Environmental sustainability and the competition and consumer law regimes

ICLA UK response to the CMA call for inputs

A. Introduction

1. The In-house Lawyers Competition Law Association UK ("ICLA UK") welcomes the opportunity to respond to the CMA's Call for Inputs on environmental sustainability and the competition and consumer law regimes.

2. ICLA UK fully supports the CMA's strategic objective to support the UK's transition to a low carbon economy. We would also encourage the CMA to take a leading role in progressing the thinking on competition law and sustainability internationally, particularly to ensure that consistency is achieved where possible, to provide businesses much needed legal certainty as they seek to tackle urgent environmental sustainability challenges, including global warming and net zero targets, loss of bio-diversity and water pollution.

3. ICLA UK is an informal association of in-house competition lawyers in the UK comprising around 100 members. ICLA UK meets usually twice a year to discuss matters of common interest, as well as to share competition law knowledge. ICLA UK does not represent specific businesses, but rather is made up of individuals who are experts in competition law. As such this paper represents the views of the ICLA UK members and not the companies who employ them, and it does not necessarily represent the views of all its members.

4. ICLA UK is part of the wider In-house Competition Lawyers' Association of in-house competition lawyers across Europe and in South East Asia which currently numbers more than 450 members based in different countries around the globe.

5. ICLA UK's response to the call for inputs is set out below. ICLA UK has not sought to respond on every aspect, but rather on the issues most relevant to its members. As such the response focusses on the competition law regime and Chapter I in particular, given most of our recent experience has been in this area.

6. In addition, ICLA UK includes in this response a number of other relevant ICLA papers, relating to sustainability and competition law, submitted to the European Commission in response to similar consultations and calls for input. Those documents are annexed to this response as follows:

    - **Annex 1**: Input from ICLA to the European Commission on Competition Policy supporting the Green Deal dated 20 November 2020.

    - **Annex 2**: Input from ICLA to the European Commission on the Review of the Horizontal Guidelines and Sustainability dated 3 July 2021.

    - **Annex 3**: ICLA response to the European Commission's consultation on the Horizontal Block Exemption Regulations – Section 6.6 Sustainability, dated 5 October 2021.

B. Competition law enforcement questions

Question 1: Are you aware of examples where the CA98 regime has constrained or frustrated actual or potential agreements or initiatives that could support the UK's Net Zero and sustainability goals? Please explain the issue faced and any solutions identified.

7. In ICLA UK's experience many of the discussions taking place to date are high level or policy related and fall outside the scope of the Chapter 1 CA98 rules. We cannot at this stage identify numerous examples of initiatives which have been frustrated by the existing regime. However, the CMA should not assume that a lack of multiple concrete examples, of initiatives which have been frustrated by the CA98 rules, means that there are no issues or tensions to be addressed or that businesses do not foresee issues with the application of these rules in future.

8. The lack of examples is attributable in part to the fact that sustainability has only recently taken centre-stage in many sectors and many businesses choose to progress the agenda as far as they can unilaterally, before seeking to achieve wider change across the industry. In some cases, preconceptions within business that certain forms of cooperation would be high risk from a competition law standpoint may mean that some initiatives may have been excluded at an early stage, even before being escalated to in-house lawyers for a feasibility assessment. It is well acknowledged that ambitious and widespread action is required across all sectors in the economy to address the urgent climate challenge we face and, in that context, guidance that encourages innovation will be welcome.

9. In future, it may not be sufficient to rely on voluntary, unilateral action, where meaningful change can only be achieved in the very limited time available through industry-wide collaboration with critical mass (e.g., driving more ambitious sustainability targets or ensuring those targets are more broadly adopted and delivered).

10. Moreover, while regulation should play a role in establishing minimum standards, it is unlikely to be sufficient to bring about the significant and wide-ranging shifts required to meet the climate challenge in time, given how long it takes regulation to be adopted and differences in approach globally.

11. In some cases, there may be insufficient resources or incentives to take unilateral action e.g., to invest in creating new data sources spanning various industries or to create new products, technologies, or infrastructure. Concerns about a first mover disadvantage may also inhibit action, e.g., sustainability teams may face challenges in convincing commercial colleagues to commit to more ambitious targets than competitors, if they impact bottom lines through higher costs or the loss of more profitable business in the short-run.

12. The examples of tension, between competition considerations and sustainability goals, identified by the CMA at paragraph 20 of its Consultation Paper may be broadly relevant to many sectors. Under the current framework, these examples may be viewed as higher-risk by advisors, even where such cooperation may support the sustainability goals of the UK or other governments or bodies such as the EU or the UN and where timely and widespread action may be critical to minimise environmental damage. This is particularly so in cases where the explicit goal of collective action may be to reduce outputs of a certain kind.

13. Looking at a few industry specific examples of potential sustainability collaboration it is clear that tensions between competition law and sustainability aims may arise in future:

14. Energy sector

    i. In the energy sector, many industries that transition to a new fuel pathway require collaboration across the supply chain to develop the entire infrastructure required. In order to drive substantial decarbonization across industry, substantial changes must occur in the demand for energy types and the supply for of those new energies. Energy users will need to know what fuels can be supplied in order to determine how to use that zero or net zero carbon energy in the future. Energy suppliers need certainty that if investments are made into alternate zero or net zero carbon fuels, there will be demand for those fuels. This connectedness between energy supply and energy demand has created the need for a sectoral approach to decarbonization pathways, especially for certain hard-to-abate industrial sectors. Thus, sustainability agreements in the energy and related sectors will often need to involve sectoral-wide collaboration.

    ii. Some sustainability initiatives would achieve a more impactful and significant contribution towards energy transition goals were companies to agree on mandatory sustainability standards that are stricter than the law. These types of commitments globalise positive local sustainability legislation/initiatives and provide an equal playing field for companies. The success of some solutions as part of the energy transition will be dependent on scale, high cost and high-risk investments which often will require up-front industry consensus on a future pathway in order for the solution to materialise e.g., new fuels. The same may be true in other industries too.

15. Banking sector

    i. In the banking sector, banks are in a unique position in society to help accelerate the transition to a low-carbon economy and support the UK's Net Zero and sustainability goals, by financing the trillions of pounds of investment required to help our clients transition to greener business models.

    ii. Many banks have unilaterally adopted their own Net Zero goals and interim commitments to hit that goal. However, in order to limit global warming to 1.5°C and avert potentially disastrous climate consequences, there is an urgent need to broaden these commitments across the sector, ensure they are embedded within businesses, and develop them into credible plans to deliver the Net Zero transition. With initiatives such as the UN-sponsored Net Zero Banking Alliance launching in the past 12-24 months, there is also real momentum in the financial sector to act now.

    iii. In order to make appreciable progress on these fronts, collaboration among banks is essential, particularly given that climate science is a new and developing field, where the sharing of knowledge and perspectives of practitioners and experts across firms can significantly contribute to solving these questions/problems and rapidly, in the context

where the sector is also under pressure to act quickly on these issues.[1] Collaboration is necessary e.g. to build a common approach to effectively quantify emissions, so that firms can be more easily compared.

iv. Banks also play a role in assessing whether a particular client's transition plans are credible. Therefore, not only do they need to have a good understanding of the pathways to Net Zero in financial services, but also a similar understanding in relation to other sectors. Sharing know-how and best-practices plays a part in ensuring banks build up this knowledge in short-order. At present, data available to measure emissions is also patchy and requires work on identifying and developing appropriate data sources.

v. While we believe the voluntary initiatives described above to-date fall outside the scope of the CA98 regime, in future, there may be some potential tension between the existing competition law regime and a need for concerted action to drive the transition to a Net Zero economy more efficiently and swiftly. For example, this may include hypothetical scenarios where scientific consensus calls for certain action in order to meet the Paris Agreement goals e.g., to agree on mandatory sustainability standards or targets that are stricter than the law or to agree a common road map or objectives for financing more environmentally sustainable companies.

vi. Banks in general adopt a conservative approach in their competition law risk assessment, which means that the self-assessment process under Chapter I is rarely capable of giving parties to a potential sustainability initiative sufficient comfort to proceed where the considerations are finely balanced (notwithstanding the guidance currently available from the CMA). Even if the agreement in question raises strong arguments regarding the generation of significant efficiencies that could warrant an exemption under the section 9 criteria, the risk appetites of the bank, and the seriousness with which it observes its competition law compliance obligations, would typically mitigate against the pursuit of the initiative. In such a circumstance it is unlikely that the conversation would proceed past an initial phase where there is a reasonable prospect of the perception of a Chapter I infringement.

16. Aviation sector

i. A trend started by individual airlines to commit to net zero emissions by 2050 was expanded into an IATA[2] membership-wide commitment in October 2021. The vast majority of aviation emissions come for the industry's use of jet fuel, both the combustion of jet fuel by aircraft during flights and the extraction and refinement process further up the supply chain. This target is an ambitious one given the industry is only just beginning to recover from the impact of the Covid crisis, and because it is one of the most difficult industries to decarbonise. This is due to (a) a lack of existing alternatives to jet fuel

[1] This is recognised for example, in various places in the FCA's ESG Strategy (published on 03 November 2021; available here). The FCA notes that it is: "*committed to working with others to enhance industry capabilities and support firms' management of climate-related and wider sustainability risks, opportunities and impacts. In a fast-moving and challenging space, progress towards positive ESG outcomes will depend on sharing experiences and providing mutual support*" and will "*continue to work closely with industry, civil society and academics to promote collaboration, shared experience and mutual support".*

[2] International Air Transport Association.

powered aircraft, such as electric or hydrogen powered, in the short to medium term, particularly for long-haul aircraft, (b) the huge cost required of transitioning an entire global industry to, e.g. hydrogen fuel, in particular establishment of a new global infrastructure (ensuring airports worldwide are capable of fuelling hydrogen powered aircraft) which is expected to cost in the trillions, and (c) but for the impact of Covid-19, growing demand for air travel globally in the long-term.

ii. Given the above, for many airlines the road map to net zero is focussed on sustainable aviation fuel ("SAF").[3] However, there are a number of challenges associated with SAF including lack of scale (SAF penetration is only 0.01% globally) and cost (it currently trades at circa 3.5 times higher than the fossil fuel price).

iii. In order to meet those challenges quickly and effectively collaboration between airlines is likely to be required. This could include creating sufficiently large purchasing groups to stimulate the supply and demand of SAF and create sufficient scale to attract investors into SAF production capacity. In addition, the creation of large joint purchasing groups, and indeed joint investment groups into new SAF production, to achieve more favourable pricing and greater supply of SAF and to ensure exposure to SAF price volatility (given the huge price disparity between SAF and jet fuel which will necessarily impact airline ticket pricing) is experienced by a range of competitors and not just the first mover. However, such cooperation may well go over the existing market share limits of traditionally acceptable joint purchasing initiatives and therefore a relaxation of those limits may be required to ensure the most efficient and rapid scaling up of SAF use.

iv. Carbon removals such a carbon capture storage initiatives are also costly and in order to deliver these at greater scale, cooperation across industry players is likely to be required. No doubt other industries are facing analogous issues. Currently there is a perception that competition law may well prevent such large group collaborations.

v. A further issue is that of ensuring consistent reporting of per passenger emissions intensity (information increasingly requested by corporate customers). Some third parties already provide certain figures, however with varying degrees of accuracy. Guidance with the aim of ensuring a consistent methodology would be helpful in this instance to ensure like-for-like comparisons. However, it is possible that to achieve such consistency detailed airline operating data may need to be shared, such as load factors, cabin allocations, premium/non premium splits, and specific aircraft types. Certain information is publicly available and the presence of a separate industry body, IATA, would create options for the collation and masking of any eventual commercially sensitive data using IATA as a third party. However, such mitigations may not be present in every industry and the current approach to information sharing may be a blocker to participants, in certain industries, sharing data and information for the purposes of creating consistent measures and approaches to sustainability reporting.

[3] SAF, like jet fuel, is a kerosene fuel and therefore can be used in existing aircraft. However, SAF's emissions are significantly reduced when compared with jet fuel – a minimum of 70% lower net carbon depending on the source of the SAF, not least because there is no extraction of oil from the ground – itself a very carbon intense process. SAF can be made from many sources including household waste, cooking oil waste and waste gasses.

vi. Other hypothetical areas for potential collaboration to achieve further-reaching environmental sustainability aims without a first mover disadvantage could include, agreeing to replace older more polluting aircraft with newer more fuel-efficient models, or agreeing to fly slower to reduce emissions. However current competition rules and the potential to impact consumers through, for example, increased prices or reduced service quality, could have a chilling effect on the discussion or implementation of such initiatives.

17. A number of the above industry examples no doubt extend across numerous sectors. Further cross-industry examples include:

    i. Pooling data on suppliers or clients who fail to meet certain minimum sustainability standards or engage in deforestation, fishing in or the destruction of wetlands (but doing so in an anonymous way that does not disclose which firms hold relationships with which suppliers or clients).

    ii. Sharing information or research related to pipeline projects that could significantly improve environmental sustainability.

    iii. Consumer goods or food manufacturers investing in developing sustainable packaging; or agreeing to standards about the packaging material used or package sizes, to minimise packaging used.

    iv. Standards or agreements between purchasers of goods or services to drive the adoption of more sustainable practices by upstream suppliers.

    v. Agreements to impose a fixed levy, which is passed on to consumers, to support more sustainable production practices, such as battery recycling (such a scheme was authorised by the Australian Competition & Consumer Commission)[4].

18. The very substantial amounts involved in investing in many sustainability projects means that businesses need more certainty as to what is acceptable pursuant to competition laws both in respect of collaboration and possible abuse of dominance scenarios. Without this there will be a chilling effect on sustainability investment as businesses are discouraged from taking financial risks of investing in a project that may later be found to unlawful pursuant to competition laws, resulting in unwinding, wasted expense and possibly even fines.

19. Businesses are working at pace to tackle a monumental global challenge, but progress against international goals is not fast enough.[5] Against that background ICLA UK has concerns that, for a number of reasons, in-house advisors may currently feel constrained to taking a conservative

[4] https://www.accc.gov.au/media-release/voluntary-battery-stewardship-scheme-granted-authorisation

[5] For example, on 9 November 2021 the Climate Action Tracker (CAT) organisation noted that despite all the net zero promises, including those pledged at COP 26, there is inadequate real-world action unable to deliver the kind of climate action that is aligned to the 1.5˚C temperature limit: in 2015, ahead of the Paris Agreement, the CAT estimated current policies would lead to warming of 3.6°C, and the submitted targets (nationally determined contributions - NDCs) would lead to 2.7°C. Six years later, the warming from current policies has now come down to 2.7°C. If governments were to achieve their 2030 NDC targets and binding long-term targets (LTS), temperature increase could be limited to 2.1°C – still far higher than 1.5˚C. The link to the CAT report can be found here.

approach to risk, which may frustrate legitimate and necessary collaboration in future, when consulted on such more extensive forms of industry cooperation. These reasons include:

i. the UK/EU authorities' historic approach to applying the "by object" standard to competitor cooperation which may result in output restrictions or price increases for the immediate consumers, regardless of its wider aims;

ii. the fact that the market share thresholds for horizontal cooperation safe harbours would be easily exceeded by any industry initiative with meaningful participation;

iii. the currently narrow approach to relevant benefits when applying section 9 of CA98 and the historic lack of precedent where such benefits have been shown to outweigh the restrictive effects of an agreement, particularly on the basis of the wider public interest benefits to society;

iv. the seemingly conservative approach of several enforcers when they speak about sustainability agreements at conferences, particularly in contrast (confusingly) with the more focussed/recently updated approaches of several other national regulators, some examples of which we cite below;

v. the significant fines (including the risk of recidivism), reputational consequences and exposure to private damages actions;

vi. the fact that compliance with competition laws has to be self-assessed and there is a lack of detailed guidance on the nuances of its application to the specific area of sustainability; and

vii. the sheer level of some of the investments required to complete certain sustainability initiatives, combined with a lack of clear guidance, creating a chilling effect on large scale collaborative investments due to perceived uncertainties and therefore unacceptable risk levels.

