Linklaters

Position Paper

HBERs and Horizontal Guidelines Consultation Response

We appreciate the opportunity to participate in the public consultation launched by the European Commission on the Evaluation of the Research & Development Block Exemption Regulation ("R&D BER"), the Specialisation Block Exemption Regulation ("Specialisation BER", together with the R&D BER, the "HBERs")[1] and the draft Guidelines on horizontal cooperation agreements ("DHGL").[2]

In the position paper, we comment on the proposed new guidance concerning (1) the distinction between restrictions of competition by object and by effect, (2) the applicability of Article 101(1) TFEU to practices involving joint ventures and their parent companies, (3) sustainability agreements, (4) bidding consortia, (5) information exchange, particularly in a data pooling context and (6) research and development agreements.

1. DISTINCTION BETWEEN RESTRICTIONS BY OBJECT AND BY EFFECT

(1) In paragraph 29 of the DHGL, it is said that *"it is sufficient that [an agreement] has the potential to have a negative impact on competition"* in order for it to amount to an object restriction. We are aware of this quote from the CJEU's rulings in the *T-Mobile* and *Allianz Hungary* cases.[3]

(2) However, it is equally well known that this statement became the target of strong criticism. Professor Whish referred to the seemingly unstoppable expansion of the "object box".[4] The conceptual ambiguity of the court's reasoning caused certain NCAs to invoke these rulings in support of labelling almost any kind of agreement or practice as a restriction of competition by object. However, the CJEU later revisited this issue and has emphasised the need for making a restrictive interpretation of the concept of by object restrictions, starting in the *Groupement des cartes bancaires* case and repeated several times since.[5]

(3) We consider that Section 1.2.4 of the guidelines ought to be revised and redrafted to better reflect the recent case-law of the CJEU. The guidance provided should, in our view, stress that agreements and practices condemned as by object restrictions must be intrinsically harmful to competition and that where the effects on competition are ambivalent and a more detailed analysis of market conditions etc. is necessary in order to understand the effects, the conduct must be assessed based on an effects test.[6]

2. APPLICABILITY OF ARTICLE 101(1) TO AGREEMENTS BETWEEN JOINT VENTURES AND THEIR PARENT COMPANIES

(4) We welcome the inclusion of a new section in the DHGL that provides guidance on the applicability of Article 101(1) to agreements and concerted practices involving joint ventures and their parents.

(5) Article 101(1) does not apply to agreements between undertakings which constitute an economic unit.[7] The concept of undertaking should, according to case-law, be interpreted in a uniform manner throughout

---

1 Commission Regulations (EU) No 1217/2010 and 1218/2010.

2 The views expressed herein are those of the Linklaters lawyers who prepared this response and cannot be assumed to represent the views of any clients of Linklaters.

3 CJEU judgments in Case C-8/08, *T-Mobile*, para. 31, and in Case C-32/11, *Allianz Hungária*, para. 38.

4 Whish and Bailey, *Competition Law*, Oxford University Press, 9th ed. 2019, p. 124.

5 CJEU judgments in Case C-67/13 P, *Groupement des Cartes Bancaires (CB) v Commission*, para. 58; Case C-307/18, *Generics UK,* para. 67; and in Case C-228/18, *Budapest Bank*, para. 54.

6 Peeperkorn, "Defining by Object Restrictions", *Concurrences*, no. 3-2015, pp. 40-50.

7 CJEU judgment in Case C-531/16, *Specializuotas transportas*, paras. 28-29.

EU competition law.[8] And if this concept should be applied in a coherent manner across different fields of competition law, why should it be applied differently depending on whether Article 101(1) is used in order to (a) impute liability to a parent company for the unlawful conduct of the joint venture or (b) to determine whether the prohibition is applicable to an agreement between the same parent and the joint venture?

(6) We note however that the proposed guidance is less conclusive than the guidance that was included in the draft horizontal guidelines in 2010 ("*Article 101 does not apply to agreements between the parents and such a joint venture […]*") but this ultimately did not find its way into the current guidelines.

(7) Indeed, the new proposed wording does not state that Article 101(1) "*does not apply to*" agreements between a joint venture and its parents, but merely notes only that "*the Commission will typically not apply*" Article 101(1) to such agreements.

(8) This wording, and more specifically the word "*typically*", suggests that the Commission does not exclude the possibility that Article 101(1) may apply. Indeed, the Commission only signals that it *would not* challenge relevant agreements or concreted practices (including information exchanges) if they concern activities in the markets where the joint venture is active.

(9) While it is a step in the right direction and useful for companies to know that the Commission does not intend to challenge such practices if they relate to the markets where the joint venture is active, the increment in legal certainty brought about by this clarification is limited. This is because in practice the primary concern in relation to restrictive clauses in agreements between joint ventures and their parents is often whether such provisions are valid and enforceable, and here the 2010 statement was more helpful. Moreover, the self-limitation the Commission is willing to assume in the updated guidance does not affect how Article 101(1) is applied at Member State level.

(10) The absence of a clear statement in the DHGL on the applicability of Article 101(1) is therefore regrettable. We assume that the main reason for the Commission's hesitation is the CJEU ruling in the *Dow Chemical* case.[9] It is submitted, however, that this ruling, which concerned the imputability of unlawful conduct to parents, does not prevent the Commission from taking a firmer view.

(11) The CJEU's recent judgment in the *Sumal* case also supports an updated and "asymmetric" approach to the single economic unit concept. The CJEU emphasises in its ruling (at paragraph 47) that *"the same parent company may be part of several economic units"*.[10] This applies, according to the CJEU, to conglomerates. Similarly, nothing should prevent a joint venture from forming part of several economic units, i.e. in relation to each of the parent companies that exercise decisive influence over the joint venture. The fact that the parent companies are independent undertakings belonging to different economic units and Article 101(1) applies to how they agree, vis-à-vis each other, to conduct themselves in the market is a different matter.

(12) If the Commission nonetheless prefers not to revert to the clear and helpful guidance in the 2010 draft guidelines, we would still invite the Commission to expand its guidance to the following aspects:

a) As regards the application of Article 101(1) to agreements setting up the joint venture itself, it requires that such agreements do not give rise to a concentration in the meaning of the EU Merger Regulation. We note the guidance provided in paragraph 51 but consider that it would be helpful to include at least a cross-reference to that guidance in paragraph 14.

[8] General Court judgment in Case T-443/08 and Case T-455/08, *Freistaat Sachsen*, para. 117.

[9] CJEU judgment in Case C-179/12 P, *The Dow Chemical Company v. Commission*, para. 58.

[10] CJEU judgment in Case C-882/19, *Sumal v Mercedes-Benz*.

b) Likewise, it would be helpful if the Commission could confirm that agreements between parent companies that alter the scope of a joint venture can only be caught by Article 101(1) if such alteration does not constitute a concentration.

c) We also would invite the Commission to clarify that when determining whether an agreement concerns the market where the joint venture is active, not only shall areas be considered where the joint venture has third-party sales but also the markets where the joint venture is expected to become active in the foreseeable future. In particular in a situation where a joint venture is set up without contribution of an existing business, it may take some time before the joint venture starts generating sales. Likewise, the joint-venture's business plan may foresee a gradual expansion of its activities to additional products or geographies. We would expect that agreements relating to such other products/geographies would still fall into the Commission's no-challenge zone.

d) It also would be helpful if the guidelines would elaborate on the consequences of a breach of Article 101(1) at the moment when a joint venture is created as regards the legality and validity of subsequent agreements between the joint venture and its parents. We consider that there is no basis to apply the fruits of the poisonous tree doctrine which would imply that a potential breach of Article 101(1) when setting up a joint venture would automatically affect the legality of subsequent agreements entered into by the parent companies and the joint venture. We consider that instead, the legality of any such subsequent agreement needs to be assessed separately.

