REVIEW OF THE TWO HORIZONTAL BLOCK EXEMPTION REGULATIONS FOR HORIZONTAL COOPERATION AGREEMENTS

COMMENTS OF THE IN-HOUSE COMPETITION LAWYERS' ASSOCIATION ('ICLA')

Introduction

1. The In-House Competition Lawyers' Association ("ICLA") www.competitionlawyer.co.uk) is an informal association of in-house competition lawyers across Europe and in South East Asia. The Association meets usually twice a year to discuss matters of common interest, as well as to share competition law knowledge. There are currently almost 400 members in 12 countries. The Association does not represent companies but is made up of individuals as experts in this area of the law. The paper does not necessarily represent the view of all of its members.

2. Because of their role, in-house competition lawyers have a clear interest in a simple and straightforward competition law regime that prioritises certainty, minimises costs, and does not represent a disproportionate demand on businesses' time and resources.

3. 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"), together referred as "the Horizontal Block Exemption Regulations" or "BERs", are due to expire on 31 December 2022. The European Commission is consulting on the BERs and is considering whether it should let them lapse, prolong their duration or revise them on the basis of the evidence gathered. We welcome the opportunity to provide comments to the Commission to assist it in its review. As part of the consultation, ICLA will also provide comments on the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union ('TFEU') to horizontal co-operation agreements or "Guidelines".

4. ICLA did not seek to respond to every question in the questionnaire; rather, we decided to focus on a number of points on which our members' views and experience would be of most assistance to the Commission. This paper, attached to the questionnaire, is intended to convey the key points in a single document.

Importance of the BERs and Guidelines but need to adapt

5. The BERs and the Guidelines are very valuable instruments for companies and their legal advisors. They provide in-house lawyers with tools to assist their business colleagues in their day to day business activity. They provide the internal legal team with useful indications on the application of competition law to horizontal agreements and assist us in getting as much legal certainty as possible. In light of this key role, ICLA is of the view that the BERs and the Guidelines fulfil a vital role and should be maintained. However, with the passing of time and with more experience in the application of the BERs, there are some sections and some aspects that would benefit from some further guidance or flexibility.

6. In particular, over the last decade, markets and technologies have developed dramatically and thus the need for European companies to cooperate in order to address the new challenges has also increased. The current rules do not give sufficient flexibility to European companies to facilitate procompetitive cooperation, which are key to compete in a world characterised by globalisation and digitalisation. For this reason, the rules should be adapted to ensure a future-proof framework, able to respond to the challenges ahead.

Horizontal Agreements and information exchange

7. We have several comments in relation to the section on information exchanges. This is an area where in-house lawyers find themselves advising frequently their internal clients and where we believe some more clarity and a less restrictive approach would be welcomed. In our view the guidance overestimates the potential anti-competitive effect of information exchanges and underestimates the potential pro-competitive effects. Companies and their representatives have become so conscious of the potential issues around information exchanges that they sometimes take an overly restrictive approach. For example, it is not uncommon for companies to have stopped all their employees from attending trade meetings or trade associations. While a meeting with competitors (even for legitimate reasons) could result in an illegal coordination, the outcome of such total ban is to stop several initiatives that could be of wider benefit to society and to stop legitimate coordination between competitors. The risk in attending is deemed too high.

8. We have identified a number of specific issues we would like to address

    a. <u>Nature of the information</u>

    The Guidelines acknowledges that the exchange of "genuinely public information" normally should not be a problem although it leaves open the possibility, as it does in relation to other issues in the Guidance, that even genuinely public exchanges of information may facilitate a collusive outcome in the market[1].

    An information is defined as ‘”genuinely public if it makes the exchanged data equally accessible (in terms of cost of access) to all competitors and customers”.

[1] Paragraph 94

Such a definition is quite restrictive as plenty of public information might entail costs for some competitors or customers. Nobody would disagree that the information on prices of petrol shown on motorways is public information. But if somebody were to collate that information on a national basis, it would be easy to argue that it is not 'genuinely public' as it is not equally accessible in terms of cost of access to all competitors and customers.

Such restrictive definition makes advising business unnecessarily complicated and an alignment with the normal concept of 'publicly available information' would be welcomed.

b. Too many exceptions

In many instances, the Guidance, having expressed a statement that would give comfort to business, states that there could be exceptions. While we understand that the Commission would like to have flexibility in its enforcement to capture situations that were not foreseen at the time the Guidance was drafted, that decreases its value and creates legal uncertainty, in particular when it is unclear what such exceptions are supposed to entail. If exceptions are deemed to be needed, describing the type of information or behaviour that the Commission aims to capture would be helpful.

c. Restrictions of competition by object

The Guidance states that 'information exchanges between competitors of individualised data regarding intended future prices or quantities should be considered a restriction of competition by object'[2]. However, the Guidance leaves open several other situations which could be characterised as an infringement by object (see Paragraph 72) and therefore it becomes clear that Paragraph 74 is just an example.