20. Sustainability is often perceived as a quality benefit on which companies should compete, however, many "green" products will be more expensive and many consumers are not willing to pay more for greener solutions. This is a key part of the market failure dilemma of climate change. Companies taking unilateral action will face extra costs that they cannot bear without suffering first-mover disadvantage, which may result in more sustainable products not entering the market where there is no level-playing field.

21. ICLA UK agrees with the CMA that care must be taken to ensure that sustainability does not become a cover for cartel or other anti-competitive conduct, including potential greenwashing. We believe that the existing rules are sufficiently robust to prevent this happening. Competition law may be relied upon to prevent abuses by businesses which (i) use specific types of green collaboration as, e.g., a cover to collude more widely than necessary to achieve climate- or environment-related objectives, or (ii) seek to jointly limit the development of, e.g., cleaner technologies or greener production processes.

22. ICLA UK also agrees that sustainability may be an important differentiator in certain industries, where firms should and do compete in the development and marketing of sustainable products or services. Notwithstanding, from a policy perspective, the CMA and Government ought to consider whether certain aspects of the sustainability agenda ought to be treated in a similar way to compliance on matters such as health and safety or security, where it is accepted that businesses are not competing, but instead they are encouraged to collaborate and share best practices and know-how, in order to achieve the UK's sustainability and net-zero objectives more quickly and efficiently.

23. Ultimately what is required is a competition regime that is fit for purpose to take into account sustainability outcomes and provide clear, certain, and consistent guidance to businesses to ensure they are encouraged and incentivised to cooperate where appropriate. We set out in our response to the questions below some suggestions for changes in enforcement practice or for where additional guidance may help to address the potential tension between competition law and the pressing sustainability goals in relation to these sorts of scenarios.

Question 2: Are there changes to the CA98 regime that would help to achieve the UK's Net Zero and sustainability goals? If so, what changes should be made to the regime, and what would they achieve?

24. We consider that further clarity, in respect of: (i) how the Chapter I exemption criteria apply to sustainability agreements and other forms of pro-sustainability collaboration between same industry participants; and (ii) when conduct, which could potentially be otherwise abusive under Chapter II, may be objectively justified on the basis of sustainability, would be highly likely to encourage more industry-wide sustainability and environment initiatives.

Expansion of existing guidance

25. Existing CMA guidance could be adapted and expanded to provide greater clarity on the treatment of sustainability cooperation, and in particular in relation to the section 9 criteria and how firms can demonstrate that environmental benefits would offset any restrictions of competition, along the lines of the guidance published by the Netherlands Authority for Consumers and Markets ("ACM").

26. Any guidelines need to be practical and drafted in such a way to empower advisors to move away from an overly conservative approach. To achieve this guidelines should contain case studies and worked examples setting out the situations and characteristics of sustainability initiatives that are unlikely to restrict competition.

27. In order to provide meaningful comfort to firms any guidance should address the following:

    i. A clear position that legitimate collaboration on sustainability aims will not be a by object infringement. For example:

        - Traditionally hard-core conduct in sustainability initiatives, such as potential boycott risks, ought to be addressed by recognising that genuine sustainability agreements will not be treated as containing hard-core restrictions and may therefore benefit from the application of section 9 exemption criteria. For example, agreeing to buy only from suppliers who do not engage in deforestation

to ensure the application of sufficient pressure to transition to more sustainable production methods.

- Information exchanges taking place in pursuit of legitimate sustainability goals ought to be assessed under an effects analysis, to encourage businesses to be more willing to consider initiatives to pool data or know-how in pursuit of sustainability goals (e.g., sharing details of future company level sustainability targets, which do not provide an insight into the specific commercial drivers that could be flexed to implement it).

ii. Confirmation that certain activity should fall outside Chapter I altogether, such as:

- Broad targets, e.g., to reduce emissions overall; to reduce emissions from a particular type of activity or production method; or to ensure a certain percentage of global volumes produced or purchased meet or exceed certain sustainability standards. Such targets are relatively remote from commercial decisions which impact a specific market and firms retain the discretion on how that target is delivered (e.g., which parts of their business processes they will adjust and how or where they will make the changes location-wise in order to meet the target).

- Unilateral commitments to adhere to a minimum standard or adopt a set of targets or declarations proposed by a credible alliance (e.g., typically, in the sustainability space, these tend to be alliances of governments, quasi-governmental, academics and businesses, such as the UK government-led Powering Past Coal Alliance).[6]

- Coordinated action taken in response to expectations set by governments or international bodies such as the UN or where governments encourage (without compelling) industry to take certain action. Businesses could be required to report on these actions to ensure full transparency and assurance to the CMA.

- Sharing of best practice, methodologies, and tools to assess risk, control or monitor activities in relation to sustainability goals (excluding commercially sensitive information).

- Standardising methodologies to measure emissions.

iii. Clear guidance on the application of the section 9 exemption criteria, including examples, that distinguishes between coordinated action that may trigger competition law concerns and those which would not – e.g., a specific commitment to phase out a product / service, which may result in an output restriction or be perceived as a boycott.

iv. More examples of when beneficial cooperation (e.g., joint purchasing, joint R&D or jointly negotiating with suppliers for more sustainable production practices) could benefit from exemptions, even if the participants have a collective degree of market power. This is essential to enable the high levels of investment, from both industry participants in a

[6] https://www.poweringpastcoal.org/about/who-we-are

project and financial investors, required to make large scale sustainability activities viable. Investments will be seen as too risky if adequate demand, take-up, and commitment by industry cannot be demonstrated. Moreover, the CMA should take into account that, in relation to cooperation by purchasers, notwithstanding their downstream market power, they may only have a small position on the purchasing market such that collective action is necessary to bring to bear a degree of pressure to effect any real change (e.g., in pursuing emissions reductions or greener technologies from suppliers).

v. Recognition that material progress on certain sustainability goals could only be achieved through mandatory standards in the absence of appropriate regulation, even if these may, in the short run, lead to higher prices or reduced choice for direct customers.

vi. Clarification on how the current guidance on standard setting, and particularly the transparency and unrestricted participation requirements, may apply in the context of a sustainability standard that impacts upstream suppliers or a downstream client, who is unable to meet that standard and may be most opposed to change, even where other stakeholders (e.g., investors, scientists, policy makers, end-consumers) may consider it as necessary.

vii. Providing prioritisation guidance for cases with a sustainability angle. For example, businesses would welcome any comfort that the CMA can provide that it would not seek to prioritise cases where:

- the primary aim of the collaboration is to pursue environmental goals, which contribute to the public interest or align to the UK or international governmental sustainability goals;

- the collaboration is necessary to achieve material progress against those goals or achieve those public interest benefits, i.e. that one business alone could not achieve the same levels of progress; and

- the collaboration is transparent and open to interested competitors.

By reducing the enforcement risk of such initiatives, such guidance would limit the chilling effect that competition law may currently have on the types of potential activities described above.

viii. The explicit recognition of environmental benefits in section 9(1)(a) of CA98, following the lead taken by the Austrian legislators. For example, this could take the form of legislative change, as in Austria or confirmation, in guidance, that the CMA will interpret the first criterion to include activities such as closures, down-sizing, and input sharing, where those improvements can be shown to have an identifiable sustainability objective or outcome.

ix. In relation to the second criterion of section 9, confirmation that the CMA will accept out of market environmental sustainability benefits. It is now well-recognised that environmental benefits (e.g., emissions reductions) may accrue to wider society or an indirect group of consumers other than the direct consumers (or suppliers) potentially harmed by a reduction in competition. ICLA UK calls on the CMA to confirm, as the ACM guidelines do, that it will take into account broader, indirect environmental benefits

accruing to direct and indirect users (i.e. not only direct financial costs/benefits for the direct consumers).

x. In terms of the quantification of benefits, a pragmatic approach would be welcomed. In this regard, ICLA UK welcomes the European Commission, for example, acknowledging that some sustainability benefits can be assessed as qualitative, rather than quantitative efficiencies. For many sustainability agreements, it may not be feasible to precisely quantify the economic benefits of a particular environmental goal or the impact of the cooperation in achieving that goal, whereas the environmental benefits pursued would be obvious from a common sense perspective. ICLA UK would encourage the CMA to follow the ACM's approach in recognising that in some cases, quantification is not required, if the competitive harm is "evidently smaller than the benefits of the agreement." We recognise that there may not be a "one tool fits all" solution, in which case it would be helpful if the CMA could provide examples of the different measures or valuation methodologies it would consider.

xi. Clarification of how the third criterion (requiring that the agreement does not impose restrictions which are not indispensable to the attainment of those objectives) may apply where the necessary sustainability solutions have not yet been precisely identified by the negotiating parties. Discussions about how collaboration between competitors could lead to sustainability benefits will not necessarily be conducted with a clear outcome in mind, as they require brainstorming and in some circumstances the sharing of sensitive information. Confirmation that industry "problem solving" meetings, with a clear sustainability objective but without an identified output, may be exempted from a real or perceived Chapter I infringement would be essential to encourage industries to brainstorm. ICLA UK suggests that the establishment of sustainability clean teams between businesses, comprising individuals not involved in day-to-day commercial decision making such as pricing, ought to be formally recognised as a mechanism to enable such meetings and information sharing on sustainability initiatives to go ahead.

xii. As a general point, clarification would be welcome on the relative weighting between the considerations to be undertaken, and, whether a "tipping point" for the sustainability criteria may apply, such that parties to such agreements can feel comfortable that the CMA will perceive any SLC as reasonably likely to be outweighed by the sustainability benefits generated by the agreement.

xiii. Suggestions of categories of agreement that would benefit from case studies and worked examples within the expanded guidelines are as follows:

- Voluntary and binding emissions target setting, including what they can / cannot include in terms of the mechanisms to achieve their legitimate objectives (e.g., reduction of greenhouse gas ("GHG") emissions).

- Joint commitments by business either to implement activities to positively impact the environment or to refrain from certain activities that negatively impact the environment (e.g., commitments to refrain from environmentally damaging processes or commitments only to use sustainable suppliers);

- The standardisation of GHG measurement methodology;

- Projects (e.g., for new or untested fuel or technology) where there is no established or developed market and which will require several market players to participate given the risks, expertise and high costs involved. This can raise several issues for companies wanting to collaborate, for example:
    - Defining the relevant market(s) in the context of projects seeking to help address climate change may be complex.
        - Specific guidance on market definitions at various stages of a project, particularly in the pre-operational stages of a project, when no real market has developed (e.g., carbon capture storage ("CCS") projects pre-revenue), or in markets that are not well established, would therefore assist in providing greater legal certainty for businesses.
    - In these types of nascent markets before an opportunity develops into a concrete project / proposal (which can often be 5-10+ years away from being operational) there will need to be a higher level of information exchange and pre-marketing activities between potential collaborators than in traditional, established markets in order to understand potential demand, economics and/or viability of a specific fuel or technology (e.g. joint engagements with potential customers to explore the extent of potential demand and commitment to purchasing new fuels or technology).
        - Clarity and guidance that the CMA sees no issue with these engagements in order to gain understanding of how these new supply chains could work, with worked examples, would assist in providing greater legal certainty for businesses trying to develop complex new products and technologies at pace.

28. Furthermore, existing CMA guidance could be expanded to provide greater clarity on the interaction between the Chapter II prohibition and sustainability agreements and/or initiatives. For example, businesses are increasingly looking to work with their supply chain to align the latter to their sustainability objectives and reduce environmental impacts. RFP tender processes now often include sustainability questions and suppliers' responses, own targets/policies and environmental solutions may be taken into account within firms' scoring matrices. This may lead to firms deciding to switch away from, or no longer deal with, a supplier that has scored poorly on environmental matters. Indeed, if no suppliers are able to satisfy a firm's sustainability criteria, it may even consider entering the downstream market itself to self-supply on a more sustainable basis and/or compete with its former suppliers. Where the firm leading such initiatives within its supply chain has market power, there is a risk of a competition law infringement based on e.g., refusal to deal or discrimination. There may also be a constructive refusal to deal where a dominant undertaking will only contract with a supplier if it agrees to certain contractual terms based on environmental sustainability.

29. It is open for a dominant undertaking to demonstrate that its conduct falls outside the scope of the Chapter II prohibition where it is objectively justified and proportionate. For example, the CMA's current guidance on an abuse of a dominant position states that "*a refusal to supply might*

be justified by the poor creditworthiness of the customer" [7]. While every case will turn on its facts, there is limited guidance, decisional practice, or judicial precedent[8] on the extent to which such an objective justification may be based on environmental factors. Therefore, ICLA UK considers that any CMA guidance should provide further examples of the circumstances in which a dominant undertaking's unilateral interactions with customers and suppliers may be objectively justified on environmental sustainability grounds.

Advisory/comfort letters

30. In addition, to address the potential chilling effects of a self-assessment regime, ICLA UK would welcome opportunities for businesses to consult with the CMA earlier on potential sustainability cooperation (e.g., through a short-form opinion or an advisory/comfort letter). The need for such comfort may diminish over time, as legal certainty emerges around how sustainability collaborations will be assessed.

31. In order to use this tool to full effect, the CMA should be nimble and willing to act swiftly when providing bespoke guidance to companies who reach out for advice. For example, keeping RFIs proportionate and not overly onerous.

32. Where possible such letters or short-form opinions ought to be published, or at least summarised, to increase legal certainty for all.

Block exemption

33. ICLA UK suggests that the CMA ought to consider recommending to Government the introduction of a specific sustainability block exemption in order to increase the certainty and predictability for businesses thus encouraging speedier and optimal sustainability initiatives (which are time critical if net zero targets are to be achieved). This would also free up the CMA to concentrate on the most complex cases involving sustainability initiatives either through investigations or in its issuing of advisory/comfort letters.

34. Given that solutions to help address climate change often require cooperation between multiple businesses to deliver best results, any market share thresholds for cooperation should be higher than the limit normally provided in other block exemptions.

35. Competition laws need to balance the harm caused to competition against the positive benefits brought to society as a whole, rather than focusing merely on short-term, monetary benefits to users. The potential environmental benefits of projects seeking solutions to help address climate change should be taken into account for the purpose of this balancing test, assessed over the longer term. A block exemption setting out this balancing process and the factors that may be taken into account, particularly in terms of qualitative versus quantitative benefits, will enable businesses to implement sustainability initiatives more quickly and at greater scale.

[7] OFT402: Abuse of a dominant position (para. 5.3).

[8] In *Purple Parking Ltd and Anor vs Heathrow Airport [2011] EWHC 987 (Ch)*, the High Court held that a refusal to provide access to parking facilities was not objectively justified on the basis of, *inter alia*, environmental considerations (para. 211)

Question 4: While the CMA is concerned primarily with public enforcement, the CMA would also welcome any comments in relation to private enforcement in this sphere. For instance, if you have suggested changes in response to previous questions, what impact, if any, do you think this could have on private actions?

