Linklaters

Response by Linklaters LLP to the Commission's Consultation on the 2019 Evaluation of the R&D and Specialisation Block Exemption Regulations and the Horizontal Guidelines

Linklaters LLP, a leading global law firm, greatly appreciates the opportunity to participate in the public consultation launched by the European Commission (the "**Commission**") on the Evaluation of the Research & Development Block Exemption Regulation[1] (the "**R&D BER**"), the Specialisation Block Exemption Regulation[2] (the "**Specialisation BER**", together with the R&D BER the "**HBERs**") and the Commission Guidelines on horizontal cooperation agreements[3] (the "**Horizontal Guidelines**").

The 2010 guidelines have been very helpful, increasing legal certainty and enabling companies to self-assess the compliance of their horizontal arrangements with Article 101 TFEU. However, the last 10 years have been characterized by the emergence of the digital economy, as well as important cases that provide more clarity on important issues covered by the guidelines.

Against this background, the guidelines could offer further clarifications for the assessment of all horizontal agreements. In particular the developments in the areas of the concepts (i) potential competition (ii) object restrictions, (iii) agreements and concerted practices should be reflected. This concerns both new jurisprudence and new business practices and tools like algorithms. Further guidance for standardisation agreements and FRAND licensing would also be welcome. These areas are crucial for the development of the Internet of Things ("**IoT**"), and the scope of permissible cooperation for purchasing alliances vs. purchasing cartels.

It should be noted that in certain areas, despite the guidance contained in the Horizontal Guidelines, Article 101 TFEU has not been applied in a uniform manner throughout the Union. This reform is an opportunity to take stock of the situation and provide clarity regarding issues where the enforcement of national competition authorities and courts in different Member States is showing signs of diverging. Such divergence is not only incompatible with the aims of Regulation 1/2003[4] and the ECN+ directive,[5] but also a major source of legal uncertainty. We discuss below concrete examples of such divergence in the areas of information exchange and bid consortia. Also in relation to information exchange, as a law firm, we have come across numerous cases in restructuring scenarios where the Horizontal Guidelines, and in particular the rules on information exchange between actual/potential competitors, do not provide sufficient clarity to enable the effective restructuring of companies in distress.

Lastly, we also encourage the Commission to introduce a new chapter that would set out its enforcement approach to sustainability agreements. There is currently considerable uncertainty in this area, as some industry initiatives have been subject to competition enforcement while there were also signals that point to more flexibility in this area.

---

1 Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements.

2 Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements.

3 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements.

4 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

5 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

In terms of the HBERs, both are applied in practice and useful and should be updated in accordance with the updated Horizontal Guidelines. Both R&D and production agreements often involve significant up-front irreversible investments and legal certainty *ex ante* is particularly important.

Our detailed comments, which are provided below, focus on six themes:

- General issues (potential competition, restrictions by object, concept of agreement in digital markets)
- Information exchange (guidance on information exchange for restructuring of companies in distress, hub-and-spoke agreements, boundaries between lawful and unlawful information exchange)
- Sustainability agreements
- Purchasing agreements (boundaries of lawful purchasing alliances vs. illegal purchasing cartels)
- Production and commercialisation agreements (bid consortia)
- Standardisation agreements (scope of FRAND obligations)

1 General issues

1.1 Potential competition

The concept of potential competition is central to the assessment of any agreement as a "horizontal agreement".

Para. 10 of the 2010 Horizontal Guidelines currently state that a company is treated as a potential competitor with another undertaking if "*in the absence of the agreement, in case of a small but permanent increase in relative prices it is likely that the former, within a short period of time, would undertake the necessary additional investments or other necessary switching costs to enter the relevant market on which the latter is active."* Para. 10 further states that "*This assessment has to be based on realistic grounds, the mere theoretical possibility to enter a market is not sufficient".*

The Commission should codify the recent case-law on potential competition, including the 30 January 2020 ECJ preliminary ruling in *Generics (UK),* where the ECJ used very similar language to para. 10 but further elaborated that a company can only be considered a potential competitor if there are "*real and concrete*" possibilities for the company to enter the market, and that this cannot be inferred from a purely hypothetical possibility of such entry or even *"the mere wish or desire"* of the company in question.[6] The ECJ further clarified that this assessment must be carried out having regard to the structure of the market, and the economic and legal context within which it operates.[7]

1.2 Restrictions by object

In light of the recent case-law of the ECJ, the discussion regarding the definition and scope of restriction of competition by object contained in the Horizontal Guidelines should in our view be updated considering post-2010 case law of the EU courts.

---

[6] Case No. C-307/18, *Generics (UK) Ltd, GlaxoSmithKline plc, Xellia Pharmaceuticals ApS, Alpharma LLC, Actavis UK Ltd, Merck KGaA*, ECLI:EU:C:2020:52, 30 January 2020, at para. 38.

[7] Case No. C-307/18, *Generics (UK) Ltd, GlaxoSmithKline plc, Xellia Pharmaceuticals ApS, Alpharma LLC, Actavis UK Ltd, Merck KGaA*, ECLI:EU:C:2020:52, 30 January 2020, at para. 39.