This has created significant uncertainty within companies. Many companies have adopted an extremely restrictive approach to information exchange out of fear of ending up in the "restriction by object box". In our view, we believe that, in enforcing the rules on information exchanges, there is a tendency by competition authorities to jump quickly to the object box (as there is no need to prove effects) in cases that go far beyond information exchanges on future prices or quantities. The object box should become again the exception; in all others the assessment of the effects should be taken into account.

Restrictions of competition by effect

While it tends to be easier to look at the two extremes (what is legitimate and what is an object infringement), it is more difficult to assess under the current Guidelines what is in the effect box, what is in the middle. What are the conditions that need to be met so that the exchange can be deemed unlikely to create anti-competitive effects? The Office of Fair Trading (now the Competition and

[2] Paragraph 74

Markets Authority) in the UK acknowledged the difficulty of identifying information exchanges where the effect could be anticompetitive.

In our view, some of the problems of the rules on information exchanges are due to a limited use of Article 101(3) TFEU. Further work in this area as well as more information about the factors to be taken into account for the assessment of efficiency gains would be welcomed. In particular, it would be useful to consider and include non-price factors. When considering the potential pro-competitive effects and/or benefits for customers, the Guidelines should explicitly recognize that considerations such as improvements in sustainability, infrastructure, standards, innovation (and other factors) are equally important as price.

d. The characteristic of an information exchange

The Guidelines specify the characteristics of the information exchange in Paragraph 86 to 94 such as strategic information, market coverage, aggregated/individualized data, age of data, frequency of information exchange, public/non-public information, public/non-public exchange of information. Paragraph 105 gives some indication of how to deal when considering a specific criterion. However, the Guidelines do not give an indication of the emphasis that should be given to each of these elements. While we understand that all will depend on the facts of the case, the relationship between the different criteria remains unclear. More guidance in this area would be desirable.

e. Clarification would be welcomed in relation to the following elements:

Transparency

The internet has allowed more transparency on markets and that is widely acknowledged as beneficial for consumers. Of course, more transparency could lead also to collusive outcomes. But in our view, transparency may have more positive than negative effects, and that should be acknowledged in the Guidance.

Joint ventures between competitors

Joint Ventures between competitors are in many instances necessary to benefit from the know-how and skills of the parents. However, these joint ventures could, sometimes not intentionally, became a vehicle for the exchange of information between the competing parents. In-house lawyers who advise on these issues find themselves advising directors on Chinese walls, limitation to what they can and cannot do and create complex structures that hamper business people from doing their job. It is accepted that information which does not relate to the business matters covered by the joint venture should not be exchanged, and any discussion within the joint venture about pricing / strategy should only be those that are necessary for the collaboration and limited to the specific scope of the joint venture.

The situation is more complex however in relation to what is passed to the parents in order to make the joint venture function. More specifically in the context of jointly controlled joint ventures we would like to see consistency with

the approach in Paragraph 11 of the Guidelines that states that solely controlled subsidiaries are part of a single economic entity. We would like to see the reintroduction of the paragraph that was included in the draft 2010 Horizontal Guidelines that had an explicit confirmation that Article 101(1) TFEU would not apply to dealings between parents and their jointly controlled subsidiaries: *"… as a joint venture forms part of one undertaking with each of the parent companies that jointly exercise decisive influence and effective control over it, Article 101 does not apply to agreements between the parents and such a joint venture, provided the creation of the joint venture did not infringe EU competition law*".

Direct and indirect contacts

According to the Guidelines, "any direct or indirect contact between competitors (…)" (paragraph 61) might constitute a concerted practice under Art. 101 TFEU. In our view, this wording (which is even wider in the German version of the Guidelines "Fühlungnahme") and, in particular, the inclusion of any "indirect contact" creates considerable legal uncertainty and extends the very sense of a "concerted practice" as a two-sided kind of interaction. We believe that there is a need for more guidance on what kinds of "indirect contact" do and do not constitute a "concerted practice".

Information exchanges in the context of a vertical relationship

9. In our view, the current chapter on information exchange in the Guidelines does not provide sufficient legal guidance with regard to information exchanges that occur in the context of a vertical (distribution) relationship.

10. It is widely accepted that an exchange of commercial information between operators at different levels of a vertical supply chain – i.e., between a supplier and its distributor(s) – is part of a normal business dialogue. It is also recognized that such a business dialogue is generally a source of efficiency. For example, such commercial discussions allow the supplier to benefit from feedback from its distributors on the price positioning of its products, and on consumer demand that are likely to improve the effectiveness of its distribution network.