36. ICLA UK can envisage hypothetical scenarios in which, in order to achieve meaningful and lasting sustainability benefits to society as a whole, concerted action may be required which necessarily results in some short term harm to certain supplier or direct customer groups.

37. The threat of private litigation is currently a significant factor that in-house advisors focus on when advising business colleagues on risk. Therefore, clear guidance on where the CMA considers certain conduct not to breach competition law, rather than merely framing the guidance as a matter of prioritisation, would be beneficial in mitigating some risk aversion that may stem from the threat of private damages.

C. Merger control regime questions

Question 5: If, and how, does the current merger control framework constrain or frustrate initiatives or transactions that might support the UK's Net Zero and sustainability goals? If possible, please provide examples.

38. Consolidation can generate significant sustainability benefits. For example, in financial services, consolidation between operators over the provision of legacy services and the use of existing infrastructure can significantly reduce the carbon footprint of merger parties post-transaction. A quantifiable carbon footprint reduction is a clear benefit that supports sustainability goals. We appreciate that in the context of a merger control assessment, the CMA will be required to weigh up any such sustainability benefits against actual or potential SLC arising from the relevant merger situation.

39. However, we consider that the CMA's discretion in making its assessments allows it to assess actual and future competition in real terms, taking into account a substantial number of variables, and one of these should be the carbon intensity of the proposed transaction as considered against the counterfactual. In our view, potential merger parties would benefit from greater certainty on how sustainability factors, such as a reduction in carbon consumption, will be weighed in a substantive competitive assessment.

Question 7: Do you consider that the CMA's merger control regime could better contribute to protecting the environment and support the UK's Net Zero and sustainability goals? If so, please explain how.

40. ICLA UK refers the CMA to the ICLA response to the European Commission on Competition Policy supporting the Green Deal contained in Annex 1 of this Response for further commentary on potential merger control regime adjustment reform which would also be relevant and applicable to the UK regime.

D. Other considerations

Question 18: What other considerations should the CMA take into account in responding to the Secretary of State's request for advice?

41. In order to encourage significant and far-reaching action to combat climate change and other sustainability issues and meet net zero aims, which are urgently required, ICLA UK asserts that the CMA should consider the following:

    i. Explicitly acknowledging the need for greater cooperation between business to support society's goal of a move to a lower carbon energy system and the promotion of other vital environmental objectives.

    ii. Signalling a willingness to find solutions for legitimate sustainability agreements and collaborate with industry in doing so. The ACM has explicitly stated that it seeks solutions not fines. The CMA should adopt the same approach and work in collaboration with industry.

    iii. Ensuring the CMA's approach to businesses engaged in environmental sustainability activities is clear and consistent across the UK's governmental agencies to ensure legal certainty and clarity for business and its advisors.

    iv. Recognising the need to act swiftly and efficiently, ICLA UK suggests through enhanced guidance and the use of advisory/comfort letters as soon as possible, followed by a block exemption (and accompanying guidance) in due course.

    v. Creating a dedicated sustainability team within the CMA to enable it to act as swiftly and decisively as possible in this area.

    vi. Taking the lead and engaging with other international authorities to ensure a consistent and ambitious approach is taken to competition policy and enforcement in this area, given climate change is an international issue and differing approaches and incentives could also lead to market skewing between global regions and jurisdictions.

ICLA UK
17 November 2021

20 November 2020

Competition Policy supporting the Green Deal

Call for Contributions

Input from the In-House Competition Lawyers' Association (ICLA)

Introduction

1. The In-House Competition Lawyers' Association ("ICLA") is an informal association of in-house competition lawyers across Europe, Asia and America. There are currently more than 450 members based in different countries around the globe. The Association does not represent companies but is made up of individuals as experts in the area of competition law. Because of their role, in-house competition lawyers have a clear interest in a simple and straightforward competition law regime that prioritises legal certainty, minimises costs, and does not represent a disproportionate demand on businesses' time and resources. This submission represents the position of ICLA and does not necessarily represent the views of all its individual members.

2. ICLA is grateful for the opportunity to contribute to the discussion on how competition policy can support the Green Deal. These issues are of utmost importance and urgency.

3. In our response, we will focus on Parts 2 (antitrust) and 3 (merger control) of the call for contributions document and the questions raised therein.

Contribution

Part 2: Antitrust rules

Summary

4. ICLA encourages further clarifications and comfort be given by the European Commission ("EC") on the assessment of agreements that serve the objectives of the Green Deal.

5. Climate and environment emergencies call for "specific treatment" in the form of (i) separate guidance and the return of comfort letters, and (ii) a slightly reoriented consumer welfare analysis.

<u>Question 1</u>: Please provide actual or theoretical examples of desirable cooperation between firms to support Green Deal objectives that could not be implemented due to EU antitrust risks. In particular, please explain the circumstances in which cooperation rather than competition between firms leads to greener outcomes (e.g. greener products or production processes).

Example 1:

6. Greening leather supply chains is difficult for one business, unless a significant part of the supplier's customers align to bring standards up. Tanneries may not be able to make the necessary investments to improve processing practices without investment from their customers. Such investments are however unlikely to be made by one customer given that competing businesses would benefit from these (free-riding). A concerted effort is needed, which may require agreement on purchasing terms. Absent such concerted effort, incentives are difficult to allow one brand owner to materially improve its supply chain. Similarly, different (environmental) requirements given to suppliers is impractical for suppliers and means that a lowest common denominator approach may be the result which is the opposite of what customers and suppliers want.

Example 2:

7. The aviation industry is seeking to reduce its environmental footprint. Old aircraft decommissioning and replacement by more environmentally compliant planes could help achieving Green Deal objectives. Decisions by individual companies are unlikely to be sufficient to achieve the scale needed to attain the industry's carbon-neutral growth target and may in any event lead to a first-mover disadvantage to the detriment of the business which opted for the transition to more environmentally compliant aircraft. It is unclear whether and the extent to which competing businesses could join forces to set up and implement a strategy in this regard. Agreements to replace old aircraft by cleaner alternatives could lead to higher prices for passengers. Such agreements could also, however, favor the replacement of the most inefficient capacity with more environmentally compliant capacity and thus contribute to the Green Deal objectives.

Example 3:

8. Another example relates to data sharing and data pooling between competitors for the purpose of identifying manufacturing processes that are less harmful to the environment or seeking system optimization. These data sets may include commercially sensitive information. The implementation of safeguards such as reliance on third parties or the addition of clean teams or black boxes often translate into layers of complexity which can be a project killer (especially for greening projects that are sometimes seen as being capable of cutting as non-essential). In the telecoms sector, telecom operators are increasingly using Big Data and AI applications to optimize system performance to make networks as sustainable and cost-efficient as possible. The data transmitted by smart meters is used for the targeted implementation of energy efficiency solutions, such as the application of standby mode to limit energy consumption when traffic is slowed down. Businesses would benefit from additional guidance on how to assess bona fide joint environmental actions.

Example 4:

9. The aviation industry is of the view that Sustainable Aviation Fuel (SAF) is a game changer as it can cut life-cycle emissions by about 80%. The problem is that there is not enough SAF being produced today. To

encourage the development of SAF on a global scale, airlines could joint efforts and commit to buying certain volumes, thus stimulating investment in the production and supply of SAF in different regions of the world. Such a joint purchasing exercise raises questions related to, e.g., risks of oligopsony power. Another question is whether airlines could decide to only procure SAF that meet certain emissions standards, even if such standards go beyond legal minimum requirements?

Example 5:

10. Infrastructure sharing agreements are a usual and effective way for telecom operators to deploy networks across Europe due to their procompetitive effects: substantial efficiencies, costs-savings, reduction of environmental impact, co-investments; as well as the benefits for consumers: increase coverage, innovation, high quality and speeder networks. In the process of digitalization, ultra-fast fibre and 5G networks have become key to drive the de-carbonization of economies while at the same time reducing the emissions of the digital sector (enablement effect). The huge investment required for network deployment with ambitious expectations from public authorities and consumers regarding roll-out timing and coverage make key the cooperation among telecom operators to ensure business sustainability, improve efficiency of energy consumption, reduce environmental impact and satisfy high quality connectivity demand in accordance with regulatory obligations.

Example 6:

11. Other instances where partnering with competitors could lead to substantial benefits from an environment perspective are in relation to aircraft or ground operations. Thus, an agreement between airlines to fly slower could impact the quality of the service to passengers but also lead to the optimization of, e.g., fuel efficiency. Another example relates to the sharing of ground-based facilities among competitors, which could lead to a reduced use of Auxiliary Power Units (APUs) through substitutes and have a positive impact on the environment (reduction of CO_2 and NO_x) and fuel consumption.

<u>Question 2</u>: Should further clarifications and comfort be given on the characteristics of agreements that serve the objectives of the Green Deal without restricting competition? If so, in which form should such clarifications be given (general policy guidelines, case-by-case assessment, communication on enforcement priorities…)?

12. The Green Deal provides an action plan to "*boost the efficient use of resources by moving to a clean, circular economy and to restore biodiversity and cut pollution.*"[1] The EU aims in particular to be the first climate-neutral continent by 2050.

13. It is unquestionable that the EU ambitious Green Deal targets will not be achievable without individual businesses taking their share of responsibility and without the possibility for these businesses to discuss and implement various forms of environment-conscious or climate-conscious agreements.

14. Two key points are worth mentioning at this stage:

    (i) In many cases, the pursuit of environment-conscious or climate-conscious objectives by one single business is likely to create a first-mover disadvantage. Why be a pioneer and invest,

[1] European Commission, *A European Green Deal – Striving to be the first climate-neutral continent*, https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en#actions

e.g., in green production processes if your competitors can easily undercut you as a result? The fear of competitive disadvantage hinders the development of sustainability initiatives.[2]

(ii) Ambitious targets call for ambitious projects, some of which may only be achievable through joint mobilization, including collaborative efforts among private businesses. Competition law (or at least certain concepts or principles attached to it) may hamper (or may be perceived as hampering) joint industry efforts aimed at achieving sustainable objectives. Yet, competition law must be part of the solution[3], not part of the problem.

15. Responses to the Covid-19 pandemic by antitrust authorities around the world have shown that extraordinary circumstances may call for loosening[4], or at least a more flexible approach towards, rules governing certain types of collaboration to ensure the attainment of specific objectives.

16. Climate change and environmental degradation are emergencies; (European) competition authorities cannot stand idly. ICLA encourages further clarifications and comfort be given by the EC on the assessment of agreements that serve the objectives of the Green Deal, to turn legal possibilities into environment-conscious or climate-conscious business opportunities and concrete realities for European citizens.

Comfort

17. The EC has a wide margin of discretion regarding whether to open an investigation into a possible infringement of competition law. In cases where there is a high likelihood that joint industry efforts would not fall under Article 101(1) TFEU or at least be exempted under Article 101(3) TFEU, relevant parties

[2] See, e.g., D. Soto Abril, Antitrust, Sustainability and Living Wages/Living Incomes, CPI Antitrust Chronicle, July 2020: "*A study by the Fairtrade Foundation UK on industry attitudes towards multi-stakeholder collaboration in the UK grocery sector found that the fear of competitive disadvantage is among the main contributors why market actors are not acting unilaterally on sustainability issues, in particular on paying and influencing higher prices to producers. Through a series of interviews with businesses, brands, retailers and industry experts, the Fairtrade Foundation revealed that collaboration amongst companies and industry actors is necessary to ensure businesses commit to paying living wages and incomes. The respondents to the survey believe that collaboration among the economic actors is necessary to achieve key benefits for both the producers and consumers while effectively also embodying the real environmental costs of products. It is – once again – stressed that the first-mover disadvantage is a real issue.*"

[3] Competition law should also be relied upon to prevent abuses by businesses which (i) use specific types of green collaboration as, e.g., a cover to collude more widely than necessary to achieve climate- or environment-related objectives, or (ii) seek to jointly limit the development of, e.g., cleaner technologies or greener production processes.

[4] In Norway, the United Kingdom and Australia, several transport companies were granted a temporary exemption from the prohibition against anticompetitive agreements, thus allowing these companies to coordinate their schedules to maintain a minimum service for citizens (MLex, SAS and Norwegian given three-month exemption from Norway's antitrust laws, 18 March 2020; MLex, Isle of Wight ferry services competition rules suspended due to Covid-19, says UK government, 27 March 2020; MLex, Regional Express, Virgin Australia, Qantas Airways to coordinate on regional flight routes, 26 March 2020). New Zealand's competition authority issued guidelines to authorize agreements between businesses or individuals that are anticompetitive but are otherwise in the public interest, recognizing "that in some circumstances collaboration between businesses is much less likely to harm competition and that cartel provisions can form part of arrangements that have pro-competitive or benign competitive effects" (MLex, New Zealand companies face new competition guidelines to govern Covid-19 collaboration, 1 May 2020).

should be able to get some comfort (whether formal or informal) from the EC that it will apply its administrative priorities and not intervene.

18. In April 2020, the EC addressed a letter providing comfort under Article 101 TFEU for certain cooperation practices aiming at responding effectively to some of the challenges faced by the pharmaceutical industry as a result of the Covid-19 outbreak. ICLA is of the view that climate change and environmental degradation call for the exceptional (probably temporary) return of comfort letters allowing cooperation between businesses to tackle climate and environment emergencies and effectively contribute to the Green Deal, and offering recommendations on how to establish safeguards to limit antitrust exposure.

19. In the press release accompanying the EC guidance on allowing limited cooperation among businesses during the pandemic, the EC indicated that, in many cases, oral guidance given to companies was enough.[5] ICLA is however of the view that comfort letters would be more effective in addressing novel and/or unique questions. To the extent that guidance is indeed provided (see section below) and case law is developing, the EC's approach towards specific types of collaboration will become clearer and the need of comfort letters will likely decrease over time. Yet, as things currently stand, guidance in the form of comfort letters would certainly be a welcome development.

Guidance

20. Formal or informal comfort require the parties to engage with the EC. Such engagement requires, however, the parties to have, e.g., a Memorandum of Understanding signaling the willingness of the parties to move forward with some sort of cooperation. Yet, few individual businesses reach that stage. Many joint climate- or environment-related projects – or rather ideas – are abandoned at inception phase, because of fear of competition law implications.

21. As indicated above, businesses (will) play a crucial role in attaining the Green Deal objectives. They need clear guidance (e.g., in the form of a Communication on environment-conscious or climate-conscious agreements) setting out the main criteria that the EC will follow in assessing such cooperation projects and in setting its enforcement priorities in this regard.

<u>Question 3</u>: Are there circumstances in which the pursuit of Green Deal objectives would justify restrictive agreements beyond the current enforcement practice? If so, please explain how the current enforcement practice could be developed to accommodate such agreements (i.e. which Green Deal objectives would warrant a specific treatment of restrictive agreements? How can the pursuit of Green Deal objectives be differentiated from other important policy objectives such as job creation or other social objectives?).

22. In most cases, bona fide environment-conscious or climate-conscious agreements, aimed at stimulating innovation or enhancing product quality or production processes, will promote competition. However, the mere fact that an environment-conscious or climate-conscious agreement seeks to realize Green Deal objectives does not rule out that the agreement can be anti-competitive.

23. ICLA does not call for a revolution but is indeed of the view that the climate and environment emergencies call for "specific treatment" in the form of (i) separate guidance and the return of comfort letters (see

[5] Press release IP/20/618, 8 April 2020.

above), and (ii) a slightly reoriented consumer welfare analysis of environment-conscious or climate-conscious agreements.

