e.g. in a public report) should not be considered as such as a collusive practice, as the aim is not to collude but simply to implement a legal requirement imposed on the company. In such a situation, only the misuse of such information to engage in collusive practices or to support cartel activity is obviously unquestionably illegal.

We also invite the Commission to ensure that any upcoming EU initiative implying information exchanges or the unilateral divulgation of information be fully coherent with article 101 TFEU and with the HGL.

Finally, concerning information exchanges as part of merger/acquisition processes under para 410, we invite the Commission to provide additional guidance on the kind of information exchange that may be necessary and at which stage of the process, in light of the Altice and Facebook / Whatsapp cases.

Our suggestions for para 411:

- **Make clearer that disclosure/exchange of information prescribed by law do not amount to a breach of article 101(1) TFEU, as long as the disclosure/exchange does not go beyond what is required by law.**
- **Clarify that unilateral disclosure of information required by law are not considered per se as a colluding practice.**
- **Ensure that any future EU legislative action imposing information exchange is fully compliant with the HGL and article 101(1) TFEU.**

Our suggestions for para 410:

- **Provide additional guidance on necessary information exchanges (and at which stage) as part of a merger/acquisition, in light of the Altice and Facebook/Whatsapp cases.**

c) Assessment under Art. 101(1)

The interpretation of the case law referred to in para 413 is overly broad. The case referred to concerns a decision dealing with an exchange of information in the context of a comprehensive cartel. Para 413 should therefore clarify that not every exchange of any kind of potentially competitively sensitive information among competitors, irrespective of the context, restricts competition. Para 413 should therefore be aligned with para. 423 et seqq., which provide detailed guidance under what circumstances which information is competitively sensitive and which is not.

Moreover, a clear provision should be added that undertakings must explicitly and publicly distance themselves from any anti-competitive conduct that occurred in their presence, in order not to be considered a party to such conduct.

Our suggestions:

- **Amend para 413 to align it better with para 423 et seqq. The case law cited in para 413 lead to a broad interpretation that does not correspond strictly to the guidance in para 423.**
- **Clarify that undertakings witnessing an anti-competitive conduct must distance themselves from this conduct in order not to be party to such a conduct.**

d) The case of algorithms

We appreciate the willingness to provide guidance on the use of algorithms. However, the guidance provided is very generic and does not give practical help in assessing their use. Some national competition authorities have more detailed guidance on the matter, for instance.

We therefore invite the Commission to provide more detailed guidance on algorithmic collusion and how to prevent it from happening. For example, how to make sure that using algorithms (without intention to collude or without any agreement with competitors) does not pose the risk of algorithmic collusion. The guidance should also make clear that algorithmic collusion is limited to situations where algorithms are used as elements supporting collusion among competitors.

Moreover, in para 432, the example on algorithms should make clearer that such collusion through unilateral disclosure is limited to cases where competitors share an algorithm tool.

Our suggestions:

- **Provide additional practical guidance on algorithmic collusion and how to prevent it from happening.**
- **Para 432 should make clearer that, on algorithms, collusion only concerns cases where shared algorithms are used.**

e) Example of commercially sensitive information

We welcome the clarification provided in relation to the definition of information (covering inter alia raw data and pre-processed data) in para 407. Concerning raw data, the Guidelines note that '*raw data may be less commercially sensitive than aggregated data*': we invite the Commission to clarify that raw data can be less sensitive only if it does not contain any information allowing reducing one competitor's uncertainty about the current or future market behaviour of another competitor or several other competitors.

We also globally welcome the list of examples provided by the Commission of commercially sensitive information. Concerning exchanges of future product characteristics relevant for consumers, these are particularly sensitive between competing manufacturers in industries where innovation plays a critical role. However, this may not be the case in all sectors.

Also, this may create an issue in dual distribution scenarios not covered by the future revised Vertical Block Exemption Regulation, if a market threshold limits the dual distribution exemption. Were the HGL to apply to some dual distribution scenarios excluded from the exemption under the VBER, this

may pose a problem if a supplier and a buyer need to discuss product characteristics relevant for consumers. Aggregated customer preferences and information relating to information on new goods are listed as information necessary to improve the production or distribution of the contract goods in the draft Vertical Guidelines, but it is unclear how future product characteristics would be assessed in a dual distribution relationship if the HGL were to play a role in the assessment.

Our suggestion:

- ➔ **Clarify para 407 concerning raw data, which can be less sensitive if it does not contain information reducing uncertainty over current/future market behaviour.**
- ➔ **Nuance the assessment on the sensitiveness of exchanges of future product characteristics for sectors where innovation is less critical, and in dual distribution scenario possibly not covered by the VBER exemption.**

f) Age of data

The current version of the HGL includes some very helpful and important guidance that should not be eliminated in the new version. The current HGL state that the threshold when data becomes historic also depends on the data's nature, aggregation, frequency of the exchange, and the characteristics of the relevant market (for example, its stability and transparency). That guidance should be included in the new HGL as well. It allows to assess the data as historic not merely depending on the data's age but also interdepending on other characteristics, therefore allowing to a more complete assessment of the data's sensitivity and role in reducing uncertainty on the market. Removing these provisions from the existing HGL will actually raise legal uncertainty.

