Baker McKenzie.

RESPONSE TO EU HORIZONTALS CONSULTATION

1. INTRODUCTION

1.1 Baker McKenzie welcomes the opportunity to provide views on the R&D and specialisation block exemption regulations (HBERs) and complementary horizontal co-operation guidelines (HGL). This submission is made in response to the European Commission's ("Commission") questionnaire relating to the public consultation on the functioning of the current regime for the assessment of horizontal cooperation agreements under EU antitrust rules. Our comments are based on our experience of advising clients in various sectors on the application of EU competition law on horizontal cooperation agreements.

1.2 The HBERs and HGL together provide businesses and their advisors with a useful framework of analysis when self-assessing horizontal agreements. In particular, the HBERs provide legal certainty, which have the potential to save businesses time and money when assessing their agreements.

1.3 Our comments focus on the areas where we consider there is room for further improvement and where clarity is still lacking. In practice, the HBERs and HGL provide guidance to national competition authorities and national courts, as well as to parties involved in horizontal cooperation agreements. Clarity is key in order to ensure the consistent application of EU competition law throughout the EU.

1.4 This submission does not include our views on expanding the HGL to include agreements on sustainability initiatives. We will be providing a separate submission to the Commission in due course.

1.5 We consider that there are a number of issues that cut across both HBERs and/or the HGL which should be considered during the review:

Potential competition

1.6 We would welcome more clarity, and a sufficiently flexible approach regarding the meaning of "potential competitor". The test set out in paragraph 10 of the HGL and accompanying footnotes is essentially based around market definition and can be difficult to apply in practice. In our view, the ability to enter into the market in the short term needs to be evidence-based and not merely speculative. In deciding whether a firm is a potential competitor, there should be evidence of a clear commercial strategy within the business, supported by internal documents showing a clear plan to invest in entering the market. This would be particularly relevant where market impact/results are very difficult to predict, such as R&D.

Commonality of costs

1.7 In the current HGL, the Commission rightly explains that commonality of costs is an important parameter and that "*significant commonality of costs achieved by a horizontal co-operation agreement can only allow the parties to more easily coordinate market prices and output where the parties have market power, the market characteristics are conducive to such coordination, the area of co-operation accounts for a high proportion of the parties' variable costs in a given market, and the parties combine their activities in the area of co-operation to a significant extent*" (paragraph 36 HGL). However, throughout the HGL, there are references to "high" or "significant" commonality of costs without any concrete guidance on what this actually means. For example, in paragraph 221, 50% of commonality of costs is considered to be high, whilst in the example at paragraph 222, 80% is considered as significant.

1.8 In practice, it is difficult to assess whether cost commonality is significant, and will usually be industry-specific e.g. 80% commonality of costs in a highly competitive market may not necessarily raise competition concerns.

1.9 After ten years of practice under the current HGL, it would be useful to understand how the Commission would assess commonality of costs in practice. At an OECD meeting in 2010, the Commission was asked "*how the EU would assess whether common costs raise concerns in the downstream market. What factors can be used…to determine whether common costs significantly influence price?*" The Commission responded that "*there is no specific percentage that can be used to define what significant means. One has to look at the major components of the downstream price, the abilities of the companies to shift the other components, and the importance of the component that is fixed and common to all*."[1] It would be useful to understand how the Commission has developed its thinking since then.

Structure of the HBERs and consistency with the HGL

1.10 The current HBERs, whilst useful, are difficult to read and apply in practice. For instance, some agreements are exempt unless hard core restrictions or exclusions apply, but then those hard core restrictions and exclusions may in turn have exceptions (see 5(b)(ii) and 5(c) of the R&D BER, as well as 4 (b) (i) and (ii) of the Specialisation BER, especially in light of para 160 HGL. We encourage the Commission to use this opportunity to simplify and streamline the text of both block exemptions.