24. ICLA shares the view that other authors[6] have already expressed, "*we face a climate emergency* [and] *we have a moral imperative* […] *to take action whenever and wherever we can.*"[7] The pursuit of Green Deal objectives therefore calls for a wider inclusion of, and more clarity on, climate and environment-related considerations in the interpretation of Article 101(3) TFEU.

25. To benefit from an exemption under Article 101(3) TFEU, an agreement must meet four cumulative conditions:

    (1) The agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress;

    (2) Consumers get a fair share of the resulting benefit;

    (3) The agreement is necessary to achieve these benefits and does not go beyond what is necessary;

    (4) The agreement does not lead to the elimination of competition in a substantial part of the market.

26. ICLA is of the view that not much "change" is required in relation to conditions 1, 3 and 4. Bona fide environment-conscious or climate-conscious agreements call however for a more progressive approach to condition 2.

Condition 1: The agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress

27. Improving the environment has already been recognized by the EC as a factor which contributes to improving production or distribution or to promoting economic or technical progress.[8]

28. Environment-conscious or climate-conscious agreements will meet the first condition of Article 101(3) TFEU if the parties can substantiate the claimed benefits either qualitatively or quantitatively.[9]

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[6] See, for example, S. Holmes, Climate change is an existential threat: competition law must be part of the solution and not part of the problem, CPI Antitrust Chronicle, July 2020; M. Dolmans, Sustainable Competition Policy, CLPD, Vol. 5, Issue 4 and Vol.6, Issue 1.

[7] See, for example, S. Holmes, Climate change is an existential threat: competition law must be part of the solution and not part of the problem, CPI Antitrust Chronicle, July 2020.

[8] See, e.g., XXVth Report on Competition Policy (1995), paragraph 85 and Commission decision of 24 January 1999 in Case IV.F.1/36.718. CECED, paragraphs 47-48 and 50: "*The agreement is designed to reduce the potential energy consumption of new washing machines by at least 15 to 20 %* […]. *Washing machines which, other factors being constant, consume less electricity are objectively more technically efficient. Reduced electricity consumption indirectly leads to reduced pollution from electricity generation. The future operation of the total of installed machines providing the same service with less indirect pollution is more economically efficient than without the agreement* […]. *The agreement is also likely to focus future research and development on furthering energy efficiency beyond the current technological limits of category A, thereby allowing for increased product differentiation amongst producers in the long run.*"

[9] See, e.g., Autoriteit Consument en Markt, Draft Guidelines – Sustainability agreements: Opportunities within competition law.

Condition 2: Consumers get a fair share of the resulting benefit

29. The Guidelines on the application of Article 101(3) TFEU provide that the assessment of the "*benefits flowing from restrictive agreements is in principle made within the confines of each relevant market to which the agreement relates*" (paragraph 43, our emphasis) and that "*the net effect of the agreement must at least be neutral from the point of view of those consumers directly or likely affected by the agreement*" (paragraph 85, emphasis added).

30. ICLA is of the view that the definition of "consumers" shall not be limited to the direct purchasers or users of the products or processes at issue in the environment-conscious or climate-conscious agreements.

31. A key problem with, e.g., carbon emissions is that they involve negative externalities, imposed by a consumer on its fellow and future citizens.

32. These **negative externalities cannot be ignored** and call for the notion of "consumers" to include (i) current and future purchasers or users, (ii) direct or indirect purchasers or users, and even (iii) the "society".[10]

33. Furthermore, they necessitate a slightly different, progressive, approach to the concept of "fair share." As indicated in the Autoriteit Consument en Markt's draft guidelines on sustainability agreements, "*it can be fair not to compensate users fully for the harm that the agreement causes because their demand for the products in question essentially creates the problem for which society needs to find solutions.*"

34. ICLA is of the view that, in the case of bona fide environment-conscious or climate-conscious agreements, the fact that the society at large enjoy benefits such as carbon emission reductions should lead to a **presumption** that the society is getting a fair share of the benefits pursuant to Article 101(3) TFEU.

Condition 3: The agreement is necessary to achieve these benefits and does not go beyond what is necessary

35. The parties to the agreement will have to demonstrate that the restrictions at issue make it possible to perform the activity in question more efficiently than would likely have been the case in the absence of the restrictions concerned.

36. This third condition also invites thought to be given by businesses on potentially less restrictive ways of achieving Green Deal objectives.

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[10] See Commission decision of 24 January 1999 in Case IV.F.1/36.718. CECED, paragraph 56: "*The Commission reasonably estimates the saving in marginal damage from (avoided) carbon dioxide emissions (the so-called "external costs") at EUR 41 to 61 per ton of carbon dioxide. On a European scale, avoided damage from sulphur dioxide amounts to EUR 4000 to 7000 per ton and EUR 3000 to 5000 per ton of nitrous oxide. On the basis of reasonable assumptions, the benefits to society brought about by the CECED agreement appear to be more than seven times greater than the increased purchase costs of more energy-efficient washing machines. Such environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines*" (our emphasis). See also M. Dolmans, Sustainable Competition Policy, CLPD, Vol. 5, Issue 4 and Vol.6 Issue 1: "*an agreement to reduce pollution may increase prices, but reduce the same consumers' healthcare costs and increase their life expectancy and quality of life by more than the extra amount they pay for the cleaner products.*"

Condition 4: The agreement does not lead to the elimination of competition in a substantial part of the market

37. It is expected that most environment-conscious or climate-conscious agreements will meet this condition as it is expected that the parties involved will continue to compete on key parameters.

Additional comments

38. Joint industry efforts about climate and environment sometimes have an impact beyond the borders of the European Union. ICLA encourages the EC to actively engage in discussions in international fora, with relevant regulators and competition authorities, to explore how best to consider climate and environment in their policies and enforcement practice.

Part 3: Merger control

Summary

39. ICLA submits that EU merger control policy and practice should be reviewed, and if necessary, adjusted to allow European competition enforcers to better facilitate concentrations that create businesses with stronger environmental credentials.

40. Adjustments could be made to various parts of the EU merger control 'toolbox', including the EC's practice in relation to market definition, efficiencies, and remedies.

41. ICLA also encourages the EC and national regulators to proactively address the challenges that Green Deal related adjustments to EU merger control policy may pose to the system, such as increased complexity, uncertainty, and global divergence.

Question 1: Do you see any situations when a merger between firms could be harmful to consumers by reducing their choice of environmentally friendly products and/or technologies?

42. ICLA shares the view that other authors[11] have already expressed, which is that the **consumer welfare standard** under EU law generally is broad enough to accommodate environmental and sustainability concerns.[12] Consumer welfare can be affected not only by short-term price effects, but also non-price effects such as an increase or decrease in quality, choice, or innovation. The increasing popularity of products focusing on sustainability (e.g., meat substitutes) is testament to the fact that environmental qualities are relevant parameters not only for choice, but also quality and innovation.

43. The ICLA also agrees with the position expressed in the consultation paper that mergers, in certain circumstances, have the potential of eliminating the pressure between firms to innovate on sustainability aspects of some products or production processes. Accordingly, mergers may affect consumer welfare by reducing consumer choice of environmentally friendly products or technologies.

[11] See, for example, Christina Volpin, *Sustainability as a Quality Dimension of Competition: Protecting our Future (Selves)*, in: CPI Antitrust Chronicle July 2020, pages 8-18.

[12] In particular, if, as discussed in paragraph 32 above, the notion of "consumers" includes (i) current and future purchasers or users, (ii) direct or indirect purchasers or users, and even (iii) the "society".

44. An important counter-balancing factor to consider, however, is that a rapidly increasing range of external stakeholder forces (including investors, financiers and insurers) are shaping expectations for environmental and sustainability performance of companies, necessitating quality and innovation (with ancillary benefit to consumer welfare) regardless of a firm's market position or the impact on a competitor.

45. In ICLA's view, there are at least two situations where mergers can cause consumer harm:

I. Removal of an emerging, more eco-friendly competitor or supplier

46. The most obvious examples of mergers reducing choice and quality of, or innovation in relation to, eco-friendly products and technologies are acquisitions that **take out a potential new competitor developing eco-friendlier solutions than the incumbent**. Such acquisitions would prevent the eco-friendlier solution to be brought to market and, hence, would be inconsistent with the objectives of the Green Deal. However, given the growing pressure from a range of stakeholders on businesses to fulfill environmental and sustainability expectations, including when conducting M&A, we consider such outcomes to be increasingly rare.

47. Less obvious and possibly more difficult to detect are acquisitions that remove a player that does not necessarily have better environmental credentials but develops a novel product or technology that is an **important intermediate step** in the transformation of a (downstream or related) eco-friendlier product or technology. We imagine, for example, software developers, internet platforms, service providers, financiers, or suppliers of essential inputs to eco-friendly products or technology potentially falling into that bucket.

II. Anti-competitive mergers

48. More generally, mergers that are deemed to be significantly impeding effective competition based on existing standards, for example because they help create or strengthen a dominant market position, have a real potential to create outcomes that are also sub-optimal from an environmental or sustainability perspective. We see at least two scenarios here:

- First, anti-competitive mergers may reduce innovation and stifle technological process in the relevant market. As technological progress is key for achieving environmental and sustainable development goals, such mergers have the potential to be detrimental to the objectives of the Green Deal.
- Second, anti-competitive mergers can lead to price increases for essential inputs for downstream businesses developing eco-friendly and more sustainable products (e.g. lithium and other chemicals for electric car batteries). Again, such mergers could be detrimental to the objectives of the Green Deal although the impact would likely be indirect.

<u>Question 2</u>: Do you consider that merger enforcement could better contribute to protecting the environment and the sustainability objectives of the Green Deal? If so, please explain how?

49. Concentrations, i.e., mergers, acquisitions, and ("full-function") joint ventures, can be important accelerators of technological progress. Concentrations can increase economies of scale and make operations more cost-efficient, allowing for higher investments into research and development and provide the "balance sheet" required to sustain innovation and deploy cutting-edge technology. They can

also help prevent eco-friendly businesses models and technologies from exiting the market because of lack of scale.

50. Technological progress is essential for the development of greener production processes and products. The faster such environment-friendly transformation can take place, the better for the environment and the implementation of the Green Deal.

51. The technologies required to implement the Green Deal will be increasingly novel, untested and dependent on long-horizon R&D investment. Concentrations can also create the financial resources needed to fund such commitments.

I. Express recognition of environmental concerns

52. For these reasons, ICLA submits that merger control policy and practice should be reviewed, and if necessary, adjusted to allow European competition regulators to facilitate concentrations that create businesses with stronger environmental credentials, and both commitment and financial resources to fund the technological innovation required.

53. To achieve these goals, **ICLA advocates for clear, express recognition of environmental concerns** in the competition ruleset and relevant practice guidelines.

54. According to an OECD report of 2016, several countries already have clauses expressly permitting the state to take into account environmental concerns when reviewing M&A, e.g. Australia (foreign investment control), Spain and South Korea (merger control).[13]

55. In past merger cases, the EC seems to have already acknowledged the potential impact of mergers on the environment.[14] However, an express recognition in the EU competition ruleset and practice guidelines would emphasize the importance, and add to the legitimacy, of environmental and sustainability considerations in merger reviews.

II. Preliminary thoughts on implementation

56. The following sets out ICLA's initial thoughts on the practical aspects of integrating environmental concerns into EU merger control policy and practice.

(1) Market definition and closeness of competition

The EC could consider adjusting the guidelines on demand and supply side substitution. If the prevailing SSNIP test would be supplemented by normative criteria, products and services with evidently superior eco-friendly characteristics and sustainability features could be excluded from the definition of the relevant product market for the incumbents' products or services. This could,

[13] OECD, Public Interest Considerations in Merger Control (2016), available at: http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2016)3&docLanguage=En, p. 4.

[14] Press Release by the EC, M.9409, Aurubis/Metallo Group Holding, November 19, 2019, https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6305: "*[a] well-functioning, competitive copper recycling industry is key to meet the future needs of European industry and to limit the impact on the environment.*" (emphasis added); IV/34.252, Philips-Osram: "*The use of cleaner facilities will result in less air pollution, and consequently in direct and indirect benefits for consumers from reduced negative externalities*" (emphasis added).

for example, facilitate joint ventures between two incumbents in the area of clean technology that would otherwise not be possible due to high market share additions or, in case of joint ventures between vertically related companies, foreclosure concerns. Alternatively, the EC could consider such normative criteria when assessing the closeness of competition between the merging parties. However, such adjustments may equally facilitate the removal of an emerging, more eco-friendly contender by an incumbent through a (killer) acquisition. Because of the ambivalent effects of any adjustments of the EC's toolbox at that level of market definition and/or closeness of competition, ICLA's preliminary view is to refrain from making such adjustments but instead focus on the assessment of efficiencies and the design of remedies as they allow for more tailor-made solutions (see immediately below).

(2) Efficiencies

When assessing whether a merger would significantly impede effective competition, the EC generally takes into account efficiencies the merger brings about, provided they demonstrably benefit consumers (ideally, on the basis of a slightly expanded consumer concept[15]), are merger-specific and verifiable. The EC, going forward, **should consider adapting its policy as regards efficiencies** to facilitate incorporating positive environmental effects in its overall competitive appraisal of the merger. Possible pathways include the following:

(i) Exempt environmental benefits from the timeliness requirement (para (83) of the Horizontal Merger Guidelines), allowing the EC to take full account of long-term climate effects; and

(ii) Relax the standard of proof for merger-specificity (para 85), and the standard of verifiability, for environmental effects (para 86) to make it easier for the EC to clear mergers based on positive environmental effects.

Such adjustments could also benefit the review of non-horizontal mergers (see para (53) of the Non-Horizontal Merger Guidelines).

(3) Remedies

The EC should consider adapting its remedies policy to cater for environmental commitments by the merging parties. Environmental commitments can include commitments to discontinue outdated technologies or unsustainable business lines, make investments into environmental R&D, implement sustainability policies and processes, make IP rights available to third partiesetc. Environmental commitments could help the EC better monitor and control that the efficiencies promised by the merging parties are realized. As environmental commitments can include long-term behavioral commitments, the EC should review its preference for divestitures and other structural remedies for environmental commitments specifically. The EC should also consider adding internal resources to allow the EC to oversee the implementation of environmental commitments over a longer period post-completion.

[15] See para 32 above.

III. Potential practical challenges

57. The incorporation of sustainability concerns may pose certain practical challenges for merger control reviews. Any reform of the competition rules would need to anticipate those challenges and provide for the appropriate solutions. ICLA makes a few suggestions in this respect.

Increasing level of complexity

58. We imagine that assessing the green credentials of an acquirer, its operations and technologies can be a complex undertaking. Such assessment may involve intricate, and even controversial, scientific assumptions.

59. While widely available, regulators may not be able to fully rely on Environmental, Social, Governance (ESG) public ratings. They reportedly suffer from subjectivity and inconsistency.[16] Also, public ratings typically rate a company or group of companies (often listed) in their entirety, not individual business lines or technologies as may be required in the context of a merger review.

60. Competition regulators may have to make their own assessments based on data and expert opinions provided by the parties. Best practices may have to be established to ensure transparency and accountability of the review. Competition regulators may have to recruit their own expert team to assess the accuracy and credibility of the parties' submissions. Such environmental analysis needs to be framed in a way that the EU and national courts can understand and evaluate its meaning and significance. The EC would need to obtain and verify such data and conclude the analysis within the existing timeframes available under the EU Merger Regulation.