Currently, paragraphs 24 and 25 of the 2010 Horizontal Guidelines define restrictions of competition by object as those that by their "*very nature have the potential to restrict competition*":

> *"Restrictions of competition by object are those that by their very nature have the potential to restrict competition within the meaning of Article 101(1). It is not necessary to examine the actual or potential effects of an agreement on the market once its anti-competitive object has been established.*
>
> *According to the settled case-law of the Court of Justice of the European Union, in order to assess whether an agreement has an anti-competitive object, regard must be had to the content of the agreement, the objectives it seeks to attain, and the economic and legal context of which it forms part. In addition, although the parties' intention is not a necessary factor in determining whether an agreement has an anti-competitive object, the Commission may nevertheless take this aspect into account in its analysis. Further guidance with regard to the notion of restrictions of competition by object can be obtained in the General Guidelines."*

However, competition authorities and national courts have applied this concept very broadly to cover all agreements that were merely "capable" of producing an anticompetitive effect, without a thorough assessment of the legal and economic context. In the 2014 *Cartes Bancaires* judgment, the ECJ clarified that the concept should be interpreted restrictively, and be limited only to agreements which reveal a '*sufficient degree of harm*' to competition.[8]

The *Cartes Bancaires* judgment further clarified that a person alleging that an agreement is anticompetitive by object cannot confine its assessment to the provisions and objectives of the agreement, but they must also carry out a proper assessment of the legal and economic context to "*take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the markets in question"*. The ECJ also criticised the General Court for failing to consider the pro-competitive objectives of the agreement and for exclusively attaching importance to its potential to cause harm.[9]

Also, in the 2018 *Hoffmann-La Roche v Autorità Garante della Concorrenza* judgment, the ECJ confirmed once more its definition of restriction by object:[10]

> "*In that regard, it is important to recall that the concept of restriction of competition 'by object' must be interpreted strictly and can be applied only to certain types of coordination between undertakings which reveal a degree of harm to competition that is sufficient for it to be held that there is no need to examine their effects. Indeed, certain forms of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition […]*"

Lastly, in 2020, the ECJ ruled in the *Generics (UK)* case that the pro-competitive effects of an agreement must, as elements of the context of that agreement, be duly taken into account for the purpose of its characterisation as a restriction by object.[11]

---

[8] Case No. C-67/13 P, *Groupement des Cartes Bancaires (CB) v Commission*, ECLI:EU:C:2014:2204, 11 September 2014, at para. 53.

[9] Case No. C-67/13 P, *Groupement des Cartes Bancaires (CB) v Commission*, ECLI:EU:C:2014:2204, 11 September 2014, at para. 53.

[10] Case No. C-179/16, *Hoffmann-La Roche v Autorità Garante della Concorrenza*, ECLI:EU:C:2018:25, 23 January 2018, at para. 78.

[11] Case No. C-307/18, *Generics (UK) Ltd, GlaxoSmithKline plc, Xellia Pharmaceuticals ApS, Alpharma LLC, Actavis UK Ltd, Merck KGaA*, ECLI:EU:C:2020:52, 30 January 2020, at para. 103.

This trend in the case-law echoes similar arguments put forward by Commission officials.[12] The guidance should reflect these developments and aim to provide more clarity on how the Commission will assess restrictions by object.

1.3 Concept of agreement in digital markets

Algorithms are becoming increasingly important for companies in the European Digital Single Market. Algorithms have enabled innovation, cost reductions and disruptive, new business models. At the same time, there is an on-going debate in the antitrust community regarding the competition risks created by the use of algorithms.

As identified by the Commission in the E-Commerce Sector Inquiry, *"53% of the respondent retailers track the online prices of competitors, out of which 67% use automatic software programmes for that purpose. Larger companies have a tendency to track online prices of competitors more than smaller ones. The majority of those retailers that use software to track prices subsequently adjust their own prices to those of their competitors (78%)"*.[13]

In its recent contribution to the OECD, the Commission indicated that *"when various industry players (the spokes) use the same third party provider of algorithmic software (the hub) to exchange commercially sensitive information in order to determine market prices and/or react to market changes, they could be engaging in anticompetitive practices"* and *"while using publicly available data to feed algorithmic software is legal, the aggregation of sensitive information into a pricing tool offered by a single IT company to which various competitors have access could amount to horizontal collusion"*.[14]

We consider that it would be helpful for the Commission to take the opportunity to update the Horizontal Guidelines by providing guidance on when and under what conditions the use of algorithms may amount to an "agreement" or a "concerted practice" within the meaning of Article 101 TFEU.

2 Information exchange

The 2001 Horizontal Guidelines contained next to no discussion on information exchange and the 2010 Horizontal Guidelines sought to bring much needed clarity on the scope of permissible information sharing by identifying the types of information that could raise a concern under Article 101 TFEU as well as the analytical approach that the Commission will use in applying 101 TFEU to information exchange, in particular object restrictions.

However, the information exchange section of the Horizontal Guidelines seems to provide little guidance on new challenges that arise in the information-driven digital economy. The *Competition for the Digital Era* report prepared for the Commission stresses that data sharing and data pooling will often be pro-competitive and deliver significant efficiencies, but that added legal clarity is needed to realise their full potential.[15] We share this view.

At the same time, information-driven conduct may also raise anticompetitive concerns.

In order to provide the best environment for companies to fully enjoy the European Digital Single Market, the Commission could revise the Horizontal Guidelines by providing more

[12] L. Peeperkorn, "Defining by Object Restrictions", *Concurrences*, no. 3-2015, pages 40-50.

[13] Commission Staff Working Document accompanying the document 'Report from the Commission to the Council and the European Parliament', Final Report on the E-commerce Sector Inquiry, 10 May 2017, para. 149.

[14] OECD, *Hub-and-spoke arrangements - Note by the European Union*, 2019, paras. 27-28 (available at: https://one.oecd.org/document/DAF/COMP/WD(2019)89/en/pdf).

[15] J. Crémer, Y.A. de Montjoye, and H. Schweitzer, *Competition policy for the digital era*, 2019, pages 9, 73, and 92.

legal certainty on certain potentially unlawful behaviours. In that respect, we believe that the information exchange section of the Horizontal Guidelines could benefit from the Commission addressing the concept of "hub-and-spoke arrangements" under 101 TFEU and bringing clarity to the boundary between lawful and unlawful information sharing to address situations where the rules are applied differently to identical cases in different Member States.