3. SUSTAINABILITY AGREEMENTS

(13) Linklaters greatly welcomes the (re-)introduction of the Chapter on sustainability agreements in the DHGL and the Commission's guidance provided therein for the assessment of agreements that pursue one or more sustainability objectives. This marks a significant step forward for companies needing or wishing to collaborate to achieve sustainability goals. We believe this will ultimately benefit society and consumers.

(14) Indeed, achieving ambitious sustainability objectives will require close co-ordinated action, often between competing firms, to overcome a potential "first-mover disadvantage" and deliver initiatives of sufficient scale to have a meaningful impact. As advisors, we have seen instances where companies have forgone genuinely beneficial projects because of perceived competition law risks which they considered could not be appropriately mitigated despite our advice, and where those companies could not effectively pursue those projects alone. In other words, competition law has been forming a barrier (even if only perceived) for companies to move forward with their sustainability initiatives,

(15) The new Chapter is one step closer to removing that barrier. Whilst we recognise and support the progress the Commission has made in this area; we also consider that there are a number of elements that would benefit from further clarification or amendment.[11]

3.1 In general, the sustainability chapter is helpful and welcomed

(16) The broad definition of sustainability used in the DHGL is welcomed, and we are content to see that the definition surpasses environmental factors, including respecting human rights, fostering resilient infrastructure and innovation, reducing food waste, facilitating a shift to healthy and nutritious food, and ensuring animal welfare. We also agree that many collaborations pursuing these aims will not affect competition and, therefore, will fall outside the scope of Article 101 completely.[12]

[11] This supplements Linklaters' contributions to the (i) EC Consultation and Competition Policy and the Green Deal; and (ii) the first EC Consultation on the current Horizontal Guidelines.

[12] DHGL, para. 551.

(17) We welcome the fact the Commission has set out examples of agreements that fall outside the scope of Article 101. However, some of the categories of sustainability agreements that do not raise competition concerns, for example agreements on internal corporate conduct that do not concern the economic activity of competitors,[13] appear to involve unilateral corporate conduct. The DHGL could benefit from clearly providing the categories of sustainability agreements that fall outside Article 101, for example by reference to the five categories set out in the Dutch Authority for Consumers & Markets' (the "**ACM**") Guidelines on Sustainability Agreements.[14]

(18) The fact that the aim of an agreement which genuinely pursues a sustainability objective may be taken into account when assessing whether any particular restriction is a restriction by object or a restriction by effect, is helpful.[15] However, the DHGL should be rebalanced in favour of more strongly protecting competition for sustainable, rather than unsustainable, goods:

a) The Commission does not appear to consider that the *Albany*, *Wouters* and *Meca-Medina* case law can extend to sustainability agreements.[16] These cases recognise that agreements fall outside Article 101(1) if the anticompetitive restrictions are inherent or necessary for a legitimate objective to be pursued. We believe there are very strong parallels between sustainability and the objectives protected in these cases (such as, in *Meca-Medina*, the rules to safeguard "*equal chances, […] the integrity and objectivity of competitive sport and ethical values in sport*"). The concept of "ethical values in sport" could be said to be analogous to the values inherent in the sustainability objective. We would therefore encourage the Commission to indicate that it will consider if legitimate sustainable considerations exclude the application of Article 101 on a case-by-case basis. This might be the case, for example, where stakeholders other than competitors are part of the agreement, such as consumer associations, environmental organisations, or governmental agencies.

b) Just as competition policy should not seek to protect inefficient competitors, it should also not protect unsustainable production and consumption – with "unsustainable" including the concept of "inefficient when externalities are taken into account". We would therefore recommend removing "*foreclosure of alternative standards*" as an anti-competitive effect, where those standards are unsustainable and competition for sustainable products remains.[17]

(19) The DHGL would also benefit from more general recognition of the positive competitive impacts of sustainable collaborations beyond sustainability standards similar to the effects recognised in paragraph 568. A specific reference could be made in this regard to the need to overcome first-mover disadvantages.

3.2 Sustainability standardisation agreements and the soft harbour

(20) We believe the recognition, that sustainability standardisation agreements often have positive effects on competition, to be helpful.[18] Indeed, such standards are essential for businesses to reach sustainability goals and the guidance provides a useful roadmap. There are also some key amendments to the DHGL that would assist businesses in agreeing such standards in practice.

---

13 DHGL, para. 552.

14 See https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf, Section 4.

15 DHGL, para. 559.

16 DHGL, para. 548 and footnote 315.

17 DHGL, para. 569.

18 DHGL, para. 568.

(21) While the cumulative conditions for the soft safe harbour to apply are helpful,[19] we note that mandatory standards agreed by participants appear critical for successful sustainable collaborations, notably where investments in adherence to the standard are substantial. This is typically the case for the most impactful sustainability industry co-operations. We welcome the clarification that the sustainability standard should not impose on undertakings that do not wish to adopt the standard, an obligation to comply with the standard. But this does not exclude that the participants in the standard *can be* obliged to comply with it. This may be essential for the standard to work and should be articulated explicitly.

(22) We do see a potential tension between the statement that an agreement between parties to "*put pressure on third parties to refrain from marketing products that do not comply with the sustainability standard restricts competition by object*",[20] and the positive statement in relation to industry-wide awareness campaigns discussed earlier,[21] which are deemed to fall outside Article 101. In addition, we do not think that such conduct is anti-competitive by nature. For example, if "third parties" is a reference to competitors, having market-wide standards is not necessarily harmful where parties can compete in respect of other parameters of competition. Further, free-riding can occur where sustainable and non-sustainable standards co-exist.[22] Similarly, if "third parties" refers to distributors or suppliers, it can be imperative for companies to ask those parties to comply with the standard in order for the sustainable benefits of the agreement to manifest. In addition, paragraphs 571 and 572 should be clarified to explain that agreements not to purchase goods not complying with the sustainability standard are not necessarily in breach of competition law.

(23) The general view expressed in the DHGL is that the potential anti-competitive effects of a sustainability standard will increase with the proportion of the suppliers that agree to apply such standard.[23] We understand this point but, even where standards have a high market coverage (and thus potentially a particularly positive sustainability impact), they can remain competitively neutral if the standard leaves room to compete on at least another key parameter of competition (including manner of implementation of the standard). Competition may remain vigorous even if everybody follows the (sustainability) standard – there are ample examples of this point. Equally important is the fact that, the greater the market coverage, the greater the sustainability benefits and (other things being equal) the greater the likelihood that the agreement meets the criteria for an exemption.

3.3 Sustainable purchasing agreements

(24) While joint purchasing agreements are individually assessed under Section 4 of the DHGL, the sustainability aspects are assessed under Section 9. This notes that joint arrangements between purchasers to only purchase sustainable products must be assessed in light of the principles set forth in Section 4 of the DHGL.

