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

**Comments from the Association of Inhouse Competition Lawyers ('ICLA')**

**26 April 2022**

ICLA is an informal association of in-house competition lawyers with currently nearly 500 members across the globe. The Association does not represent companies but is made up of individuals as experts in the area of competition law. This paper represents the position of ICLA and does not necessarily represent the views of all of its individual members.

ICLA welcomes the European Commission's decision to initiate a public consultation to seek stakeholder input on the draft revised block exemption regulations on research and development agreements ('R&D BER') and specialisation agreements ('Specialisation BER'), and the accompanying Guidelines on horizontal cooperation agreements ('Horizontal Guidelines'), which will expire on 31 December 2022.

Overall, the draft proposals make a significant improvement compared to the current ones, given that further guidance, clarification on certain aspects, and a coherent adaptation of the current framework to digital and green transition have been provided. These changes will provide more legal certainty to businesses when entering into cooperation agreements in the European Union. However, ICLA submits that there are still relevant items that require to be revisited by the Commission in this last interaction, either because they are not adapted to new market realities or because further clarification is needed.

ICLA's input focuses on those sections that are most relevant from an inhouse competition lawyers' perspective, and that are most likely to generate consensus amongst its members. No specific conclusions should be drawn from the lack of comments on other sections.

## 1. Draft R&D BER and accompanying guidelines

1.1 ICLA regrets that the draft R&D BER and the corresponding section in the draft Horizontal Guidelines have missed the opportunity to adjust some (or even any of the) most critical points regarding joint R&D that have been raised by stakeholders during the previous consultations around the review of the horizontal cooperation framework. Moreover, the introduction of a new category of "companies competing in innovation" (including so-called R&D poles) makes the self-assessment even more complex and is likely to have a significant chilling effect on innovation. We elaborate on these points below.

1.2 The draft R&D BER and Chapter 2 of the draft Horizontal Guidelines fails to highlight the general pro-competitive nature of joint R&D cooperation and lack clearer guidance to ensure companies have enough legal certainty to enter into pro-competitive R&D agreements, even if not all requirements foreseen in Art. 3 of the draft R&D BER are strictly fulfilled. This is even more important for non-horizontal R&D (e.g., co-creation with customer) and paid for R&D.

1.3 The draft R&D BER continues to treat paid for research as any other form of R&D. We believe this is not in line with commercial reality, because sometimes companies consider outsourcing R&D to another company. This might have several reasons such as e.g., lack of expertise, lack of capacity, etc. The idea when outsourcing R&D is usually similar to a subcontracting whereby the subcontractor produces the products and supplies them exclusively to the principal. For these reasons, paid for research should be treated under the subcontracting notice and should fall outside the scope of the R&D BER.

1.4 The draft R&D BER continues to establish that joint R&D agreements fall under the block exemption if the combined market share of the companies entering the agreements does not exceed 25% on the relevant product and technology market. We are of the view that the notion of technology market is not practical and does not add any value for the assessment. In practice, it is highly unlikely that companies have a clear overview of all technologies "capable of being improved, substituted or replaced by the contract technologies". It is even more unlikely that companies can calculate their market share on such a market. Likewise, taking into account that R&D agreements are generally pro-competitive, the reference to technology markets should be removed and the market share threshold should be limited to relevant product markets.

1.5 The draft R&D BER introduces the notion of undertakings competing in innovation, including R&D poles, which should be removed. Art. 6.3 of the draft R&D BER stipulates that R&D agreements between companies competing in innovation shall only be exempted for the duration of the R&D if, at the time the R&D agreement is entered into, there are three or more competing R&D efforts in addition to and comparable with those of the parties to the R&D agreement. We are of the view that this notion should be removed, as it is extremely unduly stringent and creates legal uncertainty. It is almost impossible for companies to assess how many parallel comparable R&D efforts exist, especially given that competitors usually do not make their R&D efforts public or exchange such competitively sensitive information (as such exchange is likely to constitute an infringement of competition rules). The difficulty in the assessment is further exacerbated by the fact that the three competing and comparable R&D efforts rule may include not only R&D efforts in which a third party currently engages but also R&D efforts "*in which a third party is able and likely to independently engage*". The high level of uncertainty will restrain companies from entering into this type of R&D agreements and thus will have the unwanted effect of hindering innovation.

1.6 The requirement of full access rights to the results for the purposes of further research and development and exploitation should be removed from the listed requirements set out in Art. 3.1. of the draft R&D BER. This requirement is unnecessary and has a chilling effect on

innovation. Moreover, future competition on innovation is sufficiently protected by the prohibition of Art. 8 (1) which includes 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.

1.7 Subsidiarily, the current notion on "Access to the final results" still creates several legal uncertainties, particularly because it implies that "positive" requirements/conditions have to be met by any R&D agreement under the draft R&D BER. Several points need to be addressed in this sense:

(i) The material scope remains unclear, and competition authorities as well as case law have not provided clear guidance on how to fulfil the criteria set out by the respective rules. For instance, it has not been made clear whether the access granted to the final results should be only to the "final" ones (to be defined accordingly in our view) or further results obtained in the course of the R&D project. Likewise, it is not clear whether the access should be granted as soon as the respective result has been achieved or it is sufficient to grant such access at the end of the R&D project.

(ii) Guidance on how access should be granted is needed, specifying the specific timeframe under which such access should be granted.

