12 FEBRUARY 2020

STATEMENT

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to

EU COMMISSION

EVALUATION

OF THE

HORIZONTAL BLOCK EXEMPTION REGULATIONS

AND THE

HORIZONTAL GUIDELINES.

A. Background

Article 101(1) of the Treaty on the Functioning of the European Union ("**TFEU**") prohibits agreements and concerted practices between undertakings that restrict competition, unless, in accordance with Article 101(3) TFEU, they contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits. The prohibition covers, inter alia, co-operation agreements and concerted practices between actual or potential competitors.

Horizontal agreements may be subject to Commission Regulation (EU) No 1217/2010 (for research and development agreements, "**R&D BER**"), and Commission Regulation (EU) No 1218/2010 (for specialisation agreements, "**Specialisation BER**"), collectively referred to as the Horizontal Block Exemption Regulations. The Commission has also provided guidance in the corresponding Commission Notice (Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements, referred to as the "**Horizontal Guidelines**").

The Commission launched an evaluation of the Horizontal Block Exemption Regulations in September 2019 in order to gather evidence on their functioning, together with the Horizontal Guidelines. A consultation, which is part of the evaluation of the Horizontal Block Exemption Regulations, aims to collect evidence and views from stakeholders including law firms advising companies on related competition issues.

B. CMS

CMS is ranked as a Top 10 Global Law Firm. With approximately 4,800 CMS lawyers and 75 offices worldwide, we advise private and public sector clients in over 70 cities in 43 countries.

CMS is organised around industry sector groups and practice area groups. The CMS Competition & EU Group is one of the largest competition teams in Europe and offers the most widespread pan-European coverage. With more than 180 competition lawyers based in 34 countries, we are a one-stop solution for clients from a very wide range of industries across Europe and beyond, through our strong and growing teams in China, Latin America and Africa. Today's CMS lawyers are continuing a successful track record of more than 50 years' experience, covering hundreds of competition law cases, including many landmark cases before EU and national courts and competition authorities.

For more information please refer to our website.[1]

[1] file:///C:/Users/br1mb/Downloads/CMS%20Competition%20Global%20Brochure%20-%20August%202019.pdf

C. Suggestions

1. Preliminary remarks

In the following response we summarise our suggestions for renewing the Horizontal Block Exemption Regulations and the Horizontal Guidelines. Our response describes only our own ideas and views based on a long-standing practice of advising clients on related issues. We have not been instructed by any third party to prepare this document.

We would be very happy to explain in more detail and/or contribute actively to the legal debate by other means in any format the Commission deems appropriate.

Our response focuses primarily on the Horizontal Guidelines as in our experience these Guidelines have been more relevant for advising clients than the two Horizontal Block Exemption Regulations.

2. Individual suggestions

Below we provide suggestions for certain paragraphs of the existing Horizontal Guidelines. Where relevant we also comment on parts of the Horizontal Block Exemption Regulations.

a) Introduction

- Paragraph 1 sets out that the Guidelines also cover horizontal cooperation agreements between non-competitors and refers as an example to agreements between two companies active in the same product markets but in different geographic markets without being potential competitors. This concept is reflected only to a very limited extent in the more specific parts of the Guidelines, e.g. at paragraph 212. We think the circumstances under which the Commission considers agreements between non-competitors to be a restraint of competition could be explained in more detail. We note that e.g. paragraph 38 refers to foreclosure effects.

- Paragraph 2 describes various potential benefits of horizontal agreements but refers only to economic benefits. We suggest clarifying that this also includes further consumer welfare benefits, e.g. enhanced sustainability of products, their production and distribution. (see also our comments at the end on sustainability agreements).

- Paragraph 10 refers to potential competition. The term of up to three years seems long given the rapidly changing environment and market structure in a majority of markets. We suggest reducing the term to one year consistent with the

Commission's approach to the exclusion for horizontal agreements in the vertical agreements regime. Specifically: the vertical agreements exemption in the Vertical Agreements Block Exemption Regulation does not generally apply where the parties are "competing undertakings"; that term is expressed to include "potential competitors"; and the definition of "potential competitor" is anchored to a party which would be likely to enter "*within a short period of time*" in response to a SSNIP. The Vertical Guidelines clarify that this period is "*normally not longer than one year*".[2]

- Paragraph 11 refers to intra-group agreements under the notion of 'undertaking' which are not covered by Article 101 TFEU. We suggest this paragraph is slightly expanded to address situations such as agreements between parent companies and subsidiaries which they control jointly with other shareholders.