1.11 We also query whether it is necessary to include a list of hard core restrictions at all. By including these in the HBERs, there is a risk that such restrictions automatically mean that the block exemption will not apply (which in turn is interpreted as engaging in a hard-core practice that can never be defended or at least is a very risky behaviour) when in some cases these restrictions could contribute to underpin beneficial pro-competitive agreements. This is particularly the case in R&D efforts where many of the requirements/restrictions related to joint exploitation (currently characterised as "hard-core" restrictions under Article 5 R&D BER) frequently represent fundamental drivers of, if not necessary, conditions for engaging in joint R&D efforts. Innovators would more frequently engage in costly and uncertain joint R&D efforts if they were afforded an effects based analysis of their exploitation plans instead of a set of hard-core restrictions, which operate as presumptions of illegality in practice.

2. R&D AGREEMENTS

2.1 We consider that there is value in retaining the R&D BER (Regulation 1217/2010) (subject to our comments below). The block exemption provides legal certainty and is a useful tool for businesses entering into R&D cooperation but it, and the corresponding section of the HGL, are too conservative in our view, and difficult to apply in practice. In our experience, legal certainty is accorded only to very obviously pro-competitive R&D efforts. The current review process should focus on simplifying those texts, in particular by removing any disincentive against innovation and growth.

Conservative approach does not foster innovation

2.2 It is common place that R&D agreements are generally pro-competitive and raise concerns in extreme circumstances. It is telling that antitrust enforcement has been very limited. Innovators require a pragmatic approach which will incentivise companies to jointly profit from the exchange of ideas. For

[1] http://www.oecd.org/competition/cartels/49139867.pdf

the reasons explained below, the current framework when followed to the letter often results in the imposition of unhelpful compliance "straitjackets" on innovators at every stage of the collaboration.

2.3 This review presents an opportunity for the Commission to boost innovation across Europe by removing costly compliance bottlenecks and freeing optimum exploitation of the results of costly and risky R&D efforts.

Definition of actual and potential competition is particularly difficult/speculative (and has serious implications)

2.4 As also noted above, realistically identifying potential competition is very challenging in practice. This issue is even more prominent when it comes to competition in innovation (R&D efforts) where even identifying actual competitors is far from easy.

2.5 Recent merger control cases identified the challenges/methodological issues that exist when it comes to defining existing markets, in light of future innovation. These cases also demonstrate challenges in identifying potential competition by accurately determining the realistic entry scenario in light of the overall uncertainty that characterises R&D efforts. Such cases arguably expand the notion of a potential competitor[2] (see esp. innovation theories of harm/ enhanced scrutiny of so called "killer acquisitions) and definitely add significant complexity to the assessment. It is unrealistic to expect that innovators and their advisors will undertake the same level of analysis as the Commission when assessing essentially the counterfactual of complex transactions. The assessment of such cases, at the heart of which lies the question of potential competition, usually takes months, if not years, and both advisors and authorities have access to thousands of internal documents, detailed submissions, studies and analyses.

2.6 In our view, parties should not be treated as competitors in the innovation space unless it is absolutely certain that their innovation efforts are in direct competition with one another. It should also be clarified that the mere targeting of a similar application or innovation space is not sufficient to characterise two companies as potential competitors. This is especially the case in the vast majority of applications where the "target" or "application" is not clearly defined and it changes/morphs along the journey of innovation. It is only at the stage where the parties are very close to production that a clear position on the potential overlap can be determined.

2.7 This issue is prominent even in industries where the innovation journey is generally determined in advance. In relation to paragraph 120 HGL, for example, are two pharmaceutical companies engaging in similar "credible" target programmes at pre-clinical stage potential competitors? We would argue that it is far too early in the innovation journey to take such a position. Only at much later stages of development (Phase III) is it possible to have a clear understanding as to whether the poles of innovation are credible *and* competing. More generally, it is extremely difficult to identify in practice a credible pole of innovation: it should be the case that at least a high likelihood of achieving a competing solution has to be identified, not the mere ability and/or interest in conducting research in the same "space". Examples to explain the position in paragraphs 119 and 120 of the current HGL would be most helpful.

Information exchange is part and parcel of innovation

[2] For example, Case M.7932 *Dow/DuPont*; Case M.8401 *J&J/Actelion*.; Amazon/ Deliveroo https://www.gov.uk/cma-cases/amazon-deliveroo-merger-inquiry

2.8 Needless to say, the implications of a potential mischaracterisation of actual or potential competition are quite significant: can such companies freely discuss their programmes to see whether a joint R&D effort makes sense, or is there a risk that such information exchange would violate competition law and leave them at risk of fines for sharing strategically important “technology data”? This results in advisors having to put in place unnecessary safeguards in collaborations between what are essentially non-competitors.

