ERT response to EC consultation on draft Horizontal BERs and Guidelines

1. Introduction

- The European Round Table for Industry (ERT) welcomes the European Commission's public consultation on its draft revised Horizontal Block Exemption Regulations (BERs) and Horizontal Guidelines published on 1 March 2022. The comments in this paper are focussed on pointing out key elements of the revised drafts which ERT believes need to be reconsidered by the European Commission.

- The comments in this paper follow ERT's previous contributions to the public consultations on the rules on horizontal agreements – specifically, ERT's February 2020 Position Paper on Horizontal Cooperation, its November 2020 Response on competition policy contributing to the Green Deal and its October 2021 response to the European Commission's questionnaire.

2. General points

2.1. Legal certainty

- As explained in ERT's previous submissions, legal certainty is of paramount importance to businesses, particularly when engaging in business activities – like those covered by the Horizontal BERs and Horizontal Guidelines – which are a matter for self-assessment. It is critical that businesses are readily able to understand whether any proposed course of action falls foul of competition rules. The review of the Horizontal BERs and Horizontal Guidelines is an excellent opportunity for the European Commission to provide greater legal certainty.

- Whilst there are aspects of the draft revised Horizontal BERs and Guidelines where ERT considers legal certainty / guidance has been improved, ERT is concerned that, on a number of key issues, legal certainty and guidance is still lacking – this is in particular the case in respect of purchasing agreements, R&D agreements, information exchange and sustainability agreements, as further explained below.

2.2. Definition of "potential competitor"

- ERT welcomes the additional guidance on the notion of "potential competitor" (paragraphs 17, 123(b) and 271 of the draft revised Horizontal Guidelines). Nevertheless, the concept continues to create significant legal uncertainty and remains impracticable.

- For example, it is difficult or impossible for companies to assess whether another company has "a firm intention and inherent ability" to enter a market within three years, or indeed meets many of the other criteria included at paragraph 17 – not least because, in the absence of publicly announced market entry plans, any exchange on such future strategy would amount to an illegal exchange of competitively sensitive information. These difficulties are particularly acute in fast-moving and dynamic digital markets.

- ERT therefore urges the Commission to provide clearer guidance on how companies would *in practice* establish whether another company is a potential competitor.

- In addition, ERT would welcome clarification that, in a dual distribution scenario, the buyer is not to be considered a potential competitor of the seller. Such clarification would reflect commercial reality – namely, the purpose of dual distribution arrangements is to extend the seller's distribution reach or to more efficiently distribute the seller's products and services.

2.3. Application of Article 101(1) to arrangements between parent companies and jointly controlled subsidiaries

- ERT welcomes the clarification in paragraph 13 of the draft revised Horizontal Guidelines that, where the parent companies exercise decisive influence over a JV, the European Commission will not "typically" apply Article 101(1) to agreements between the parent(s) and the JV concerning their activity in the market where the JV is active.

- Nevertheless, it should be made clear that paragraph 13 also applies to activities where *both* the parent *and* the JV are active. In addition, the statement in paragraph 13 that Article 101(1) will still apply *inter alia* to agreements "between the parents to alter the scope of the joint venture" lacks coherence and further guidance would be helpful. Similarly, the inclusion of the word "typically" in paragraph 13 seems redundant and likely only to cause uncertainty, particularly when set against paragraph 14 which takes a more definitive position.

2.4. Ancillary restrictions

- The draft revised Horizontal Guidelines state at paragraph 39 that an 'ancillary restraint' may be compliant with Article 101(1) if it is "objectively necessary to implement the horizontal cooperation agreement and proportionate to the objectives thereof", noting that the question is whether it would be "impossible" to carry out the agreement without the restriction in question.

- ERT notes that this threshold is extremely high, and much higher than that set out in the Commission's Notice on restrictions directly related and

necessary to concentrations (which states that an ancillary restraint to a concentration is necessary if the concentration "could not be implemented or could only be implemented under considerably more uncertain conditions, at substantially higher costs, over an appreciably longer period or with considerably greater difficulty").

- ERT considers that the threshold in the draft revised Horizontal Guidelines should be aligned with that applied to ancillary restraints for concentrations.[1]

2.5. Agreements of rise to new markets

- ERT notes that at various points the draft revised Horizontal Guidelines indicate that certain types of agreement are unlikely to have restrictive effects if the agreement gives rise to a new market – see for example paragraph 227. ERT considers that equivalent safe harbours should be included in respect of all types of agreement covered by the Horizontal Guidelines; alternatively, that the draft revised Horizontal Guidelines should include a section dedicated to agreements which give rise to new markets.