- The Horizontal Guidelines do not deal specifically with ancillary restraints and restrictions that are necessary to obtain legitimate business objectives. The new Guidelines should elaborate in more detail on this topic, potentially in the context of the "by object/by effect" dichotomy.

b) Information Exchange

- Paragraphs 55 and 61 refer to indirect contacts between competitors. The new Guidelines could usefully clarify that this does not necessarily capture all types of contacts through third parties (e.g. customers), unless there is some form of intention that the information be indirectly passed on between competitors. In other words, there should be an exception permitting the unintended flow of information from one competitor to another via an independent third party (especially where that third party is a customer). This would seem consistent with EU case law which requires a degree of intention, or at the very least awareness, to establish an infringement (e.g. *Case-194/14 - AC-Treuhand, Case T-180/15 - Icap, Case C-74/14 Eturas*). We also note that this concept has already been applied by UK courts in *Case 2005/1071, 1074 and 1623; Argos Limited and Littlewoods Limited v Office of Fair Trading and JJB Sports Plc v Office of Fair Trading* ([2006] EWCA Civ 1318, paragraph 141.

- In addition, it could be added that this exception also applies e.g. to the sale of scanner data by retailers to suppliers and to all information provided by retailers to suppliers in the course of category management projects.

[2] Guidelines on Vertical Restraints (2010), paragraph 27. The Technology Transfer Block Exemption ("**TTBER**") similarly refers to entry "*within a short period of time*" (Article 1(n)(ii)).

- Paragraph 63 refers to 'signalling'. We suggest considering whether the current description is too wide. According to the current wording any company making a public statement after a competitor has done so is at risk of being considered to have colluded. This does not seem to be consistent with the concept of concerted practice and its interpretation by the Courts, which does not prohibit parallel behaviour (established case law since *Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 Suiker Unie and Others v Commission [1975] ECR 1663, paragraph 26; and Woodpulp – Joined Cases C-89, 104, 114, 116-117, 125-129/85*).

- Paragraphs 74, 106 and 107 refer to 'by object' infringements. The new version of the Horizontal Guidelines could further clarify the characteristics of information exchanges which are considered to be 'by object' restrictions in relation to the exchange of future prices and quantities. Some NCAs have adopted a wider approach to the 'future price' concept and widened the 'by object' box, assuming that current prices amount to future prices (*Spanish competition authority, Case Expte. S/0280/10 SUZUKI/HONDA*).

- The examples in paragraphs 106 and 107 seem to establish a clear differentiation between current prices (i.e. prices currently applied) and intended future prices, even if current prices typically will be applied for some time in the future (that does not make them necessarily 'future prices' for the purposes of being 'by object' infringements). The Draft Horizontal Guidelines 2010 included a footnote that made this differentiation (current/future prices) even clearer but it was not incorporated into the final text of the 2011 Horizontal Guidelines. This clarification would contribute to the uniform application of EU competition law by NCAs. In addition, the implications of such current price exchanges being considered 'by object' and, therefore, treated as cartels are obvious (also from a damages claims perspective).

- Further, in relation to paragraph 74, some harmonisation on how to apply the 'by object' approach would be welcome. The Guidelines are not binding on NCAs. In the Spanish and French car rental cases, which refer to exactly the same facts (exchanges of past recent information on monthly turnover and number of contracts between the major car rental companies), the Spanish competition authority considered the conduct a restriction 'by object' and fined the companies involved (*Expediente S/0404/12 Servicios Comerciales AENA*). On the other hand, the French competition authority considered the conduct a restriction 'by effect' and, after a lengthy investigation, found no harmful effects and shelved the case (*Décision n° 17-D-03 du 27 février 2017*).

- In addition, it should be clarified whether or not paragraph 74 and footnote 57 are also intended to classify the exchange of future *purchase* prices as a restriction by object. The case law (*c.f. C-8/08 T-Mobile Netherlands, paragraph 41*) is not entirely clear in this regard.

- Paragraphs 86-94 refer to the characteristics of the information exchange. These paragraphs do not consider legitimate reasons for the exchange of information. In that context, it would be useful for the new Guidelines to include guidance on the management of information flows in the context of M&A transactions, and codify some of the guidance in cases (e.g. *M.7993 Altice / PT Portugal*). However, we would suggest that the guidance adopts a practical and realistic approach to risk management in this context. The Guidelines should clarify that clean teams can address the competition law concerns even if such clean teams include members of the companies involved. However, even a clean team approach does not always allow potential buyers to make an informed decision about their offers. There are other legitimate ways of managing the competition law risk in M&A transactions, including a staggered approach to information disclosure (delaying disclosure until just before completion) and adopting protocols or guidelines to manage information flows. In our view recognition of the issue and guidance would be useful.