11. Moreover, a substantial body of supply chain management literature is devoted to studying the cost-reducing effect of information flows between companies at different levels of the supply chain. A key result of this literature is that suppliers' sharing of information on the demand for their products with distributors has the effect of reducing costs by allowing them to optimise their stocking decisions. Other positive effects from information sharing also cover customer satisfaction, improved competitiveness and disintermediation.

12. In many industries, it is common practice that a supplier contractually requires its distributors to report periodically (e.g., monthly, weekly or even more frequently) commercial information relating to the distribution of the supplier's products. Such reporting requirements may include information about a distributor's inventory levels and sales performance (e.g., quantities sold, customer information, quantities on stock and quantities returned by customers). Moreover, a supplier may collect further information

on the distributors' performance at other occasions, e.g. quarterly business review or similar meetings. Sometimes such exchanges may be necessary to protect the brand name and to stop counterfeit products.

13. What is key in this context is that, in some cases, suppliers may transmit certain commercial information to their distributors with the aim to intensify downstream competition and/or to increase availability for their products to meet consumer demand. For example, a supplier may inform its distributors about their past performance compared to other distributors or may provide information about the expected demand for its products.

14. However, to the extent that information flows originating in the vertical context could, under special circumstances, create horizontal effects that may give rise to antitrust concerns, it would be helpful if the revised Horizontal Guidelines would include detailed guidance how to treat these effects. The current lack of guidance may deter companies from sharing commercial information with their respective business partners upstream or downstream in the vertical supply chain at all. This may, in turn, cause significant inefficiencies (e.g., overstocking, delay in supplies, etc.), which may ultimately harm the consumer.

15. In particular, we propose to clarify the following scenarios:

    a. Indirect sharing of information between a supplier and its (competing) distributors;

    b. Sharing of information in the context of dual distribution models.

Indirect sharing of information between a supplier and its (competing) distributors

16. A supplier may transmit certain commercial information concerning the distribution of its products to multiple (competing) distributors. For example, a supplier may provide its distributors regularly with so-called performance indicators, i.e., the percentage of sales generated by a particular distributor during a defined period relative to the total sales generated by all of the supplier's distributors. Under healthy competitive conditions (i.e., absent market power on any level of the supply chain), economic theory shows that a supplier has an incentive to intensify competition downstream to avoid double-marginalisation.[3] Therefore, information shared by a supplier with its distributors should be regarded as prima facie pro-competitive and legitimate.

17. Moreover, a supplier may unilaterally decide to disclose specific commercial information collected from one distributor (i.e., via contractual reporting obligations) to another distributor in order to improve the commercial performance of the latter and to enable the latter to better compete against the former. While such a behavior may raise confidentiality concerns, it should not give rise to antitrust concerns absent any evidence pointing towards an anti-competitive strategy jointly pursued by the supplier and its distributors.

[3] This is recognized in European Commission Guidelines on Vertical Restraints, para. 98.

18. While the current Horizontal Guidelines briefly acknowledge indirect information exchanges in para. 55, the section is completely silent with regard to the legal test and standard of proof for a "hub-and-spoke" agreement or concerted practice relating to information exchanges. Moreover, no further guidance can be derived from the decisional practice or case law at the European level. To this day, we are not aware of a decision from the European Commission or a judgment from the European courts that considers hub-and-spoke information exchanges in a vertical context. On the national level, it appears that the only jurisdiction in which courts dealt with this issue to a significant extent is the United Kingdom.

19. In fact, the UK courts have defined a high standard of proof for the assessment of hub & spoke practices based on the "**A-B-C test**" and focused on the need to demonstrate an intention of the "spokes" that strategic information be transmitted to the competitor via a "hub", particularly within the framework of a vertical distribution relationship. Given the vertical nature of the information exchanges, they found that establishing the "anti-competitive state of mind" of the competing distributors when they exchange information with their supplier is essential to demonstrate an anti-competitive concurrence of wills between these distributors.

20. More specifically, the existence of a concerted practice between two competing distributors A and C (the "spokes") and their supplier B (the "hub") having as its object or effect the prevention, restriction or distortion of competition, requires that the three branches of A-B-C test, outlined below, are met, the burden of proof being on the competition authority:[4]

    a. **Communication from A to B**: distributor A discloses to supplier B its future pricing intentions or other commercially sensitive information in circumstances where A may be taken to have the intention that B will make use of that information to influence market conditions by passing on that information to other distributors (of whom C is or may be one); and

    b. **Communication from B to C**: supplier B in fact transmits the information to C in circumstances where C may be taken to know the circumstances in which the information was disclosed to B; and

    c. **Use of Information by C**: distributor C in fact uses the information to determine its own future pricing intentions.

21. The "A-B-C test" is particularly useful when one has to distinguish prima facie lawful communication between companies active on different levels of a vertical supply chain from anti-competitive horizontal collusion.