3. Purchasing agreements

- The draft revised Horizontal Guidelines attempt at paragraphs 316 to 322 to draw a line between legitimate joint purchasing on the one hand and illegal buyer cartels on the other. However, the draft revised Guidelines lack a coherent theory of harm in respect of buyer cartels, and as a result fail to provide any clarity on where the line should be drawn. For example:

    - One of the factors included in the draft revised Horizontal Guidelines to assist undertakings in concluding that their agreement is not a buyer cartel is that the joint purchasing arrangement is clearly brought to the attention of the supplier (paragraph 319(a)); yet at the same time the Guidelines make clear that secrecy is not a requirement for finding a buyer cartel (footnote 180).

    - Another key distinguishing factor according to the draft revised Horizontal Guidelines seems to be that buyer cartels are aimed at coordinating purchasers' individual competitive behaviour (paragraphs 316 to 317); yet paragraph 319(a) also foresees that a

[1] By way of illustration of the currently overly narrow approach, ERT observes that the example provided at paragraph 403 of the draft revised Guidelines concerns a non-poaching clause in an outsourcing agreement analogous to the type discussed by the German Federal Court of Justice in its judgment in the *Subunternehmervertrag* case. The German Federal Supreme Court of Justice stated in that case that a (proportionate) non-compete is ancillary to a subcontracting agreement as it is necessary to protect the principal's relationship with its customers; in contrast, the Commission in the draft revised Guidelines assesses the scenario under Article 101(3). ERT submits it should instead be considered necessary to the implementation of the subcontracting agreement and therefore compliant with Article 101(1).

legitimate joint purchasing arrangement may bind its members on the terms of their *individual* purchases.

- A distinction should be made between cases where group purchasers have market power or play a gatekeeper role and those where a supplier and a group of purchasers have similar negotiating positions. ERT considers that if the bargaining position on both sides is balanced and the supplier agrees to the joint arrangement, it should be clear that there is no risk of a buyer cartel.

- ERT also considers that the Commission should make clear that, when assessing a purchasing arrangement, a written agreement between purchasers as envisaged in paragraph 319(b) is a "nice-to-have", but not a pre-requisite for compliance with Article 101. Or, if the Commission is intent on retaining that provision, it should be clear that such a written agreement, in combination with transparency to the supplier, would be a shield from enforcement from Article 101 – as the draft stands, even having followed the advice, companies would lack certainty.

- In addition, and as explained in ERT's previous submissions, it should be uncontroversial for the draft revised Horizontal Guidelines to distinguish between purchasing agreements in relation to "direct" material (i.e. material incorporated into the good to be sold on the selling market) and "indirect" material (i.e. a company's other purchasing needs which are not a direct input into the good to be sold on the selling market – for example, office supplies, travel agency services for employees etc). The latter – whether between competitors and non-competitors on the selling markets – are clearly unlikely to have potential restrictive effects on competition in the absence of a dominant position on the purchasing market.

4. R&D agreements

- ERT considers that the European Commission has missed an opportunity to provide clearer encouragement of R&D cooperation and to provide greater legal certainty in respect of their assessment.

- In ERT's view, the draft revised R&D BER and the relevant chapter of the draft revised Horizontal Guidelines offer no improvement over the existing position and, if anything, have made the process of self-assessment even more complex. This could have a significant chilling effect on innovation. In particular:

  - *Pro-competitive nature of R&D agreements* – The draft revised R&D BER and the draft revised Horizontal Guidelines fail to emphasise the pro-competitive nature of joint R&D cooperation or to provide clear guidance as to their assessment. ERT urges the European Commission to rectify this in the draft revised R&D BER and Horizontal Guidelines.

- *Mere paid-for R&D should be treated under the Subcontracting Notice* – The draft revised R&D BER continues to treat paid-for R&D in the same way as other forms of R&D. In ERT's view, this does not reflect commercial reality. Companies may wish to outsource R&D to another company for a variety of reasons, including for example lack of expertise or capacity. This is comparable to subcontracting where the subcontractor produces the products and supplies them exclusively to the principal. Therefore, ERT considers that paid-for research should be dealt with under the subcontracting notice and should fall outside the scope of the R&D BER.

- *Reference to market shares on technology markets should be removed* – ERT has explained in previous submissions that the notion of "technology market" is not practical and should be removed. ERT is therefore disappointed that this concept has been retained in Article 6(2) of the draft revised R&D BER and in the draft revised Guidelines, which continue to state that joint R&D agreements between competing companies are exempted where the combined market share does not exceed 25% on either the relevant product or technology markets (a similar provision applies for non-competing companies after 7 years from exploitation). In practice it is highly unlikely that companies have a clear overview of all competing technologies, or that they are able to calculate their share of such a market. Given the pro-competitive nature of R&D agreements, ERT considers that the reference to technology markets should be removed and the market share threshold limited to relevant product markets.