In addition, we wanted to raise the fact that the current guidance on information exchange does not provide sufficient clarity and flexibility for restructuring scenarios. A very strict approach to information exchange can have adverse consequences as it could prevent the relevant companies from exchanging the necessary information to carry out the restructuring.

2.1 Hub-and-spoke arrangements under 101 TFEU

Hub and spoke concerns the use of vertical information flow from a competing undertaking to a third party, which often operates upstream. The third party serves as the hub, through which information is disseminated back to the competing undertakings.

In *Tesco v Office of Fair Trading*, the UK Competition Appeal Tribunal provides an example on when the indirect information exchange through a third party could amount to a concerted practice having as its object the restriction of competition:[16]

> "*There are […] two conduct elements necessary to establish an infringement: first, the transmission by one retailer of its future pricing intentions to a common supplier; and, secondly, the onward transmission by that supplier to, and receipt by, the competing retailer. Each conduct element must be accompanied by the requisite state of mind on the part of the relevant retailer. […] Thus, each of the communications […] comprises a conduct element and a mental element*."

The Horizontal Guidelines succinctly mention hub-and-spoke arrangements in the section on information exchange (Section 2). In defining information sharing, the Horizonal Guidelines specify that "*[…] information exchange can take various forms. Firstly, data can be directly shared between competitors. Secondly, data can be shared indirectly through a common agency (for example, a trade association) or a third party such as a market research organisation or through the companies' suppliers or retailers […]*".[17] However, the Horizontal Guidelines do not provide any further guidance on this point.

The lack of any specific enforcement action from the Commission on hub-and-spoke arrangements so far,[18] and the thin case-law from the ECJ,[19] leaves companies with little guidance on drawing the difference between lawful and unlawful interactions when using a third-party supplier, especially in the e-commerce environment.

In that regard, in a note to the Organisation for Economic Co-operation and Development ("**OECD**") the Commission warned that "*the use of online platforms creates digital environments that might facilitate interactions between business users even without direct*

[16] Case 1188/1/1/1 (2012) Competition Appeal Tribunal, CAT 31.

[17] Horizontal Guidelines, para. 55.

[18] OECD, *Hub-and-spoke arrangements - Note by the European Union*, 2019, para 2 (available at: https://one.oecd.org/document/DAF/COMP/WD(2019)89/en/pdf).

[19] Case No. C-74/14, *Eturas and others v Lietuvos Respublikos Konkurencijos taryba*, ECLI:EU:C:2016:42, 21 January 2016.

contact among them since platform operators can easily organize and enforce coordination between undertaking using their platform".[20]

The Commission could take the opportunity to present a definition of unlawful hub-and-spoke arrangements in the revised Horizontal Guidelines. We would also welcome guidance on the standard of proof to establish horizontal collusion in hub-and-spoke arrangement. In particular, on the liability of the spokes. The Commission could clarify whether, in order to establish this type of collusion, it is necessary to show that the spokes were aware of the fact that the information exchanged with the hub was passed on further to other spokes.

The recent case-law in *VM Remonts* of the ECJ seems to suggest that full knowledge is not a necessary condition, and that the possibility to *reasonably foresee* the sharing of the information to other spokes could be sufficient to trigger antitrust liability.[21] In *Eturas and others*, the Court of Justice held that if the administrator of an online booking platform sends a message proposing a concerted anti-competitive price increase to all its members (travel agents), then the travel agents who have knowledge of the content of the message may be presumed to have participated in a concerted practice, unless they took steps to publicly distance themselves. That said, the ECJ also confirmed that actual knowledge was required for an infringement to exist, and that the transmission of the message alone cannot give rise to a presumption of knowledge. This case-law should be codified into the new Horizontal Guidelines.

2.2 Boundaries between lawful and unlawful information exchange.

As stated above, the new chapter on information exchanges in the 2010 Horizontal Guidelines brought much needed clarity on the permissible scope of such practices.

However, case-law has developed since 2010 and it would helpful to update this chapter to take into account ECJ rulings such as *FSL Holdings* and *Dole Food Company.*[22] The case-law stating that "by object" infringements should be given a restrictive interpretation is also highly relevant to information sharing. In general, the rulings of the ECJ have confirmed the Horizontal Guidelines in so far as it classifies information sharing regarding intended future market conduct as a potential restriction of competition by object.[23] This suggests that no major reform is required.

Nevertheless, since there are signs of a diverging application of Article 101 TFEU at Member State level in relation to information sharing, we encourage the Commission to oversee the existing text in order to ensure a uniform application of the rules throughout the Union.

An striking example of such lack of uniformity is the investigations carried out by the French and Spanish competition authorities into an almost identical conduct in relation to the sharing among car rental companies of the aggregate sales revenues and the number of rental contracts during the previous month at certain public airports. The information shared was company-specific but not forward-looking. In addition, due to the heterogenous nature of the rental contracts entered into in terms of length of the rental, category of vehicle, discounts,

[20] OECD, *Hub-and-spoke arrangements - Note by the European Union*, 2019, para. 22 (available at: https://one.oecd.org/document/DAF/COMP/WD(2019)89/en/pdf).

[21] Case No. C-542/14, *SIA 'VM Remonts' v Konkurences padome*, ECLI:EU:C:2016:578, 21 July 2016, para. 29.