- Paragraph 90 refers to the age of data. It is clear that "historic" information does not necessarily need to be one year old, and the threshold for when data becomes historic depends on the economic sector, the frequency with which price changes and price negotiations take place (and the combined analysis of the various other factors included in the Guidelines). However, not all NCAs are willing to accept that some exchanges of recent information are in fact exchanges of historic information. For example, in *Case S/0404/12 Servicios Comerciales AENA*, the Spanish competition authority concluded that the exchange of information that was one month old in a market where prices change constantly, even several times a day, was not historic. Some clearer guidance could be helpful to harmonise the decision-making practice.

- Paragraph 92 refers to exchange of information that is already in the public domain. We suggest adding a sentence to confirm that any prices that are published widely either on the internet, by media campaigns or by displaying the product to the public by other means (e.g. shelf prices in supermarkets) qualify as 'public'.

c) Research and Development

- As a general remark, we are not aware of any relevant public enforcement cases concerning R&D agreements. This apparently reflects the fact that any anti-competitive concerns to which R&D agreements regularly give rise are not sufficiently grave to warrant the initiation of enforcement action by the authorities. In fact, it is our experience that anti-competitive concerns only arise in very exceptional cases.

- In reality, in the vast majority of cases joint R&D is only considered by companies which cannot achieve the respective results on a standalone basis (due to the lack of technical/human/financial resources or sufficient expectations to achieve positive results in the short term). Article 101(1) TFEU should not apply to such cases from the outset, including all ancillary restraints forming part of such agreements. R&D is essential in many industries to improve living standards, create better products, address sustainability concerns and enable the European industry to compete on a worldwide scale, so overall efficiency gains are much more likely to be achieved than in most other forms of horizontal cooperation.

- Against this background we consider it essential that the Guidelines or the R&D BER itself clarify, in a meaningful manner, when R&D agreements including their ancillary restraints are not caught by Article 101(1) TFEU from the outset. This would allow businesses to enter into R&D agreements without necessarily having to comply with all the conditions of the current R&D BER. In fact, the conditions of the R&D BER in our experience are often perceived as a "straightjacket" by businesses. The mere existence of the R&D BER and its list of hardcore restrictions in practice means that companies do not dare enter into R&D agreements which do not comply with the R&D BER, even though the respective R&D cooperation may not even fall within the scope of Article 101(1) TFEU. As several of the conditions of the R&D BER are perceived as economically not viable (in particular with regard to paid-for R&D), in our experience this "straightjacket" effect has real chilling effects on R&D. Several R&D projects we have advised on have had to be abandoned because the parties were not comfortable with the legal uncertainty implicitly brought about by the R&D BER and its seemingly critical view of R&D agreements. Along the same lines, we would also suggest widening the scope of the block exemption regulations in several ways (market share thresholds, terms, conditions) and to reduce their complexity.

- Article 1 lit. (c) defines the notion of R&D. The definition suggests that the threshold at which it is assumed that R&D takes place is low. Nonetheless, we suggest clarifying the notion of R&D. In practice, it is often difficult to say whether a given situation is joint R&D (Article 1 (m) and (n)), paid-for R&D (Article 1 lit. (p)) or no R&D (such as in the situation described in para. 202 of the Vertical Guidelines).

- In addition, we understand the BER to also cover vertical R&D agreements (if they contain restrictive clauses, because vertical R&D in itself does not restrict competition at all). The hardcore restrictions in Article 5, however, do not fit in with restrictions in vertical R&D agreements, such as customer restrictions for the supplier. Further, the strict access requirements in Article 3(2) and (3) are often not reasonable in vertical R&D scenarios. We therefore suggest that – as is the case in other BERs (e.g. TTBER) – separate provisions are introduced to take account of the reduced potential of vertical restrictions of endangering competition.