- *Requirement for there to be three or more competing R&D efforts remaining* - Article 6(3) of the draft revised R&D BER provides that, where parties to the R&D agreement are undertakings competing in innovation, the exemption shall only apply if, at the time of entering the R&D agreement, there are three or more competing R&D efforts in addition to and comparable with those of the parties to the R&D agreement. The Commission has provided no explanation as to why three is the appropriate number of competing R&D efforts in this scenario. Moreover, this requirement is unworkable in practice and will undermine the objective of legal certainty. How should parties determine this in practice when rival R&D efforts – and particularly their comparability to those of the parties – is almost inevitably (and necessarily, absent illegal information exchange) unknown? And what happens in the situation where parties are the first or second movers in a field – the draft revised Guidelines as currently drafted indicate that in such a situation the exemption would not apply (see paragraph 200), which ERT submits cannot be right. Or in markets where it is implausible that there would be three competing R&D efforts – for example, because there are fewer than four highly specialised market players, or high barriers to R&D exist? Furthermore, what constitutes a "new product or technology"

(paragraphs 1(18) and 1(7) of the draft revised R&D BER) – where is the line between new products or technologies on the one hand and improvements/replacements to existing products or technologies on the other? Beyond undermining legal certainty, this approach also risks slowing down European innovation, in particular in fields such as digitisation and green technologies.

- *Access to final results* – ERT is disappointed that the draft revised R&D BER retains the requirement to provide full access to the final results of the R&D for the purpose of further R&D and exploitation. As ERT has explained in previous submissions, this requirement is unnecessary and has a chilling effect on the willingness of companies to engage in joint R&D. The pro-competitiveness of joint R&D does not depend on future R&D efforts based on the results. Future competition on innovation is sufficiently safeguarded by the prohibition (retained in the draft revised R&D BER) on including a hardcore restriction that limits the parties' R&D activities in the same or a connected field after the completion of the joint R&D. Moreover, the scope of the requirement to provide full access to final results remains unclear – for example, do the parties have to grant access only to the final results or to any results; must access be granted as soon as a preliminary result is achieved or is it sufficient to grant access at the end of the project; how and on what terms must access be granted? Can the parties agree scope of field restrictions?

  ERT considers these access requirements are particularly disproportionate in non-horizontal R&D collaborations and in respect of paid-for R&D. In this regard it is unclear why Recital 18 of the R&D BER has been deleted, particularly given similar points are made at various points in the draft revised Horizontal Guidelines. In a vertical arrangement the access requirements do not benefit the parties directly involved, yet pose a risk that knowledge could be leaked to competitors through the cooperation partner. In respect of paid-for R&D, the access requirement also appears questionable - if an undertaking fully funds R&D through an independent party, it should be able to reap the full benefit of the work it has paid for, without any restriction or condition which may compromise the value it receives.

- *Access to pre-existing know-how* – ERT is also disappointed that the draft revised R&D BER retains the requirement for parties entering R&D agreements that exclude joint exploitation to grant access to any pre-existing know-how if it is indispensable for the purpose of exploitation. As explained in ERT's previous submissions, this restrictive requirement also has a significant chilling effect on the willingness of companies to engage in joint R&D, especially if there remains ambiguity on field of use restrictions. At a time when innovation is crucial for (among other things) the furtherance of European competitiveness and delivering on the Green Deal, the draft revised R&D BER should remove this requirement and leave it

to the parties to the joint R&D agreement to stipulate access rights to background IP and rights of exploitation, including restrictions on field of use where the parties are not downstream competitors.[2]

Again, ERT considers these access requirements are particularly disproportionate in non-horizontal R&D collaborations and in respect of paid-for R&D. Moreover, ERT considers that Article 4 of the draft revised Horizontal Guidelines should contain provisions equivalent to Article 3(3) and 3(4) of the draft revised Guidelines.

- *Discontinuation of alternative R&D* – Paragraphs 69 and 70 of the draft revised Horizontal Guidelines note that R&D agreements are restrictive by object where their main purpose is to serve as a tool to engage in a cartel or other "by object" infringements such as, amongst other things, restrictions of technical development. ERT notes that it is often the case that parties agreeing on a joint R&D project will discontinue or deprioritise their own independent efforts regarding alternative solutions – this should not result in the cooperation being classified a restriction by object.