2.9 Moreover, information exchange is key to determine whether combining forces in R&D projects is meaningful/desirable. But it is unclear which technology data referred to at paragraph 86 of the HGL could be considered strategic enough to create issues/require safeguards for information exchange. What is the relevant test? A few examples would be desirable.

No doubt as to the centre of gravity/application of the R&D block exemption

2.10 In our view, a stronger presumption that the centre of gravity should be at R&D level is required, even if the R&D involves pairing/combination of existing technologies/developed products. The word "decisive" at paragraph 14 of the HGL does not really help. Collaboration agreements are increasingly complex and typically involve a combination of R&D, joint production/specialisation, distribution etc. As long as there is meaningful R&D at the centre of joint R&D efforts, the R&D BER and HGL should apply. It is important to bear in mind that innovation most frequently takes place in small incremental steps, not in giant leaps. Every step is characterised by uncertainty. Being one step closer to joint production does not mean that the centre of gravity is joint production or commercialisation. For example, in pharma, a collaboration between two companies with potential drugs at Phase III trials should never be viewed as joint production. Paragraphs 137-139 of the HGL explain the scepticism against R&D which may have restrictive effects and this suffices in practice.

No real need for hard-core restrictions in R&D efforts and subsequent exploitation

2.11 Currently, there is no guidance/analysis available on the hard-core restriction of Article 5 of the R&D BER. The HGL correctly point out at paragraph 128 that joint exploitation is not necessarily restrictive of competition and do not identify any meaningful R&D-related "by object" restriction. However, Article 5 of the R&D BER introduces hard-core restrictions. We are of the view that there should not be any R&D-related hard core restrictions, at most, some could be viewed as excluded restrictions (and moved to Article 6 of R&D BER). It is particularly baffling why the exemption of fixing prices at Article 5(c) does not cover joint exploitation by way of specialisation and requires the existence of a joint team or entrustment to a third party.

Market share thresholds difficult to apply; other yardsticks could and should be used

2.12 Last but not least, the application of market share thresholds are quite difficult in practice, especially when market share needs to be calculated on the basis of total licensing income, as usually no real data is available to advisors. We would argue that it is time to increase the threshold, or even abolish a market share test in light of the overwhelmingly positive effects of joint R&D. The current cap of 25% is not sufficient to indicate market power, since market shares at that level are unlikely to raise significant antitrust concerns.

3. SPECIALISATION AGREEMENTS

3.1 The HGL on joint production and specialisation provides useful guidance. The emphasis on restrictive effects appears as the right approach but makes practical guidance all the more important. We also

consider that the Specialisation BER should remain with some amendments regarding the safe harbour thresholds as outlined below.

3.2 We see two areas with a particular need for clarification: First, more clarity is desired for the assessment of economic factors when a co-operation enables the parties to launch a new product or service (cf. paragraph 163 of the HGL). Second, more guidance is welcomed on how the Commission assesses the "overall effects" of production agreements that also provide for the joint production of the jointly manufactured goods or other "integrated commercialisation functions".

Objective criteria for counterfactual

3.3 The HGL could provide more clarity in relation to the question of when it sees an objective justification of one party to an agreement to not launch a product or service.

3.4 In paragraph 163 the HGL propose that restrictive effects are unlikely when the agreement enables the parties' launch of a product or service which they would otherwise, on the basis of objective factors, not have been able to. (Missing) technical capabilities of the parties are named as the only example. In practice, often more important is the economic viability of a launch. It might be technically possible, in the near or at least mid-term, for each party to independently invest and launch a product or service. However, the investment costs and uncertainties associated with the launch of such a new product or service would likely lead them to abandon them.

3.5 Thus, any additional guidance as to when the Commission considers restrictive effects unlikely even when both parties have technical capabilities would be welcomed.