Managing uncertainty

61. We expect competition regulators to have to manage significant uncertainty when making eco-friendliness and/or sustainability a relevant, or even determining, factor in merger reviews:

    (i) Given the pace of scientific and technological progress, the assessment of the environmental advantages of one business or technology over the other can change over time. What seems as scientific consensus at the time of the review, could later turn out to be an untenable position.

    (ii) Also, a technology may bring both environmental benefits and risks (eg nuclear energy lowers carbon emissions but can pose serious public health issues in case of accidents). At the time of review, the benefits may be better understood than the risks, or vice versa.

    (iii) Lastly, merging parties may have the intent to pursue an environmental-friendly strategy, but circumstances may change post-closing so that the strategy is never implemented.

[16] For example, a 2018 study by the American Council for Capital Formation found significant disparities in the accuracy, value, and importance of ratings by rating agencies, for various reasons such as lack of standardization as well as company, industry and geographic bias. Available at: https://accfcorpgov.org/wp-content/uploads/2018/07/ACCF_RatingsESGReport.pdf (last visited on 8 Nov 2020).

Avoid inconsistency with other M&A screening regimes

62. M&A activity in the EU is subject to various, partially overlapping, screening regimes. The EC should take into account the existence of those regimes when making Green Deal related adjustments to EU merger control policy. This is to maximize the effectiveness of such policy changes and avoid inconsistent outcomes. The following screening regimes seem particularly relevant in the context of the Green Deal:

(i) Foreign Direct Investment (FDI) screening, which is particularly relevant where the acquirer is from outside of the EU / EFTA. As the example of Australia (Foreign Investment Review Board) shows[17], environmental considerations can play a role in FDI reviews and, to the extent they do at the EU or the Member States level, a certain level of harmonization and convergence should be sought.

(ii) Once implemented, EU regulation on foreign subsidies could result in another separate review mechanism for mergers and acquisitions (called "Module 2" in the relevant White Paper[18]). The EU interest test proposed in the White Paper encompasses public policy objectives such as "climate neutrality" and "protecting the environment".[19] Again, some alignment between the different tests should be sought.

(iii) Industry-specific approval requirements, e.g. for investments into credit institutions or other regulated entities, and to the extent the "fit and proper" assessment can, or in fact must extend, to environmental credentials of the acquirer under applicable laws.

Avoid international divergence

63. Mergers subject to review by the EC or, the case may be, competition authorities of the Member States, are often subject to parallel reviews outside of the EU. Effective implementation of environmental policies in merger reviews requires a **certain consensus and convergence across different jurisdictions**. ICLA encourages the EC, once a set of policies or guidance has been formulated, to engage the global antitrust community through the various platforms (International Competition Network (ICN), bilateral cooperation, international conferences) to seek alignment with other key regulators globally on environmental concerns.

***

[17] See Australia's Foreign Investment Policy 2020, available at https://firb.gov.au/sites/firb.gov.au/files /inline-files/2020-foreign-investment-policy.pdf (last visited on 11 Nov 2020): "*Investments must also be consistent with the Government's objectives in relation to matters such as environmental impact.*" (emphasis added)
[18] White Paper on levelling the playing field as regards foreign subsidies, COM(2020) 253 final.
[19] *Ibid*, page 17.

Contribution ID: 5a5aaa4b-2632-4e72-8338-9d976c791e1b
Date: 05/10/2021 21:00:12

Stakeholder consultation on the review of the HBERs

Fields marked with * are mandatory.

1
Introduction

Article 101(1) of the Treaty on the Functioning of the European Union ('TFEU') prohibits agreements between undertakings that restrict competition unless they generate efficiencies in line with Article 101(3) of the Treaty. This happens if they contribute to improving the production or distribution of goods or services, or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits; they only impose restrictions that are indispensable for the attainment of these objectives and do not eliminate competition in respect of a substantial part of the product in question. The prohibition contained in Article 101(1) of the Treaty covers, amongst others, agreements entered into between actual or potential competitors (so-called 'horizontal cooperation').

Horizontal cooperation relates, in most cases, to cooperation between actual or potential competitors in areas such as research and development ('R&D'), production, purchasing, commercialisation or standardisation. It can also involve information exchange, either as a self-standing agreement or in the context of another type of horizontal cooperation agreement. Horizontal cooperation agreements may cause a restriction of competition but also give rise to substantial efficiencies, in particular if the companies involved combine complementary activities, skills or assets.

The European Commission (the 'Commission') is empowered to adopt block exemption regulations, which define certain categories of agreements for which it can be presumed with sufficient certainty that they fulfil the conditions of exemption under Article 101(3) TFEU. The Commission has made use of this empowerment by adopting two block exemption regulations that declare Article 101(1) TFEU not applicable to certain categories of R&D agreements and certain categories of specialisation agreements. The R&D Block Exemption Regulation ('R&D BER') and Specialisation Block Exemption Regulation ('Specialisation BER) (together the 'Horizontal Block Exemption Regulations' or 'HBERs') entered into force on 1 January 2011

and will expire on 31 December 2022. The HBERs are accompanied by Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements ('Horizontal Guidelines').

In May 2021, the Commission finalised its evaluation of the HBERs and the Horizontal Guidelines with the publication of a Staff Working Document. The results of the evaluation showed that the HBERs and the Horizontal Guidelines are useful instruments and remain relevant for stakeholders. Nonetheless, the evaluation identified a number of potential issues. On the basis of these results, the Commission is now looking into policy options for a revision of certain areas of the HBERs with the aim to have revised rules in place by 31 December 2022, when the current rules will expire.

On 7 June 2021, the Commission published an Inception Impact Assessment ('IIA') setting out the areas for which the Commission proposed policy options and asked stakeholders to provide feedback by 5 July 2021. During the impact assessment phase, the Commission will collect views from stakeholders on these policy options and their ability to tackle the issues identified in the evaluation. The Commission will also collect feedback on other areas of the HBERs and the Horizontal Guidelines for which the results of the evaluation identified room for improvement or clarification. This questionnaire is one of the key instruments to collect stakeholders' views and the replies to the questionnaire will inform the drafting of the revised rules.

2 How to answer this consultation

You are invited to reply to this public consultation by filling out the EUSurvey questionnaire online.

The questionnaire is structured as follows:

1. The first part of the questionnaire (Sections 3 and 4) concerns **general information** on the respondent.
2. The second part focuses on **policy options** for a possible revision of the HBERs (Section 5). It aims at gathering information and views from stakeholders to assess the impact of the policy changes that the Commission is exploring.
3. The third part of the questionnaire addresses **other issues and elements** (e.g. improvements, clarifications) to be considered during the impact assessment phase (Section 6).

Languages

The questionnaire is available in **English, French and German** but you may respond to the

questionnaire in the EUSurvey tool in any official EU language.

Next steps

The Commission will summarise the results in a **report**, which will be made publicly available on the Commission's Better Regulation Portal.

Practical remarks:

1. To facilitate the analysis of your reply, we would kindly ask you to keep your answers concise and to the point.
2. You may include documents and URLs for relevant online content in your replies.
3. You are not required to answer every question. You may respond 'no opinion' to questions on topics where you do not have particular knowledge, experience or opinion. Where applicable, this is strongly encouraged in order to ensure that the evidence gathered by the Commission is solid.
4. You have the option of saving your questionnaire as a 'draft' and finalising your response later. In order to do this, click on 'Save as Draft' and save the new link that you will receive from the EUSurvey tool on your computer. Please note that *without this new link you will not be able to access the draft again* and continue replying to your questionnaire. Once you have submitted your response, you will be able to download a copy of your completed questionnaire.
5. Whenever there is a text field for a short description, the maximum number of characters will be indicated.
6. Questions marked with an asterisk (*) are mandatory.
7. To avoid any confusion about the numbering of the questions, please note that you will be asked some questions only if you choose a particular reply to the respective previous one(s).

No statements, definitions, or questions in this public consultation may be interpreted as an official position of the Commission. All definitions provided in this document are strictly for the purposes of this public consultation and are without prejudice to definitions the Commission may use under current or future EU law or in decisions.

You are invited to read the **privacy statement** attached to this consultation for information on how your personal data and contribution will be dealt with.

In case **you have questions**, you can contact us via the following functional mailbox: COMP-HBERS-REVIEW@ec.europa.eu.

If you encounter **technical problems**, please contact the Commission's CENTRAL HELPDESK.

3 About you

* 1 I am giving my contribution as

- ○ Academic/research institution
- ○ Business association
- ○ Company/business organisation
- ○ Consumer organisation
- ○ EU citizen
- ○ Environmental organisation
- ○ Non-EU citizen
- ○ Non-governmental organisation (NGO)
- ○ Public authority
- ○ Trade union
- ◉ Other

* 2 First name

Ief

* 3 Surname

Daems

* 4 Email (this won't be published)

ief.daems@inhousecompetitionlawyers.com

* 6 Language of my contribution

- ○ Bulgarian
- ○ Croatian
- ○ Czech
- ○ Danish
- ○ Dutch
- ◉ English
- ○ Estonian
- ○ Finnish
- ○ French
- ○ German

- Greek
- Hungarian
- Irish
- Italian
- Latvian
- Lithuanian
- Maltese
- Polish
- Portuguese
- Romanian
- Slovak
- Slovenian
- Spanish
- Swedish

* 9 Organisation name

255 character(s) maximum

Association of Inhouse Competition Lawyers (ICLA)

* 10 Organisation size

- Micro (1 to 9 employees)
- Small (10 to 49 employees)
- Medium (50 to 249 employees)
- Large (250 or more)

11 Transparency register number

255 character(s) maximum

Check if your organisation is on the transparency register. It's a voluntary database for organisations seeking to influence EU decision-making.

Identification number: 513747339430-11

* 12 Country of origin

Please add your country of origin, or that of your organisation.

- Afghanistan
- Åland Islands
- Djibouti
- Dominica
- Libya
- Liechtenstein
- Saint Martin
- Saint Pierre and Miquelon

- Albania
- Algeria
- American Samoa
- Andorra
- Angola
- Anguilla
- Antarctica
- Antigua and Barbuda
- Argentina
- Armenia
- Aruba
- Australia
- Austria
- Azerbaijan
- Bahamas
- Bahrain
- Bangladesh
- Barbados
- Belarus
- Belgium
- Belize
- Benin
- Bermuda
- Bhutan
- Bolivia
- Dominican Republic
- Ecuador
- Egypt
- El Salvador
- Equatorial Guinea
- Eritrea
- Estonia
- Eswatini
- Ethiopia
- Falkland Islands
- Faroe Islands
- Fiji
- Finland
- France
- French Guiana
- French Polynesia
- French Southern and Antarctic Lands
- Gabon
- Georgia
- Germany
- Ghana
- Gibraltar
- Greece
- Greenland
- Grenada
- Lithuania
- Luxembourg
- Macau
- Madagascar
- Malawi
- Malaysia
- Maldives
- Mali
- Malta
- Marshall Islands
- Martinique
- Mauritania
- Mauritius
- Mayotte
- Mexico
- Micronesia
- Moldova
- Monaco
- Mongolia
- Montenegro
- Montserrat
- Morocco
- Mozambique
- Myanmar/Burma
- Namibia
- Saint Vincent and the Grenadines
- Samoa
- San Marino
- São Tomé and Príncipe
- Saudi Arabia
- Senegal
- Serbia
- Seychelles
- Sierra Leone
- Singapore
- Sint Maarten
- Slovakia
- Slovenia
- Solomon Islands
- Somalia
- South Africa
- South Georgia and the South Sandwich Islands
- South Korea
- South Sudan
- Spain
- Sri Lanka
- Sudan
- Suriname
- Svalbard and Jan Mayen
- Sweden

- Bonaire Saint Eustatius and Saba
- Bosnia and Herzegovina
- Botswana
- Bouvet Island
- Brazil
- British Indian Ocean Territory
- British Virgin Islands
- Brunei
- Bulgaria
- Burkina Faso
- Burundi
- Cambodia
- Cameroon
- Canada
- Cape Verde
- Cayman Islands
- Central African Republic
- Chad
- Chile
- China
- Christmas Island
- Clipperton
- Guadeloupe
- Guam
- Guatemala
- Guernsey
- Guinea
- Guinea-Bissau
- Guyana
- Haiti
- Heard Island and McDonald Islands
- Honduras
- Hong Kong
- Hungary
- Iceland
- India
- Indonesia
- Iran
- Iraq
- Ireland
- Isle of Man
- Israel
- Italy
- Jamaica
- Nauru
- Nepal
- Netherlands
- New Caledonia
- New Zealand
- Nicaragua
- Niger
- Nigeria
- Niue
- Norfolk Island
- Northern Mariana Islands
- North Korea
- North Macedonia
- Norway
- Oman
- Pakistan
- Palau
- Palestine
- Panama
- Papua New Guinea
- Paraguay
- Peru
- Switzerland
- Syria
- Taiwan
- Tajikistan
- Tanzania
- Thailand
- The Gambia
- Timor-Leste
- Togo
- Tokelau
- Tonga
- Trinidad and Tobago
- Tunisia
- Turkey
- Turkmenistan
- Turks and Caicos Islands
- Tuvalu
- Uganda
- Ukraine
- United Arab Emirates
- United Kingdom
- United States

- Cocos (Keeling) Islands
- Colombia
- Comoros
- Congo
- Cook Islands
- Costa Rica
- Côte d'Ivoire
- Croatia
- Cuba
- Curaçao
- Cyprus
- Czechia
- Democratic Republic of the Congo
- Denmark
- Japan
- Jersey
- Jordan
- Kazakhstan
- Kenya
- Kiribati
- Kosovo
- Kuwait
- Kyrgyzstan
- Laos
- Latvia
- Lebanon
- Lesotho
- Liberia
- Philippines
- Pitcairn Islands
- Poland
- Portugal
- Puerto Rico
- Qatar
- Réunion
- Romania
- Russia
- Rwanda
- Saint Barthélemy
- Saint Helena Ascension and Tristan da Cunha
- Saint Kitts and Nevis
- Saint Lucia
- United States Minor Outlying Islands
- Uruguay
- US Virgin Islands
- Uzbekistan
- Vanuatu
- Vatican City
- Venezuela
- Vietnam
- Wallis and Futuna
- Western Sahara
- Yemen
- Zambia
- Zimbabwe

The Commission will publish all contributions to this public consultation. You can choose whether you would prefer to have your details published or to remain anonymous when your contribution is published. **For the purpose of transparency, the type of respondent (for example, 'business association, 'consumer association', 'EU citizen') country of origin, organisation name and size, and its transparency register number, are always published. Your e-mail address will never be published.** Opt in to select the privacy option that best suits you. Privacy options default based on the type of respondent selected

* 14 **Contribution publication privacy settings**

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

○ **Anonymous**
Only organisation details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published as received. Your name will not be published. Please do not include any personal data in the contribution itself if you want to remain anonymous.

◉ **Public**
Organisation details and respondent details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published. Your name will also be published.

☑ I agree with the personal data protection provisions

4 About your organisation

15) Please provide the main activity of your organisation (e.g. product(s) and/or service(s) provided)

500 character(s) maximum

ICLA is an informal association of in-house competition lawyers with currently nearly 500 members across the globe. The Association does not represent companies but is made up of individuals as experts in the area of competition law.