22. In the absence of such a precise legal test and a high standard of proof, distributors that engage in communication with their suppliers are continuously under the sword of Damocles of being potentially accused of participation in an anti-competitive hub-and-spoke collusion. Lowering the requirements of the legal test or the standard of proof would mean that distributors could be held liable for their supplier's behavior, on which

[4] Court of Appeal of England and Wales Decision No.2005/1071, 1074 and 1623 of October 19, 2006, *Argos, Littlewoods and JJB Sports*, para. 141. See also CAT Decision No. 1188/1/1/11 of December 20, 2012, *Tesco*.

they have limited control.[5] More broadly, applying a legal test that is less strict than the one established in the UK precedents risks casting a suspicion of illegality on all discussions between a supplier and its distributors relating to their commercial activities, despite the fact that there are legitimate business reasons justifying such exchanges.

23. For the reasons set out above, it would be helpful if the European Commission could clarify its position with regard to the assessment of indirect information exchanges in the context of a vertical distribution relationship, for example by adopting the UK courts' "A-B-C" test. In addition, we invite the European Commission to consider a safe harbor. That is, under certain conditions (e.g., no market power; exchange initiated by the supplier; information does not include future prices/quantities; no demonstration of a common anticompetitive strategy) such information flows should be regarded as pro-competitive, provided there is no evidence that these exchanges go beyond the legitimate framework of a vertical relationship.[6]

Sharing of information in the context of dual distribution models

24. Nowadays suppliers increasingly sell directly to consumers either online or in brick and mortar shops and thus at retail level compete with their distributors. Being considered competitors has an impact on what suppliers can do or share with their distributors.

25. The current European Commission Regulation (EU) No. 330/2010 of April 2010 ('VBER') exempts dual distribution in Art. 2(4). Correspondingly, paragraph 12 of the Guidelines clarify that dual distribution is exclusively assessed under the VBER.

26. In its contribution to the European Commission's evaluation of the VBER,[7] ICLA already stressed that a revised VBER should continue to exempt dual distribution and that the Vertical Guidelines should clarify that dual distribution is purely a vertical relationship and that collection of information that is relevant in the vertical relationship (e.g. inventory and sales data for better planning and logistics that ensures better availability of products to meet consumer demand and limits over production) should not give rise to horizontal concerns between the supplier and its distributors and on the application of the VBER.

27. We believe that a consistent approach to the treatment of dual distribution across the European Commission's regulations and guidelines is vital for legal certainty. Therefore, the updated Guidelines should clarify that information exchange between a supplier active in dual distribution and its distributors is ancillary to the vertical relationship which remains to be exclusively assessed under the VBER. Therefore, such information

[5] CAT Decision No. 1188/1/1/11 of December 20, 2012, *Tesco*, para. 65: "*It is important to consider why the retailer's state of mind matters in a case of this kind. Where commercially sensitive information is disclosed directly by retailer A to retailer C, it is often unnecessary to go behind the fact of the disclosure in order to assess the parties' states of mind […]. Where supplier B is interposed between A and C, however, there can be no presumption as to A's state of mind. The onward transmission of A's pricing intentions to one of A's competitors C, is made by their common supplier, B. It is therefore incumbent on a competition authority to demonstrate that A acted with the relevant state of mind to avoid A being held strictly liable for the conduct of B, over whom it may have limited control*."

[6] This is the case if evidence shows that the parties pursue an anticompetitive strategy, i.e. to collude on retail prices (for example, emails that show that distributors put pressure on the supplier to ensure that other distributors implement a price increase or abide to a particular (retail) price).

[7] Available at: http://competitionlawyer.co.uk/ICLA/Documents_files/ICLA%20VBER%20FINAL.pdf.

exchanges should be excluded from the scope of the Guidelines. This may also apply for other situations where undertakings, generally on different levels of the value chain but considered (potential) competitors (e.g. with their demand for intermediate products), exchange information with pro-competitive effects. Moreover, it should be recognized that competition between a supplier and a distributor is by definition of a different nature than competition between independent distributors as the supplier owns the brand, designs the products and drives the brand image. This is possibly an area where further thoughts should be given to avoid creating unnecessary obstacles and compliance costs.

Information exchange in the digital field

a. Ecosystems

A closely related issue is the uncertainty in relation to what type of information can be exchanged between companies when dealing with new cooperation models in the digital field such as ecosystems. Over the past few years, markets have significantly changed due to increasing digitalization. This requires companies to act fast and to cooperate more often to create innovative digital solutions for customers, to ensure interoperability and to create new technological standards all to the benefit of customers. This is all the more necessary if they want to catch up in the digital field which is currently largely dominated by big incumbents.