"Main" economic activity and relation between production costs overall variable costs

3.6 More clarity would be helpful with respect to the question when, according to the Commission, production represents the "main economic activity" (cf. paragraph 164 HGL) and when exactly the Commission considers that the production costs represent a "large or substantial proportion" of the variable costs (cf. paragraphs 177, 188 HGL). The share provided in example 3 (paragraph 189 HGL) as a singular example does provide insufficient guidance in relation to a question that is highly relevant in practice and often comparatively easy for undertakings to estimate.

3.7 In particular, the relevance of the commonality of costs (and how this is assessed in practice) should be further explored in order to provide more useful guidance, as discussed above in sections 1.7 - 1.9. It would also be helpful to know how this has been used in practice.

3.8 With respect to the production costs to the overall variable costs of a product/service, the safe harbour in the Specialisation BER should be considered, allowing undertakings to engage in joint production even when their market shares on the relevant markets would be higher than 20% by increasing the threshold to 25%. It may also be considered to introduce an additional safe harbour based on the percentage share of the production costs in relation to the overall variable costs of a product and/or service: As long as the ratio production cost / overall variable costs is limited, the risk of cost commonalities and price commonalities should be minor and not give rise to competition concerns.

Revision of examples

3.9 The examples provided should be revisited, clarified where needed, or replaced or deleted where they add little guidance: Example 2 (paragraph 188 HGL) suggests that in a market with similar market shares and one pre-existing production JV, an additional link would likely produce a collusive outcome.

However, there should be a number of other additional factors (e.g. type of product, share of total production) that should play a key role as to whether collusion in such a scenario is really the likely outcome.

3.10 Example 6 (paragraph 192 HGL) provides no substantial guidance. It seems obvious that "*secretly* exchanging information about future prices" outside the agreement is having as its object a restriction of competition. It could be deleted.

Joint Production and Joint Distribution

3.11 It would be helpful to have more guidance on how the Commission assesses the "overall effects" of production agreements that also provide for the joint distribution of the jointly manufactured goods or other "integrated commercialisation functions". In particular, it would be useful to see more guidance on the conditions and circumstances the Commission will consider for a joint distribution agreement to be necessary for the joint production agreement.

3.12 In this respect, it should be useful for the Commission to explore why the R&D BER allows joint exploitation by virtue of *one party* as the sole distributor (Art. 3 (5)), as opposed to an exploitation "only" by a team, organisation, undertaking or third party under the Specialisation BER (Art. 2 (3) (b)).

Safe harbour threshold

3.13 We suggest to evaluate the 20% 'safe harbour' thresholds in the HGL /Specialisation BER. The threshold should be increased to 25% which is, after all, a safe harbour for transactions under EU merger control.

4. INFORMATION EXCHANGE

4.1 The current HGL are useful. However, any amendments should focus on clarifying guiding principles in line with existing General Court and European Court of Justice decisional practice.

Divergence of NCAs

4.2 We submit that there is inconsistent application of competition law in regard to information exchange by NCAs. For example, whether past information exchange, not related to price or quantity, should be subject to an "effect assessment" rather than a "by object" assessment. This consultation and any subsequent revision to the HGL presents an opportunity to harmonise approach across Member States. It would be useful for the Commission to carefully consider and provide guidance on areas of divergence by NCAs to information exchange.

Restriction by object vs. restriction by effect

4.3 In regard to "by object" or "effect" restrictions paragraph 72 of the HGL states that it "*will take into account whether the information exchange, by its very nature, may possibly lead to a restriction of competition*". In the following two paragraphs, the Commission clarifies that such "very nature" is given when the information exchange concerns future conduct regarding prices and quantities.

4.4 In view of the practice of the Commission, the NCA, and the Courts it would be helpful for the Commission to clarify whether the principles set out in paragraph 74 HGL on "by object" restrictions could also apply to other types of information exchange.

Form of distancing from information received

4.5 Paragraph 62 of the HGL provides that an undertaking will be presumed to have accepted "strategic information" and adapted its market conduct accordingly, unless it responds with a clear statement that it does not wish to receive such data.