[22] Case No. C-469/15 P, *FSL Holdings,* ECLI:EU:C:2017:308, 27 April 2017; Case No. C-286/13 P, *Dole Food Company,* ECLI:EU:C:2015:184, 19 March 2015; and Case No. C-98/17 P, *Koninklijke Philips,* ECLI:EU:C:2018:774, 26 September 2018.

[23] Horizontal Guidelines, para. 73.

corporate vs private customers, additional services, etc., it was not possible to extrapolate information about the terms offered to the rental customers.

The French competition authority therefore concluded that the information shared between the companies did not, given the nature of the market in which the conduct took place, have a strategic nature and did not restrict the independence of the parties.[24]

The Spanish authority, however, drew precisely the opposite conclusion in its decision three years earlier. It considered that the data was of a commercially sensitive nature and found that it removed uncertainties as to how competition developed in the affected market and condemned the conduct as an infringement of Article 101 TFEU.[25]

We believe that a key reason for the different outcomes in this case is that the French authority tested if there was any plausible and market-specific theory of harm. The Spanish authority seemed to rely instead on a vague notion of the merits of "hidden competition", which it derived from the ECJ's judgment in *John Deere*.[26] Accordingly, we think it would be helpful to underline the importance of taking into account the market context and to articulate a clear theory of harm before taking enforcement action over what would otherwise be a pro-competitive information exchange. This could be addressed in the updated guidelines.

We also note that the Commission, when it opened an investigation in 2018 against a number of motor vehicle manufacturers regarding alleged plans to limit the development and roll-out of certain emission-control systems for cars, the Commission also decided not to investigate further information sharing on other technical topics such as common quality requirements for car parts, common quality testing procedures or exchanges concerning their own car models that were already on the market, crash tests and crash test dummies. The Commission's press release contains few details, but it hinted that the pooling of expertise in these areas was liable to have beneficial effects.[27] This is an issue that the Commission may want to expound upon in the updated Horizontal Guidelines.

3 Sustainability agreements

3.1 Approach can be accommodated within the Treaty and the consumer welfare standard

We wish to begin by emphasising that what we suggest is a fine-tuning of Article 101 TFEU that is firmly anchored in the Treaty and existing case-law. There is no need to radically reform EU competition law.

Article 11 TFEU states that environmental protection must be integrated into the implementation of the Union's policies and activities. EU competition law cannot exist in a vacuum, but its application must, within reasonable limits, be informed by other policy goals. This is reflected in the ECJ's case-law. For example, in *Albany* the court accepted that certain restrictions of competition are inherent in collective agreements between employers and workers and carved them out from the scope of Article 101 TFEU.[28] In *Wouters*, the ECJ

[24] Decision of the *Autorité de la Concurrence* of 27 February 2017 in Case No. 17-D-03 (available at: https://www.autoritedelaconcurrence.fr/sites/default/files/commitments//17d03.pdf).

[25] Decision of the *Comisión Nacional de los Mercados y la Competencia* of 2 January 2014 in Case No. S/0404/12 (available at: https://www.cnmc.es/sites/default/files/398378_11.pdf).

[26] Case No. C-7/95 P, *John Deere*, EU:C:1998:256, 28 May 1998.

[27] Commission press release of 18 September 2018 (IP/18/5822).

[28] Case No. C-67/96, *Albany International*, EU:C:1999:430, 21 September 1999.

concluded that restrictions adopted by a national bar association aimed at ensuring the independent exercise of the legal profession did not infringe Article 101(1) TFEU.[29]

Likewise, the Commission has accepted, in several cases, that environmental protection is an efficiency that provide benefits to consumers within the meaning of Article 101 TFEU.[30] Indeed, even long-term environmental harm, such as climate change, can be quantified in monetary terms, which means that it is possible also to estimate the value for consumers of avoiding such harm.[31] This shows that there is no need to abandon the consumer welfare standard and that sustainability benefits can be taken into account without endangering the integrity of EU competition law or departing from existing precedents.

3.2 However enhancement via block exemption and/or guidelines is required to deliver necessary legal certainty

The 2001 Horizontal Guidelines contained a chapter on environmental agreements that was removed in the 2010 Horizontal Guidelines. The Commission has emphasised that this must not be understood as any downgrading of the importance of the assessment of environmental agreements. Such agreements are to be assessed under the relevant chapter of the 2010 guidelines, be it standardisation (which contains examples pertaining to environmental standards), R&D, production or specialisation agreements.[32]

However, given the urgency of addressing climate change and meeting the targets of the Paris Agreement the Commission should reconsider this approach when updating the Horizontal Guidelines. It is widely accepted that industry action is needed to reach these goals. For example, the new Commission's Green Deal refers to the importance of *"mobilising industry for a clean and circular economy"*[33] and the Action Plan for a Circular Economy encourages companies to cooperate across the value chain on matters such as material and product design.[34]

This need for coordinated action is linked to a number of well-known market failures that characterise many activities that risk leading to long-term environmental harm:

- "Coordination failure": to redesign an industry in a manner that is optimal from a sustainability perspective is usually beyond the scope of a single company; industry structures and practices are shaped over time and gradually become entrenched and difficult to change in a process economists call "path dependency". For example, it would be very difficult for a single company to stop using standardised packaging or a transport unit adopted by multiple operators across a complex value chain. This means that sustainability agreements must normally be industry-wide.

---

[29] , Case No. C-309/99, *Wouters*, EU:C:2002:98, 19 February 2002.

[30] Commission decisions of 21 December 1994 in IV/34.252 - Philips-Osram; and of 24 January 1999 in 199IV.F.1/36.718 – CECED. See also XXVIIIth report, para 131; and XXVth report, para. 183-185.

[31] The Commission is carrying out interesting work in this area within the scope of the COACCH project (see: https://www.coacch.eu).