16) Please describe the sectors in which your organisation or your clients or members conduct business:

500 character(s) maximum

ICLA is not a business/economic operator. ICLA members work for companies which are active in a wide range of sectors. This submission represents the position of ICLA and does not necessarily represent the views of all of its individual members.

17) Please indicate the 2 digit NACE Rev.2 code(s) referring to the level of 'division' that applies to your business (see part III, pages 61 – 90 of Eurostat's statistical classification of economic activities in the European Community, available here):

250 character(s) maximum

Not applicable

18) Please mark the countries/geographic areas where your main activities are located:

- [ ] Austria
- [x] Belgium
- [ ] Bulgaria
- [ ] Croatia
- [ ] Cyprus
- [ ] Czech Republic
- [ ] Denmark
- [ ] Estonia
- [ ] Finland
- [ ] France
- [ ] Germany
- [ ] Greece
- [ ] Hungary
- [ ] Ireland
- [ ] Italy
- [ ] Latvia
- [ ] Lithuania
- [ ] Luxembourg
- [ ] Malta
- [ ] Netherlands
- [ ] Poland
- [ ] Portugal
- [ ] Romania
- [ ] Slovak Republic
- [ ] Slovenia
- [ ] Spain
- [ ] Sweden
- [ ] United Kingdom
- [ ] Others in Europe
- [ ] The Americas
- [ ] Asia
- [ ] Africa

☐ Australia

19) Please describe the **relevance** of the **HBERs** and the **Horizontal Guidelines** f or your activities and/or your organisation.

Regulations and Guidelines	Relevance
R&D BER	As inhouse competition counsel, we rely on the Horizontal BER and guidelines to provide clarity and legal certainty, so that we can advise our business partners to make sure they take decisions in a compliant manner.
Specialisation BER	As inhouse competition counsel, we rely on the Horizontal BER and guidelines to provide clarity and legal certainty, so that we can advise our business partners to make sure they take decisions in a compliant manner.
Horizontal Guidelines	As inhouse competition counsel, we rely on the Horizontal BER and guidelines to provide clarity and legal certainty, so that we can advise our business partners to make sure they take decisions in a compliant manner.

20) Please indicate whether your organisation is or has been a party to any of the following **horizontal cooperation agreements**. Alternatively, please indicate whether you have experience with any of the following horizontal cooperation agreements:

Horizontal cooperation agreements	Yes	No
R&D agreements	☑	☐
Production (or specialisation) agreements	☐	☐
Information exchanges	☑	☐
Joint purchasing agreements	☑	☐
Commercialisation agreements	☑	☐
Standardisation agreements	☑	☐
Other (e.g. agreements pursuing sustainability goals, etc.)	☑	☐

21) If you have been **discouraged or dissuaded** in the last ten years from entering into a **pro-competitive horizontal cooperation agreement** (taking the

form of any of the ones mentioned in the previous question), please
(i) indicate the type of horizontal cooperation agreement you are referring to
(ii) explain the main reasons for the decision not to pursue the cooperation and
(iii) describe any obstacles/deterrents arising from any provision in the HBERs and /or the Horizontal Guidelines.

5000 character(s) maximum

In our experience, horizontal cooperation agreements require a significant legal effort to ensure compliance with EU competition laws, including the need of external advice, the creation of clean teams or investments to monitor compliance. Providing more legal certainty and guidance that will facilitate the review of horizontal agreements is therefore highly appreciated.
Over the past few years, markets have significantly changed and have become fast-moving due to increasing digitalization. This requires companies to be more agile and cooperate more often to create innovative digital solutions, ensure interoperability and create new technological standards to the benefit of customers.
In addition, there is a strong need on developing sustainable solutions to reduce the environmental impact. The BER and HGL should take these new dynamics into account and recognize that cooperation that seek to address these goals are generally pro-competitive.
The BER and HGL should be revised in order to provide a higher degree of legal certainty to participants of such cooperation initiatives:

- Information exchange, particularly with regard to digital cooperation and cooperation to develop sustainable solutions: Information exchange outside the scope of a cartel agreement should not be a “by object” restriction but the actual effects of the exchange on competition should be assessed. Any abstract assessment of information exchange can lead to prohibiting information exchange which is neutral for competition or even pro-competitive.
Uncertainty in terms of what kind of information can be exchanged becomes even greater when dealing with these new cooperation models in the digital field and cooperations to develop sustainable solutions.
These cooperation models require a certain degree of information exchange and data sharing. However, companies are currently lacking clear guidance with regard to the boundaries of permitted information exchange in such cooperations. The BER and HGL should include guidance on these types of information exchanges taking into account the general pro-competitive nature of the vast majority of these cooperations.

- Joint bidding: The HGL 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 receives.

- R&D agreements: Both the HGL & the BER on R&D agreements should be reviewed in order to extend the current framework to cover other kind of horizontal agreements that boost the creation of innovative technologies within the Digital Economy environment: platforms, cloud services, Big Data etc. Cooperation on R&D is also indispensable for companies to meet sustainability objectives.
Second, the BER and HGL should clarify that joint R&D agreements are generally pro-competitive. The current tools should emphasize more strongly the pro-competitive nature of joint R&D co-operations 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 Art. 3 of the R&D BER are strictly included. In addition, the R&D BER should be simplified, as its complex application makes it difficult to get the desired legal certainty.
Third, there is a need to remove the reference to market shares on technology markets and limit the market share threshold to relevant product markets, as this notion is not practical and does not add any value for the assessment. In practice, it is highly unlikely that companies have a clear overview of all competing

technologies. It is even more unlikely that companies can calculate their market share on such a market. Fourth, in view of the overall pro-competitive nature of R&D co-operations, the revised R&D BER should remove the restriction on limiting passive sales and should allow the parties of an R&D cooperation to impose strict restrictions on each other under any form of specialization in the context of exploitation. Finally, "paid for" R&D should be treated under the subcontracting notice instead the R&D BER. Outsourcing R&D is usually similar to subcontracting, whereby the subcontractor produces the products and supplies them exclusively to the principal.

- Network sharing agreements: even though the analysis will always need to look at case and country specific circumstances, the HGL should provide some general points to facilitate self-assessment and encourage investments in high quality networks. The HGL on joint production do currently not provide sufficient guidance. The relevant Section 4 of the HGL should include a set of criteria based on which an adequate self-assessment can be made. Network sharing could also be introduced under the Examples under Section 4.5 to provide more legal certainty and enable consistency amongst different competition authorities.

5 Policy options for the HBERs

During the impact assessment phase, the Commission is exploring **policy options** aimed at improving the HBERs. The baseline scenario against which these policy options will be assessed is a renewal of the HBERs and the Horizontal Guidelines *without substantive change*.

5.1) Policy options relating to SMEs, research institutes and academic bodies

The Commission is exploring options to encourage the participation of SMEs, research institutes and/or academic bodies in R&D and production/specialisation agreements that do not raise competition concerns. The policy options currently identified include:

SMEs – R&D and specialisation

- Option 1: No change

- Option 2: The potential **introduction of a specific category of R&D agreements** exempted by the R&D BER, subject to conditions to be defined, in case such agreements are ***concluded by SMEs***; *and/or*

- Option 3: The potential **introduction of a specific category of specialisation /production agreements** exempted by the Specialisation BER, subject to conditions to be defined, in case such agreements are ***concluded by SMEs***; *and/or*

Research institutes /academic bodies – R&D

- Option 4: Clarifying the **definition of competing undertakings** in case **research institutes and/or academic bodies** are involved in R&D agreements; *and/or*

SMEs and research institutes /academic bodies – R&D

- Option 5: **Limiting (and/or potentially removing) the condition(s) in the R&D BER of full access to the results and/or access to pre-existing know-how** in case R&D agreements are concluded with SMEs, academic bodies and/or research institutes.

Options 2 to 5 could be applied cumulatively.

22) **Type of R&D agreements**. Please indicate which type of R&D agreement(s) you are currently a party to, or have been a party to in the last ten years.

- ☐ Joint R&D of products/technologies
- ☐ Joint R&D of products/technologies and joint exploitation of R&D results (e.g. production, distribution, application, assignment and/or licensing)
- ☐ Paid-for R&D of products/technologies (i.e. one party finances the R&D activity, that is carried out by the other party)
- ☐ Paid-for R&D of products/technologies and joint exploitation of R&D results (e. g. production, distribution, application, assignment and/or licensing)
- ☐ Joint exploitation of R&D results jointly carried out pursuant to a prior agreement between the same parties
- ☐ Joint exploitation of the results of paid-for R&D pursuant to a prior agreement between the same parties
- ☐ Other type(s) of R&D cooperation agreement(s)
- ☐ None

24) **Type of specialisation/production cooperation agreements**. Please indicate which type of specialisation/production agreement(s) you are currently a party to, or have been a party to in the last ten years.

- ‘*Unilateral specialisation agreement*’ (i.e. an agreement between two parties which are active on the same product market by which one party agrees to fully or partly refrain/cease production of certain products and to purchase them from the other party, who agrees to produce and supply those products to it)
- ‘*Reciprocal specialisation agreement*’ (i.e. an agreement between two or more parties which are active on the same product market, by which two or more parties on a reciprocal basis agree to fully or partly cease or refrain from producing certain but different products and to purchase these products from the other parties, who agree to produce and supply them)
- ‘*Joint production agreement*’ (i.e. an agreement by which two or more parties agree to produce certain products jointly)
- '*Horizontal subcontracting agreements with a view to expanding production'* (i. e. an agreement by which the contractor entrusts the subcontractor with the production of a good, while the contractor does not at the same time cease or limit its own production of the good)
- Other type(s) of specialisation/production agreement(s)
- None

5.1.1) **New categories of exempted agreements**.

The Commission is exploring options to encourage the participation of SMEs in R&D and specialisation/production agreements.

26) Based on your experience, would the introduction of a specific exemption for **R &D agreements concluded by SMEs** achieve such an objective (i.e. encourage the participation of SMEs)?

- Yes
- No
- No opinion

28) Based on your experience, would the introduction of a specific exemption for **p roduction/specialisation agreements concluded by SMEs** achieve such an objective (i.e. encourage the participation of SMEs)?

- Yes
- No
- No opinion

30) **Impact (R&D - SMEs)**. Based on your experience, what would be the impact of **exempting a specific category of R&D cooperation agreements concluded by SMEs** on the following aspects:

Impact on:	Very negative	Negative	Neutral	Positive	Very positive	No opinion
Competition on the market	○	○	○	○	○	○
Prices	○	○	○	○	○	○
Quality of products /services	○	○	○	○	○	○
Innovation / Investment in R&D	○	○	○	○	○	○
Self-assessment of horizontal R&D agreements	○	○	○	○	○	○
Cooperation by SMEs in R&D	○	○	○	○	○	○
Costs for your organisation	○	○	○	○	○	○
Legal certainty for your organisation	○	○	○	○	○	○

Harmonised application of competition rules by national competition authorities and national courts						

32) **Impact (Specialisation/Production - SMEs)**. Based on your experience, what would be the impact of **exempting a specific category of specialisation (production) cooperation agreements concluded by SMEs** on the following aspects:

Impact on:	Very negative	Negative	Neutral	Positive	Very positive	No opinion
Competition on the market	○	○	○	○	○	○
Prices	○	○	○	○	○	○
Quality of products/services	○	○	○	○	○	○
Innovation	○	○	○	○	○	○
Self-assessment of horizontal specialisation/production agreements	○	○	○	○	○	○
Cooperation by SMEs in specialisation/production	○	○	○	○	○	○
Level of production	○	○	○	○	○	○
Costs for your organisation	○	○	○	○	○	○
Legal certainty for your organisation	○	○	○	○	○	○
Harmonised application of competition rules by national competition authorities and national courts	○	○	○	○	○	○

5.1.2) **Potential conditions for exempting horizontal cooperation agreements by SMEs**.

34) **R&D agreements**. Based on your experience, please consider the potential conditions under which an R&D agreement by SMEs could be exempted and indicate which of the possible conditions listed below would be the easiest to apply?

- ☐ Conditions based on market shares of the parties to the agreement
- ☐ Conditions based on revenues of the parties to the agreement
- ☐ Conditions linked to the duration of the agreement
- ☐ Other
- ☐ No opinion

36) **Specialisation/production agreements**. Based on your experience, please consider the potential conditions under which a specialisation/production agreements by SMEs could be exempted and indicate which of the possible conditions would be the easiest to apply?

- ☐ Conditions based on market shares of the parties to the agreement
- ☐ Conditions based on revenues of the parties to the agreement
- ☐ Conditions linked to the duration of the agreement
- ☐ Other
- ☐ No opinion

5.1.3) **Conditions for exemption under the R&D BER**.

The Commission is exploring options to ensure that the rules encourage the participation of (i) SMEs and (ii) research institutes/academic bodies in R&D agreements, when these agreements do not raise competition concerns. Options that the Commission is exploring may include limiting (and/or potentially removing) the condition(s) for exemption in the R&D BER regarding full access to the results and/or to pre-existing know-how in case R&D agreements are concluded with SMEs, academic bodies and/or research institutes. Limitations to the condition of full access to the final R&D results could for instance include limitations to the duration of full access, or the scope of the access, etc. Limitations to the condition of access to pre-existing know how could for instance include limitations to the duration of access, the exploitation activity the access is linked to, etc.

38) Based on your experience, would the following options concerning **R&D agreements concluded by SMEs** achieve such objective (i.e. ensure that the rules encourage the participation of SMEs in R&D agreements)?

Options	Yes	No	No opinion
Limiting the condition of **full access to the final R&D results** (for example, by limiting the duration of full access or the scope thereof, etc.)	○	○	○
Limiting the condition of **access to pre-existing know–how** if this know-how is *indispensable* for the purposes of exploitation of the R&D results (for example by limiting the duration of access or the exploitation activity it is linked to, etc.)	○	○	○
Removing the condition of **full access to the final R&D results**	○	○	○
Removing the condition of **access to pre-existing know–how** if this know-how is *indispensable* for the purposes of exploitation of the R&D results	○	○	○

40) Based on your experience, do you consider that the limitations that are identified in the table above (i.e limiting the duration of full access to the final R&D results or the scope thereof or limiting the duration of access to pre-existing know-how or the exploitation activity it is linked to, etc.) would be most appropriate to achieve the objective (i.e. ensure that the rules encourage the participation of SMEs in R&D agreements?

5000 character(s) maximum

41) If, based on your experience, you consider that other types of limitations to the conditions of full access to the final R&D results or to pre-existing know-how than the ones listed in the table above would be more appropriate to achieve the objective (i.e. ensure that the rules encourage the participation of SMEs in R&D agreements), please list them and explain the reasons.

5000 character(s) maximum

42) Based on your experience, would the following options concerning **R&D agreements concluded with research institutes/academic bodies** achieve such objective?

Options	Yes	No	No opinion
Limiting the condition of **full access to the final R&D results** (for example, by limiting the duration of full access or the scope thereof, etc.)	○	○	○
Limiting the condition of **access to pre-existing know–how** if this know-how is *indispensable* for the purposes of exploitation of the R&D results (for example by limiting the duration of access or the exploitation activity it is linked to, etc.)	○	○	○
Removing the condition of **full access to the final R&D results**	○	○	○
Removing the condition of **access to pre-existing know–how** if this know-how is *indispensable* for the purposes of exploitation of the R&D results	○	○	○

44) Based on your experience, do you consider that the limitations that are identified in the table above (i.e limiting the duration of full access to the final R&D results or the scope thereof or limiting the duration of access to pre-existing know-how or the exploitation activity it is linked to, etc.) would be most appropriate to achieve the objective (i.e. ensure that the rules encourage the participation of research institutes/academic bodies in R&D agreements?