- *Restriction of passive sales* - In the draft revised R&D BER there continues to be a contradiction between: (i) a scenario where companies agree by way of specialisation that only one company will distribute the products, while the other will not sell the products *actively or passively*, and (ii) a scenario where the companies agree to allocate certain territories or customers exclusively to each other by way of specialisation, in which case the companies are only permitted to restrict *active* sales into the territory or to customers allocated exclusively to the other (Article 8(4)). ERT considers that companies may have legitimate reasons to limit active *and* passive sales by the other party – for example, in order to prevent the other party selling products to competitors. ERT considers that, given the pro-competitive nature of R&D agreements, this restriction on limiting passives sales should be removed from the draft revised BER and the parties should be able to impose restrictions on each other under any form of specialisation in the context of exploitation.

5. Information exchange

- In previous submissions, ERT has explained that the assessment of the anti-competitive nature of information exchanges under the existing Guidelines has become too broad, with the current approach placing many

[2] ERT also notes that the draft revised R&D BER seems to draw an artificial distinction between R&D followed by joint exploitation where this was agreed upon up front as part of the original R&D agreement (Article 1(1)(a) and (b)), and R&D followed by joint exploitation where such joint exploitation is not foreseen under the original R&D agreement (Article 1(1)(c) and (d)). In the latter scenario, the R&D agreement would be required under Article 4(1) to grant access to pre-existing know-how of the other parties which is indispensable for exploitation; in the former scenario, no such access would need to be granted.

exchanges at risk of a "by object" infringement finding. This legitimate overly-cautious approach also fails to provide the necessary flexibility for data sharing in the digital economy – given the overarching role of data in these markets, this will prevent industry reaping the full benefits of data sharing, to the detriment of the European consumer.

- ERT considers that the draft revised chapter of the Horizontal Guidelines on information exchange provides no improvement over the current Guidelines. ERT urges the Commission to adopt a more flexible, case-by-case approach to the competitive assessment of information exchange which balances the nature and characteristics of the information exchange on the one hand (paragraph 453) with its context and purpose on the other. An exchange which is problematic in one context may be legitimate and commercially necessary in another.

- In ERT's view the draft revised Horizontal Guidelines continue to take an overly cautious approach and have in many respects made the assessment of information exchanges broader and/or even less clear than before:

    - *Information exchange in M&A context* – The draft revised Horizontal Guidelines note at paragraph 410 that an information exchange may be part of an acquisition process. The Guidelines state that, in this scenario, the exchange may be subject to the rules of the Merger Regulation and that any conduct restricting competition that is not "directly related to and necessary for" the implementation of the acquisition remains subject to Article 101. ERT is concerned that this paragraph fails to reflect the realities of the M&A process. It is indispensable for an acquiring company (not just its external advisers) to be able to see information relating to the target at various key stages of the acquisition process. In this respect:

        - What information is "directly related to and necessary" for M&A activity may be much more expansive than would be the case in many other contexts given the commercial risks inherent in such a project, and the need for parties to be able to value the deal, decide whether to pursue the deal and then ensure the terms of the transaction adequately capture and allocate the risks;

        - What is "directly related to and necessary" may change through the course of an M&A transaction as, first, the likelihood of a deal being reached (and therefore risks being realised) increases, and, second, completion (and therefore smooth implementation) nears.

        ERT urges the Commission to recognise the commercial realities of this process and to clarify in the draft revised Horizontal Guidelines that, in an M&A context, information is "directly related to and

necessary for" the implementation of the acquisition where it is directly related to and necessary for:

- Conducting due diligence of the target company;
- Ensuring the preservation of the value of the target company between exchange and completion; and
- Planning and preparing for completion and the integration of the target company.

ERT would also welcome further guidance as to the type of information exchange in an M&A context which falls within the sphere of Article 101 and the type of information exchange that falls within the sphere of the standstill obligation under the Merger Regulation.

- *Exchanges of genuinely public information* – As a general comment, the guidance on what is considered "genuinely public" information is too vague and more guidance should be provided to ensure legal certainty as to when information is considered "genuinely public". For example, the draft revised Horizontal Guidelines state at paragraph 425 that "genuinely public" information is that which is generally equally accessible in terms of costs of access to all competitors and consumers. ERT considers that more clarity is required on whether, where information is available at a (potentially considerable) cost to all undertakings in the market and is purchased as a matter of course by all undertakings in the market, that information constitutes genuinely public information. Similarly, costs of receiving industry sources may vary by the size of the business and this should not prevent such information from being classed as publicly available. Likewise, it should be clear that being "equally accessible" does not require that the information is in fact equally accessed. The nature of funding industry bodies means that the guidance given at paragraph 426 is likely unworkable as it is often the case that those bodies are subsidised by participants who then receive preferential terms for accessing reports received by those bodies – clarification is therefore needed on how the comment at footnote 219 (that a database can be offered at a lower price to customers which have contributed data to it as by doing so they have normally incurred costs) interrelates with the guidance in paragraph 426. ERT would also welcome guidance from the Commission on the exchange of information in investor communications and earnings calls – such communications are indispensable and in ERT's view should be unproblematic since they are more or less public and are widely reported in the press.