(25) Sustainable purchasing agreements typically involve purchasers in a downstream market agreeing among themselves not to deal with certain suppliers in the upstream market where those products are not sustainable (or to only purchase certain categories of sustainable products). By entering into these types of agreement, purchasers are not attempting to protect themselves from competition at their own level of the market, i.e., the object of the agreement is not a restriction or distortion of competition. Instead, a sustainable purchasing agreement pursues a legitimate and desirable aim, implemented in the form of a vertical purchasing restriction relating to firms in an upstream market, where the detriment to

[19] DHGL, para. 572.

[20] DHGL, para. 571.

[21] DHGL, para. 554.

[22] DHGL, para. 605.

[23] DHGL, para. 575.

competition is less obvious. In these circumstances, an effects analysis would appear to be more appropriate.

3.4 Assessment under 101(3) and benefits

(26) As recognised by many, the assessment of the benefits under Article 101(3) is the most important, but also the most controversial element of the assessment. In this respect, we welcome the Commission's discussion on the benefits of sustainability agreements. It rightly recognises the significant benefits they can bring to consumers and society more broadly.

(27) Regarding the first condition of Article 101(3), the DHGL use the term "*benefits*" as well as "*efficiencies*". We consider "benefits" to be more accurate in a sustainability contest. It not only corresponds to the wording of the TFEU, whilst also encompassing "efficiencies", but it also allows a wider range of improvements to be more readily recognised as relevant. This includes cleaner technology, less pollution, improved conditions of production and distribution, more resilient infrastructure or supply chains, better quality products, etc.[24]

(28) The Commission's recognition, consistent with the 2004 exemption guidelines,[25] that it is not always necessary to carry out a detailed assessment (and even less to attempt to quantify everything) where "*the competitive harm is clearly insignificant compared to the potential benefits*", is very much welcomed.[26] This will often be the case particularly in relation to co-operation to fight climate change.[27]

(29) We also agree that collaborations may be indispensable[28] to ensure that consumer-supported sustainable goals can be achieved in a more cost-efficient way. In addition, an agreement may also be indispensable where there is demand for sustainable products (i.e., not just where the sustainability goal can be reached in a more "cost efficient" way, but, most obviously, where current demand leads to insufficient market coverage or minimum economies of scale and there is a need to transform a whole sector of the economy).

(30) We share the Commission's view that an agreement may not be necessary to the extent there is already a specific EU or national law in place requiring companies to comply with concrete sustainability goals.[29] However, co-operation may be justified in order to achieve that goal either more quickly or to go beyond that goal.[30] Therefore, the DHGL 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.[31] Meaningful sustainability improvements often require scale not only to overcome first mover disadvantages related to cost increases, as the Commission recognises, but also in order for environmental or social benefits to materialise as broadly as possible. We would also encourage the Commission to avoid a narrow focus on "cost efficiencies".

---

24 DHGL, paras. 577 and 578.

25 Commission Guidelines on the application of Article 81(3) of the Treaty.

26 DHGL, para. 589.

27 See, for example, paras. 53 to 56 of the ACM Guidelines on Sustainability Agreements.

28 DHGL, para. 582.

29 DHGL, para. 583.

30 This would be consistent with EU State aid law.

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

(31) The DHGL take important steps to reject a narrow view of pass-on benefits, by recognising collective benefits[32] and benefits to indirect users.[33] However, we consider that the approach remains too limited, and that the concept of "consumers" is too narrowly defined.

(32) In relation to individual benefits, we agree that consumers value more than just their own individual benefit, and the recognition of individual non-use value benefits is therefore, in principle, helpful. However, tying these benefits to the willingness to pay principle materially undermines their use.

(33) While consumers are increasingly conscious of sustainability issues, an inherent challenge that is recognised by the Commission is that negative externalities, "*are not sufficiently taken into account by the economic operators or consumers that cause them*".[34] As acknowledged by the Commission itself, willingness to pay is therefore an unsuitable measure to assess individual non-use benefits, and it fails to consider fully the long-term benefits. This is further supported by the fact that the Commission also acknowledges that there is often a difference between what consumers say their preferences are and what their purchasing behaviour indicates,[35] and that consumer statements change if they are adequately informed of the consequences their consumption choices have on society, the environment, ecosystems, or the climate. Accordingly, the Commission should rely on an enhanced willingness to pay test, which also considers changing preferences as well as future consumers, next to considering also qualitative elements.

(34) The DHGL do not cover other quantifying methods, such as the use of environmental prices or shadow-pricing. These methods allow the determination of societal costs of emissions based on insights of environmental economics and may lead to a more correct outcome than the willingness-to-pay test. The Chapter would clearly benefit from guidance on when and how to use these techniques, as it is likely that undertakings may rely on them.

(35) The most important issue to be addressed in the DHGL is the Commission's treatment of collective benefits. While we commend the fact that the Commission has included collective benefits as a concept worthy of exemption under Article 101(3), the Commission's apparent requirement that full compensation of the direct users in the relevant market is required is very limiting and contrary to the progressive position taken by other authorities,[36] including the ACM, and the Commission's own position in connection with agricultural agreements.

(36) This is 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 is only fair that where demand for products and services is driving up, e.g., greenhouse gas emissions, it should bear (at least) some of the costs. 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 DHGL would result, in many cases, in geographic and social boundaries being drawn around issues for which collective responsibility should be taken.

(37) As set out in the ACM's Legal Memo, following discussions of the text of Article 101(3) and the case law of the CJEU, the sustainability context "*is generally that of initially negative but potentially (once remedied) positive externalities affecting society as a whole. Where sustainability issues result from negative externalities, consumers in the relevant market are also polluters who have a choice to modify their behaviour or not. The out of market consumers share in the negative effects of the pollution without having*

[32] DHGL, Section 9.4.3.3.

[33] DHGL, para. 588.

[34] DHGL, para. 545.

[35] DHGL, paras. 597 and 598.

[36] DHGL, para. 603.

this choice or the option of forcing in market consumers to modify their polluting behaviour."[37] We agree with the ACM's conclusion that out of market benefits are relevant and full compensation of directly affected consumers is not required in all cases. Full compensation is also not supported by the text of Article 101(3) (which requires only a "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. We strongly encourage the Commission to consider this and reflect it in the final DHGL.[38]

3.5 The examples of sustainability agreements

(38) The practical examples elaborated in the DHGL are a useful start to frame the analysis of certain types of sustainability agreements,[39] but we think that they could benefit from some clarifications, as discussed in more detail below. In addition, as a more general point, we note that the examples are very focussed on manufacturing and would benefit from also considering other areas of the economy, such as sustainable finance.

(39) **Example 2**: While this example is useful, we would argue that the Commission should come to the same conclusion even if the market share were higher, especially given the parties are free to compete outside the standard if they wish. As discussed above, a mandatory standard can be very impactful from a sustainability perspective, and the parties are still free to compete on other parameters of competition. To ensure a meaningful agreement, sufficient scale is required, and agreements can possibly even be market-wide. Furthermore, when only a limited number of undertakings are engaged, they will have to carry the burden, while other market players may benefit from their unsustainable products being sold at lower costs.

(40) **Example 4**: The analysis under this example appears to be wrong, as is the conclusion that it does not meet the criteria under Article 101(3). The analysis fails to recognise that competition between producers has only led to approximately 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 sustainability goals. 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). As noted above, an enhanced willingness to pay test appears more suitable.