- Article 5 lit. (d) could be understood to mean that parties to an R&D agreement may not impose exclusive supply obligations for products developed under the R&D agreement. Such an understanding would not be reasonable. We suggest clarifying this point.

d) Production Agreements

- Article 1 lit. (q) of the Specialisation BER defines the term 'joint' in the context of distribution and refers to the possibility of a joint team, organisation or undertaking. We suggest clarifying (in the BER or in the Guidelines) under which conditions within these types of joint distribution arrangements the parties may allocate customers among themselves e.g. according to pre-existing contacts and/or specific general access to certain (types of) customers.

- Article 2 (1) BER also exempts joint production agreements. We understand Recital 7 BER to mean that the exemption also covers the formation of a joint venture for a joint production venture facility, even if the parties to the joint production agreement each retain their own production facilities on the same product and geographic market. This also covers an agreement on joint distribution, i.e. the joint sale of the products produced by the joint production facility joint venture, either by such joint venture or by a joint team consisting of members from both parties. The exemption in that case also covers the setting of prices for the jointly produced goods even if the parties continue to sell the products produced in their own facilities in parallel and independently from one another. We further understand that the exemption also covers the joint venture for joint production and joint sale of the jointly produced goods. Such joint venture will not be regarded as an undertaking distinct from those of the parties. Therefore, no information barriers are required between each party, on the one hand, and the joint venture on the other hand. We suggest clarifying such aspects that relate to the scope of the exemption in the case of the formation of joint ventures.

e) Purchasing Agreements

- As a general remark we would like to point out that the landscape of joint purchasing activities has changed substantially since the existing Guidelines were drafted. While traditional joint purchasing referred to cooperation by and between smaller companies which aimed to catch up with their bigger rivals to achieve similar purchasing terms and conditions, in reality it has developed much further. Today, larger companies also enter into joint purchasing arrangements with smaller competitors where it is sometimes questionable which benefits the larger party intends to achieve (since its sales volumes do not significantly increase when the smaller quantities of smaller competitors are added). Another new phenomenon is the creation of international retail alliances consisting only of market leading retailers from different home markets. These new types of joint purchasing are not sufficiently covered by the existing Guidelines.

- As a second general remark we would like to note that Art. 101 (1) TFEU does not make a distinction between agreements or concerted practices no matter whether they concern sales or purchase prices. It appears that the current guidelines seem to be based on the idea that Article 101 TFEU aims at protecting the interests of consumers (under which concept any potential reduction of selling prices seems to ‘per se’ exclude a restraint of competition) but not to protect competition as a ‘process’ (according to which joint buying still qualifies as a restraint of competition which would then need to be justified under Article 101 (3) TFEU). This approach seems not to be in line with the jurisprudence of the Courts who confirmed that the general aim is to protect competition as a ‘process’. In any event further clarification seems necessary.

- Paragraph 194 defines joint purchasing arrangements and also refers to “*looser forms of co-operation*”. It is not clear how such “*looser forms of cooperation*” are to be distinguished from mere information exchanges about purchasing prices. It could be made clear that any information exchange about purchasing prices within the safe harbour provided by paragraph 208 is considered not to restrict competition.

- Paragraph 199 refers to the relevant markets. The current wording does not seem to be consistent with paragraph 212 which correctly points out that negative effects on competition on downstream markets (e.g. retail markets) may also exist if buyers do not compete downstream.

- Paragraphs 205-206 refer to ‘by object’ infringements in the context of joint purchasing arrangements. We believe the new Guidelines should clarify in greater detail when the Commission would qualify cooperation by buyers as a ‘by object’ infringement.

- It appears at least unclear how the guidelines qualify the joint fixing of purchasing prices since paragraph 205 and paragraph 206 seem to be unclear or even inconsistent. We note that the Commission imposed high fines on companies which agreed to apply the same purchasing prices for the purchase of used car batteries (*Case AT.40018 Car Battery Recycling*). We also note that this decision has been confirmed by the Courts (*Case T-222/17 Recylex SA, Fonderie et Manufacture de Métaux SA, Harz-Metall GmbH v Commission* and *Case T-361/17 Eco-Bat Technologies Ltd, Berzelius Metall GmbH, Société traitements chimiques des métaux v Commission*). The Commission qualified this activity as a 'by object' infringement and did not consider any potential positive effects on selling prices (which the parties claimed as a justification). This case law needs should be reflected in the new guidelines.

- Paragraph 205 refers not only to joint purchasing prices but also to agreed output limitations. In this context it should be clarified that collective or coordinated boycotts (e.g. coordinated de-listings) are regarded as 'by object' infringements since products disappear from shelves and are no longer available for consumers. It should also be clarified that this applies even in case the buyers do not compete downstream.