- *Unilateral disclosures* – ERT is concerned that paragraphs 432 and 433 of the draft revised Horizontal Guidelines mean that a unilateral disclosure by one company, for example on a website, can bring the entire sector within Article 101 if the sector does not respond with a

clear statement that it does not wish to receive such information. ERT queries whether this would also apply to unilateral statements, such as those made to the investment community (e.g. general statements on the need to increase prices due to commodity price increases). The European Commission has shifted the burden of proof onto the industry to demonstrate that it has distanced itself from the information (which it may not even be aware exists given the ambiguity over what is intended by "who accepts it" in relation to posts on websites), rather than the burden being on the European Commission to show that the exchange had the object or effect of restricting competition. This is wrong. Amongst the changes required to address this point are clarity over what is required to have "accepted" a unilateral disclosure (paragraph 432), and that paragraph 434 should be amended so as to be unequivocal that the unilateral announcement of genuinely public information will not constitute a concerted practice and therefore not require a proactive statement by the recipient that it does not want to receive such information (paragraph 434 currently states that such unilateral announcements "generally" do not constitute a concerted practice).

- *Future product characteristics* - ERT notes that paragraphs 424 and 449 of the draft revised Horizontal Guidelines categorise as a restriction of competition by object exchanges of information regarding future product characteristics. Categorising such exchanges as object infringements will make it very difficult for companies to create industry standards which inevitably relate to future product characteristics – if this is not the Commission's intention, the Commission should make clear that these paragraphs are not intended to apply to the creation of industry standards, which instead fall to be assessed under the chapter on standardisation. This is a particular issue when creating standards to try and shift industries to more sustainable production methods, packaging, transport and services (see further below and the example in Annex 1). Similar concerns apply to creating and advocating common industry positions on legislative proposals.

- *Data aggregation and age* – The provisions at paragraph 428 create confusion by at once describing aggregated information as potentially both more and less competitively sensitive. This requires clarification. ERT also considers that the Commission should provide concrete examples illustrating the level of aggregation required in order for "the recognition of individualised company level information [to be] sufficiently difficult or uncertain". The same point holds for paragraph 429 and what is the threshold for "sufficiently large market share". Similarly, more specific guidance would be welcomed on when information can be considered historic (paragraph 431). In addition, as regards M&A deals, and in the context of the digital economy, the European Commission needs to acknowledge that recent or even

current information may be required at the point of making decisions, which should be acceptable with appropriate safeguards.

- *Data sharing / data pooling* – The draft revised Horizontal Guidelines recognise data sharing and data pooling as a form of information exchange, but nevertheless only provide cursory guidance on these types of cooperation (paragraph 442). The limited guidance provided is focussed purely on the potential restrictive foreclosure effects of these types of cooperation, without any recognition of the many pro-competitive effects of data sharing and data pooling. Moreover, no clarity is provided on the types of information which would be considered commercially sensitive within a data sharing/data pooling arrangement. ERT considers that, given the importance of this type of cooperation agreement for the digital economy, more specific and dedicated guidance on such arrangements is necessary, which recognises that data sharing and data pooling are distinct from other forms of information exchange and are pro-competitive. For example, it is crucial that more concrete guidance is provided as to how certain concepts, such as the frequency of exchange and data aggregation/age, may apply differently in the context of digital markets and data sharing/data pooling. The draft revised Guidance should clearly set out the circumstances in which data sharing / data pooling might be problematic; it should also provide greater certainty on the circumstances in which the obligation to grant access to data arises.

- *Information exchange and dual distribution* – ERT welcomes the Commission's decision, in the context of its ongoing review of the Vertical Block Exemption Regulation and Vertical Guidelines, to launch a public consultation on the draft new section dealing with information exchange in dual distribution. However, there are fundamental differences between information exchange in a dual distribution scenario and information exchange between competitors. ERT considers that the draft revised Vertical Guidelines should be amended to make clear that all instances of information exchange in dual distribution should be assessed under those Guidelines, and not under the Horizontal Guidelines.

6. Sustainability

- ERT welcomes the inclusion of a new chapter on sustainability agreements in the draft revised Horizontal Guidelines. It is a welcome step forward in unlocking the benefits of sustainability collaborations for society and consumers. It also sends a positive signal to businesses that the European Commission encourages types of cooperation that industry peers may not yet have contemplated due to antitrust concerns.