(iii) Especially in cooperation projects with publicly funded research institutions and universities, there is still uncertainty about the coherence with State Aid law. The scope and material means to guarantee access to the final results also need to be addressed if the cooperation project is publicly funded (except for Art. 3(3) of the draft R&D BER).

(iv) Last, key definitions (e.g., field of use restrictions) remain unclear. These definitions must be addressed and further clarified by the Horizontal Guidelines or the R&D BER.

1.8 Article 4 of the draft R&D BER stipulates "access to pre-existing know-how" as a condition to benefit from the exemption (regarding R&D agreements that exclude joint exploitation of the results). This refers to background know-how which is indispensable for the purposes of the exploitation of the results. This requirement should be removed, it has significant chilling effect on the willingness of companies to engage in joint R&D which would eventually be contravening the spirit of the R&D BER. It should be left to the parties that join the agreement to stipulate access rights to background IP and rights of exploitation.

1.9 If the European Commission decides to maintain this requirement, the inherent ambiguity surrounding the term "indispensable" may trigger fierce disputes between the parties as to what pre-existing know-how should be accessible in order to comply with this condition. To avoid this, we suggest that this provision is limited to all pre-existing background know-how that was introduced into the joint R&D project by the owning party and which was necessary to produce the project's final results.

1.10 A restriction of passive sales in any type of specialisation in the context of exploitation should be possible under the draft R&D BER. Businesses might have a legitimate interest to limit both active and passive sales of the products by the other party of the R&D agreement.

For example, companies might want to prevent that any party to the joint R&D cooperation sells the products to their competitors. Under the current rules, this would be a hardcore restriction. Therefore, considering the pro-competitive nature of R&D agreements, we believe that companies should be allowed to impose restrictions on each other under any form of specialization in the context of exploitation.

1.11 Paragraph 72 of the draft Horizontal Guidelines reads: "… *R&D cooperation between not competing undertakings generally does not give rise to restrictive horizontal effects on competition*". The Horizontal Guidelines should provide further certainty by crossing out the term "generally" in the quoted snippet, in particular considering that the concept of "competing undertaking" covers both actual and potential competitors (see Article 1 paragraph 1(17) and paragraph 1(18) of the draft R&D BER). This proposed amendment would be in line with Article 6.1 of the draft R&D BER, which states that "*[w]here the parties to the R&D agreement are not competing undertakings, the exemption provided for in Article 2 shall apply irrespective of market shares*...".

1.12 The definition of "potential competitor" for an existing product and/or technology (Article 1 paragraph 1(17) of the draft R&D BER) differs from the current definition in one important respect. Currently, a company is considered a "potential competitor" if it is likely to undertake the necessary investments or other switching costs to enter the product/technology market "*in case of a small but permanent increase in relative prices*". The quoted language is no longer in the draft. This is surely a conscious amendment, which makes it more difficult to become a "potential competitor" under the draft. This is an important change that should also find its place in the Horizontal Guidelines. Thus, it should be made clear at paragraph 123 of the draft Horizontal Guidelines that for a company to be considered a "potential competitor" it has to be likely that it will undertake the necessary investments even if there is no small but permanent increase in relative prices.

1.13 More general comments on the notion of "potential competitor", which remains impractical and continues to create legal uncertainty, are included in paragraph 3.1.3. below. Relatedly, both the current and the forthcoming Horizontal Guidelines indicate that the "*potential competitor*" should "*be likely to undertake, within not more than 3 years, the necessary additional investments*" to supply the relevant competing product/technology. The drafting is confusing. ICLA considers that the 3-year period relates to the time the company should take between now and the moment it brings the competing product/technology to the market. It should not refer to the time between now and the moment when the company would undertake the necessary additional investment, as it currently reads. This should be properly redrafted to avoid confusion.

1.14 Article 8 (3) of the draft R&D BER states that the fixing of prices when selling products or the fixing of license fees when licensing technologies constitutes a hardcore restriction. However, it then establishes an exception to this hardcore restriction: i.e., the fixing of prices/license fees charged to immediate customers/licensees where the joint exploitation of the results includes joint distribution/joint licensing and is carried out by a joint team, organisation or undertaking or is jointly entrusted to a third party. This exception leaves out the third way in which the results can be jointly exploited, namely where the parties allocate

the exploitation work between them. In this respect, it is difficult to see why both parties cannot lawfully fix the price in situations where one party is in charge of production and the other in charge of distribution, or where only one party produces and distributes on the basis of an exclusive licence granted by the other party. It seems apparent that in these scenarios both parties have a legitimate interest in determining the price to the end customer. Without having a say in such price they might well decide not to allocate tasks.

1.15 Paragraph 170 of the draft Horizontal Guidelines pretends to summarise the hardcore restraints set out at Article 8 (6) of the draft R&D BER. However, this paragraph is wrongly drafted and thus not capture the Article 8 (6) restraints.

## 2. Draft Specialisation BER and accompanying joint production guidelines

2.1. In general, the European Commission should enable cooperation to jointly invest in innovation technologies to ensure future proof digital ecosystem in Europe. Therefore, the pro-competitive aspects of such joint production agreements need to be more strongly accounted for. In this context, we welcome the recognition of connectivity being key to drive the digital economy and related benefits that network sharing brings with regard to faster roll-out and more innovative technologies. In order to allow European business and consumers to reap the full potential deriving from network sharing cooperation it needs to account for all the benefits, including reduction of ecological impact, and provide sufficient flexibility to adapt to the constant evolution of network technology to ensure most efficient and innovative networks. For instance, while the distinction between passive sharing, active RAN sharing and spectrum pooling needs to be flexible to be future-proof with regard to the 5G and 6G virtualisation of networks.