(41) **Example 5**: We consider that this example takes a step back from the CECED case for a number of reasons: (i) not all machines are being phased out; (ii) the net benefit on price/costs on its own is positive (even before the collective benefits are taken into account); and (iii) only the collective environmental benefits to these consumers are taken into account, which is narrower than the CECED case.[40]

(42) Furthermore, we note that there was specific evidence that less restrictive efforts to move to a more sustainable basis had failed - this might have been implied from the fact that inefficient washing machines were still widely prevalent in the market (if there had been competition on sustainability criteria). This is relevant to the indispensability of the co-operation, including the combat against greenwashing.

3.6 Non-prosecution and comfort letters

---

[37] ACM Legal Memo, "What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context?", 27 September 2021, available at https://www.acm.nl/sites/default/files/documents/acm-fair-share-for-consumers-in-a-sustainability-context.pdf.

[38] At the very least, we would encourage the Commission to conform paragraph 602 (which refers only to "*the group of consumers affected by the restriction and benefitting from the efficiency gains [being] substantially the same*") and paragraph 604 (which refers to "*substantial overlap*") with the better expressions in paragraphs 603 and 606(c), which helpfully refer to the in-market consumers substantially overlapping or being "*part of*" the larger group of beneficiaries. Paragraph 601 should also be consistent and refer to both concepts (substantial overlap and part of).

[39] DHGL, Section 9.6.

[40] Commission Decision in Case IV.F.1/36.718, *CECED*. 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*" (emphasis added).

(43) As done in the context of the COVID-19 crisis, it would be very helpful and welcome if the Commission could provide ad-hoc guidance with respect to sustainability agreements, as well as potentially general reassurance to businesses that it will not prosecute in cases where businesses genuinely follow the DHGL in good faith to pursue sustainability goals.

(44) In this respect, we welcome Commissioner Vestager's statements that the Commission would be willing to provide guidance to businesses on specific initiatives.[41] To create a climate in which companies are confident about bringing forward their sustainability initiatives, we encourage the Commission to provide an effective separation between advisory units and enforcement units.

(45) We also note that, in its equivalent guidelines, the ACM states that with regard to sustainability agreements that have been published, 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 the 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.[42]

4. BIDDING CONSORTIA

(46) We welcome the inclusion of a new sub-section in the DHGL dedicated to bidding consortia. The proposed new guidance is valuable and is expected to significantly increase legal certainty for companies participating in such consortia.

(47) Our experience shows that when assessing consortia under Article 101(1) there are regularly a number of additional considerations coming into play which are not yet addressed in the DGHL. Companies participating in consortia would greatly benefit from specific guidance on these aspects. We therefore would invite the Commission to expand the DHGL to these topics which we set out below.

4.1 Centre of gravity of bidding consortia

(48) Many bidding consortia involve the joint production or provision of the contract goods or services. For example, this may be the case in many joint bids for large construction and civil engineering projects, where the core of the cooperation is joint planning, design and construction. According to the DHGL such integrated cooperation must, as a general rule, be assessed based on all the chapters pertaining to the different parts of the cooperation.

(49) The question whether a certain conduct qualifies as an object or effect restriction, in contrast, normally needs to be assessed only based on the guidance included in the chapter of the DHGL pertaining to the part of the cooperation which can be considered the "centre of gravity".

(50) If the centre of gravity of the agreement lies in the production activity, only Chapter 3 on production agreements will normally be relevant to determine whether a certain conduct shall be considered a restriction of competition by object or by effect. By contrast, if the agreement mainly or exclusively involves joint commercialisation, this assessment will normally be conducted based on the principles set out in Chapter 5.

(51) This clarification is helpful. However, we would welcome additional guidance as regards the interplay between the rules foreseen in Chapter 3 and Chapter 5 with regard to the assessment of bidding consortia. This could be done by way of an additional example which sets out more clearly the criteria that will determine whether the centre of gravity of a joint bid is rather the production or the commercialisation.

---

[41] Commission's Executive Vice-President Margrethe Vestager, *The Green Deal and Competition Policy*, 22 September 2020.

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

(52) The inclusion of the section on bidding consortia in Chapter 5 suggests that in the Commission's view the centre of gravity of bidding consortia is typically the commercialisation. In our view this is however not necessarily the case.

4.2 Joint bids of suppliers with partially overlapping activities

(53) As regards the question whether companies shall be treated as competitors for the purpose of assessing consortia under Article 101(1), paragraph 391 DHGL only discusses instances where the companies joining forces have complementary activities or where they are active in the same market but not in position to carry out the contract individually, e.g. due to the size of the contract.

(54) The DHGL do not address the scenario of bidding consortia formed by undertakings with partially overlapping capabilities. One could for instance imagine a scenario where the fulfilment of the contract requires capabilities in relation to the product / service markets A, B and C and where undertaking X (active in markets A and B) forms a consortium with undertaking Y (active in markets B and C) in order to meet the tender requirements.

(55) The guidance provided under paragraph 391 HDGL suggests that such cooperation would not constitute a restriction of competition, given that neither of the two undertakings is able to compete for the contract individually. It would be helpful if the DHGL would explicitly confirm that point or alternatively set out the parameters against which, in the Commission's view, consortia should be assessed in such circumstances.

(56) Does it e.g. make a difference – using the example above – whether there are other undertakings that are only active in market A or market B that X and Y could team up with instead? Does it depend on the proportion of the contract value relating to products or services in respect of which an overlap between the activities of the consortium members arises (product/service market B in the example above)?

(57) Likewise, the DHGL do not address a situation where a company that could bid individually teams up with a partner with overlapping capabilities that could not bid individually. Such cooperation can be in the interest of the customer if it allows e.g. to deliver the project at a lower price. Given that such cooperation would not result in a reduction of the overall number of bids we submit, it does not amount to a restriction of competition and would be grateful if the Commission could confirm this point in the DHGL.

4.3 Factors determining whether an undertaking qualifies as competitor

(58) Generally, it would be helpful if the DGHL would recognize more explicitly that the question of whether a consortium partner is a competitor needs to be assessed case by case for each individual tender or contract.

(59) We submit that an undertaking should only be treated as a competitor with regard to a specific tender if there is a realistic chance that such undertaking will actually participate in the tender and submit a bid. This is a question of ability but also a question of incentives. In our view, the discussion in paragraph 392 of the parameters determining whether an undertaking qualifies as competitor, is too narrow since it only focuses on the undertaking's ability to perform a contract individually.

(60) The participation in a tender can, depending on the type and the size of the project, require a very significant amount of resources. If so, undertakings will normally only participate in a tender, if they see a sufficiently high prospect of winning the tender. If they see only purely theoretic success chance (e.g. because of an insufficient track record or because the customer has a strong preference for suppliers established in a certain geography) undertakings will normally not have an incentive to participate in a tender.

(61) If this is the case, an undertaking should therefore, in our view, not be treated as a competitor, even if it has the capabilities to carry out the contract individually. Such approach would in our view also be

consistent with the parameters set out in paragraph 17 of the DHGL to be taken into consideration to determine when an undertaking shall be treated as a potential competitor. It would be very helpful if the DGHL would confirm this point.

(62) In addition, we would invite the Commission to add to the parameters mentioned in paragraph 392 against which the ability of an undertaking to fulfil a contract shall be measured, the ability to assume the risk associated with a given project. If the risk associated with a project is beyond the acceptable maximum risk level, as defined in the risk policy of an undertaking, such undertaking will be disqualified from individually participating in the tender, irrespective of its technical capabilities, and should therefore in our view not be treated as a competitor. In that case, teaming up with a partner may allow to bring down the risk to a level allowing participation in the tender.