- Nevertheless, ERT has identified several areas where further changes are required:

- *Sustainability agreements falling outside Article 101* – ERT appreciates the inclusion in the draft revised Horizontal Guidelines of a section on sustainability agreements that fall outside Article 101. Nevertheless, ERT feels that by limiting this to agreements which do not affect parameters of competition, the European Commission has missed an opportunity to provide meaningful guidance for companies on this topic. ERT urges the European Commission to consider what other types of sustainability agreements may fall outside Article 101. At the very least, agreements made in the context of companies complying with their obligations under the proposed Directive on Corporate Sustainability Due Diligence should be included in the category of sustainability agreements falling outside Article 101.

- *Focus on sustainability standardisation agreements* – ERT is disappointed that, to the extent the draft revised Horizontal Guidelines provide guidance on the assessment of sustainability agreements under Article 101(1), they focus only on sustainability standardisation agreements. ERT does not regard these types of agreement as the "most typical sustainability agreements". In focussing on sustainability standardisation agreements, the draft revised Horizontal Guidelines leave other forms of sustainability-driven cooperation (including initiatives to promote cleaner supply chains and sharing information and best practices on sustainable and ethical sourcing) unaddressed, which instead fall to be assessed under the relevant chapter(s) of the draft revised Horizontal Guidelines. ERT urges the European Commission also to include in Chapter 9 of the draft revised Guidelines clear guidance on the assessment of other types of sustainability agreements beyond the narrowly defined concept of sustainability standards. To assist the Commission in this respect, we have included in Annex 1 some examples of cooperation which we consider the draft revised Horizontal Guidelines should address.

- *Sustainability and information exchange* – As already noted above, ERT is concerned that paragraphs 424 and 449 of the draft revised Horizontal Guidelines categorise as a restriction of competition by object exchanges of information regarding future product characteristics, on the basis that the parties might thereby reach a common understanding on future conduct. ERT notes that, in a sustainability context, upcoming product generations will tend to form part of the discussions taking place within industry groups. It does not necessarily follow that such discussions will give rise to a common understanding. ERT strongly urges the European Commission to acknowledge the unique challenges facing companies seeking to cooperate in furtherance of sustainability objectives and provides more realistic and helpful guidance as to what is and is not restrictive of competition.

- *Requirements of sustainability standards soft safe harbour* – ERT considers that certain of the conditions required to meet the soft safe

harbour set out in paragraph 572 of the draft revised Horizontal Guidelines require clarification:

- *Mandatory standards* – In our experience, mandatory standards are critical for successful sustainability collaborations. ERT is therefore supportive of the draft revised Horizontal Guidelines' inclusion of mandatory standards in the soft safe harbour (i.e. paragraph 572 specifies that obliging *third parties* to comply with a standard falls outside the safe harbour, indicating that obliging *parties* to comply with the standard is within the safe harbour). Nevertheless, ERT urges the Commission to spell this out explicitly to avoid ambiguity.[3] It is also unclear whether an agreement would fail to fulfil this condition of the soft safe harbour (and therefore fall outside the safe harbour) if, following the adoption of the standard on the market, non-complying undertakings felt *commercial* pressure to comply with the standard. Further clarity on this would also be welcome.

- *No significant increase in price or reduction in choice* - In order to fall within the soft safe harbour, the draft revised Horizontal Guidelines provide that the sustainability standard should not lead to a significant increase in price or reduction in the choice of products available on the market. ERT believes this condition risks rendering the safe harbour meaningless – in most cases sustainability standards will inevitably mean an increase in price or a reduction in choice in the short term, as more sustainable (and often therefore more expensive) products/processes are used and unsustainable products/processes are forced to exit the market. This should not deprive such agreements of the benefit of the safe harbour - ERT urges the Commission to provide further clarity on this point and refers the Commission to the examples in Annex 1.

- *Efficiency gains* – ERT welcomes the inclusion of guidance on the efficiency gains of sustainability agreements, and in particular the recognition of collective benefits. ERT has the following observations:

  - *Resilience* – ERT welcomes the recognition in paragraph 578 of the draft revised Horizontal Guidelines that the efficiencies produced by sustainability agreements can include increased resilience – this is an important and promising inclusion, but

[3] In this context, ERT would welcome guidance on the acceptability of, amongst other things, adherence to the standard being a criterion for membership in a trade association, and the use of sanctioning mechanisms in circumstances where individual members do not adhere to the standard, such as ejection from the trade association or "naming and shaming".

ERT considers that more guidance is required on when issues pertaining to resilience can be considered as efficiency gains.