## 3. Draft Horizontal Guidelines

### 3.1. Introductory Chapter – General comments

3.1.1. Overall, ICLA considers that the draft Horizontal Guidelines do not sufficiently envisage the challenges emerged by digitalisation and globalisation. New forms of cooperation are emerging in the digital economy and bigger scale is needed to compete in global markets, which require undertakings to cooperate in more agile ways to create innovative digital solutions for customers with the aim to ensure interoperability and the creation of new technological standards in the digital field. The draft Horizontal Guidelines do not sufficiently address new market dynamics and new forms of cooperation that form part of broader ecosystems and are envisaged in creative formats such as hackathons, for example, that aim to foster innovation and competition on the merits. The draft Horizontal Guidelines fail to provide legal certainty to participants of such cooperations. Therefore, it would be useful if the draft Guidelines would include some examples on new types of cooperation such as digital ecosystems, industry alliances and hackathons, among others.

3.1.2. ICLA welcomes the clarification made in paragraph 13 of the draft Horizontal Guidelines, whereby agreements and concerted practices between the parent(s) undertakings and their jointly controlled subsidiaries (JV) will not meet Art. 101 (1) TFEU, as they are considered a single economic unit and thus, a single undertaking under EU competition rules. This clarification is key to ensure legal certainty for companies in their relationship with their JVs, and it is aligned with recent case law. However, in the scenarios listed in paragraph 13 under which Art. 101 (1) TFEU will still apply, the scenario applied to agreements "*between the parents to alter the scope of the joint venture*" is unclear. We do not understand the coherence behind this provision and further guidance on this point will be welcomed to ensure legal certainty to undertakings in the relationship with their JV.

3.1.3. The guidance provided on the notion of potential competitor in paragraph 17 of the draft Horizontal Guidelines remains unclear, creating substantial legal uncertainty for undertakings. We believe companies hardly assess whether or not another company has the "*firm intention and inherent ability"* to enter the market in a timeframe of three years. If the intention to enter a given market by a company is not available in the public domain, any exchange on future strategy plans would likely result in an exchange of competitively sensitive information, which is prohibited by EU competition rules. Likewise, the same applies to the other criteria included in the draft Horizontal Guidelines such as whether or not a company has taken "*sufficient preparatory steps*" or "*the real and concrete possibilities of an undertaking*" to enter the market. Therefore, the draft Guidelines should clarify the term "competitor", by only including actual competitors, or it should provide clearer, specific and more practical guidance that allows companies to assess whether or not a company is a potential competitor in practice.

3.1.4. The notion of "ancillary restrictions" set out in paragraph 39 is too strict and the threshold to be met under the draft Horizontal Guidelines is much higher than the threshold foreseen in the Commission Notice on Ancillary Restraints.[1] The Notice on Ancillary Restraints establishes that an ancillary restraint to a concentration is legitimate if the concentration "*could not be implemented or could only be implemented under considerably more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably greater difficulty*" (paragraph 13). This threshold is not economically sensible. Therefore, the threshold foreseen in the draft Guidelines should be adjusted to reflect the threshold applied in the Notice for Ancillary restraints.

### 3.2. **Information Exchange**

3.2.1. We believe there is still significant room for the draft Horizontal Guidelines to provide clearer guidance on when information exchange serves the consumer benefits or constitutes a restriction. In addition, we believe there are several sections in the draft Horizontal Guidelines where legal uncertainty has increased with the provided wording, in particular, with regard to data sharing, which is indispensable in the digital economy.

[1] Commission Notice on restrictions directly related and necessary to concentrations (2005/C 56/03).

3.2.2. We believe the draft Horizontal Guidelines do not sufficiently address the information exchange in the digital field and the new types of cooperation that are emerging. As big data is of essence in the digital economy these cooperation models require broader information exchange and data sharing between the participating companies. Clear guidance on these new cooperation models is needed, as the boundaries of permitted information exchange in such cooperations remain unclear. Especially with regard to digital ecosystems, it should be clarified that exchange and collaboration within the ecosystem (intra-ecosystem) can only harm competition if there is not sufficient competition from other ecosystems (inter-ecosystem).

3.2.3. Data sharing and data pooling agreements are considered a specific type of information exchange within the draft Horizontal Guidelines (paragraph 407 and related footnote). The consideration of data sharing and data pooling agreements as information exchange may lead to any information shared within this kind of agreements being considered commercially sensitive and therefore subject to potential breaches of competition rules, even if sharing of data that in other contexts may be considered sensitive may have an overall pro-competitive effect or bring substantial consumer benefits. Moreover, considering that this type of cooperation will become even more common than before within the digital economy, ad-hoc guidance on data sharing and data pooling agreements would be extremely helpful to provide legal certainty for undertakings in their assessment under the meaning of Article 101 TFEU.