4.4 Distinction between object and effects restrictions

(63) In particular, when the projects at stake are very large and complex, it can be very challenging for an undertaking to determine whether a potential consortium partner would be able to, and have the incentives to, participate in a tender individually. In such situation, it can be very difficult for an undertaking to assess the legality of a potential cooperation in practice.

(64) Against this background, it is all the more important to provide undertakings with the necessary guidance allowing them to determine, based on the facts available to them, whether or under what circumstances a contemplated cooperation could potentially constitute an object restriction and therefore involve an increased risk.

(65) At paragraph 394 of the DHGL, reference is made to the general explanations relating to the distinction between object and by effect restrictions for commercialisation agreements at paragraphs 360 to 375 of the DHGL. However, given that fixing an overall price is an integral and necessary part of the vast majority of joint bids, the reference in paragraph 394 risks being understood as suggesting that any bidding consortia (involving competing undertakings) with a centre of gravity falling into Chapter 5 would constitute an object restriction. Only bidding consortia with a centre of gravity falling into Chapter 3 (joint production) would escape this classification. It is submitted that making such a sharp distinction between bidding consortia having a centre of gravity falling into either Chapter 3 or Chapter 5 would not be appropriate and that the general guidance for commercialisation agreements to which reference is made in paragraph 394 DHGL is not suitable for bidding consortia.

(66) We therefore would invite the Commission to provide more specific guidance on how object restrictions shall be delineated from effect restrictions, when looking at bidding consortia involving partners that could also bid individually or when looking at a situation where a consortium partner can at least not exclude that its bidding partner could also bid individually.

(67) At paragraph 387 of the DHGL the Commission draws a general distinction between bidding consortia and collusive tendering which is helpful. The Commission however also acknowledges that the distinction between bid rigging and legitimate forms of joint bidding is not always straightforward and that it can in particular be challenging in cases involving sub-contracting.

(68) In this respect it would be helpful if the Commission could expand its guidance and elaborate on the parameters that in its view will determine whether a cooperation constitutes bid rigging (i.e. an object restriction) or whether it constitutes a legitimate form of joint bidding which would at most constitute an effect restriction.

(69) One general distinction criterium for the Commission appears to be that bid-rigging will typically not involve a joint participation in a tender but a coordination of individual bids and also involves an element of secrecy (paragraph 388 DHGL).

(70) In our view, similar principles should apply in this respect, irrespective of whether the cooperating undertakings are active on the purchasing or supply side. If one imagines a hypothetical scenario where two different consortia would supply each other product / services in exchange of the product / services received from the respective other consortium (instead of getting a monetary remuneration), it would not be plausible to apply different criteria depending on whether the consortia acts on the supply or purchasing side.

(71) We therefore submit that the general principles developed in Chapter 4 of the DHGL in relation to the distinction between object and effect restriction in relation to purchasing agreements, should equally apply in relation to joint bidding. For example, in paragraph 316 it is mentioned that a joint purchasing normally does amount to a restriction by object if it involves collective negotiation and conclusion of the agreement.[43] An analogous principle should, in our view, be applied to bidding consortia. This would be in line with the general idea, as reflected in the 2011 HGL and the Commission's Article 81(3) Guidelines, that the integration of resources and activities is a plausible source of efficiencies, and the CJEU's recent case-law, which indicates that agreements that are driven by genuine pro-competitive aims should not be deemed anti-competitive by object.[44] Indeed, bidding consortia are hugely important in many sectors and an overly harsh treatment under Article 101 risks having a chilling effect on companies' willingness to enter into such agreements and therefore cause significant harm to competition and consumer welfare.

(72) If the customer is aware that a bid is submitted by a consortium including several suppliers, the underlying bidding consortium should therefore as a matter of principle not constitute an object restriction (see paragraph 319 of the DHGL). It would be helpful if the Commission could confirm this view and, in particular, clarify whether the disclosure of the identity of the participating suppliers would be relevant for the qualification of a bidding cooperation as object or effect restriction.[45]

4.5 Ancillary exclusivity arrangements

(73) Engaging in bidding consortia is often associated with considerable costs and efforts. An undertaking participating in consortia will therefore often have a legitimate interest to ensure that their consortia partners are fully committed and that they will not free-ride on the contribution of other consortia partners by participating in other consortia for the same project.

(74) As the Commission itself recognizes at paragraph 388 of the DHGL the participation of one undertaking in more than one bid / consortium for a given contract also involved a risk of collusion.

(75) In practice, consortia agreements will therefore often foresee that members participate on an exclusive basis, so that they cannot participate in other competing bids submitted for the same contract.

(76) The DHGL currently do not address exclusivity clauses regarding joint bidding and it would therefore be very helpful if the Commission could confirm that such exclusivity arrangements are permitted or, alternatively, specify the parameters that would be relevant to assess their legality under Article 101(1).

(77) It is worth noting that in relation to purchasing agreements, the DHGL state at paragraph 325 that a clause imposed for parties to a joint purchasing arrangement preventing them from participating in other competing purchasing arrangements constitutes a permitted ancillary restraint to the extent that the participation in a competing buying group could jeopardise the purchasing arrangement. In our view the

[43] In this respect, we note a certain inconsistency between paragraphs 316-317 that state that buyer cartels aim at coordinating purchasers' individual competitive behaviours and paragraph 319(a) which foresees that a legitimate purchasing cooperation may bind the individual purchasers.

[44] Horizontal Guidelines, paras. 2 and 183; Commission Guidelines on the application of Article 81(3) of the Treaty, paras. 49, 60 and 65; and CJEU judgments in Case C-67/13 P, *Groupement des Cartes Bancaires (CB) v Commission*; and in Case C-228/18, *Budapest Bank*.

[45] On a related note, the Commission explains at paragraph 319(a) that when a joint purchasing agreement is clearly disclosed to the supplier this indicates that the conduct is not a buyer cartel, but at the same time in footnote 180, the Commission states that secrecy is not a requirement for finding a buyer cartel. We suggest to review the text for increased consistency.

same should hold true for exclusivity clauses in joint bidding arrangements and we would be grateful if the Commission could confirm this point.

5. INFORMATION EXCHANGE AND DATA POOLING

5.1 Introduction

(78) We welcome the incorporation of important lessons from new case law since the release of the current version of the HGL in 2011. The DHGL provide a helpful overview to guide undertakings through their self-assessment exercises. We also welcome the more explicit recognition of the various efficiencies related to data sharing and the link with the *European Strategy for Data*.