- *"Polluter-must-benefit principle"* – Recognising collective benefits is vital to enable the most impactful sustainability cooperation. However, ERT is disappointed that the draft revised Horizontal Guidelines require there to be a substantial overlap between the consumers affected by an agreement and any beneficiaries outside of the relevant market. ERT considers that this "polluter-must-benefit" approach ignores that in many cases the costs of an unsustainable product may only or largely be felt by those who do not consume it. Moreover, it is unclear when sustainability goals start benefiting a particular customer group – for example, the share of benefit to drivers arising from purchasing less polluting fuel is negligible, but the Commission considers this sufficient to justify a sustainability agreement (paragraph 604); it is therefore unclear why European consumers would not also benefit from clean cotton production elsewhere in the world – chemicals used in cotton production pollute rivers, which in turn pollute the oceans, which are all connected. Contrary to the view of the Commission (paragraph 604), the share of the benefit for consumers buying clothes in Europe is comparable to the share of benefits for drivers in the first example. ERT is also disappointed that benefits to *future* users are not taken into consideration given that the very clear driver for sustainability is driven by *future* needs.

- *Requirement that sustainability benefits be significant* – The draft revised Horizontal Guidelines require at various points that the sustainability benefits must be "significant enough to compensate for the harm in the relevant market" (see paragraphs 589, 591, 603, 604). This ignores that environmental challenges can only be addressed at company-level through minute incremental steps, which will often not be significant enough to compensate for an immediate, tangible detrimental effect on consumers (such as a price increase). Similarly, the draft revised Guidelines note that for collective benefits to materialise, the market coverage of the agreement may often need to be significant (paragraph 605). ERT is concerned this has the effect that companies cannot engage in a sustainability initiative unless a significant number of them joins. The example provided at paragraph 620 of the draft revised Horizontal Guidelines is similarly concerning as it suggests that companies are prevented from taking small sustainability steps (e.g. slowing down deforestation) if consumers would prefer to pay lower prices for non-sustainable products. ERT urges the Commission to recognise that many sustainability issues can only be solved through a high number of limited, marginal steps at company level, and that such steps

are to be encouraged rather than discouraged. *Broader regard to sustainability benefits* – More generally, ERT considers that sustainability benefits should be considered in the overall assessment of any horizontal cooperation agreement under Article 101(3), and not only those categorised as "sustainability agreements" under paragraph 541 of the draft revised Horizontal Guidelines. This is critical given the unduly narrow framing of sustainability agreements in the draft guidelines and could be achieved for example by including reference to sustainability efficiencies in the general discussion of Article 101(3) in paragraph 41, as well as in each of the chapters of the draft revised Guidelines.[4] ERT refers the Commission to the examples set out in Annex 1.

- *Out of market benefits* – Particularly against the backdrop of strong political and public pressure for decisive and meaningful action on issues of climate change and sustainability, ERT was disappointed to see the draft revised Horizontal Guidelines continuing to take an unduly narrow approach to the issue of out-of-market benefits, both in terms of the persons affected and on the temporal scope given the necessarily long-term benefits of action on climate change vs short term concerns on competitive harm.

- *Indispensability and public policy / regulations* – Paragraph 583 of the draft revised Horizontal Guidelines state that where EU or national law requires undertakings to comply with concrete sustainability goals, cooperation agreements and the related restrictions cannot be deemed indispensable for the goal to be achieved. ERT considers that companies should be permitted to go further than is required by public policy and regulation – the final sentence of paragraph 583 should therefore be amended to make clear that "cooperation agreements may be indispensable for reaching the goal in a more cost-efficient way <u>*or to achieve more sustainable goals*</u>". ERT considers this would be in line with paragraph 546, which states that "cooperation agreements may become necessary if there are residual market failures that are not <u>fully</u> addressed by public policies and regulations" (emphasis added).

7. Mobile infrastructure sharing agreements

- ERT members welcome the recognition in the draft revised Horizontal Guidelines that connectivity is key to driving the digital economy, as well as

[4] In addition, paragraph 547 of the draft revised Guidelines could be amended as follows: "Where a sustainability agreement concerns a type of cooperation described in any of the preceding chapters of these Guidelines, its assessment will be governed by the principles and considerations set out in those chapters, while also taking into account the specific sustainability ~~objective pursued~~ <u>benefits stemming</u> from the agreement".

the related benefits that network sharing brings, for example with regard to faster roll out and more innovative technologies. The benefits deriving from such co-operations are far greater than purely cost-savings - they also enable faster and wider deployment of new technologies and reduce the industry's ecological footprint, while allowing European businesses and consumers to reap the full potential of digital economy with the most efficient and innovative networks.

- In this context it is crucial that the draft revised Guidelines provide sufficient flexibility to adapt to the constant evolution of network technology and are future proof to enable innovative co-operations. For instance, the distinction between passive sharing, active RAN sharing and spectrum pooling/sharing for the competitive assessment of these agreements needs to be flexible to be future-proofed for the virtualisation of networks in the roll-out of 5G and 6G.