3.2.4. When it comes to data pooling agreements, we believe the European Commission takes a negative bias on the assessment of potential restrictive and foreclosure effects of data pooling. Data pooling can provide companies with a larger data base for analytical purposes and allow them to create and improve their innovative solutions to the benefit of customers. Therefore, the draft Horizontal Guidelines should explicitly recognize that data pooling is pro-competitive and that it is generally allowed between competitors and non-competitors. We are of the view that data pooling can only be problematic if data pool owner(s) have a dominant position. Thus, the draft Guidelines should establish a clear safe harbour for data pooling in the absence of a dominant position that should end where such data pooling is abused for anti-competitive alignment.

3.2.5. On the guidance provided on information exchange in M&A transactions (paragraph 410), we are of the view that this paragraph fails to reflect the realities of the M&A process. In particular, information that 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 ensure the terms of their transaction adequately capture and allocate those risks. Similarly, 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 realized) increases, and second, completion (and therefore smooth implementation) nears.

3.2.6. The draft Horizontal Guidelines set out in paragraphs 423 and 424, upfront identification of commercially sensitive information for the assessment of information exchange under Art. 101(1) TFEU. ICLA is of the view that the guidance provided should be precise enough to

avoid broad interpretation. In this sense, several changes should be made to provide legal certainty:

On the one hand, Paragraph 423 of the draft Horizontal Guidelines refers to the term "commercially sensitive information". It states that "*[i]t often concerns information that is important for an undertaking to protect in order to maintain or improve its competitive position in the market(s)*". This seems to be the first and only time the draft attempts to define in general terms the concept of "commercially sensitive information". However, the use of "it often concerns" blurs the definition with a shroud of uncertainty. The reference to "it often concerns" should be crossed out.

On the other hand, paragraph 424 identifies as commercially sensitive information "*[t]he exchange with competitors of future product characteristics which are relevant for consumers*". This provision is too general and uncertain, and it could lead to unjustified strict provisions on information exchange/data sharing which would limit undertakings' ability to exchange information that may generate efficiencies. Beyond that, this seems to be unworkable in the context of joint production or standardisation. Relatedly, paragraph 424 identified as commercially sensitive information "*[t]he exchange with competitors of information concerning positions on the market and strategies at auctions for financial products*". This example should be limited, as the exchange of market shares that are public and in the public domain, should not raise any anticompetitive concerns. Therefore, we propose to fine-tune the wording, by including the following addition:

> "*The exchange with competitors of information concerning positions on the market* ***(as long as such positions are not public)*** *and strategies at auctions for financial products*"

3.2.6 Paragraph 425 of the draft Horizontal Guidelines reads as follows: "*In general, exchanges of genuinely public information are unlikely to constitute an infringement of Article 101. The fact that information is genuinely public may decrease the likelihood of a collusive outcome on the market*". We believe that the European Commission has sufficient experience to be more assertive and provide full certainty as to the untainted nature of "genuinely public information".

3.2.7 Paragraph 428 of the draft Horizontal Guidelines reads as follows: "*the exchange of genuinely aggregated information where the recognition of individualised company level information is sufficiently difficult or uncertain, is much less likely to lead to a restriction of competition than exchanges of company level information*". The European Commission could give more certainty about the untainted nature of "genuinely aggregated information" where proper reverse engineering is not possible. This is yet another example of the cautious tenor which surrounds the draft Horizontal Guidelines in this section.

3.2.8 The heading in section 6.2.4.2 refers to "*Indirect information exchange and exchanges in mixed vertical/horizontal relations*". Based on our reading of paragraphs 435 to 438, ICLA understands that the Commission exclusively has indirect exchanges via third parties in

mind. Therefore, we propose not to refer to mixed vertical/horizontal relations in the section heading, but exclusively to "indirect information exchange".

3.2.9 Paragraph 437 of the draft Horizontal Guidelines is an attempt to explain the legal test applicable to assess a hub-and-spoke scenario (or any other type of indirect information exchange) under Article 101 TFEU. This is a great opportunity for the European Commission to shed full clarity on this type of situations. However, we believe paragraph 437 is not sufficiently clear and thus misses an important opportunity to provide clarity. The main problem seems to lie on the fact that paragraph 437 conflates together the required level of awareness of the supplier and the recipient. This way to proceed confuses the explanation. We propose the following changes to paragraph 437:

> "~~An u~~**U**ndertaking**s** that indirectly ~~receives or~~ transmit~~s~~ **and receive** commercially sensitive information may be held liable for an infringement of Article 101(1). This may be the case on the condition that **both** the undertaking that ~~received or~~ transmitted the information **and the undertaking that received it** ~~was~~ **were each** aware of the anti-competitive objectives pursued by its competitor~~s~~ and the third party and intended to contribute to them by its own conduct. **Regarding the supplier,** ~~T~~**t**his would apply~~,~~ if the undertaking expressly or tacitly agreed with the third party provider sharing that information with its competitors or when it intended, through the intermediary of the third party, to disclose commercially sensitive information to its competitors. ~~In addition, the condition would be met if the undertaking receiving or transmitting the information could reasonably have foreseen that the third party would share its commercial information with its competitors and if it was prepared to accept the risk which that entailed.~~ **Regarding the recipient, this would apply if the undertaking knew or must have reasonably foreseen that the supplier either (i) expressly or tacitly agreed with the third party provider to share the information with its competitors, or (ii) intended to disclose commercially sensitive information to its competitors through the intermediary of the third party, and if the recipient undertaking was prepared to accept the risk which that entailed.** On the other hand, the condition is not met when the third party has used an undertaking's commercially sensitive information and, without informing that undertaking, passed this on to its competitors".