(79) Nonetheless, we see various areas where the DHGL could be further refined:

- **Object vs effect delineation**: when following the assessment of information exchange under Article 101(1) put forward in the DHGL, there is a risk that different competition concerns – and their related tests and standard of proof – are conflated. To help undertakings in their self-assessment, the DHGL should provide further guidance on the requirements for an infringement to be found for each type of competition concern, and a step-by-step guide (or checklist) for ruling out each potential concern.
- **Clearer guidance for data pooling initiatives**: the DHGL should make clear that undertakings must avoid two distinct types of harm when agreeing to pool data: the first is to avoid that data pooling leads to a collusive outcome (which can result in a *by object* infringement) and the second is to avoid that data pooling leads to foreclosure (which should generally be judged on an effects basis and, absent market power, is unlikely). In that context, we believe that the DHGL could provide more effective guidance to undertakings, such as a step-by-step guide, to self-assess when the pooling of data could be considered pro-competitive (or at least competitively neutral). To avoid a chilling effect on innovation which depends on analysis of shared data, this section should be expanded and further refined.
- Need for clarification between the **interplay between DHGL and other (expected) sector-specific data sharing rules and guidelines**.
- Future-proofing the self-assessment framework under the DHGL: the importance of *ad hoc* **comfort letters** and other **soft law instruments.**

(80) Our response focuses, in particular, on the issues arising from data pooling for the mutual benefit of (potentially) competing undertakings. The cross-industry importance of data analytics is a relatively recent phenomenon and undertakings cannot yet rely on extensive case law, meaning more tailored guidance from the Commission is necessary to ensure that undertakings are able to effectively develop potentially pro-competitive data pooling arrangements.

5.2 A clearer delineation between by object vs by effect competition concerns

(81) In the assessment of information exchange under Article 101(1), there is a risk that different competition concerns – and their related tests and standard of proof – are conflated.

(82) In that regard, the DHGL could provide more detailed guidance on the types of information exchange that may lead to particular competition concerns and the standard that will be applied when assessing those competition concerns.

(83) Section 6.2.2. of the DHGL already outlines the main competition concerns related to information exchange, and Sections 6.2.6 and 6.2.7 explain the concepts of restriction of competition by object and

restrictive effects on competition, respectively. However, it would be helpful for undertakings' self-assessment exercises if these sections could be consolidated or cross-refer to one another.

(84) The competition concerns in the DHGL can be grouped into three different categories, each of which has a different framework for assessment under Article 101(1):

(i) Information exchange which *in itself* may result in a collusive outcome

(85) As noted in paragraph 448 of the DHGL, a restriction of competition by object may be found where the information exchanged is commercially sensitive and the exchange is capable of removing uncertainty between participants as regards the timing, extent, and details of the modifications to be adopted by the undertakings concerned in their conduct on the market.

(86) Such information must be sufficiently strategic that it is capable of influencing the conduct on the market of an actual or potential competitor. The reason why such information exchanges can, in and of themselves, reasonably be considered restrictions *by object* is at the heart of the concept of a concerted practice. Indeed, otherwise, undertakings could circumvent Article 101(1) by communicating their planned future conduct to competitors without formally reaching an "agreement".

(87) The 2011 HGL reasonably noted that the *"exchange of information about intentions concerning future conduct is the most likely means to enable companies to reach such a common understanding"*. We do not see the reason for the removal of this statement in the DHGL, as it provides helpful (and still valid) guidance. While it may in certain circumstances be possible that information about the recent conduct of a competitor is capable of influencing the (future) conduct of a competing recipient, this is relatively exceptional, and is less likely to justify the finding of a restriction by object for an exchange of information in and of itself.

(88) In view of the above, we believe Section 6.2.2.1 could be adjusted by providing further guidance on the types of information exchange that are likely to lead to a collusive outcome *in itself* (i.e. information, in particular concerning future conduct, which is capable of influencing the future conduct on the market of an actual or potential competitor) and clarifying that such information exchanges may be considered restrictions *by object*.

(89) Furthermore, we consider that the list at paragraph 424 is, in part, misleading and risks causing confusion and lead to erroneous interpretations of Article 101(1). It should therefore be eliminated or at least amended. The list is said to refer to examples of information that have been considered particularly sensitive and the exchange of which was qualified as a by object restriction. However, the list relies very heavily on a single case (the General Court in *Infineon Technologies*[46]) which concerned a hard-core cartel and in which many types of information was shared on an organised and recurring basis with the common aim, according to the Commission's decision, of limiting price competition.[47] The list however gives the impression that any sharing of such data, also in a non-cartel context, constitutes an object restriction.

(90) Moreover, the list contains several examples of current information, e.g. an "undertaking's pricing" and its "current capacity". It is not clear how sharing such information can remove uncertainties as regards *"timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market"* in the meaning of paragraph 448. Data about current prices and current production capacities is widely available in many fiercely competitive markets. In addition, it is doubtful whether the cases referred to in the footnotes actually support the view that sharing such information is restrictive by object. For example, in the *Infineon Technologies* case (the Smart Card Chips cartel), the information

[46] General Court judgment in Case T-758/14 RENV, *Infineon Technologies v Commission*.

[47] Commission decision in Case AT.39574, *Smart Card Chips*.

that what was actually exchanged among the cartel members was price forecasts, utilisation rates and future capacities.

(ii) Information exchange which can *support* an anticompetitive agreement or concerted practice

(91) A second category of information exchange is information which can be used to increase the stability of an anticompetitive agreement or concerted practice. These are discussed in paragraphs 418 and 419, considering information which could increase internal and external stability of an anticompetitive agreement. The DHGL already helpfully indicate that both exchanges of present and past data can constitute such a monitoring mechanism (either to detect "deviations" from collusive outcomes or to monitor entry).

(92) However, the DHGL could provide further guidance by making clear that such information exchanges will not be considered a restriction *by object*, and that in order for such exchanges to result in an infringement, the Commission would need to show evidence that it is ancillary to an anticompetitive agreement or concerted practice that is restrictive by object. It follows logically that, if the general concern is that such information exchanges can increase the stability of an anticompetitive agreement or concerted practice, there must be an anticompetitive agreement or concerted practice in place for the exchange to be harmful. Alternatively, it must at least be established that a collusive outcome is more likely than not to occur *as a result* of the information exchange. But the result of that analysis depends on market power and other market characteristics, not on the intrinsic harmfulness of the conduct as such, and should therefore form part of an analysis of anti-competitive effects. This is particularly the case where there is a legitimate rationale for the exchange of such information, such that it cannot be inferred that the information would be used to support the stability of an anticompetitive agreement or concerted practice.

(93) Example 1 (at page 110) provides a good example of the risks of not clearly setting out the framework for the assessment of such exchanges. In the example, it is first stated that, as the exchange does not concern future prices or quantities, it would not be a restriction by object under Article 101(1). However, it is later added that the information would be *"most likely used to monitor deviations from the collusive outcome"*. This statement is problematic as it assumes that the *purpose* of exchanging the information is to support a collusive outcome (i.e. that the exchange has an anticompetitive object), although the analysis should be *effects* based. Moreover, if the concern about the information exchange is only that the information would be used to monitor *deviations* from the collusive outcome, the example fails to indicate how the undertakings would first reach a common understanding on the terms of coordination. The Commission would in that case at least be required to demonstrate either (i) that the exchange is ancillary to an anticompetitive agreement or concerted practice, or (ii) that a collusive outcome is more likely than not to occur *as a result* of the information exchange.

(94) As such, we consider that Section 6.2.2.1 should be adjusted by providing further guidance on the types of information exchange that may support an anticompetitive agreement or concerted practice, and the additional elements that would need to be shown to find an infringement in such cases.

(iii) Information exchange which can lead to anticompetitive foreclosure

(95) A third category of information exchange is information which, when pooled together and not available to all undertakings, could be used to foreclose competition. In relation to this concern, we are concerned that the DHGL in some places seems to assume that foreclosure effects are likely to arise from data pooling. We have devoted the next section to this particular issue.