Examples of cooperation to be addressed in draft revised Horizontal Guidelines

ERT has included the examples in this Annex 1 in response to requests from the Commission for examples of sustainability agreements. The examples provided are "real" examples from ERT members, which have been anonymised by introducing fictitious industries and subject matters. ERT urges the Commission to provide guidance on each of these examples in turn.

1. "Naming and shaming"

- A trade association has an aim to put pressure on suppliers to remove commodities linked to deforestation [or any other unsustainable / unethical behaviour] from the distribution chain.

- Any individual unilateral "boycott" of suppliers connected with deforestation will not change supplier behaviour – as there will always be companies prioritizing cheapest input, especially in the current climate of increasing input costs.

- The trade association invites members to share supply chain due diligence with an external third party in order to identify which suppliers are (a) involved in deforestation or (b) unable to prove that their commodities are not connected with deforestation.

- The trade association then publishes the list of suppliers which are on the "bad list" (and recommends members not to purchase from them), hoping that by "naming and shaming" these suppliers, this will force a change of behaviour.

2. "Excluding Suppliers/Collective Boycott"

- A trade association has the aim to force suppliers to use a less polluting technique in mining aluminium. The mining of aluminium may take place within or outside of the EU.

- The less polluting technique has a higher cost than the polluting alternative, and therefore there will likely be a higher purchase price (which might be passed on to consumers).

- There is no regulation in place – or it will take many years to get regulation in place (or there may never be regulation if the product is mined outside of the EU).

- Any unilateral action by an individual company will not change behaviour, because the companies deploying polluting techniques will find alternative buyers and those buyers who have lower costs may gain market share by being able to price more aggressively.

- The trade association members agree to boycott any suppliers who use the polluting technique, thereby denying them a large portion of the potential purchasing market and hopefully forcing through change.

3. Alternative Base Materials

- Road pollution is caused by emissions as well as fine particles from tyres and brakes.
- Media and political attention is on emissions, however industry also wants to address the pollution caused by tyres and brakes.
- Industry successfully creates an alternative material for tyres and brakes which vastly reduces the amount of fine particles “emitted”.
- This alternative is significantly more expensive but the cost could be significantly reduced if adopted by all manufacturers.
- There is no regulation or regulation is many years away.
- Industry wants to agree that all new tyres and brakes manufactured after [a short time in the future] will only use the new material.
- This will increase all manufacturers costs and each manufacturer is free to decide whether and how to pass on the price increase.

4. Sponsoring Upstream Sustainability

- The industry has the aim of encouraging sustainable farming techniques on a wide-scale in order to make a measurable difference in reducing the need for fertilizers, prevent soil erosion and move toward carbon neutrality. The farmers may be based in or outside the EU.
- In order to have a measurable impact a minimum of 500 farms need to deploy the sustainable techniques.
- No individual company can sponsor and buy all the output of 500 farms.
- A number of competitors agree to support the farms by providing financial incentives and technical support to deploy the sustainable techniques.
- It will also be necessary to ensure the crops are all purchased.
- The competitors will need to agree how much each party buys and from which farm. It might even be necessary to agree a common price in order to convince the farms to enter the programme.

5. Collective Agreement to Stop Advertising

- The drinks industry is reacting to research that excessive consumption of energy drinks by children and adolescents can lead to adverse health consequences. Three companies have a large portion of the energy drinks market (more than 60%).

- There has been significant media attention around this issue, following a highly publicised study.

- It will take years for all Member States to introduce appropriate marketing regulation.

- The top three energy drink manufacturers would like to agree to stop any marketing directed at under-18 audiences. This could include marketing at sports events popular with children and adolescents.

- It is critical that all three companies agree to the same restriction, otherwise those who remain free to market at these sporting events will easily gain market share at the benefit of the more “responsible” companies. This threat of loss of market share cannot be counteracted by the other competitors advertising their “responsible approach”.

6. Joint sustainability initiatives in the production process

- Industrial manufacturing is one of the key drivers for greenhouse emissions. In order to reduce these emissions, alternative production processes have to be developed. This is often associated with extraordinary costs, which industrial players cannot bear by themselves.

- To overcome this dilemma, joint development of production facilities with competitors might enhance the dynamic of green transformation of carbon-heavy industry, e.g. by switching from fossil energy sources to hydrogen.

- In this context, information exchange with competitors is crucial for the planning process. Also transferring production capacities to joint production facilities with competitors – by means of a joint venture or a contractual cooperation – could be considered as a restriction of competition.

- ERT would welcome clarification that such genuinely environmental-friendly initiatives reducing the carbon footprint of industrial manufacturing in the EU would be considered as agreements not falling within the scope of Article 101(1).