An ecosystem typically comprises of a cloud-based platform on which various providers can run the applications. The application providers and the platform provider have to collaborate closely to offer the users and customers a seamless, interoperable product/experience. As a matter of fact, the different application providers are at the same time partners of this ecosystem and at the same time competing with their various applications against each other.

These cooperation models necessarily require a certain degree of information exchange and data sharing between the participating companies. However, companies are currently lacking clear guidance with regard to the boundaries of permitted information exchanges in such cooperation.

Especially with regard to ecosystems, it should be clarified that exchange and collaboration within the ecosystem (intra-ecosystem) can only harm competition in case there is not sufficient competition from other ecosystems (inter-ecosystem). Guidance would be welcomed.

b. New forms of cooperation in the digital world

In general, the Guidelines should take these new market dynamics and new forms of cooperation into account. They should recognize that such initiatives are generally pro-competitive. Since companies that fear to end up violating antitrust rules may be hesitant to engage in such cooperation or joint initiatives, the Guidelines should be revised in order to provide a higher degree of legal certainty to participants that need to cooperate, e.g. by:

i. Introducing de minimis rules/safe harbours for digital markets and more focused theories of harm. The current discussions about antitrust in the digital business often focus on the usual tech giants, but there is cooperation between smaller companies/companies with small to moderate market shares which is pro-competitive and should not be subject to the same restrictive rules.

ii. Creating a general safe harbour/exemption for nascent digital markets.

iii. In the digital sphere it quite difficult to determine whether or not a company is a potential competitor, in particular if the company has not publicly announced its entry plans. Specifically, when dealing with cooperation in the digital field, any company may be a potential competitor in the digital business field should it decide to write the respective code tomorrow. The revised Guidelines should therefore clarify that the term "potential competitor" includes companies that have made public their intention to enter the market and have visibly taken steps to enter the market.

Pricing algorithms

28. The Commission and other competition authorities have started looking at the use of pricing algorithms. Pricing algorithms can benefit consumers and promote competition, for example by reducing labour costs and allowing for faster and more informed decision-making. But the Commission has also stated that (pricing) algorithms could potentially lead to horizontal collusion, especially if firms are all using the same pricing algorithms, alluding to the fact that buying the same algorithm as your competitors could raise competition law concerns.

29. If algorithms are included in the review, it would be useful to provide further guidance in terms of which specific behaviour would or would not raise competition concerns. After all, prohibiting a company of selling a price algorithm to more than one company in a particular relevant market to prevent competitors from having the same algorithms would be a considerable commercial restriction and impossible to apply (can I sell it to two competitors or three only? What about potential competitors? etc.). Also, the acquiring company, for confidentiality reasons for example, might not even know – and maybe should not know – that its competitors have bought the same algorithm.

Joint bidding

30. The Guidelines should clarify that joint bidding between competitors can only create potential restrictive effects on competition if a cooperation between competitors effectively leads to a reduction of the number of bids (i.e. competitive pressure) that a customer could receive. This should be the relevant test for assessing potential effects on competition of joint bidding between competitors.

31. In that respect, the guidelines should clarify that it is sufficient if e.g. only one of two competitors cannot submit an offer independently. In such a case, cooperation between

those competitors will not reduce the number of bids (i.e., competitive pressure) on the market as one of the two competitors would not have the ability to bid alone at all. On the contrary, the consortia might be able to submit a lower or technically better bid as a result of the cooperation between competitors to the benefit of the customer. The Guidelines should provide more relevant examples of the reasons which can justify the creation of a consortium between competitors.

Joint purchasing

a. Increase of "safe harbour" thresholds

Paragraph 208 of the Guidelines states that purchasing agreements between competitors are unlikely to give rise to restrictive effects on competition if the parties to the joint purchasing arrangement have a combined market share not exceeding 15% on both the purchasing and the selling markets. These thresholds are too low and should be increased significantly to at least 30%.

b. Distinction between purchasing agreements for "direct" and "indirect" material

The Guidelines currently do not distinguish between purchasing agreements in relation to so-called "direct" and "indirect" material. Direct material refers to products and services that are a direct input into the final product that a company sells on the selling market. Indirect material refers materials that are used in a production process and which are no direct input to the end products sold by a party on the selling market (e.g. office supplies, travel agency services for employees, etc.).

A purchasing agreement in relation to indirect material can have no impact on competition on the selling markets. Yet, the Guidelines foresee the same safe harbour threshold and guidance on individual assessment as for purchasing agreements for direct material. The Guidelines should explicitly clarify that purchasing agreements relating to "indirect" material both between competitors and non-competitors on the selling markets are unlikely to have potential restrictive effects on competition in the absence of a dominant position by the purchasing alliance on the purchasing markets.