5.3 More detailed and ambitious guidance on efficiencies and data pooling

(96) As a result of the rapid digitalisation of markets, vast amounts of data are collected from goods and services which are offered to European consumers. As the new DHGL notes, the use of big data analytics

and machine learning techniques can play an increasingly important role in this context. As noted in Section 5.2(iii) above, we believe that the DHGL could provide more effective guidance to undertakings to self-assess when the *pooling* of data could be considered pro-competitive (or at least competitively neutral).

(97) The EC Special Advisors Report highlighted the importance of an *effects* analysis for data pools in particular in their 2019 Report: *"So far, the issue of data pools is a relatively new and under-researched topic in competition law. Its economics is also not very well understood. A scoping exercise of the different type of data pooling and a subsequent analysis of their pro- and anti-competitive aspects is therefore necessary to provide more precise guidance on this topic, through, for example, guidance letters, "no infringement" decisions under Article 10 of Regulation no. 1/2003, or the next review of the Guidelines on horizontal cooperation."*[48] The Report devoted several pages to this topic and the EC itself recently also hinted to specific section on data pooling and sharing agreements in the DHGL, in its press release announcing its Statement of Objections to *Insurance Ireland* in relation to alleged restrictive practices via its data sharing platform.

(98) However, the current version of the DHGL does not mirror this ambition. To avoid a chilling effect on innovation which depends on effective data analytics, the guidance on data pooling should thus be expanded and further refined, and a clear pathway for undertakings to enter into data pooling arrangements should be set out.

(99) The DHGL offers little in the way of positive reinforcement for data pooling initiatives and, as regards foreclosure, even takes a harsher line than the previous guidance. For example, we note that the current DHGL has amended the statement in the 2011 HGL that *"this type of foreclosure is only possible if the information concerned is very strategic for competition and covers a significant part of the relevant market"* to read *"this type of foreclosure is possible if the information concerned is of strategic importance and the exchange covers a significant part of the relevant market"*. This seems to suggest that the Commission will pursue a harsher line on data pooling.

(100) More worrying still is the statement at paragraph 441 that:

"The exchange of such strategic information may be permissible only if the information is made accessible in a non-discriminatory manner, to all undertakings active in the relevant market. If such accessibility were not guaranteed, some of the competitors would be placed at a disadvantage, since they would have less information, which would also not facilitate the entry of new operators on to the market".

(101) There are multiple issues with this statement:

(i) First, the statement is made in the abstract, and seems to implicitly assume a scenario where the undertakings forming the data pool have market power. It fails to consider whether other undertaking active in the relevant market have the ability to form similar competing pools of data. There may be good reasons to support competition between pools of data, for example to allow for the emergence of competing or complementary standards for the exchange of data.

(ii) Second, the statement assumes that competitors which are not granted access to the pool would be placed at a disadvantage and ignores the necessary assessment of whether the information at hand is sufficiently essential or strategic that it is capable of leading to anticompetitive foreclosure. Although it may be useful for innovation, pooled data is often not a critical asset in order to compete in a market. In that regard, the DHGL provides little guidance as to when data will be considered sufficiently strategic that it may lead to foreclosure of competitors.

[48] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era – Final report' (2019) (Commission digitalisation report), available here, p. 93.

(iii) Third, it does not consider whether there may be legitimate reasons for not granting access to *all undertakings active in the relevant market*. For example, the purpose of forming the pool may be for smaller competitors to compete with the first party data pools of larger competitors. The EC Special Advisors Report indeed rightly noted that it may not be desirable if a group of smaller players that set up a data pool enabling them to compete more effectively with an incumbent (with access to a much larger pool of first party data) were forced to grant that rival access to their pooled data.[49] This point becomes even more important in light of the upcoming Digital Markets Act ("**DMA**") and the proposed European Data Act. If gatekeepers were to be entitled to receive access to data pools set up by smaller rivals, this would risk eliminating the very pro-competitive purpose of such a data pool and indeed the objective of the DMA to rebalance the relationships between gatekeepers and business users. The proposed European Data Act, for example, specifically precludes designated gatekeepers from benefitting from the data access rights that it sets forth, explaining that *"[…] given the unrivalled ability of these companies to acquire data, it would not be necessary to achieve the objective of this Regulation, and would thus be disproportionate in relation to data holders made subject to such obligations, to include such gatekeeper undertakings as beneficiaries of the data access right"*.[50]

(iv) Finally, the case law which is cited in footnote 244 of the DHGL explicitly recognises that the object of the credit information exchange systems at hand in that case was not to restrict competition, and that therefore the national court had to establish an anticompetitive *effect*.[51] The non-discriminatory access which is subsequently referred to in that judgment cannot therefore be regarded as a legal requirement for all data pools, but only a factor which is liable to influence the effects of the such arrangements.

(102) The DHGL should therefore be revised to reflect the fact that the assessment of whether foreclosure is likely to result from a data pooling will be made on the basis of *effects*. In that regard, when drafting the guidelines, the Commission should consider the many potentially pro-competitive scenarios involving pooling of data (and not just the negative examples). Absent (collective) market power, data pools are unlikely to lead to anticompetitive foreclosure, even if access to the data pools is not open to all.

(103) Inspiration can be taken here from the DHGL section on standardisation agreements, which states that: *"In the absence of market power, a standardisation agreement is not capable of producing restrictive effects on competition".* Moreover, even for those standardisation agreements which risk creating market power, in relation to the factors of assessment (including open and FRAND access), the DHGL states that *"the non-fulfilment of any or all of the principles set out in this Section will not lead to any presumption of a restriction of competition within Article 101(1). However, it will necessitate a self-assessment to establish whether the agreement falls under Article 101(1) and, if so, if the conditions of Article 101(3) are fulfilled."*

(104) We see no reason why the assessment of the possible foreclosure effects of data pooling should substantially differ from the framework set out above for standardisation. As such, we consider that Section 6.2.2.2 could be improved by clarifying (in a similar vein as the standardisation section) that: (i) in the absence of market power, data pools are unlikely to lead to anticompetitive foreclosure and (ii) where (combined) market power may be created by the data pool, by clarifying the factors which are likely to affect the assessment of possible foreclosure effects.

5.4 Illustrative example of step-by-step assessment

[49] *Ibid.*, p. 97.

[50] Proposal for a Regulation of the European Parliament and the Council on harmonised rules on fair access to and use of data (Data Act), Brussels, 23.2.2022, COM(2022) 68 final, available here, recital 36 and Article 5(2).

[51] CJEU judgment in Case C-238/05, *Asnef-Equifax*, para. 48.

(105) To illustrate why it would be helpful to set out the framework of assessment for different competition concerns discussed in Sections 4.2 and 4.3 of this response, we consider the example of a group of advertisers (with a combined market share not exceeding 20% in advertising or related advertised product markets) which seeks to combine (anonymised) first party advertising data in a data cooperative, in order to better target users. Such a data pool may for example help advertisers reduce their dependency on gatekeeper platforms.

- **Step 1 (see Section 4.2.i) – confirm that data pooling is not collusive in itself:** The first question in setting up such an advertising pool should be whether any of the information that would be exchanged is so sensitive that it could lead to a collusive outcome. The undertakings should therefore ensure that the pool does not include any information which is so strategic that it is capable of influencing the conduct on the market of an actual or potential competitor, in particular information relating to future conduct (e.g. pricing intentions or product launches), either on the market for advertising or the related advertised product markets. Including such information in the pool (without safeguards) may increase the risk of a *by object* infringement.