3.2.10 Relatedly, paragraph 436 of the draft Guidelines should also be updated accordingly:

> "In case of an indirect exchange of commercially sensitive information, a case by case analysis of the role of each participant is required to establish whether the exchange concerns an anti-competitive agreement or concerted practice and who bears liability for the collusion. This assessment will notably have to take into account the level of awareness of **both** the supplier~~s~~ ~~or~~ **and** recipient~~s~~ of the information regarding the exchange~~s between other recipients or suppliers~~ of information **between them** ~~and~~ **through** the third party."

3.2.11 Paragraph 448 of the draft Horizontal Guidelines explains when an information exchange will be considered a restriction by object. In this sense, we would like to flag the following issues:

As starting point, we are of the view that information exchange should not be a "per se" violation. As stated in previous consultations, the guidance over restriction by object continues to be unhelpful and underlines the very strict approach that the European Commission will take on information exchange as a restriction by object. As a consequence, many companies will continue to adopt an extremely restrictive approach to information exchange out of fear of ending up in the "restriction by object box", having a chilling effect for companies to enter into pro-competitive agreements. Instead, the draft Guidelines should explicitly clarify that the actual effects of the exchange on competition should always be assessed by carefully balancing the potential restriction against the benefits that may arise from the information sharing. This holds particularly true in the context of data-driven digital markets.

If the Horizontal Guidelines were still to consider that certain types of exchange constitute a "per se" violation, ICLA offers the following comments:

According to paragraph 448 of the draft Horizontal Guidelines: "*An information exchange will be considered a restriction by object when the information 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*". Under this new, very general proposed definition all information exchange that may affect future conduct will be tainted as a *by object* restriction, regardless of whether it is a conduct on prices and/or quantities (which are the key concerns under the existing Guidelines) or a conduct about any other more innocuous parameter. Thus, the draft Guidelines appears to go unjustifiable and improperly wide on the proposed definition.

Relatedly, paragraph 424 of the draft Horizontal Guidelines provides examples of what information exchange between competitors may be qualified as a *by object* restriction. It does so mainly by reference to the nature of the information exchanged. Again, those examples go well beyond what the current Guidelines establish which, as said, limit the *by object* box to the exchange between competitors of individualised data regarding intended future prices or quantities. Furthermore, those examples include the exchange of current data within the *by object* box. In this respect, it should be noted that exchange of current data could amount to a restriction *by object* only where it may provide an indication of the future conduct to adopt in the market.

Paragraph 449 of the draft Horizontal Guidelines states that "*[i]n order to establish whether there is an infringement by object, the decisive criterion is the nature of the contacts*". This reference to "the nature of the contacts" as the decisive factor seems new, and without further clarification will trigger a huge amount of uncertainty.

Last, the example in paragraph 449 needs to be reconsidered. Under no circumstances should any discussion that concerns the regulation of future products be

regarded as a *by object* restriction. Regulatory initiatives tend to focus on the impact of upcoming product generations. If an exchange of "environmental characteristics" is permissible only with reference to current or historic products, common industry positions will no longer be possible to a large extent.

3.2.12 In the "Access to information and data collected" section (paragraphs 441 and 442), it is stated that in situations where the information exchanged is strategic for competition and covers a significant part of the relevant market, the exchange of such strategic information may not entail competition risks only in case such information is made accessible in a non-discriminatory manner to all undertakings active in the relevant market. We believe that this provision is excessively restrictive and should be deleted, as it puts at odds the incentives for undertakings to enter into data sharing agreements, whilst interfering with the commercial freedom of the parties.

3.2.13 With regard to unilateral disclosures (paragraph 432), the draft Horizontal Guidelines should expressly state that, in any type of unilateral disclosure, the general principle of presumption of innocence dictates that it is for the Regulator to demonstrate that a competitor was aware of the unilateral disclosure. In addition, the statement at paragraph 432 whereby a unilateral disclosure through posting on websites can constitute a concerted practice, seems to be at odds with paragraph 434, which states that "*[w]here an undertaking makes a unilateral announcement that is also genuinely public, for example through a post on a publicly accessible website, …. this generally does not constitute a concerted practice*". It also seems to be at odds with the box at paragraph 426 which considers that the advertising by petrol stations of their current pricing information is a typical example of genuinely public information, and thus it cannot constitute a concerted practice. Finally, it would be rather awkward if every time a competitor becomes aware of information publicised in a public tool/domain, it had to somehow publicly distance itself from such information.

3.2.14 Paragraph 433 is unclear and should clarify that disclosure of commercially sensitive information from a competitor refers to "non-public information", under which companies would be expected to firmly object or report. We believe an addition should be made in this paragraph, as following:

> "When an undertaking receives commercially sensitive information from a competitor (be it in a meeting, by phone, electronically or as input in an algorithmic tool **or any other way which is not genuinely public announcement**), it will be presumed to…."

3.2.15 Moreover, paragraph 434 should clearly state that the unilateral announcement of genuinely public information will not constitute a concerted practice under the meaning of Article 101 (1) TFEU and therefore not require a proactive statement by the receiver that it does not want to receive such information. Likewise, we are of the view that unilateral disclosure of data to customers is not problematic and that this should be emphasized in the draft Horizontal Guidelines, also by removing the example given in the same paragraph.