5000 character(s) maximum

45) If, based on your experience, you consider that other types of limitations to the conditions of full access to the final R&D results or to pre-existing know-how than the ones listed in the table above would be more appropriate to achieve the objective (i.e. ensure that the rules encourage the participation of research institutes /academic bodies in R&D agreements), please list them and explain the reasons.

5000 character(s) maximum

46) **Impact (R&D full access to results)**. Based on your experience, what would be the impact of **limiting (and potentially removing) the condition of full access to the final results** from R&D cooperation agreements concluded with SMEs, research institutes and/or academic bodies on the following aspects:

Impact on:	Very negative	Negative	Neutral	Positive	Very positive	No opinion
Competition on the market	○	○	○	○	○	○
Prices	○	○	○	○	○	○
Quality of products/services	○	○	○	○	○	○
Innovation / Investment in R&D	○	○	○	○	○	○
Self-assessment of horizontal R&D agreements	○	○	○	○	○	○
Cooperation with SMEs in R&D	○	○	○	○	○	○
Cooperation with research institutes/academic bodies in R&D	○	○	○	○	○	○
Costs for your organisation	○	○	○	○	○	○
Legal certainty for your organisation	○	○	○	○	○	○
Harmonised application of competition rules by national competition authorities and national courts	○	○	○	○	○	○

48) **Impact (R&D access to pre-existing know-how)**. Based on your experience, what would be the impact of **limiting (and potentially removing) the condition of access to pre-existing know-how** from R&D cooperation agreements concluded with SMEs, research institutes and/or academic bodies on the following aspects:

Impact on:	Negative	Neutral	Positive	Very positive	No opinion
Competition on the market	○	○	○	○	○
Prices	○	○	○	○	○
Quality of products /services	○	○	○	○	○
Innovation / Investment in R&D	○	○	○	○	○
Self-assessment of horizontal R&D agreements	○	○	○	○	○
Cooperation with SMEs in R&D	○	○	○	○	○
Cooperation with research institutes/academic bodies in R&D	○	○	○	○	○
Costs for your organisation	○	○	○	○	○
Legal certainty for your organisation	○	○	○	○	○
Harmonised application of competition rules by national competition authorities and national courts	○	○	○	○	○

5.1.4) **Research institutes and academic bodies**.

The R&D BER currently defines academic bodies and research institutes as undertakings which supply R&D as a commercial service without normally being active in the exploitation of results (e.g. production, distribution, etc.).

50) Based on your experience, under which circumstances would you consider **res earch institutes and/or academic bodies** to be ***actual or potential competitors*** to another organisation in R&D? Please be as detailed as possible indicating the relevant R&D areas (e.g. development/improvement of new/existing products and /or technologies)?

5000 character(s) maximum

51) The Commission is exploring options to ensure that the rules encourage the participation of research institutes/academic bodies in R&D agreements. Based on your experience, would a clarification of the definition of competing undertakings applicable to **research institutes and/or academic bodies** involved in R&D agreements achieve such objective?

- Yes
- No
- No opinion

53) **Impact (R&D - research institutes/academic bodies)**. Based on your experience, what would be the impact of **adding further clarifications to the definition of competing undertakings** for R&D cooperation agreements concluded with **research institutes and/or academic bodies** on the following aspects:

Impact on:	Very negative	Negative	Neutral	Positive	Very positive	No opinion
Competition on the market	○	○	○	○	○	○
Prices	○	○	○	○	○	○
Quality of products/services	○	○	○	○	○	○
Innovation / Investment in R&D	○	○	○	○	○	○
Self-assessment of horizontal R&D agreements	○	○	○	○	○	○
Cooperation with research institutes/academic bodies in R&D	○	○	○	○	○	○
Costs for your organisation	○	○	○	○	○	○
Legal certainty for your organisation	○	○	○	○	○	○
Harmonised application of competition rules by national competition authorities and national courts	○	○	○	○	○	○

5.1.5) **Additional remarks on policy options regarding SMEs, research institutes and academic bodies**

55) Based on your experience, please explain whether there are any other measures that could encourage the participation of SMEs, research institutes and /or academic bodies in horizontal R&D and production/specialisation agreements, when these agreements do not raise competition concerns.

5000 character(s) maximum

5.2) Policy options relating to the R&D BER: Conditions for exemption

The Commission is exploring options to encourage the conclusion of R&D agreements **by all types of market participants** which are unlikely to raise competition concerns. The Commission will assess the following policy options:

- Option 1: No change.
- Option 2: Allowing for limitations to the condition of **full access to the results** of the R&D cooperation; *and/or*
- Option 3: Allowing for limitations to the condition of **access to pre-existing know–how** indispensable for the purposes of exploitation of the R&D results.

Options that the Commission is exploring may include limiting (and/or potentially removing) the condition(s) for exemption in the R&D BER regarding full access to the results and/or to pre-existing know-how for R&D agreements. Limitations to the condition of full access to the final R&D results could for instance include limitations to the duration of full access, or the scope of the access, etc. Limitations to the condition of access to pre-existing know how could for instance include limitations to the duration of access, the exploitation activity the access is linked to, etc.

Options 2 and 3 could be applied cumulatively.

56) **Conditions for exemption**. Based on your experience, how do the conditions for exemption affect the conclusion of R&D cooperation agreements? Please

consider agreements concluded by **all types of undertakings** (e.g. large, medium, small, etc.)

Conditions for exemption under the R&D BER	**Very negative**	**Negative**	**Neutral**	**Positive**	**Very positive**	**No opinion**
Condition of full access to the final R&D results	○	○	○	○	○	○
Condition of access to any pre-existing know-how of other parties if it is indispensable for the exploitation (e.g. production, distribution, application, assignment, licensing) of the R&D results	○	○	○	○	○	○

58) **Full access to the final R&D results**. Based on your experience, do you consider that a **limitation of the condition of full access to the final R&D** results would encourage the conclusion of R&D cooperation agreements that do not raise competition concerns? Please consider agreements concluded **by all types of undertakings** (e.g. large, medium, small, etc.).

- ○ Yes
- ○ No
- ○ No opinion

60) **Access to pre-existing know-how**. Based on your experience, do you consider that **limiting the condition to provide access to pre-existing know-how** would encourage the conclusion of R&D cooperation agreements that do not raise competition concerns? Please consider agreements concluded **by all types of undertakings** (e.g. large, medium, small, etc.).

- Yes
- No
- No opinion

62) **Impact (access to final R&D results)**. Based on your experience, what would be the impact of **limiting the condition of full access to the final R&D results** on the following aspects?

Impact on:	Very negative	Negative	Neutral	Positive	Very positive	No opinion
Competition on the market						
Prices						
Quality of products /services						
Innovation / Investment in R&D						
Self-assessment of horizontal R&D agreements						
Costs for business						
Legal certainty for businesses						
Harmonised application of competition						

rules by national competition authorities and national courts						

64) **Impact (access to pre-existing know-how)**. Based on your experience, what would be the impact of **limiting the condition to provide access to pre-existing know-how if such know-how is indispensable for the exploitation of R&D results** on the following aspects:

Impact on:	Very negative	Negative	Neutral	Positive	Very positive	No opinion
Competition on the market						
Prices						
Quality of products /services						
Innovation / Investment in R&D						
Self-assessment of horizontal R&D agreements						
Costs for business						
Legal certainty for businesses						
Harmonised application of competition rules by national						

competition authorities and national courts						

5.3) **Policy options regarding the Specialisation BER - Scope and conditions for exemption**

The Commission aims at clarifying the scope and the conditions for exemption under the Specialisation BER. Hence, the Commission is exploring the following separate options:

- Option 1: No change.

- Option 2: To widen the scope of the Specialisation BER by **expanding the definition of unilateral specialisation** to include agreements concluded between more than two parties; *and/or*

- Option 3: To verify whether **horizontal subcontracting agreements with a view to expanding production** in general would meet the requirements of Article 101(3) and hence should be included in the scope of the Specialisation BER; *and/or*

- Option 4: To review the conditions for exemption as regards **joint distribution** for unilateral or reciprocal cooperation agreements.

Options 2 to 4 could be applied cumulatively.

66) **Unilateral specialisation**. Based on your experience, do you consider that **expanding the definition of unilateral specialisation agreements to include agreements concluded between more than two parties** would allow to exempt pro-competitive agreements among competitors (actual or potential)?

*[The Specialisation BER defines 'Unilateral specialisation agreement' as an **agreement between two parties** which are active on the same product market by virtue of which one party agrees to fully or partly refrain/cease production of certain products and to purchase them from the other party, who agrees to produce and supply those products to it]*

- Very likely

- Likely
- Neutral
- Unlikely
- Very unlikely
- No opinion

68) **Horizontal subcontracting with a view to expanding production**. Based on your experience, do you consider that widening the exemption in the Specialisation BER to **include subcontracting agreements with a view to expanding production** would allow to exempt pro-competitive agreements?

[Under the Horizontal Guidelines, subcontracting agreements with a view to expanding production are agreements whereby the contractor entrusts the subcontractor with the production of a good, while the contractor does not at the same time cease or limit its own production of the good].

- Very likely
- Likely
- Neutral
- Unlikely
- Very unlikely
- No opinion

70) **Impact (unilateral specialisation)**. Based on your experience, what would be the impact of expanding the scope of the Specialisation BER by allowing **unilateral specialisation agreements between more than two parties** on the following aspects:

Impact on:	Very negative	Negative	Neutral	Positive	Very positive	No opinion
Competition on the market	○	○	○	○	○	○
Prices	○	○	○	○	○	○
Quality of products/services	○	○	○	○	○	○
Innovation	○	○	○	○	○	○
Level of production	○	○	○	○	○	○
Self-assessment of specialisation/production agreements	○	○	○	○	○	○
Costs for business	○	○	○	○	○	○
Legal certainty for businesses	○	○	○	○	○	○
Harmonised application of competition rules by national competition authorities and national courts	○	○	○	○	○	○

72) **Impact (expand production)**. Based on your experience, what would be the impact of expanding the scope of the Specialisation BER by **exempting horizontal sub-contracting agreements with a view to expanding production** on the following aspects:

Impact on:	Very negative	Negative	Neutral	Positive	Very positive	No opinion
Competition on the market	○	○	○	○	○	○
Prices	○	○	○	○	○	○
Quality of products/services	○	○	○	○	○	○
Innovation	○	○	○	○	○	○
Level of production	○	○	○	○	○	○
Self-assessment of specialisation/production agreements	○	○	○	○	○	○
Costs for business	○	○	○	○	○	○
Legal certainty for businesses	○	○	○	○	○	○
Harmonised application of competition rules by national competition authorities and national courts	○	○	○	○	○	○

5.3.1) ***Joint distribution***

- According to the *Specialisation BER*, unilateral and reciprocal specialisation agreements should only be covered by the regulation where they provide for supply and purchase obligations or joint distribution. Under this regulation, **joint distribution** means that the parties: (i) carry out the distribution of the products by way of a joint team, organisation or undertaking; or (ii) appoint a third party distributor on an exclusive or non-exclusive basis, provided that the third party is not a competing undertaking (recital 9 and Article 1 (1)(q) Specialisation BER).

- Under the *R&D BER*, **'joint' distribution** includes a scenario where only one party produces and distributes the contract products on the basis of an exclusive licence granted by the other parties (Articles 1(1)(m)(iii), 1(1)(o) and 3(5) R&D BER).

74) Based on your experience, what would be the impact of allowing under the Specialisation BER that **only one party distributes the contract products** on the following aspects:

Impact on:	Very negative	Negative	Neutral	Positive	Very positive	No opinion
Competition on the market	○	○	○	○	○	○
Level of market concentration	○	○	○	○	○	○
Volume of products in the market	○	○	○	○	○	○
Prices for consumers	○	○	○	○	○	○
Innovation/Investment in R&D	○	○	○	○	○	○
Investment in production	○	○	○	○	○	○

6 **Other areas for review**

The evaluation has identified **further areas** where the HBERs and Horizontal Guidelines may be improved. The following questions relate to such possible improvements.

6.1) **General questions**

77 Based on your experience, please indicate what would be the best way to determine which chapter of the Horizontal Guidelines takes priority in the assessment of a horizontal agreement that combines different types of cooperation and for which there may be different chapters that apply (e.g. an agreement combining R&D and commercialisation, or information exchange and joint purchasing):

- [x] The 'centre of gravity' that prevails for the entire cooperation [*two factors are relevant to determine the centre of gravity: (i) the starting point of the cooperation and (ii) the degree of integration of the different functions which are combined*]
- [ ] The nature of the activity that constitutes the starting point of the cooperation (e.g. R&D, production, etc.)
- [ ] The degree of integration of the different functions which are combined
- [ ] The nature of the activity that constitutes the end point of the cooperation (e.g. distribution, commercialization, etc.)
- [ ] The rules of the most stringent chapter of the Horizontal Guidelines
- [ ] Other criteria
- [ ] I do not know
- [ ] No opinion

78 Please explain your choice.

It is important to have a clear reference point for an efficient self assessment of a horizontal cooperation. Potentially having multiple different sets of categories/rules apply to one and the same cooperation would make a self assessment too complicated and burdensome. Furthermore, in case different sections or rules apply, companies will need to implement the most stringent ones. This may result in substantially reduced forms of cooperation, sacrificing some of the benefits such cooperation could bring to consumers.
Overall, it is important that a revised guidance on horizontal cooperation recognizes the pro-competitive and consumer benefits that may be achieved via cooperation.
To this end the "center of gravity" criteria seems the most appropriate, since the relevant factors to determine the center of gravity are clear and easy to determine at the outset of a cooperation. Trying to look at the endpoint might be difficult, because it may not always be clear what that point is at the time of the self assessment.

79) Based on your experience, should the Horizontal Guidelines clarify whether and in which circumstances Article 101 TFEU applies to horizontal agreements between a joint venture and its parent(s) provided that the creation of the joint venture did not infringe competition law? Please also consider in your answer the scenario of horizontal cooperation agreements between the parents of a joint venture outside the scope of the joint venture.

5000 character(s) maximum

A clarification on the circumstances under which Art. 101 TFEU applies to joint ventures and its parents would help creating more legal certainty for the self assessment.
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 can't 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".

6.2) **Information exchange**

The Horizontal Guidelines contain a chapter on information exchange. Paragraphs 55 and 56 explain that information exchange can take many different forms and can take place in different contexts. Information exchange is a common feature in many competitive markets and may generate various types of efficiency gains. Companies can for instance save costs as information sharing may allow them to calculate possible risks better.

Information exchange can also be necessary for the efficient distribution of goods and services. Information concerns data that is processed into a form that has meaning and is useful. The next questions concern the exchange of information.

80) Is information exchange relevant in your industry or sector? Please explain how it is relevant:

1000 character(s) maximum

Information exchange is an important base for a successful cooperation in most industries, in particular with digitalization, where the role of data and information will increase exponentially.