Standardization agreements

32. The rules on the creation of exploitation of standards are well developed. But some clarifications would benefit cooperation between companies for the setting up of standards.

a. Unrestricted participation in the standard-setting process

Paragraph 280 et seq. of the Guidelines stipulate, inter alia, that participation in standard setting should be unrestricted and that the procedure for adopting the standard in question shall be transparent. Having an unrestricted and transparent system for the creation of standards avoids competitors being

excluded or the setting of standards without involvement of the relevant stakeholders. However, in our experience, this process is sometimes burdensome and unworkable when a standardisation process starts and there are too many companies involved. We have also seen these rules being misused by companies with the aim of blocking a standardization process (maybe because it was not aligned with their own commercial interests). For this reason, we propose that there should be instances in which a group of companies could be allowed to start a 'fast-track' process for setting a standard without the need for all potentially interested parties to be involved from the beginning. The outcome of course would be a faster development of standards. At the same time, we are fully conscious that there should not be unwanted effects on competition. Options to consider could be:

i. to limit it to a certain period of time only;

ii. to include an obligation to make available the standardised results to any third party under FRAND terms and conditions;

iii. to include a mechanism to guarantee the right of third parties to participate, while avoiding at the same time that companies which refuse to invest time and effort in the process are able to participate only with the objective of blocking the process.

b. Counterfactual for standardization

The clear procompetitive nature of standardization agreements should also be considered. It would therefore be relevant when assessing compliance of the proposed standardization agreement with competition rules to take into account the counterfactual of the considered standardization to be (various) proprietary systems. In those cases, there must be a presumption of legality, ideally included in the block exemption, for that standardization cooperation. If not, we propose to include at least such presumption in point 7.4 of the Guidelines when a case-by-case analysis is made as a positive factor showing the relevant efficiencies under Article 101(3) TFEU.

c. Setting versus implementation in Standardization Agreements

The Guidelines only provide guidance on how standard setting should be applied but not how standards should be implemented. For this reason, a clear distinction in the Guidelines between the setting of the standards and its implementation is needed.

d. Effects in various markets

In the case-by case assessment of a standardization agreement, the effects on the products and services markets, the technology and the standards markets are considered. It could be that the outcome of such analysis is different depending on the market. The guidelines should aim to include clear rules on how to balance the effects on the different markets.

Rules on joint production and commercialisation agreements

33. ICLA believes that there are other kind of horizontal agreements whose pro-competitive effects justify being included in the BER. We believe that the ongoing tendency to horizontal co-operations due to increasingly complex manufacturing processes and products, and due to globalisation effects is not reflected in the current legal framework. The scope of the Specialisation BER is too narrow and there are significant numbers of joint production or supply agreements between competitors that do not include a specialization and hence are not captured by a BER.

34. Therefore, we would welcome a broader use for the Specialisation BER as the current, very restrictive threshold of 20% combined market share prevents larger companies to benefit from the efficiencies generated by a specialisation. Especially in times where European companies lack the scale of other players, specialisation could create a level playing field and increase the competitiveness of European players. We would welcome to increase the threshold to 30%.

35. The Guidelines explicitly acknowledge these horizontal subcontracting agreements while not providing the same legal framework as a BER. A section on joint production and commercialization agreements could encompass, inter alia, the following agreements:

    a. Network sharing agreements

       Network sharing agreements have become an effective and efficient way for telecom operators to deploy networks across Europe due to their procompetitive effects: costs-savings, reduction of environmental impact, sharing of costs. And one should not forget the benefits for consumers: increased coverage, innovation, higher quality and faster networks. Network sharing agreements are even more important with the upcoming deployment of 5G technology. The huge investment required for the roll out of 5G will require infrastructure sharing agreements among operators in order to ensure the business sustainability according to the regulatory obligations.

    b. Data sharing and pooling agreements

       Data being the infrastructure of the Digital Economy, there is an increasing need for data sharing and data pooling agreement between competitors with the aim to offer innovative digital services. Data pooling provides companies with a larger data base for analytical purposes and allows them to improve solutions and to develop innovative ways of operating to the benefit of customers. Facilitating such types of horizontal cooperation agreements under certain requirements will allow stakeholders to compete in the digital world, and resolve current issues that one may see arise in digital markets: barriers to entry, bottlenecks, quasi-monopolies, conglomerate effects etc.

Research & Development BER

36. We have several comments in relation to R&D Block Exemption Regulation

a. Need to clarify that joint R&D agreements are generally pro-competitive - simplification

The strict requirements and the complexity of the R&D BER create great uncertainty for companies as to whether or not their joint R&D agreement is compliant with EU competition rules. This is particularly true in cases where the joint R&D agreement does not strictly comply with all requirements of the R&D BER, especially those included in Article 3 of R&D BER. The revised R&D BER and the Guidelines should emphasize more strongly the generally pro-competitive nature of joint R&D cooperation and provide clearer guidance to ensure that companies have sufficient comfort entering into a pro-competitive R&D cooperation even if not all requirements in Article 3 of the R&D BER are strictly included.