3.2.16 Information exchange in dual distribution should be explicitly excluded from the draft Horizontal Guidelines. ICLA actively participated and provided its views and experience in

the ad-hoc public consultation on information exchange in a dual distribution scenario, which has been dealt with under the Vertical Guidelines revision. In the draft Vertical Guidelines, the European Commission provides examples of information exchanged that are not generally considered to be necessary to improve the production of goods and services and which should be assessed taking into account the Horizontal Guidelines. We do not agree with this approach as there are undeniable differences between information exchange in dual distribution and information exchange between competitors who are not in a dual distribution relationship. Any kind of information exchange between a supplier and its distributor should therefore be explicitly excluded from the draft Horizontal Guidelines and should be assessed under the Vertical Guidelines only. This can be addressed in paragraph 48 by stating that a dual distribution relationship, which fulfils one of the conditions of Article 2(4)(a) or (b) of the VBER, including any information exchange between a supplier and its distributor, is to be assessed exclusively under the Vertical Block Exemption Regulation (VBER) and Vertical Guidelines.

### 3.3. **Purchasing agreements**

3.3.1. The draft Horizontal Guidelines contain a number of useful indications to differentiate a buyer cartel from a legitimate joint purchasing cooperation. This is a welcomed clarification. Cases where the partners jointly (and openly with regard to the supplier) bundle volumes but negotiate other terms individually are obviously not a buyer cartel but rather less restrictive of competition than a joint discussion of prices (see paragraph 319).

3.3.2. We believe that the thresholds of 15% market share on the relevant purchasing and selling market(s) remains too low and should be increased to 30%.

3.3.3. The draft Horizontal Guidelines fail to include a distinction between purchasing agreements in relation to so-called “direct” and “indirect” material. *Direct material* refers to products and services that are a direct input into the final product that a company sells on the selling market. *Indirect material* refers to materials that are used in a production process and which are no direct input to the end products sold by a party on the selling market (e.g. office supplies, travel agency services for employees, etc.).

3.3.4. A purchasing agreement in relation to indirect material can have no impact on competition on the selling markets. Yet, the draft Horizontal Guidelines foresee the same safe harbour threshold and guidance on individual assessment as for purchasing agreements for direct material.

3.3.5. The draft Horizontal Guidelines should explicitly clarify that purchasing agreements relating to indirect material both between competitors and non-competitors on the selling markets are unlikely to have potential restrictive effects on competition in the absence of a dominant position by the purchasing alliance on the purchasing markets.

3.3.6. Licensing negotiation groups (“LNGs”) are now mentioned in the draft Horizontal Guidelines (paragraph 312), but the draft Guidelines refrain from providing any clarification under with

specific requirements LNGs can be established and how compliant negotiations can be conducted. Specific guidance is needed, taking into account the specificities of Standard Essential Patents (SEP).

3.3.7. Joint purchasing agreements can be beneficial on many different markets, not only where there are very large suppliers (paragraph 313) or in cases of shortages.

3.3.8. Paragraph 339 of the draft Horizontal Guidelines states that collusion could be facilitated if the parties achieve a high degree of commonality of costs. It would be useful to receive further guidance on what is considered a high degree (e.g., above 50%).

3.3.9. The example included in paragraphs 333 and 557 of the draft Horizontal Guidelines seems overly strict. It is perfectly legitimate for companies to decide to purchase sustainable products only. This also applies if companies that bundle their purchasing volume take such a joint decision, irrespective of their buying power. It is difficult to see why such a decision could restrict competition in terms of price and choice. Most companies nowadays have a strong focus on purchasing sustainable products. This is a decision based on objective criteria which cannot be confused with a boycott scenario of a specific supplier who does not offer sustainable products. This example is likely to create confusion and legal uncertainty. It should therefore be deleted.

3.3.10. Paragraph 334 states that buying power may be used to foreclose competing purchasers by limiting their access to efficient suppliers. This example does not reflect the fact that any foreclosure can only be the result of an exclusivity obligation between the parties of a joint purchasing arrangement and several suppliers on the market. The mere fact that a joint purchasing group has buyer power does not in itself lead to foreclosure. This will only be the case if suppliers are bound to supply exclusively to the joint purchasing group. A parallel can be drawn to a situation of market dominance. Having a dominant position (or market power) is in itself not illegal. It is the abuse of that dominant position that leads to foreclosure and a violation of competition rules (e.g., by imposing exclusivities). This should be clarified in the draft Horizontal Guidelines.

3.3.11. The guidance on confidentiality safeguards again only focusses on joint purchasing by cooperatives or jointly controlled companies (paragraph 342).

3.3.12. Example 6 (paragraph 354) only focusses on information exchange. There seems to be a part missing.

### 3.4. **Commercialisation agreements**

3.4.1. In addition to the guidance in paragraph 355 as to what such kind of agreements are all about, some concrete examples would further enhance the value and certainty added by this section. For instance, based on the experience of some ICLA members, multi-national end customers increasingly require certain services to be provided in various countries from one tenderer only, whereas some product markets are fragmented in terms of geographic

coverage. The bidding consortia rationale is also suitable when, e.g., a motor vehicle fleet leasing provider joins forces with a competitor covering countries which are not part of its own portfolio. In the absence of such joint commercialization led by one "face to the customer", competition for multi-national companies with a global sourcing strategy would remain limited to very few providers covering all countries relevant to such big undertakings respectively. In order to enable the opposite scenario, the draft Horizontal Guidelines (e.g., paragraph 391) should clarify that a scenario of the abovementioned kind will in essence be treated like a bidding consortium, even if it is used by a company on the basis of an ongoing cooperation (due to the reduced feasible response time compared to a typical consortia situation such as a major construction project). Finally, the draft Horizontal Guidelines (e.g., paragraph 380) should explicitly acknowledge that the customer's wish for providers to team up to meet its expectations positively influences the relevant assessment.