- **Step 2 (see Section 4.2.ii) – confirm that data pooling is not likely to lead to collusion:** A secondary question is whether the information shared could support the stability of an anticompetitive agreement or concerted practice. In relation to this concern, if (past/present) information is shared in the pool which could theoretically support the stability of a collusive agreement or concerted practice, absent any evidence of any underlying anticompetitive plan, the undertakings may find comfort that an infringement is unlikely if market characteristics are such that a collusive outcome is unlikely to be stable(even after the information has been exchanged (e.g., if the market is highly fragmented, demand is unstable and/or products are not homogenous).[52]

- **Step 3 (see Sections 4.2.iii and 4.3) – confirm that the data pooling is not likely to lead to anticompetitive foreclosure:** The final question is whether the information shared could result in the foreclosure of competitors outside of the pool who do not receive access to the pool. In this example, given that the combined market share of the undertakings to the arrangement is less than 20% in any relevant market, the data pool would be unlikely to produce restrictive effects on competition through anticompetitive foreclosure. This could be supported by evidence that it is open to competitors to set up similarly effective data pools. Any residual risk of anticompetitive effects could then be further reduced by ensure fair access to the data pool.

(106) We believe it would be helpful to include in the DHGL a similar example (i.e. a data-pooling arrangement which is not likely to lead to competitive concerns), which considers and rules out each potential competition concern in turn.

5.5 Interplay between info exchange under Chapter 6 of the DHGL versus or under sector-specific (mandatory) data sharing guidelines

(107) It would also be helpful for the DHGL to more specifically address the interplay with the DHGL and separate legislative proposals that facilitate or even mandate data sharing between (potential) competitors in specific sectors.

(108) In particular, the DHGL does not discuss the treatment of data sharing arrangements that take place in the context of the upcoming DMA or the EU Data Act. While the latter proposal explicitly mentions that it *"should not affect the application of EU competition law"*[53], undertakings can, neither from the EU Data

[52] There may be some circumstances where coordination may be difficult to sustain before the exchange, but the exchange may sufficiently alter market conditions such that coordination becomes possible after the exchange.

[53] Proposal for a Regulation of the European Parliament and the Council on harmonised rules on fair access to and use of data (Data Act), Brussels, 23.2.2022, COM(2022) 68 final, available here, recital 88.

Act, nor from the DHGL, derive how to reconcile their obligations under both instruments. Similarly, it is currently unclear how the EC will look at data sharing agreements concluded by designated gatekeepers with certain potentially competing business users in order to comply with their data sharing obligations under Article 6 of the draft DMA.

(109) Given the variety in types and use cases of data, it makes sense for the EC to also adopt regulations or soft law guidance on data sharing or pooling arrangements in specific sectors. A notable example is the EC's ongoing public consultation in view of a regulation introducing mandatory data sharing of in-vehicle generated data in the automotive sector. Again, more specific guidance on how to assess a potential data sharing or pooling arrangement with the aim to comply with both such sector-specific rules and the DHGL would certainly improve legal certainty for businesses.

5.6 Future-proofing the self-assessment framework under the DHGL: a greater role for publishable comfort letters

(110) The overarching purpose of the EC having adopted a myriad of so-called "soft law" guidelines set forth in official EC Communications always boils down to increasing legal certainty for undertakings active in the EU single market. But what offered sufficient guidance 10 years ago may no longer be future proof a decade later. Precedents like the EC's *Emission cleaning cartel* fine show that, anno 2022, it has become increasingly difficult for companies to navigate the thin line between potentially pro-competitive technological cooperation and anti-competitive collusion. If the Commission wants *a Europe fit for the Digital Age*, its soft law guidance needs to be regularly updated to remain fully fit for the (fast evolving) digital landscape.

(111) More regular updates of the HBER and DHGL does not appear to be a practical or desirable solution. While the DHGL should remain principle-based and non-sector specific, the publication of more tailored informal guidance by the EC could increasingly play an important role over the next decade to provide more business- or sector-specific guidance, taking into account the very latest technological developments in data sharing and pooling. Already in early March 2020 (notably before the start of the global pandemic), Commissioner Vestager underlined the potential of informal guidance to unlock new possibilities for pro-competitive cooperation during a speech: *"We should also make use of the other powers we have, to make it clear to businesses how they can cooperate, without harming competition. So we'll be ready to give informal guidance when it's needed – in new or unclear situations, for instance."*.

(112) Such guidance could come in the form of actual "comfort letters" such as the one to one granted to Medicines for Europe on 8 April 2020. This allows the EC to provide practical guidance for pro-competitive cooperation of a kind which it may not be in a position to foresee when drafting the DHGL.

(113) Additionally, alternative formats such as via annexes / speeches accompanying an EC press release in the context of an antitrust case – such the announcement accompanying the *Emission cleaning cartel fine* in July last year – could be more institutionalised. A first good opportunity could be when the EC announces its acceptance or rejection of the commitments offered by Insurance Ireland to address the foreclosure concerns in relation to this exclusive data pool. That said, for the reasons outlined above (in particular Sections 2 and 3), care should be taken to avoid using an example of an infringement as the main baseline for assessing far more innocuous data pooling scenarios.

6. RESEARCH AND DEVELOPMENT AGREEMENTS

(114) We note that the Commission mentions in its explanatory note related to the revised HBER and DHGL's main changes that "*pro-competitive horizontal cooperation in the form of R&D and specialisation agreements covered by the HBER is* ***essential for the digital and green transition and can contribute***

to the resilience of the internal market".[54] We fully support this statement. However, we are concerned that the new conditions introduced with respect to R&D agreements might impede the achievement of the objectives set out in the explanatory note.

(115) More specifically, the benefit of the safe harbour is now conditioned upon the existence of "*three or more competing R&D efforts in addition to and comparable with those of the parties to the R&D agreement*" (the so called "**3 plus 1-rule**") (see Article 6.3 of the HBER).

(116) While the Commission provides a definition for the concept of "*competing R&D efforts*", we would welcome further clarifications based on concrete examples enabling undertakings to better assess the 3 plus 1-rule. More specifically, the information to be gathered on the "*competing R&D efforts*" appears to be very extensive and likely very difficult to gather given their sensitivity (see Article 7.2 R&D BER). For instance, the information on the size, the stage and the timing of the R&D efforts or the financial and human resources involved are strictly confidential by their very nature. Although some undertakings may publicly announce their R&D initiatives, the available information would likely be very limited and optimistic so that it might not be entirely reliable. Finally, when undertakings are not able to identify such competing R&D efforts, the prudent approach might be to drop the R&D cooperation. Thus, the R&D BER and DHGL do not provide the intended legal certainty and might discourage undertakings to carry out pro-competitive and efficient R&D initiatives.

(117) In addition, we welcome the slight broadening of the "*potential competitor*" concept. However, we encourage the Commission to provide further guidance on this concept including in the context of dual distribution when customers may also be competitors.

Linklaters LLP – 26 April 2022[55]

* *

*

[54] Commission's explanatory note accompanying the public consultation of the draft revised HBER and DHGL, Paragraph 2.

[55] The Linklaters lawyers who contributed to this paper are, in particular, Gerwin van Gerven, Bernd Meyring, Charlotte Colin-Dubuisson, Erik Venot, Fredrik Löwhagen, Lauren O'Brien, Lukas Solek, Joost Dibbits, Eoin O'Reilly, Charlotte Hamaide, Sari Corrijn and Florian Jonniaux.