Our suggestion:

- ➔ **Restore the more detailed guidance used in the existing HGL which link the assessment of the age of the data with other relevant characteristics.**

g) Measures to limit/control how data is used and accessed

The use of technical solutions that are designed in a way that they processes data in compliance with antitrust laws and allow participants to access only information the exchange of which does not cause any antitrust law risks should be further stressed in the draft revised HGL. Technical restrictions of access rights can prevent human error and insulate an information exchange from suspicions and allegations of an (accidental/negligent) excessive exchange of information / spill-over effects. Recommendation on the use of such systems are therefore positive and should be even more developed.

Moreover, we would like to require specific guidance on information exchanges in "cooperatives" of retailers (and groups operating as cooperatives), whereby the central office of the cooperative is administered by member entrepreneurs. The principle that the central office is administered by the members is a key principle in any cooperative often recognised by (national) law. In such a setting, some precautions may be needed to ensure that the 'member/administrator' can effectively fulfil his/her task, while minimising risks of being exposed unintentionally to some data of other individual members who, very occasionally, may be a local competitor. The provisions on clean teams is very difficult to fully implement in a cooperative company where the administrators are member entrepreneurs, or where member entrepreneurs receive a mandate to seat in a working group to fulfil

a task for the cooperative as a whole and therefore need access to data across the cooperative to fulfil their task.

We would therefore invite the Commission to provide guidance on this specific situation of cooperatives (and groups operating as cooperatives), possibly through the use of anonymization of data whenever possible, and in the case where access to members' information is necessary to complete the tasks of the administrator in the cooperative company (e.g. for joint purchasing purposes, for support to marketing activities, and other standard services provided by cooperatives to their members) to avoid any unintentional and occasional exposure to sensitive data from a local competitor who is also a member company of the cooperative. Such guidance should complete para 440 on clean teams. A list of 'standard' services provided by cooperatives to their members is attached to this position in annex.

Our suggestion:

- **We support the provisions on clean teams and technical measures to control access to data as mean to secure/eliminate any risk of collusion.**
- **In light of the specific situation of cooperatives (and groups of independent retailers functioning as cooperatives – see above), we invite the Commission to provide a specific guidance for cooperatives, with specific measures (e.g. anonymization whenever possible) when access to data of the member retailers is necessary for administrators (or cooperative members sitting in working groups and mandated to act in the general interest of the cooperative) to fulfil their task for the cooperative. See annexed non-exhaustive list of 'standard' services provided by cooperatives to their members, which is relevant for this purpose.**

5. Sustainability agreements (Chapter IX)

We globally welcome the guidance provided in Chapter IX. 4.4. in particular, we welcome the examples identified by the Commission on agreements falling outside the scope of Article 101(1) as well as the newly introduced 'soft safe harbour' for standardisation agreements. It is indeed becoming more common for competitors to develop and jointly use standards, logos, guidelines and private certifications attesting companies' engagement with sustainable practice, the use of specific products and other sustainability elements.

We have one comment concerning para 545 and the following paragraphs. In cases where there are residual market failures not addressed by regulation, the guidance should provide increased recognition of the role of market participants to address them. If participants in such a case limit their action to what is objectively necessary to eliminate the negative externalities, pro-competitive effects are extremely likely to materialise and there is a question as to whether this is at all an issue for article 101(1) and not only for article 101(3).

Moreover, para 588 explains that consumers receive a fair share of the benefits arising out of an agreement restrictive of competition when the benefits outweigh the harm, so that the effects on the market are at least neutral. We invite the Commission to follow the approach used by the Dutch Competition Authority that full compensation of consumers within the relevant market is not strictly required as long as consumers benefit from an appreciable objective advantage.

We also invite the Commission to provide guidance on agreements related to products for business-to-business use.

6. R&D BER

Retailers that do not run own R&D-sites and production facilities for their private label business are unlikely to be considered actual or potential competitors also under the new R&D-BER. In consequence, market shares of these retailers continue to be irrelevant for the application of the R&D-BER to joint R&D with a supplier.

For retailers that have their own R&D and production facilities, participation in joint R&D becomes more complicated if the BER is no more available where less than three alternative R&D efforts remain. This might become relevant e.g. where R&D co-operations aim at replacing animal-based products with innovative plant-based/vegan alternatives based on specific technology. We invite the Commission to consider these aspects and provide guidance to address the issue.

7. Specialisation BER

We support the expansion of joint production agreements to agreements with more than two parties, as this will provide clarities and pro-competitive effects also in the retail sector (e.g. in the case of private label production).

As regards the definition of potential competitor, the draft Specialization-BER leads to some uncertainties as to what is meant by „realistic grounds“ without reference to a “small but significant price increase“. We invite the Commission to also include in the specialization BER a definition of “jointly” in the context of production and integrate para. 204 of the current HGL.

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*Established in 1963, **Independent Retail Europe** (formerly UGAL – the Union of groups of independent retailers of Europe) is the European association that acts as an umbrella organisation for groups of independent retailers in the food and non-food sectors.*

Independent Retail Europe represents retail groups characterised by the provision of a support network to independent SME retail entrepreneurs; joint purchasing of goods and services to attain efficiencies and economies of scale, as well as respect for the independent character of the individual retailer.
Our members are groups of independent retailers, associations representing them as well as wider service organizations built to support independent retailers.

Independent Retail Europe represents 23 groups and their over 403.900 independent retailers, who manage more than 759.000 sales outlets, with a combined retail turnover of more than 1,314 billion euros and generating a combined wholesale turnover of 484 billion euros. This represents a total employment of more than 6.620.000 persons.

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