3.4.2. Paragraph 392 deals with the assessment of when a party can compete in a tender individually. The paragraph is helpful, but it would also help to make clear that to determine whether an undertaking is a competitor in a specific tender, it must be established that entering the project on its own would be "*economically viable*".

3.4.3. There should also be a reference as to how the geographic area may impact the assessment. In this respect, where a call for tender relates to a product market in which an undertaking is active but covers a geographic area in which such undertaking is not active, it should be determined whether it would be both realistic and economically viable for such undertaking to expand its business to enter the relevant geographic area.

3.4.4. Paragraph 392 rightly indicates that the assessment should consider the specific circumstances of the case. Such circumstances should include any regulatory permits or quality certifications required to perform a project, i.e., whether the undertaking has such permits or certifications, and – if not – whether it would be both realistic and economically viable for the undertaking to timely obtain them for the tender.

### 3.5. **Sustainability agreements**

3.5.1. The guidance provided on sustainability agreements misses an important point, as it does not take into account sustainability benefits as a relevant factor under an Article 101 (3) TFEU assessment of a horizontal cooperation agreement. Green Deal objectives should be considered as creating pro-competitive effects in the general appraisal of any horizontal cooperation agreement, and sustainability should be considered as one of the possible efficiencies to be taken into account under Article 101 (3) TFEU (paragraph 41 of the draft Horizontal Guidelines). Subsidiarily, we propose to include in every chapter of the draft Horizontal Guidelines addressing the different sorts of horizontal cooperation agreements a specific mention on the consideration of sustainability efficiencies in the assessment of the given cooperation agreement under Article 101 (3) TFEU, in such a way that sustainability efficiencies are considered in the overall assessment of an agreement's pro-competitive effects.

3.5.2. ICLA agrees that for purposes of Art. 101 (1) TFEU, whenever such agreements correspond to one of the "traditional" types of cooperation agreements (e.g., R&D, Production or Purchasing agreements), they should in principle be assessed according to the respective chapter(s) of the draft Horizontal Guidelines (paragraph 556). Nevertheless, the European Commission should clarify that an agreement "*to only purchase from suppliers observing certain sustainability principles*" (paragraph 557) does not amount to a purchasing agreement absent actual joint purchasing activities. Otherwise, paragraph 557 would create confusion with paragraph 561, whereby such an agreement will be considered a sustainability standard agreement ("*Competitors may also wish to agree on purchasing production inputs only if the purchased products are manufactured in a sustainable manner*").

3.5.3. Paragraph 571 sets out that "*an agreement between the parties to the sustainability standard to put pressure on third parties to refrain from marketing products that do not comply with the sustainability standard restricts competition by object*". We are of the view that this statement is overly broad and creates unnecessary confusion. In fact, by their very nature, successful sustainability standards often create competitive pressure on third parties to phase out less sustainable products. Moreover, if the term "third parties" includes suppliers, this could be read as preventing parties to a sustainability standardisation agreement from "trickling down" sustainability requirements along their own supply chain.

3.5.4. With regard to the guidance provided on the assessment of sustainability agreements under Art. 101 (1) TFEU, ICLA is of the view that some factors should be rebalanced in favour of protecting competition for sustainable, rather than unsustainable goods:

i) We propose the removal of "foreclosure of alternative standards" as an anticompetitive effect in paragraph 569. Principles such as the As Efficient Competitor Test recognise that consumers are not best served by protecting inefficient rivals. This should also be applicable to sustainability agreements.

ii) It would be helpful if the European Commission clarifies its position on the *Meca-Medina* and *Wouters* case law and its application to sustainability agreements (para. 548 and footnote 315). There are strong parallels between sustainability and the objectives protected in these cases (such as, in *Meca-Medina*, rules to safeguards *"equal chances, […] the integrity and objectivity of competitive sport and ethical values in sport"*). We would therefore encourage the European Commission to at least indicate that it will consider on a case by case basis if legitimate sustainable considerations can exclude agreements from the application of Article 101 (1) TFEU.

3.5.5. ICLA welcomes the draft Horizontal Guidelines' endorsement of mandatory standards (provided that participants can individually choose to adopt a higher standard). Paragraph 572 specifies that obliging third parties to comply with a standard fall outside the soft-safe harbour, meaning that obliging the parties to comply with the standard falls within the safe harbour. Nevertheless, more clarity is needed.

3.5.6. The current drafting leaves room for confusion when citing that companies are "*free to also operate outside the label*" as a reason why a collaboration may lack appreciable anti-

competitive effects (paragraph 575), and when mentioning the "*non-exclusive*" nature of a sustainable label as one of the factors making appreciable negative effects unlikely (see example 2).