[32] OECD, *Horizontal Agreements in the Environmental Context*, 2010, page 123 (available at: https://one.oecd.org/document/DAF/COMP/WD(2019)89/en/pdf).

[33] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Green Deal, COM(2019) 640 final, para. 7.

[34] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Strategy for Plastics in a Circular Economy, COM/2018/028 final, pages 1 and 6, and Annex II; and Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Closing the loop - An EU action plan for the Circular Economy, COM(2015) 614 final, page 5.

- "Negative externalities": environmental externalities are often not fully internalised, which means that a company that takes action on its own e.g. to reduce its carbon footprint may face a cost disadvantage that competitors can exploit to their benefit. This can be a powerful disincentive to take action unless other companies act in the same way simultaneously; it also increases the risk of cheating once an agreement has been reached. Accordingly, sustainability agreements which are not binding will be less effective. The so-called "tragedy of the commons" is a related issue: limited natural resources available at no cost (clean air, water, soil etc) risk being over-utilised and suffer depletion.

In the presence of market failures, the free play of market forces will lead to inefficient outcomes. Intervention to address market failures can of course take the form of regulation. However, it is submitted that we face a global climate emergency and cannot afford to wait for public authorities to address the carbon footprint of every aspect of every value chain in every industry. It is simply not realistic and would, as recognised e.g. in the Action Plan for a Circular Economy, make it impossible to reach the Union's goals and come at a huge environmental cost. Industry must take initiatives on their own and overcoming the market failures mentioned above means that coordinated industry action is indispensable.

European industry has embraced the environmental goals and is keen to participate in achieving them, as shown by the fact that an increasing number of EU companies are making climate change pledges.[35]

However, there is a broad consensus among stakeholders that sustainability agreements are stymied as a result of legal uncertainty surrounding the application of Article 101 TFEU.[36] For example, the SDG Multi-Stakeholder Platform, which was set up by the Commission and chaired by then Commission vice-president Timmermans and made up of representatives of EU industry, NGOs as well as the European Economic and Social Committee and Committee of the Regions, called upon the EU to issue "*general guidelines to clarify under which conditions the private sector can come together to agree on collectively increasing sustainability in a sector without breaching competition law (the EU could thereby prevent the chilling effects on multi-stakeholder initiatives)".*[37] Already in 2011, the Business and Advisory Committee (BIAC) of the OECD, which represents 7 million companies around the world, cautioned that the *"lack of a coherent, transparent framework of analysis […] may create inefficiencies and prevent valuable industry initiatives from prospering"*.[38]

The problems caused by the lack of certainty as to the competition analysis are also borne out of our experience as legal advisers to some of Europe's largest companies and organisations. Companies take decisions based on a risk-reward analysis and projects will not go ahead if the perceived risks outweigh the benefits. In this respect, the immediate upside for a company taking climate change action is at best uncertain while the risks it faces, if the measure is deemed anticompetitive, are daunting: up to 10 per cent of global turnover in fines and damages claims for which there is no upper threshold at all. In addition,

[35] See the European Roundtable of Industrialists, *Strengthening Europe's place in the world: pledges and priorities*, 2019, page 7 (available at: https://ert.eu/pdf-information/2019-07-2019-04-strengthening-europes-place-in-the-world-final-pdf).

[36] See N. Kar, "Competition rules stymie co-operation on climate goals", *Financial Times*, 30 January 2020; and S. Kingston, "Competition Law in an Environmental Crisis", *Journal of European Law & Practice*, Vol. 10 (2019), page 517.

[37] *Europe moving towards a sustainable future - Contribution of the SDG Multi-Stakeholder Platform to the Reflection Paper "Towards a sustainable Europe by 2030"*, 2018, page 33 (available at: https://ec.europa.eu/info/sites/info/files/sdg_multi-stakeholder_platform_input_to_reflection_paper_sustainable_europe2.pdf).

[38] OECD, *Horizontal Agreements in the Environmental Context*, 2010, page 132 (available at: https://one.oecd.org/document/DAF/COMP/WD(2019)89/en/pdf).

the cases in which sustainability agreements have been found compatible with Article 101 TFEU often apply the exemption in Article 101(3), which according to case-law requires a "complex economic assessment" and where it is for the companies themselves to prove that the applicable conditions are met.[39] Against this backdrop, it is hardly surprising that some companies take the view that it is too fraught with risk to participate in horizontal sustainability initiatives.

The lack of guidance at EU level has led some Member States to take initiatives in this field. The Dutch Government issued a policy document regarding Article 103 TFEU and sustainability in 2014 and the competition authorities in the Nordics a joint report on competition and the environment in 2010.[40] While we laud these pioneering efforts, which contain food for thought for the current consultation process, we are at the same time concerned that a piecemeal approach at Member State level will lead to a divergent application of Article 101 TFEU. Only action at EU level can remedy this risk.

We therefore encourage the Commission to take the opportunity to address environmental and climate issues as part of the current reform. The Commission has several options at its disposal, such as adopting a block exemption regulation for sustainability agreements and providing clear guidance as part of the updated Horizontal Guidelines. As a complement to the Horizontal Guidelines, it would also be helpful for the Commission to adopt and publish a number of finding of inapplicability decisions under Article 10 of Regulation 1/2003 regarding sustainability agreements. Whatever option it selects, there is an urgent need for legal certainty via precise evaluation grids that describe in a straightforward manner how companies can ensure competition law compatibility. Complex assessments where the outcome is difficult to predict increase compliance costs and uncertainty, and disincentive industry-led initiatives.