Overall, the R&D BER should be simplified. It is an extremely complex BER which makes it difficult to get the desired legal certainty.

b. Mere paid for R&D should be treated under subcontracting notice

Sometimes companies consider outsourcing R&D to another company. This might have several reasons such as lack of expertise, lack of capacity, etc. Outsourcing R&D is usually similar to a subcontracting whereby the subcontractor produces the products and supply them exclusively to the principal. Therefore, it should be treated under the subcontracting notice. Currently it would qualify as “paid for research” and thereby fall within the scope of the R&D BER. In view of the fact that R&D agreements are generally pro-competitive, the revised R&D BER should remove the reference to technology markets and limit the market share threshold to relevant product markets.

c. Increase of market share thresholds for R&D cooperation

Joint R&D agreements are generally pro-competitive and drive innovation. The revised R&D BER should therefore increase the market share thresholds from 25% to at least 30%.

d. Removal of the requirements in Article 3.2 R&D BER

Article 3.2 R&D BER requires that any joint R&D agreements must explicitly stipulate full access rights to the results for the purposes of further research and development. This requirement is unnecessary and has a chilling effect on innovation. The pro-competitiveness of a joint R&D does not depend on future R&D efforts which are based on the results. Future competition on innovation is sufficiently safeguarded by the prohibition of Article 5 (a) to include a hard-core restriction that limits the parties R&D activities in the same or a connected field after the completion of the joint R&D. The revised R&D BER should therefore remove the strict and unnecessary and unpractical requirements in Article 3.2.

e. Removal of the obligation to license background IP

Article 3.3 of the R&D BER states that companies must stipulate in their R&D agreement that each party must be granted access to any pre-existing know-how (i.e. background know-how) of the other party, if this is indispensable for the exploitation of the results.

This requirement has a significant cooling-off effect on the willingness of companies to engage in joint R&D which would eventually be contravening the spirit of the R&D BER. In times where innovation is crucial, the revised R&D BER should remove this requirement and leave it to the parties to the joint R&D agreement to stipulate access rights to background IP and rights of exploitation.

f. Introduction of the possibility to restrict passive sales in any type of specialization

Under the R&D BER, companies can generally agree by way of specialization that only one company will distribute the products while the other company will not distribute the products at all (i.e. will not sell the products actively and passively). Companies can also agree to allocate exclusively certain territories or customers to each other by way of specialisation. In that scenario, which is less far-reaching than the previous scenario in which only one company distributes the products, companies can only restrict active sales into the respective territory or to the respective customers allocated exclusively to the other company.

There is an obvious contradiction between these two scenarios. Companies might have a legitimate interest to limit active and passive sales of the products by the other party of the R&D agreement. For example, companies might want to prevent that any party to the joint R&D cooperation sells the products to their competitors. Under the current rules, this would be a hard-core restriction.

In view of the overall pro-competitive nature of R&D cooperation, the revised R&D BER should remove this restriction on limiting passive sales and should allow the parties of an R&D cooperation to impose restrictions on each other under any form of specialization in the context of exploitation.

Research & Development Market definition

37. Many traditional companies are developing new technologies that can be applied to their traditional products. Networked cars are just an example. In our view, Section 3 of the Guidelines as currently drafted does not take into account the developments that are taking place. In the Guidelines, a differentiation is made there between existing products and/ or technology markets on the one hand (Paragraphs 113-118 of the Horizontal Guidelines) and competition in innovation (R&D efforts) in Paragraphs 119 etc. Seq. That differentiation limits the ability of traditional industry players to cooperate amongst themselves while companies in the digital word are able to get together to develop these innovative services.

38. The market share threshold of 25% according to Article 4 para. 2 of the R&D Block Exemption Regulation only allow this type of cooperation between small traditional companies. However, these small competitors often lack the financial resources and/or impact to compete with new suppliers in the digital world, which sometimes plan to extend their market power to technological innovation to existing product markets. An illustrative example is the R&D activities of big, data-driven companies in the field of autonomous driving.

39. The Guidelines already provide for an alternative approach which focuses on competition in innovation/ R&D efforts. However, Paragraph 119 et seq. of the Guidelines limits this approach to the development of new products or technology which may either one day replace existing ones, or to the development of new products which will not replace existing ones but create a completely new demand. This approach is contrasted by an alternative scenario as described in Paragraph 122 of the Horizontal Guidelines where innovative efforts in an industry are not clearly structured so as to allow the identification of R&D poles. In this situation, in the absence of exceptional circumstances, the Commission would not try to assess the impact of a given R&D co-operation on innovation but would limit its assessment to existing product and/or technology markets which are related to the R&D co-operation in question. As stated above, companies who are active in an established product market transforming towards digitalization run the risk that their R&D activities are considered as a mere improvement of existing products and, thus, cannot be considered as a competing R&D pole.