- Paragraph 208 describes a safe harbour for joint purchasing agreements based on the market shares of the parties involved on both the purchasing and the selling markets. It should be clarified that these thresholds also apply if the parties do not compete on the downstream market (in line with the reasoning of paragraph 201).

- Moreover, the current wording in paragraph 201 does mention that the existence of parallel purchasing arrangements can be a relevant factor in the consideration of market power. It would appear likely that any effects on competition (be it upstream or downstream) would increase if parallel alliances exist, so a clarification to this effect seems adequate.

- Paragraph 212 refers to the scenario of buying groups whose members do not compete on the downstream market. The statement that restrictive effects of joint purchasing agreement are unlikely to exist if the parties are no competitors on downstream markets contradicts other passages on joint purchasing arrangements: Market power on buying markets can exist irrespective of whether participants are competitors on downstream markets (conflict with paragraphs 194, 197, 198, 202). In addition, the expectation that lower purchase prices will be passed on to consumers if participants have no market power on downstream markets appears to be the main ratio of the preferential treatment of joint purchasing arrangements (paragraphs 201, 208 and 219) but market power on downstream markets can exist irrespective of whether participants are competitors on downstream markets. We suggest clarifying that even in the absence of a competitive relationship on the downstream markets, market power of the participating companies on the buying or selling markets may exist, making a joint purchasing arrangement likely to fall within the prohibition of Art. 101 (1) TFEU. Further, the aspect that the absence of a competitive relationship reduces collusion effects should be moved from paragraph 212 to paragraphs 213 et seq. which deal with collusion effects.

- In addition, the existence of parallel alliances should be considered in the analysis, too.

- Finally, paragraph 212 refers to potentially detrimental effects on competing buyers (other resellers). In this context it could be clarified when any such negative effects are likely to exist. We suggest referring to waterbed and spiral effects which have already been checked (and hence accepted) by competition authorities (including the EU Commission) in merger control cases (e.g. *M.1221 REWE/Meinl*). Moreover, we suggest referring to the risk of market tipping resulting from spiral effects.

- Paragraph 219 refers to efficiency gains. The cost savings, efficiencies or gains derived from joint purchasing agreements must be passed on to consumers to an extent that outweighs the restrictive effects on competition of these restrictions for an agreement to meet the criteria of Article 101(3) TFEU. We would welcome some guidance to self-assess these types of agreements or the type of qualitative and quantitative evidence required to show that such efficiencies will actually be passed on to consumers. For example, the Commission could consider to establish that a certain (high) proportion of savings must be passed on to consumers. In addition, we suggest adding a sentence clarifying that any price reductions must be passed on to the end-customers who in fact buy the relevant products (not to end-customers who buy other products).

f) Agreements on Commercialisation

- Paragraph 234 refers to ‘by object’ infringements which, according to the Guidelines, are likely in the case of joint selling. In reality, joint selling is sometimes envisaged by suppliers with broad product portfolios, whose products do not overlap except potentially (sometimes depending on market definition) in some limited areas. We suggest adding a sentence that to establish a ‘by object’ infringement it is relevant to consider whether and to what extent the parties’ products really compete (and where negligible overlaps will not count).

- Paragraph 237 refers to consortia arrangements and the principle that they do not restrict competition if the cooperation is objectively necessary to allow the parties to participate in projects that they would not be able to undertake individually. For clarity, we suggest adding that this exception applies not only in the case of a lack of technical or human resources or know-how but also in the case of objective commercial reasons, e.g. if the volume and/or duration of a project would mean a critical financial risk for the company based on its regular risk allocation policy.

- Paragraphs 246-248 describe various potential efficiency gains. We suggest adding that any improvement in sustainability, even beyond pure direct cost savings, could qualify as efficiency gains.

g) Standardisation Agreements

- In chapter 7, the Horizontal Guidelines provide useful guidance regarding standardisation agreements. Nevertheless, it is often challenging for (potential) competitors to develop a standard together, be it with or without the support of one of their trade associations, even if their objective is pro-competitive. The fact that, according to our knowledge, (European) case law of any significance with regard to standardisation agreements has yet to be developed, particularly where these agreements do not also pertain to IPR, makes it difficult to determine what can and cannot be done.