4.6 There are situations when the information disclosed unilaterally is clearly strategically relevant. This certainly applies to future prices or quantities. However, company may receive a multitude of data either directly or indirectly from a competitor (without providing data itself). Arguably, there are many instances where it is unclear whether the information received is strategic. In particular, the information may only have strategic value when put into context and may require an in-depth analysis. Alternatively, the same set of data may potentially be of value for one competitor, but not for another.

4.7 In such instance, the guidance set out in the HGL is arguably not practical and we submit a "general presumption" is inappropriate.

Information Exchange via Digital Means (Algorithms, Data Pooling)

4.8 The HGL provide limited guidance on new forms of information exchange using digital means. For example, the use of algorithms to monitor prices, and other parameters or competitors. According to EU E-Commerce Sector Inquiry of 2017, 53% of retailers track the online prices of competitors, and 67% of them use automatic software programs for that purpose 78% of retailers that use software to track prices subsequently adjust their own prices.

4.9 We acknowledge that this is a complex field which is constantly subject to change. However, we invite the Commission to set out principles on how it will assess digital forms of exchange. In particular, the monitoring of competitor information, programmes that are self-learning, and data pooling.

5. PURCHASING AGREEMENTS

5.1 The HGL are useful but in our experience, further clarity would be helpful in a number of areas:

Legitimate joint purchasing

5.2 It would be helpful for the Commission to clearly set out the conduct that falls within Article 101(1) TFEU, and whether that conduct is an "object" restriction. The dividing line between a buyer cartel and legitimate joint purchasing is not always clear from the HGL. For example, the Commission warns in paragraph 205 of the HGL that agreements that involve the fixing of purchase prices can be a "by object" restriction of competition, and that joint purchasing arrangements which serve as a tool to engage in price fixing, output limitation or market allocation are a disguised cartel. This seems straightforward.

5.3 However, the Commission also says that this does not apply where the parties to a joint purchasing agreement agree on the prices which the joint purchasing arrangement (for example, the buying group) may pay to its suppliers for the jointly purchased products (paragraph 206 HGL). In those circumstances, an assessment of the anticompetitive effects of the purchasing agreement is required. At first sight, there appears to be no clear distinction between the two types of arrangements. A buyer cartel and legitimate joint purchasing both involve an agreement on the purchase price. Further clarity on the distinction would be welcome, particularly given that the Commission has taken recent enforcement action against a number of buyer cartels e.g. *Car Battery Recycling; Ethylene; Styrene Monomers; French Supermarkets*. We would welcome a clear statement in the HGL on how the Commission distinguishes legitimate joint purchasing from an outright buyer cartel.

5.4 The HGL do not expressly recognise at the start section 5.3.1 the pro-competitive benefits of buying groups when there is downstream competition. The current wording risks giving the impression that joint purchasing is necessarily likely to give rise to issues under Article 101 (as it involves cooperation between competitors), meaning that businesses and their advisers should concentrate on whether there are offsetting efficiencies under Article 101(3). We recommend that the revised HGL expressly recognise the benefits of the joint purchasing at the outset of this section e.g. improved efficiency.

5.5 Paragraph 218 of the HGL states that "*an obligation to buy exclusively through the cooperation may, in certain cases, be indispensable to achieve the necessary volume for the realisation of economies of scale. However, such an obligation has to be assessed in the context of the individual case*." The current wording implies that an exclusivity provision falls within Article 101(1) and needs to be exempted under Article 101(3). This seems inconsistent with the CJEU judgment in *Gottrup Klim*[3], which says that such a restriction does not fall within Article 101(1) if it is limited to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers. The wording in the new HGL should, in our view, be amended to properly reflect *Gottrup Klim*, and make clear what would not be caught by Article 101(1).

Form of the cooperation

5.6 The HGL explain that an "effects" analysis is appropriate when advising on "genuine" joint purchasing arrangements. The Commission seems to give some weight to the form of the cooperation and explains that the joint purchasing activity might be carried out by a jointly controlled company, by a company in which many other companies hold non-controlling stakes, by a contractual arrangement or by even looser forms of co-operation. The HGL do not impose a minimum requirement for how 'structural' or integrated the joint purchasing agreement needs to be. We would welcome further clarification on the importance of the form of the agreement. Is the Commission looking for a degree of integration and if so, how much integration?