40. We would appreciate some clarification in the Horizontal Guidelines that the scenario of competition in innovation/ R&D efforts may also apply in the context of traditional product markets which are in transformation towards digitalization.

Legal certainty and procedural issues

41. Horizontal cooperation is key to ensure the competitiveness in the current geopolitical environment. The Guidelines and BERs in their current status, while helpful, do not always give enough guidance. In order to make use of the full opportunities that cooperation might bring, in particular in digital Markets and reduce the associated costs, legal certainty for companies needs to be increased.

42. In addition to providing clearer guidance in the Guidelines and the BERs the European Commission should also look into how to best provide some informal and formal guidance on a case by case basis. Therefore, we suggest following tools should be used or introduced:

    a. Informal meetings with the European Commission in order to discuss the interpretation of concrete questions in connection with a certain horizontal cooperation project;

    b. Guidance letters in accordance with the Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (2004/C 101/06), where it may be necessary to reassess the interpretation for the criteria for application of this tool, given the limited use of this tool so far;

    c. A mechanism to ask for specific guidance / approval for cooperation that has certain magnitude and involves high stakes, which would be at risk for the participating companies. For such (very exceptional) cases a specific system could be envisaged.

43. Applying these procedures would also create more case law which will facilitate the self-assessment of the companies.

Sustainability

44. Finally, we could not finish the paper without mentioning cooperation between competitors in order to achieve sustainable objectives. The current rules sometimes do not permit competitors to work together to impact and foster the 'Green' agenda of the new Commission. It would be useful if certain specific types of cooperation would be allowed in particular in cases where the outcome is a reduction on the environmental impact of products. At least, such effects should be taken into consideration more prominently in any assessment.

45. The Commission now has a unique chance to address these concerns during the current review. That should happen considering the European Parliament's recent observation that "*the narrow interpretation of Article 101 of the TFEU by the Commission's horizontal guidelines has increasingly been considered an obstacle to the collaboration of smaller market players for the adoption of higher environmental and social standards*[8] ". Certain manageable modifications of the current Horizontal Cooperation Guidelines may include:

    a. Introduction of a separate chapter on environmental agreements as it was the case in the earlier 2001 Guidelines:

        i. The contents of this new chapter could come from both the standardisation chapter of the current Guidelines (with some amendments suggested below) as well as from some best practices at the national level.

        ii. This chapter should also refer to the current EU Green Deal and its 2030 and 2050 milestones so that the principles of long-term sustainability and objective necessity can be included.

    b. A reintroduced chapter on environmental agreements should not simply repeat the language and contents of the 2001 Guidelines as in the meanwhile (EU and global) priorities have shifted. In particular:

        i. any references to the parties' market shares should be mitigated as EU and global firms are now encouraged to invest in sustainability;

        ii. the concept of "aggregate environmental benefits" (Paragraph 194) should be clarified and aligned with the long-term objectives of the EU Green Deal.

    c. Amendment of the definition of consumer in the current Paragraph 49 ("*for the purposes of these guidelines, the concept of 'consumers' encompasses the customers, potential and/or actual, of the parties to the agreement*") to include the future generation of consumers in line with the 2030 and 2050 milestones of the EU Green Deal.

[8] European Parliament, Resolution on the Annual Report on Competition Policy of 2018, 31 January 2019

d. The current Paragraph 149 on R&D co-operation on dynamic product and technology markets and the environment should drop the reference to the refrained "ability of the parties to profitably raise prices" as a factor of measurement and add a long-term perspective to assessment of the benefits (for example that "future generations of consumers will benefit from a lower consumption of fuel by 2030").

e. The current paragraph 329 on environmental standards could drop the wording "the group of consumers affected by the restriction and the efficiency gains is substantially the same", to (i) allow for a long term assessment; and (ii) focus on environment protection as a necessity when that can be measured against the EU green taxonomy (rather than a net balancing where restraint of current competition and environment are considered in the current context).

f. By the same token, the current paragraph 331 on open standardisation of product packaging for reduced packaging waste and recycling costs of producers, could drop the language "*quantitative efficiencies through lower transport and packaging costs*" and "*the prevailing conditions of competition on the market are such that these costs reductions are likely to be passed on to consumers*" for the above reasons.

46. Specific guidance on the best practices in terms of open standardization would be welcome:

a. For example, the current paragraph 332 (example 8) on the scenario of a closed standardisation of a product packaging (i.e., the standard is agreed between manufacturers without an open consultation and the specifications of the voluntary standard are not published) could be included.

b. Such guidance should be consistent with any other standardisation initiatives from other Commission's services in the context of the EU Green Deal for efficiency as well as legal certainty purposes.