- In this regard, it must be noted that the Horizontal Guidelines refer to so-called “standard setting organisations” (for instance in paragraphs 279 and 283), as if the involvement of these standard setting organisations is a prerequisite, or at least assumed, in the context of the development of standards. It is true that these public and private bodies fulfill a role in many standardisation processes, and their position therefore most certainly deserves attention in the Horizontal Guidelines. However, in our view, the Horizontal Guidelines should also reflect that, under certain circumstances, competitors and/or their trade associations may have the objective to develop a standard autonomously, *i.e.* without the support of such a professional standard setting organisation. Companies and organisations can have multiple reasons to do so. The costs of involving a standard setting organisation tend for instance to be relatively high, and can be regarded as prohibitive where a trade association has significant human and legal resources of its own. More importantly, the “ownership” of the standard to be developed usually remains with the standard setting organisation rather than competitors or their trade associations. Retaining a standard setting organisation often means accepting a much lower degree of control. This negative effect can often outweigh any benefits in outsourcing much of the standardisation process.

- For those companies and trade associations that opt for an independent approach, the Horizontal Guidelines are of course particularly important. More specifically, the guidance in paragraphs 280 to 286 is key. In these paragraphs, the Commission sets out the criteria that can be applied in order to establish if a standardisation agreement has restrictive effects on competition or not. According to paragraph 280, this is not the case where participation in standard-setting is unrestricted; the procedure for adopting the standard in question is transparent; and the standardisation agreement does not contain an obligation to comply with the standard and provides access to the standard on fair, reasonable and non-discriminatory terms.

- Although the Horizontal Guidelines elaborate on these criteria in the paragraphs that follow, they do not go into detail. So far as unrestricted participation is concerned, paragraph 281 suggests that all competitors in the market(s) affected should have the opportunity to have their say, but in our view that is an oversimplification of reality. It tends to be difficult to determine who needs to be invited to participate, and whether it is sufficient to narrow the parties down to competitors only in light of the obligations with respect to transparency. The impact on companies at other levels of the distribution chain is often significant. Whether or not companies from other Member States need to be part of the process is another difficult question with a real practical dimension.

- With regard to the required accessibility of the standard, the Horizontal Guidelines mention in footnote 112 that the specification of the standard should be effectively accessible. The Horizontal Guidelines do not shed any further light on practical issues. They do not indicate if companies or trade associations can charge for the access granted to the standard, be it in order to recoup the costs of development of the standard or for other reasons, nor whether a distinction between certain parties requesting access and others can be made. This is a question that often arises in the framework of any standardisation process.

- We understand that many examples are given at the end of chapter 7, and that these support companies and trade associations to take decisions on how to achieve a standardisation agreement in practice. That said, it would in our view be better if some of the guidance that is currently given by means of examples is actually incorporated into the analysis of standardisation agreements earlier in chapter 7. The examples mentioned go to show that Article 101(1) and 101(3) TFEU provide for significant room to manoeuvre when it comes to standardisation, and it would be valuable for companies to have that confirmed in the Commission's assessment.

h) (NEW) Sustainability Agreements

- We note that sustainability is one of the most important political goals of the Union and of the industry. In fact, many of our clients recognise that lawmakers alone will not be able to solve the issues quickly and efficiently enough. Many of the sustainability issues do also have an international dimension where national or even

EU-wide regulation alone cannot solve the problem. As a result, industry initiatives to achieve sustainability goals are necessary and increasingly more common.

- At the same time, sustainability initiatives (e.g. to enhance animal welfare) tend to increase costs which ultimately could lead to higher consumer prices. In addition, companies want to avoid first-mover disadvantages which ultimately leads to the question of how they may team up with competitors to achieve sustainability goals.

- Against this background we suggest adding a section on sustainability agreements to the new Guidelines. This should deal with initiatives to enhance production and distribution standards, e.g. to enhance animal welfare, improve environmentally friendly production, reduce emissions and consumption of energy and natural resources, avoid child labour and improve the living conditions of farmers. We suggest considering creating a safe harbour for such initiatives which, however, would not be based on market share thresholds since any such initiatives necessarily need to cover the entire market. In addition, the Guidelines should set out principles on the exemption of any such initiatives under Article 101(3) TFEU. This appears especially important against the background of the purely economic methodology applied by the Dutch competition authority in the *Chicken of Tomorrow* case (*Case 13.0195.66)* compared to the more flexible concept applied by the German competition authority concerning the animal welfare label. In this context we suggest establishing that sustainability is already an existing broad goal of modern society and policymakers, including the Union, so that it would suffice (under Article 101(3) TFEU) to measure efficiency gains against this general goal.