In particular, in order to unlock the potential of such cooperation, the Commission's guidance should in our view:

- *Refrain from imposing any market share threshold*: As mentioned above, sustainability agreements will typically need to be industry-wide and span several levels of the value chain.
- *Accept binding agreements in more cases:* The chapter on standardisation agreements in the 2010 Horizontal Guidelines favours voluntary standards. However, in the presence of coordination failures and negative externalities, binding agreements will often be called for (i.e. only adherence to the agreement is voluntary). Of course, the adoption of these new environmental standards should be made on open, transparent and non-discriminatory terms, to make sure that environmental standardisation agreements are not used as a vehicle for anticompetitive exclusion.
- *Use simplified proxies for net benefit assessments*: In the *CECAD* case from 1999 regarding washing machines standards, the Commission calculated the savings in avoided harm from CO^2 emissions and weighed these savings against expected

[39] Case No. T-111/08, *MasterCard, Inc. and Others v European Commission*, EU:T:2012:260, 24 May 2012, paras 196-197 and 201.

[40] Dutch Minister of Economy's decision of 6 May 2014 in Matter WJZ / 14052830 (available at: https://wetten.overheid.nl/BWBR0035103/2014-05-09); and *Competition Policy and Green Growth: Interactions and challenges – A joint report by the Nordic competition authorities* (available at: https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/competition-policy-and-green-growth.pdf).

consumer price increases.[41] The evaluation grid in a block exemption or in the updated Horizontal Guidelines should, in our view, rely on easy-to-apply proxies instead of complex *ad hoc* estimates of savings and costs. An alternative would be to offer clear benchmarks for how to calculate environmental benefits.

- *Clarify that sustainability agreements are presumed not be anticompetitive by object:* Recent case-law clarify that plausible efficiencies should be considered as part of the analysis of whether an agreement is restrictive of competition "by object" pursuant to Article 101(1) TFEU, and not only for the purpose of applying the Article 101(3) exemption.[42] As a rule, sustainability agreements will be plausible sources of efficiency gains and it would be helpful to clarify that they should not be presumed anticompetitive. Needless to say, this would not apply if the purported environmental aim is simply a pretext for horizontal collusion.

All in all, the new Commission is asking for bold action to meet the climate challenge, but the absence of clear guidance at EU level is currently hampering industry-led initiatives. The reform of the Horizontal Guidelines should be used to address this problem. We look forward to engaging with the Commission to discuss solutions and to review a concrete proposal for an evaluation grid at a later stage of the consultation process.

4 Purchasing agreements: providing more clear guidance on safe-harbours, and setting the boundaries for purchasing alliances vs. illegal cartels

The new guidelines could provide more guidance on how companies can pragmatically apply the safe-harbours, and shed more light on the distinction between legitimate purchasing alliances vs. illegal purchasing cartels.

4.1 More clear guidance on safe-harbours

Given the emergence of purchasing alliances, particularly in the consumer goods/retail sectors, one question that arises is how market power should be assessed, and what would be the scope of permissible practices by the purchasing alliances. The Horizontal Guidelines state that in general, joint purchasing agreements are less likely to give rise to competition concerns "*when the parties do not have market power on the selling market or markets*."[43] The guidelines further state that in most cases, there should be no market power if the parties to the joint purchasing agreement have a combined firm share of less than 15%.[44]

However, there can be situations where a cross-border buying alliance that could fall well below the 15% at the national level, could still represent a significant portion of the share of sales of the upstream supplier on a pan-European basis, both in absolute and relative terms. In addition, the use of collective bargaining clauses whereby the alliance would stop purchasing from the supplier all together if the supplier does not comply with its terms could further exacerbate the buyer power of the purchaser.

[41] Commission decisions of 21 December 1994 in IV/34.252 - *Philips-Osram*; and of 24 January 1999 in IV.F.1/36.718 – *CECED*.

[42] Case No. C-307/18, *Generics (UK) Ltd*, ECLI:EU:C:2020:52, 30 January 2020, at para. 39; and Case No. C-67/13 P *Groupement des Cartes Bancaires (CB) v Commission,* ECLI:EU:C:2014:2204, 11 September 2014, at para. 53.

[43] Horizontal Guidelines, para. 204.

[44] Horizontal Guidelines, para. 208.

4.2 Setting the boundaries between legitimate purchasing alliances vs illegal cartels

The new guidelines could also shed more light on the boundaries illegal "by object" purchasing cartels vs. lawful purchasing alliances to reflect recent case law and market developments.

The current Horizontal Guidelines state that "*Agreements which involve the fixing of purchase prices can have the object of restricting competition within the meaning of Article 101(1). However, this does not apply where the parties to a joint purchasing arrangement agree on the purchasing prices the joint purchasing arrangement may pay to its suppliers for the products subject to that supply contract."*[45]

It would be helpful if the Commission codified the case law that has been developed in the last 10 years in relation to purchasing cartels, and in particular the car battery re-cycling cartel. In that case, one of the defendants argued that the alleged purchasing cartel was not capable of having any appreciable effect on competition as (i) it led to price decreases, which do not reveal a sufficient degree of harm to competition; and (ii) the parties continued to compete on the downstream market.[46] The Commission rejected the argument on the basis that any horizontal price agreement *"may be classified as very serious infringement solely on account of their nature without the Commission being required to demonstrate an actual impact of the infringement on the market."* As a result, the Commission concluded that a horizontal agreement to purchase prices is an object restriction, without having to take into account its effects.[47]

The General Court, in *Campine NV and Campine Recycling NV vs. EC*, upheld the EC's position by stating that "*Such coordination of purchase prices, with the aim of reducing or preventing their increase and thus, ultimately, increasing the cartel participants' profit margins, reveals a sufficient degree of harm to competition that it may be found that there is no need to examine its effects*."[48] The General Court further noted that the first example of a cartel given in Article 101(1)(a) TFEU, is precisely one which "*directly or indirectly [fixes] purchase or selling prices or other trading conditions."*

Against this background it would be helpful if the Commission guidance would shed more light on the distinction between unlawful buying cartels. There are several questions that need to be addressed.