Market share thresholds

5.7 The current market share thresholds of 15% in the upstream and downstream markets are too low. An analogy can be made between the effects of joint purchasing and mergers - joint purchasing involves less coordination than a full merger - if no anti-competitive effects would arise from a merger, it is unlikely that any would arise under a joint purchasing agreement (cf. OFT's comments in its Short Opinion *P&H/Makro*)[4].

5.8 In our view, the market share threshold should be increased to 25%, in line with the safe harbour for EU merger control under the EU Horizontal Merger Guidelines, on the basis that a joint purchasing agreement can be no more restrictive of competition than a merger of its members. At the very least, the Commission should consider increasing the market share threshold to 20%, in line with the threshold for the simplified Form CO procedure under the EU merger control regime.

Buying power

5.9 The HGL say that anti-competitive buying power is likely to arise if a joint purchasing agreement accounts for a sufficiently large proportion of the total volume of a purchasing market so that access to

[3] C-250/92; *Gøttrup-Klim and Others Grovvareforeninger v Dansk Landbrugs Grovvareselskab*; ECLI:EU:C:1994:413
[4] https://webarchive.nationalarchives.gov.uk/20140402165729/http://oft.gov.uk/shared_oft/SFOs/SFO_on_Joint_Purchasing.pdf

the market may be foreclosed to competing purchasers. What does the Commission consider to be "a sufficiently large proportion"? Greater clarity would be welcome.

Commonality of costs

5.10 The relevance of commonality of costs (and how this is assessed in practice) should be further explored in order to provide more useful guidance, as discussed above in sections 1.7 - 1.9.

6. COMMERCIALISATION AGREEMENTS

6.1 We consider that the current HGL lack sufficient guidance on joint bidding.

The emerging strict approach to joint bidding

6.2 The Commission and Member States in the European Union appear to be taking an increasingly hard line on joint bidding arrangements. For example in the EFTA *Ski Taxi* case, the EFTA Court ruled that joint bidding between actual or potential competitors could be likened to a price-fixing arrangement and therefore should amount to a "by object" restriction of competition. In a recent article[5], a senior European Commission official concurred with this approach, and arguably went further by stating that "*compared to a situation where the parties could have placed separate tenders, a joint tender eliminates choice and competition between the parties in all respects, including on price, quality, and the price-quality ratio*." Guidelines on joint bidding adopted by the Danish competition authority in 2018 follow the same approach[6].

6.3 At this time, there is no case-law available from the General Court or the Court of Justice on this issue and the Commission does not address this question in the current HGL. Hence, should the Commission decide to adopt the aforementioned strict approach, it would be a real blow to companies as that would make joint bidding between actual or potential competitors difficult to justify from a competition law perspective. Additionally, if the Commission were to adopt a strict approach in its new guidelines, a variety of EU Member States could follow suit. As a consequence, a more differentiated approach to joint bidding arrangements is highly needed.

A more differentiated approach

6.4 Joint bidding arrangements, even between actual or potential competitors, should not be deemed 'by object' restrictions, but rather they should be assessed against an effects standard. In our experience, economic theory, empirical research and comparative/past experience does not support the categorisation of joint bidding (even between actual or potential competitors) as a by object restriction of competition. Conversely, joint bidding arrangements offer a potential of substantial economic benefits by its ability to make competitors share risk, increase investments, pool know-how and launch innovation faster.

Guidance on how to assess joint bidding arrangements

6.5 As of today, a majority of the guidance available for how to examine the legitimacy of joint bidding arrangements is written from the perspective taken by competition authorities or public procurement officials. Hence, instead of suggesting actual pointers on what should constitute permissible

[5] Cyril Ritter, *Joint Tendering under EU competition law*, 1 February 2017.

[6] See Danish Guidelines, available at: https://www.en.kfst.dk/media/50765/050718_joint-bidding-guidelines.pdf.

cooperation for companies considering joint bidding arrangements, the main focus lies on providing guidance for competition authorities and procurement officials on when to invoke an investigation.