3.5.7. Paragraph 571 identifies restrictions by object on sustainability standards where *"agreement between the parties to the sustainability standard to put pressure on third parties to refrain from marketing products that do not comply with the sustainability standard"*. ICLA is of the view that such conduct is not necessarily anti-competitive by nature and should be removed as a *by object* restriction or otherwise, to clarify what is meant by pressurising third parties to comply with a standard and how this will be assessed. If "third parties" refers to competitors, having market-wide standards, it is not necessarily harmful that parties can compete on other elements as above. 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.

3.5.8. On the appraisal of sustainability agreements under Article 101 (3) TFEU, ICLA would like to raise several points on the criteria applied to analyse the pro-competitive nature of this sort of agreements:

i) On the indispensability, we recommend casting a broader net around initiatives that are indispensable. While the burden of proof will remain on the competitors that are cooperating to achieve a sustainable outcome, a too strict standard of proof will continue to have a chilling effect on the necessary innovation and steps forward in view of the limited time allowed to achieve the necessary sustainable outcomes. Achieving earlier and more effective benefits should be protected, the necessity of mandating minimum standards should be recognised, and assumptions on legislative intentions should be removed.

ii) On the pass-on to consumers, we suggest the following changes: (i) We agree that consumers value more than just their own individual benefit, and the recognition of individual non-use value benefits are helpful. However, tying these benefits to the willingness to pay materially undermines their use; (ii) On the collective benefits, we believe that although it is highly commendable that the European Commission endorses collective benefits as relevant within Art. 101 (3) TFEU, unfortunately, the ability to do so is significantly limited by the requirement that actual direct users must be beneficiaries. So, unless the polluters themselves (and more generally consumers whose otherwise unsustainable behaviour would cause negative externalities) benefit, collective benefits are irrelevant and co-operations achieving such benefits not legally feasible. We consider that Article 191(2) TFEU (polluter pays principle) allows the Commission to take such necessary step. With the need to combat climate change, the pass-on to consumers should be allowed to be relative and should be able to take into account that those consumers the Commission now considers should get a fair share, may have benefited too much in the past.

iii) On the no elimination of competition, ICLA agrees that market-wide sustainability agreements covering the entire industry do not necessarily eliminate competition where businesses can compete on at least one important aspect of competition (paragraph 611). In fact, addressing properly negative externalities requires industry wide collaborations. This makes market coverage highly beneficial for sustainability agreements.

iv) We welcome the recognition of collective benefits as efficiencies under Art. 101 (3) (paragraph 601 ff.). However, by requiring that the collective benefits accrue to the consumers in the relevant market (or showing consumer's willingness to pay), the European Commission takes a half-hearted, Euro-centric approach that does not seem in line with current legislative efforts that mandate sustainability due diligence across the entire (global) supply chain. In practice, this requirement would make sustainability standardisation agreements harder where they are most effective, as illustrated by the example in paragraph 604. It could also be said that with global phenomena such as climate change, environmental benefits accrue to everyone, regardless of geographic or product markets as defined by the competition law concept.

3.5.9. Instead, we believe that the draft Horizontal Guidelines should foresee a de minimis/safe harbour concept for sustainability agreements to allow specific types of cooperation, particularly those aimed at reducing the environmental impact of products or solutions. The guiding principle should not be whether one party would be able to achieve the same result or in a more cost-efficient way (as appreciated e.g., in paragraph 582 ff.), but more precisely, whether it would be able to do so within substantially the same time because time is of the essence when it comes to sustainability goals.

3.5.10. The safe harbour protection should end where sustainability initiatives are abused for anti-competitive alignment (as reflected in "by object" sections paragraph 560 and 570 ff.).

3.5.11. The concept of a "soft safe harbour"[2] (paragraph 572 ff.) is in principle appreciated but the terminology is confusing and the term "significant" increase in price or reduction of choice requires further guidance. In addition, some of the cumulative conditions should be clarified, in particular:

i) Pursuant to the second condition, "*the sustainability standard should not impose on undertakings that do not wish to participate in the standard an obligation - either directly* or *indirectly - to comply with the standard*". The European Commission should clarify that (i) this does not exclude imposing contractual obligations on suppliers to meet certain sustainability requirements resulting from the standard; and (ii) the sustainability standard can impose an obligation to comply with the standard on

[2] We believe there could be other cases where the Commission could provide a safe harbour to allow specific types of cooperation to encourage collaboration and joint working. For instance, in the transport industry, the Commission is promoting the sector to work more collaboratively to achieve the large scale change needed to decarbonise the sector and has established the Renewable and Low-Carbon Fuels Value Chain Industrial Alliance (see here).

undertakings that are party to the agreement (if they remain free to adopt even higher standards, cf. the third condition).

ii) Pursuant to the sixth condition, "*the sustainability standard should not lead to a significant increase in price or to a significant reduction in the choice of products available on the market*". By design, sustainability standards often lead to up-front price increases (e.g., by internalizing negative externalities and/or improving the efficiency, longevity or repairability of the product) and/or reduction in the choice of (unsustainable) products. The European Commission should provide qualitative criteria on what makes such effects "significant" enough to warrant excluding the respective sustainability standardization agreements from the safe harbour. An ex-ante assessment of the magnitude of potential effects on price or choice may be extremely difficult, not least because it could require exchanging competitively sensitive information on cost structures, pricing and product strategies between the parties. From a practical perspective, quantifying these effects may amount to an analysis typically done under Art. 101 (3) TFEU and thus contradict the idea of a safe harbour.

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