First, is there a requirement of secrecy? The car battery re-cycling cartel was clearly secret, but would this type of arrangement avoid the "object restriction" characterisation if the members to the arrangement would inform their suppliers that they are coordinating on the prices that they are offering to them?

Second, would an arrangement like the car battery re-cycling arrangement be lawful if all the car battery manufacturers had decided to set up a purchasing alliance and commit to only purchase all their requirements through such an alliance? In that connection, is the existence

[45] Horizontal Guidelines, para. 206.

[46] Commission Decision of 8 February 2017 (AT.40018 – Car battery recycling) at para. 234.

[47] Commission Decision of 8 February 2017 (AT.40018 – Car battery recycling) at para. 234.

[48] Case No. T-240/17, *Campine NV, Campine Recycling NV v. European Commission*, ECLI:EU:T:2019:778, 7 November 2019, at para. 297.

of genuine integration of both parties' purchasing function the key distinguishing factor, as suggested by some authors?[49]

5 Production and commercialisation agreements: bid consortia

Much of the discussion regarding joint bidding has focused on the risks related to bid-rigging and other cartels related to procurement markets. This is a genuine and serious problem and we support the Commission and the national competition authorities' efforts to prosecute such conduct.

However, the fight against bid-rigging cartels sometimes overshadows the fact that legitimate bid consortia where companies team up to improve the value proposition to the customer is a much more common occurrence. Such consortia deliver substantial consumer welfare benefits and must be encouraged. However, the Horizontal Guidelines offer scant guidance for companies that want to ensure that joint tendering is competition law compliant. As we explain in the following, this has created significant legal uncertainty across the EU and we have experienced, in our role as legal advisers, how this acts as a powerful disincentive for participating in efficiency-enhancing joint bids.

The Horizontal Guidelines as well as the Commission's Article 81(3) Guidelines acknowledge that the integration of resources and activities is a plausible source of efficiencies.[50] Arrangements that are guided by genuine pro-competitive aims are, according to recent case-law, normally not anti-competitive by object; instead, it is necessary to assess whether they will cause restrictive effects.[51]

Most joint bidding will, in our experience, involve a significant degree of integration of resources and activities and must not be presumed anti-competitive. This is particularly true for consortia set up to carry out complex civil engineering works and where the consortium members closely co-operate throughout the design and construction phases. Studies show that another positive effect of such consortia is to mitigate the impact of the so-called "winner's curse", i.e. sharing information about anticipated costs and risks during the performance of the contract means that companies bid more aggressively. Otherwise the fear of pricing too low would make the firms increase their margins to cover unforeseen cost overruns, a perennial problem in civil engineering.[52]

In our view, such consortia should be viewed, for the purposes of applying the Horizontal Guidelines and the Specialisation Block Exemption, as production joint ventures. They are not mere agreements on commercialisation; the "centre of gravity" lies in the joint production of the services.[53]

This difference is important. According to the production agreement chapter of the Horizontal Guidelines, price-fixing that is ancillary to the joint production and distribution of a good or a

[49] See P. Carstensen, "Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy", *William. & Mary Business Law Review,* Vol 1:1 (2010), pages 1-46.

[50] Horizontal Guidelines, paras. 2 and 183; and the Commission's Article 81(3) Guidelines, paras. 49, 60 and 65.

[51] Case No. C-67/13 P, *Groupement des Cartes Bancaires (CB) v Commission*, EU:C:2014:2204; 11 September 2014; and Case No. C-307/18, *Generics UK*, 30 January 2020, EU:C:2020:52.

[52] OECD Policy Roundtable, *Competition in Bidding Markets*, 2006, pages 22 and 29 (available at: https://www.oecd.org/daf/competition/cartels/38773965.pdf).

[53] Horizontal Guidelines, paras. 13, 14 and 228. See also C. Ritter, "Joint tendering under EU competition law", 2017, pages 11-12 (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2909572).

service does not entail that the agreement is anti-competitive by object.[54] This means that an effects analysis is required before condemning the agreement under Article 101(1) TFEU and that it may benefit from the market share safe-harbour in the *De Minimis* notice as well as from the Specialisation Block Exemption.

By contrast, pursuant to the section on agreements on commercialisation, the guidelines suggest that price-fixing is likely to restrict competition by object.[55] This means that the agreement will normally be deemed to infringe Article 101(1) TFEU no matter how insignificant the parties' combined market share is.[56] In addition, as by object infringements are regarded as particularly harmful, the consortium is, according to the Article 81(3) Guidelines, unlikely to fulfil the conditions for an exemption.[57] This leads to a situation in which the only way to escape a finding of an infringement and severe fines is to prove that the consortia members did not have the ability to bid independently, a condition which has been applied very stringently (and which is not applied to production agreements).

Accordingly, to mechanically apply the traditional evaluation principles for agreements on joint selling to bid consortia is based on a mistaken interpretation of the Horizontal Guidelines, increases compliance costs and incentivises companies to avoid participating in legitimate and welfare-enhancing bid consortia.