6.6 In order to offer practical guidance useful from both perspectives, the Commission should consider to deepen and expand its current guidelines on how joint bidding arrangements should be assessed (including through case studies). In particular, areas where further guidance would be desirable include:

(a) How to assess, in the context of joint bidding, whether companies are actual or potential competitors. The current guidance (paragraph 237[7]) is helpful in the sense that it seems to focus on the practical reality: only treating as competitors companies that could bid individually for a particular contract.[8] However, further guidance is needed on, for example, how to assess whether a company has the ability to bid individually. The Commission could break this down further by explaining that 'ability to bid' means the ability to meet the tender specifications – in terms of having sufficient spare capacity, equipment, staff, regulatory permits, quality certifications, etc. We do not think that a company should be treated as a competitor where it does not have sufficient capacity to bid individually and could only acquire such capacity by assuming an insupportable financial risk.

(b) Examples of efficiency gains that could make a joint bidding arrangement lawful and an explanation of how the companies can evidence those claims. The guidance should cover both (i) cost efficiencies; and (ii) qualitative efficiencies. Cost efficiencies would arise, e.g., where competitors bring different proprietary technologies that work together to reduce the costs involved in undertaking the project or where coming together allows efficiencies of scale. Qualitative efficiencies would, for example, be better products or services (than would have been possible absent the joint bid) or the faster launch of services.

(c) Practical steps to reduce the risk that a joint bid breaches competition law, e.g. how to manage information exchange at each stage of a project and what information should, in the interests of transparency, be provided to the purchasing body (e.g. the fact that a joint bid is being submitted and if a member may participate in more than one consortium etc.).[9]

7. STANDARDISATION AGREEMENTS

7.1 Section 7 of the HGL deals with both standardisation agreements, whose primary objective is the definition of technical or quality requirements with which current or future products, production processes, services or methods may comply, and standard terms and conditions of sale or purchase elaborated by a trade association or competing companies. For the most part this section is helpful in providing clarity on the application of EU competition law for both these forms of horizontal co-operation.

[7] Para 237 of the Horizontal Guidelines explains that with regard to "consortia arrangements that allow the companies involved to participate in projects that they would not be able to undertake individually", "the parties to the consortia arrangement are therefore not potential competitors for implementing the project".

[8] This is in apparent with the approach taken in Irish guidelines on consortium bidding which appear to take a more high level product-market type approach to the issue – see para 3.4: https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/02/Consortium-Bidding-Guide_0.pdf).

[9] See para 3.10 of Irish guidance on consortia agreements https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/02/Consortium-Bidding-Guide_0.pdf.

7.2 However, in respect of standardisation agreements, the HGL has mostly focussed on ensuring that the standardisation procedure is open to all, with information sharing actively encouraged between participants, and that the process is carried out in a fair and unrestrictive manner. Further guidance would be welcome in relation to standardisation agreements in circumstances where intellectual property rights (IPR), and patents in particular, are important, especially relating to the processes around fair, reasonable and non-discriminatory (FRAND) licensing of standard-essential patents (SEPs).

7.3 In addition, further guidance in relation to pre-pool co-ordination (i.e. determining which market players should participate in the standardisation pool) would be welcome.

FRAND licensing of SEPs

7.4 In the case of a standard involving IPR, the HGL requires a clear and balanced IPR policy. Among other things, such policy requires participants wishing to have their IPR included in the standard to provide an irrevocable commitment to license their essential IPR to all third parties on FRAND terms. This will have to be combined with good faith disclosure early in the standard-setting procedure of participants' IPR that might be essential for the standard (paragraphs 284 to 286 of theHGL).

7.5 However, paragraph 288 of the HGL indicates that "*compliance with Article 101 by the standard-setting organisation does not require the standard-setting organisation to verify whether licensing terms of participants fulfil the FRAND commitment*", and there is no requirement for IPR holders to review the relevance of their declaration at the time of adoption of the final standard (or on an ongoing basis), nor to indicate which aspects of the standard are relevant to their particular SEPs. Furthermore there is no requirement for essentiality claims to be scrutinised by the standard-setting organisation. The consequence of these factors is that a standardisation agreement that complies with the requirements of the HGL may nonetheless have anti-competitive consequences.