Regrettably, this is precisely what happens in some Member States today. For example, the Spanish competition authority has held that bid consortia, even for complex civil engineering works, can only escape condemnation under Article 101 TFEU if the members are unable to bid on their own.[58] The fact that integration of resources and activities can be expected to deliver efficiency gains and that the value proposition is actually improved as a result of the co-operation is afforded little or no importance. The Italian competition authority took a very different approach in a case regarding bid consortia for the collection of donated blood and the manufacture and supply of plasma-based drugs. In that case, it put an end to its investigation after accepting that the joint bid allowed the firms to submit a better offer and increase the competitive constraints exercised on the other bidders for the same contract.[59]

Another problem is that when companies seek to explain that they would not in any event have submitted independent bids, many national competition authorities dismiss the argument claiming that such evidence must be objective and cannot be based on subjective factors (e.g. internal guidelines regarding what is an acceptable financial risk exposure has been deemed too subjective). Some authorities also argue that a company's interest in not tying up too many resources to a single customer ("not placing all eggs in the same basket") and to keep spare resources available for other business opportunities does not justify joining a consortium with another company. And even if it did suffer a scarcity of resources, should it not have acquired more resources or hired additional staff instead of joining a consortium?[60]

---

[54] Horizontal Guidelines, para. 160. This paragraph distinguishes between cases in which parties would have no incentive to co-operate on production save for the joint distribution of the output and cases where this is not the case. However, in a bid consortium for the supply of services, production and commercialisation or distribution cannot be separated.

[55] Horizontal Guidelines, para. 234, and the examples in paras. 252, 253, 254 and 255.

[56] Case No. C-226/11, *Expedia*, EU:C:2012:795, 13 December 2012.

[57] Commission's Article 81(3) Guidelines, para. 46.

[58] Decision of the *Comisión Nacional de los Mercados y la Competencia* of 14 March 2019 in Case S/DC/0598/2016, page 251: (available at: https://www.cnmc.es/sites/default/files/2380080_31.pdf).

[59] Decision of the *Autorità garante della concorrenza e del mercato* of 12 December 2019 in Case 27465 (available at: https://www.agcm.it/dotcmsdoc/bollettini/2018/49-18.pdf).

[60] See the discussion in Ritter, *op. cit.*, pages 4-10.

It is submitted that this interpretation of Article 101 TFEU does not only lack support in the ECJ's case-law, but is also wholly detached from the commercial reality in which companies operate.[61] The consequence is that a company may be left to choose between two options, both of which are worse for consumer welfare than joining a consortia: (a) to give up its freedom to decide which risks it is willing to bear and how to best manage its resources, and submit an independent bid that is less advantageous for the customer than a joint bid; or (b) to refrain from participating in the tender procedure (the worst outcome of all).

Again, many of these problems would be avoided if it is clarified that bid consortia, in which the members' resources and activities are integrated, are to be seen as production joint ventures and that an effects analysis should be carried out. If sufficient competition remains from other bidders, there is no reason to fear that such consortia will cause negative effects on price, quality, etc. In addition, it is in our view important to offer pragmatic guidance that brings the analysis of whether the consortium members, in the absence of their agreement, are likely to have submitted separate bids in line with market realities.

We therefore encourage the Commission to include a chapter on bid consortia in which these issues are addressed. The present uncertainty has a chilling effect on pro-competitive bid consortia and harms, in particular, the European tax payers since the affected customers are often public authorities.

6 Standardisation agreements: further clarity on FRAND

The exact scope of the FRAND licensing obligations will be of crucial importance in the coming years given the emergence of 5G and the IoT. With the emergence of the IoT, the issue of FRAND licensing for Standard Essential Patents ("SEPs") will arise for a much broader range of products, from refrigerators to cars.

A key question in relation to FRAND licensing is whether the SEP holders should license all their SEPs to *any* third party, including upstream component manufacturers. There are two opposing views on this issue.

The SEP holders claim that FRAND licensing should be done on a "single point in the value chain". In the 5G context, this would be that SEP Holders could meet their FRAND commitment by licensing at the end user level, and impose a FRAND loyalty as a percentage of the price of the final product, which in the IoT environment could range from a mobile phone device to a car. In their view, imposing SEP licensing on the smallest saleable unit, i.e. licensing at component level, could adversely affect the SEP holders' incentive to invest in R&D and innovate.[62]

On the other hand, SEP implementers take the view that FRAND licensing should not only occur at the level of the final device, and that SEP holders should also license component manufacturers. In other words, based on the SEP implementers, an SEP license should be made available to anyone who wants to implement the relevant standard. In their view, any

[61] Whether a company would be likely to bid independently for a contract bears many resemblances with the discussion regarding whether a company is a "potential competitor" in relation to certain market. The Horizontal Guidelines, para. 10, stress that this assessment must be based on "realistic grounds" and that the mere "theoretical possibility" to enter a market is not sufficient.

[62] See e.g. Ericsson letter to DG COMP on "Roadmap on EU Competition Rules on horizontal agreements between companies – evaluation" (2 October 2019).

company that implements a standard, including an upstream component manufacturer, should be able to get a FRAND license.[63]

In that connection, the 2010 Horizontal Guidelines state that "*Any standard-setting agreement which clearly discriminates against any of the participating or potential members could lead to a restriction of competition. For example,* ***if a standard setting organisation explicitly excludes upstream only companies (that companies not active on the downstream production market), this could lead to an exclusion of potentially better technologies***."[64] The Horizontal Guidelines also state that standard setting can give rise to a restriction of competition if it leads to the exclusion of or discrimination against, certain companies by prevention of effective access to the standard.[65]

Against this background, it would be essential to clarify further the scope of the FRAND obligation that standardisation agreements should contain in order to be compliant with Article 101(1) TFEU.

[63] See e.g. ACT / The App Association comments to the European Commission's Directorate General for Competition, on its Roadmap, Evaluation of the two Block Exemption Regulations for horizontal co-operation agreements (3 October 2019).

[64] Horizontal Guidelines, para. 297.

[65] Horizontal Guidelines, para. 264.