7.6 It is, of course, emphasised in paragraph 291 of the HGL "*that nothing in these Guidelines prejudices the possibility for parties to resolve their disputes about the level of FRAND royalty rates by having recourse to the competent civil or commercial courts.*", and similarly disputes about the validity, essentiality and infringement of SEPs can (and have) been brought before the relevant courts. However, such proceedings are costly and time-consuming and therefore also detract from the efficiencies brought about by the standardisation procedure.

7.7 The issues around the licensing and enforcement of SEPs were raised in the European Commission: Communication from the Commission to the Institutions on setting out the EU approach to standard essential patents[10]. This Communication set out a number of measures that might assist with resolving the identified issues. Consideration of the proposals within that Communication to identify any aspects that should be included in any future version of the HGL and/or that should be taken into consideration from a competition law perspective when working with such standardisation agreements would be useful.

7.8 Of the measures suggested, the following would, in our view, be of most assistance in improving the situation and promoting the pro-competitive benefits of standards and SEPs, while not disproportionately raising the costs or burdens involved in standard-setting:

[10] COM (2017) 712 final, 29 November 2017; see https://ec.europa.eu/docsroom/documents/26583/attachments/1/translations/en/renditions/native

(a) increasing transparency of the SEP databases held by standard-setting organisations;

(b) more up-to-date and precise declarations - in particular it should be a requirement that rightholders review the relevance of their SEP declarations once the final standard has been adopted, and that they identify at least which section of the standard is relevant to the SEP;

(c) the creation of patent pools and licensing platforms to facilitate SEP licensing should be encouraged - and clarification of the requirements to enable this to be done within the bounds of competition law would be helpful; and

(d) steps should be taken to make the enforcement environment for SEPs more predictable.

7.9 Finally, further guidance on the interplay between Article 101 and 102 in this context would be helpful. The HGL are stated to be "*without prejudice to the possible parallel application of Article 102 of the TFEU to horizontal co-operation agreements"* (paragraph 16) - and it is interesting that enforcement of the FRAND obligations of SEP holders have to date relied on arguments of an abuse under Article 102.

Pre-pool coordination for the standardisation procedure

7.10 Paragraph 281 of the HGL provides that, "*to ensure unrestricted participation the rules of the standard-setting organisation would need to guarantee that all competitors in the market or markets affected by the standard can participate in the process leading to the selection of the standard.*" However, pre-pool co-ordination (i.e. determining which market players should participate in the standardisation pool) is in practice vital to ensuring there is an effective standardisation procedure. Several participants could be involved in a patent pool. Each participant will have its own IP portfolio, business needs, target markets and business models. It can be difficult for a patent pool to align these different positions and, if the aims of the patent pool are not aligned and/or the aims of the participants conflict, it could be difficult for the standardisation procedure to operate and set the appropriate standard in an efficient manner.

7.11 The potential need for a more limited pool is recognised in paragraph 295 HGL, and its footnote 2:

"*Also, if in the absence of a limitation on the number of participants it would not have been possible to adopt the standard, the agreement would not be likely to lead to any restrictive effect on competition under Article 101(1); [footnote 2: Or if the adoption of the standard would have been heavily delayed by an inefficient process, any initial restriction could be outweighed by efficiencies to be considered under Article 101(3)]*"

and in paragraph 316, citing Commission Decision in Case IV/31.458, *X/Open Group*, paragraph 45 and Commission Decision in Case 39.416, *Ship Classification*, paragraph 36:

"*Participation in standard-setting should normally be open to all competitors in the market or markets affected by the standard* ***unless the parties demonstrate significant inefficiencies of such participation or recognised procedures are foreseen for the collective representation of interests***" (our emphasis).

However, the carve-out in paragraph 316 and Examples 7 and 8 within section 7 suggest that pre-pool coordination will only be legitimate in very limited circumstances.

7.12 Therefore, Commission guidance would be helpful on whether pre-pool coordination would always be anti-competitive. If not, examples of situations when pre-pool coordination is legitimate, or the type of coordination that would be legitimate, would be welcomed (as would guidance on when it would be anti-competitive to carry out pre-pool coordination).