It is important that the relevant chapters are carefully revised to be fit for the digital age and not conflicting with other EC policy goals. It should be clear what the distinction is between “information” (under the restrictive chapter of information exchange) and “data” (under the probably more flexible chapter of data pooling). Criteria such as age of data or frequency of exchange need to be updated for the digital age.
The HGL should recognize that new forms of cooperation in the digital field / to develop sustainable solutions are generally pro-competitive, and that they require a certain degree of information exchange and data sharing to achieve their goals. Companies are lacking clear guidance with regard to the boundaries of permitted information exchange in such cooperations.

81) Have you shared information with your (potential) competitors, or do you intend to do so in the future?

at most 3 choice(s)

- [x] Yes: I shared information in the past
- [x] Yes: I am currently sharing information
- [x] Yes: I intend to share information in the future
- [ ] No
- [ ] Not applicable/no opinion

82) How did or do you share information?

at most 5 choice(s)

- [ ] Directly with one or more (potential) competitor(s)
- [ ] Through a common agency, such as business or industry association
- [ ] Through a third party that is not active on the same market
- [ ] Through my suppliers or retailers
- [ ] In another manner

84) Do you expect that information exchange in your industry or sector will change in the next 10 years, and if so, how?

5000 character(s) maximum

See our response to Question 21 above. With digitalisation of most industries and the increased focus on sustainability, the role of data and information will increase exponentially. Consequently, the need for information (data) exchange will continue to grow significantly.

Data pooling and data sharing

Technological advances have made it possible for companies to collect, store, and use large amounts of data. Timely access to relevant data has become important to compete in certain industries and sectors. Data pooling and data sharing allows companies to develop better products or services. However, data pooling and sharing arrangements may also become anti-competitive in certain scenarios. As with other types of information exchange, they may facilitate collusion when they enable undertakings to be aware of the market strategies of their

competitors. In addition, (potential) competitors who do not have access to important data may be foreclosed from the market.

The next questions concern data pooling and data sharing.

85) Is **data pooling** and **data sharing** important in your industry or sector?

- (●) Yes
- ( ) No
- ( ) I do not know

86) Please explain your reply.

1000 character(s) maximum

In the digital economy data is one of the key inputs in order to be able to offer innovative IoT and AI solutions, which will also play an increasing role in the traditional industries. Against this background and given the fragmentation of the European market, there will be a much greater need for data sharing in the future to maximize the benefits of big data for industries and consumers. Facilitating horizontal cooperation with regard to the commercial exchange of data among competitors will allow stakeholders to compete better within the current geopolitical ecosystem and to resolve any barriers to entry that may exist in current digital markets.
Therefore, it is crucial that the guidelines are updated in order to provide more legal certainty and respond to the challenges of data sharing in the digital economy, acknowledging the generally pro-competitive effects of such data pooling.

87) Have you been or are you involved in data pooling or data sharing or do you intend to do so in the future?

at most 3 choice(s)

- [ ] Yes, I was involved in data pooling/data sharing
- [ ] Yes, I am still involved in data pooling/data sharing
- [ ] Yes, I will take part in data pooling/data sharing in the future
- [ ] No
- [x] Not applicable / no opinion

Information exchange in dual distribution scenarios

The Horizontal Guidelines mainly cover agreements between (potential) competitors. The growth of e-commerce has led to many suppliers now selling their goods or services directly to end customers, thereby competing with their distributors at the retail level (dual distribution). While information exchange in a vertical relationship will often not raise competition concerns, the situation may be different if the supplier is competing with its distributors at the retail level.

The next questions concern information exchange in mixed horizontal and vertical relationships.

89) Are you or your supplier engaged in dual distribution?

at most 2 choice(s)

- [x] Yes, I am a supplier and I am also selling directly at retail level
- [x] Yes, I am a distributor and my supplier also sells directly at retail level
- [ ] No
- [ ] Not applicable / no opinion

90) In the context of the relationship between a supplier, a distributor and own retail outlet: are you involved in information exchange?

at most 4 choice(s)

- [x] Yes, I am a supplier and I exchange information with my distributors
- [x] Yes, I am a supplier and I exchange information with my own retail outlets
- [x] Yes, I am a distributor and I exchange information with my supplier
- [ ] Yes, I share information in another manner
- [ ] No
- [ ] Not applicable / no opinion

91) Is the information shared between suppliers and distributors at retail level different from the information shared between suppliers and their own retail outlets?

- (•) Yes
- ( ) No
- ( ) I do not know

92) Please explain your reply.

1000 character(s) maximum

It is widely accepted that an exchange of commercial information between operators at different levels of a vertical supply chain is part of a normal business dialogue. Such a business dialogue is generally a source of efficiency. Through its direct sales channel, a supplier will not receive the same level of detail and type of information. For example, a multinational may decide to only sell to certain, large customer or only into some territories where it makes economically sense to set up an own distribution network, while distributing its products to smaller customers or into smaller territories via distributors. If such a manufacturer is not able to receive information from its distributors on general pricing requirements, customer needs or similar commercially important information, it will not be able to react to such customer needs appropriately. Ultimately, this will be to the detriment of end users, businesses and consumers.

Other information exchange, data sharing and data pooling

The following question concerns both information exchange and data sharing and data pooling, through any means and in any scenario.

93) Do you feel disadvantaged by other companies who are sharing information or data?

- [x] Yes
- [ ] No
- [ ] I do not know
- [ ] No opinion/not applicable

94) Please explain what type of disadvantages you encounter:

5000 character(s) maximum

Companies active in the EU are more and more encouraged from a political level to join European initiatives, particularly in the digital field to enhance EU digital sovereignty. At the same time, they are being informed that the same cooperation may be problematic under the applicable EU (and national) competition laws, while lacking clear guidance or boundaries particularly with regard to information exchange or data pooling.

6.3) **Standardisation agreements**

The Guidelines on Horizontal Cooperation include a chapter on standardisation agreements and standard terms. The questions in this section cover these types of agreements.

For the purposes of the following questions, standard-setting organisations cover both the formal, open standardisation bodies and the private independent bodies, alliances, partnerships or initiatives whose purpose is to develop and adopt industry standards.

95) Have you engaged in standardisation efforts / the development of standards in standard setting organisations **or** in the development of standard terms in the past ten years?

- (•) Yes
- ( ) No
- ( ) No opinion/not applicable

96) Please list here the names of the standard setting organisations that you engaged in or the framework for the development of standard terms.

5000 character(s) maximum

ICLA members have engaged or advised business teams in relation to a variety of different standard setting organizations (SSOs).

97) Please provide the governance rules/working methods of the standard setting organisations that you have experience with.

- For those standard setting organisations where the governance rules/working methods are available online, please only include a list with the hyperlinks.

- For those which are not publicly available (including for standard terms), please upload the governance rules/working methods as a separate document in reply to this question

Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

98 Does any of the standard setting organisations that you have experience with also provide guidance on the meaning or interpretation of "FRAND"?

- (•) Yes
- ( ) No
- ( ) No opinion/not applicable

99 Please upload here any guidance on the interpretation or meaning of "FRAND".

Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

100) Do you have experience with standard setting organisations which require (for example in their Intellectual Property Rights ('IPR') policy) that participants disclose their IPR that might be essential for the implementation of the standard under development for instance by identifying specific IPR, specific IPR claims, applications to patent offices for IPR protection etc.?

- (•) Yes
- ( ) No
- ( ) No opinion / not applicable

101 Please describe here what level of disclosure is requested and when such disclosure should be made.

102) If you have experience with standard setting organisations that require participants to identify specific IPR, IPR claims or applications to patent offices for IPR protection (for instance in their IPR declarations to those standard setting organisations), which impact did such requirement have on:

Impact on:	Very negative	Negative	Neutral	Positive	Very positive	No opinion
Access to the standard	○	○	◉	○	○	○
The licensing of the essential IPR	○	○	○	○	○	◉
Any costs/burden for your organisation	○	○	○	○	○	◉
Benefits for your organisation	○	○	○	○	○	◉
The standard development/setting process in general	○	○	○	○	○	◉
Your respective industry/market(s)	○	○	○	○	○	◉

103) Please explain your choices. If possible, provide concrete information on costs/benefits to your organisation.

5000 character(s) maximum

Due to its broad membership, ICLA does not have a specific position as to the advantages or disadvantages of specific (vs. general) disclosure obligations. However, it is important to note that there is no one-size-fits-all solution when it comes to disclosure rules for SSOs. Different rules will apply to different SSOs, for different reasons.

104) Have you negotiated the licensing of standards essential patents (SEPs) with potential licensees that were part of a group (for example a licensing negotiation group)?

- ○ Yes, as owner of a SEP
- ○ Yes, as potential licensee of a SEP
- ○ No
- ◉ No opinion/not applicable

6.4) **Joint purchasing agreements**

The Guidelines on Horizontal Cooperation contain a chapter on joint purchasing agreements. Such agreements concerning the joint purchase of products by several buyers may take different forms and be used in different economic sectors. Such joint purchasing agreements usually aim at creating buying power vis-à-vis suppliers which often can lead to lower prices or better quality or services for consumers. Buying power may, under certain circumstances, also give rise to competition concerns.

The following questions concern such joint purchasing agreements, their qualification as either a restriction by object or a restriction by effect and the potential benefits and negative effects associated with the creation of buying power.

106) Have you negotiated the purchase of products / services together with other buyers?

- ◉ Yes
- ○ No
- ○ Not applicable

107) If yes, which sector(s) did this concern?

5000 character(s) maximum

Our members conclude joint purchasing agreements on a regular basis, especially when dealing with suppliers of indirect materials or costs like traveling, hotels, office suppliers, etc. Also in the

telecommunications sector, joint purchasing agreements have been concluded within the framework of broader partnership programs between operators and industry players, the scope of which has usually been limited to very specific products (e.g. the joint purchase of SIM cards). These arrangements enable companies to get better commercial offers and economic conditions in their purchases against upstream suppliers that may have strong bargaining power.

108) If yes, were the buyers, competitors or potential competitors?

- ○ Yes
- ◉ Yes, but only some of them
- ○ No
- ○ I do not know

110) Was there a separate (joint) entity (so-called '*central buying organisation*' in the form of a joint venture, a company in which the buyers hold shares, a contractual arrangement, or other looser forms of cooperation) in charge of the negotiation for the buyers?

- ○ Yes
- ◉ No
- ○ Not applicable

112) If no, please explain the nature and degree of integration between the buyers.

5000 character(s) maximum

See our response to Question 107 above. The agreements referred to did not necessarily include separate purchasing entities. In some instances, one company took the lead and negotiated on behalf of others the key terms, following which other parties could place their own orders.
Companies that part of the joint purchasing agreement are typically only bound by the contractual terms and conditions laid down in the joint purchasing agreements.

113) Which aspects of the joint purchasing were negotiated jointly with the group and which ones separately?

	Jointly	**Separately**	**Not applicable**
Price	◉	○	○
Certain element(s) of the price	◉	○	○
Definition/Assortment of products/services	◉	○	○
Quantity	◉	○	○
Timing	◉	○	○
Delivery	◉	○	○

Other	○	○	○

114) Please explain your reply. In particular, if you chose 'other', please specify which aspects were negotiated jointly and which ones were negotiated separately.

5000 character(s) maximum

See our response to Question 107 above. Different elements may be discussed, depending on the type of arrangement.

115) Based on your experience or knowledge, which of the following elements should play a role in qualifying joint purchasing either as a **restriction of competition by object or as a restriction of competition by effect** (several choices are possible)?

Qualification as a restriction by object or **by effect**	**Relevant** for qualification as **by object** restriction	**Not relevant** for qualification as **by object** restriction	**Relevant** for qualification as restriction **by effect**	**Not relevant** for qualification as restriction **by effect**	**No opinio**
Buyers are competing downstream	☐	☐	☑	☐	☐
Degree of integration on the buyer side (e.g. separate joint purchasing entity)	☐	☐	☑	☐	☐
Aggregated share of the buyers in total demand in the (upstream) purchasing market	☐	☐	☑	☐	☐

Degree of concentration of sellers in the (upstream) purchasing market	☐	☐	☑	☐	☐
Aggregated market share of the buyers in the (downstream) selling markets	☐	☐	☑	☐	☐
The buyer cooperation is secret towards sellers	☐	☐	☐	☐	☑
Other	☐	☐	☐	☐	☐

116) Please explain your choices for the elements that would play a role in qualifying such agreements as a restriction of competition by object or by effect.

5000 character(s) maximum

Joint purchasing can take many different forms and the effects can vary significantly based on the setup of the joint purchasing and the prevailing market conditions. ICLA therefore believes that joint purchasing should be assessed based on its effect in the relevant markets and should not be considered as relevant for “by object” restriction.

117) Based on your experience or knowledge, what would be **potential pro-competitive benefits** of joint purchasing agreements between buyers on the following elements (several options are possible)?

Potential pro-competitive benefits	**No** pro-competitive **benefits**	**Insignificant** pro-competitive **benefits**	**Some** pro-competitive **benefits**	**Significant** pro-competitive **benefits**	Do not know	No experience /knowledge
Prices for consumers	☐	☐	☐	☑	☐	☐
Prices for upstream suppliers	☐	☐	☐	☐	☐	☑
Prices for buyers, party to the purchasing agreement	☐	☐	☐	☑	☐	☐
Prices for buyers, not party to the purchasing agreement	☐	☐	☐	☑	☐	☐
Choice/quality of products for consumers	☐	☐	☐	☑	☐	☐
Choice/quality of products for upstream suppliers	☐	☐	☐	☐	☐	☑
Choice/quality of products for buyers, party to the purchasing agreement	☐	☐	☐	☑	☐	☐
Choice/quality of products for buyers, not party to the purchasing agreement	☐	☐	☐	☑	☐	☐
Innovation for consumers	☐	☐	☐	☑	☐	☐
Innovation for upstream suppliers	☐	☐	☐	☐	☐	☑
Innovation for buyers, party to the purchasing agreement	☐	☐	☐	☑	☐	☐
Innovation for buyers, not party to the purchasing agreement	☐	☐	☐	☑	☐	☐
Other	☐	☐	☐	☐	☐	☐

118) Based on your experience or knowledge, what would be **potential anti-competitive effects** of joint purchasing agreements between buyers on the following elements (several options are possible)?

Potential anti-competitive effects	**No** anti-competitive **effects**	**Insignificant** anti-competitive **effects**	**Some** anti-competitive **effects**	**Significant** anti-competitive **effects**	Do not know	No experience /knowledge
Prices for consumers	☐	☐	☐	☐	☐	☑
Prices for upstream suppliers	☐	☐	☐	☐	☐	☑
Prices for buyers, party to the purchasing agreement	☐	☐	☐	☐	☐	☑
Prices for buyers, not party to the purchasing agreement	☐	☐	☐	☐	☐	☑
Choice/quality of products for consumers	☐	☐	☐	☐	☐	☑
Choice/quality of products for upstream suppliers	☐	☐	☐	☐	☐	☑
Choice/quality of products for buyers, party to the purchasing agreement	☐	☐	☐	☐	☐	☑
Choice/quality of products for buyers, not party to the purchasing agreement	☐	☐	☐	☐	☐	☑
Innovation for consumers	☐	☐	☐	☐	☐	☑
Innovation for upstream suppliers	☐	☐	☐	☐	☐	☑
Innovation for buyers, party to the purchasing agreement	☐	☐	☐	☐	☐	☑
Innovation for buyers, not party to the purchasing agreement	☐	☐	☐	☐	☐	☑
Other	☐	☐	☐	☐	☐	☐

119) Please explain your choices for both the pro-competitive benefits and the anti-competitive effects. If you chose "other" please explain which elements you mean.

5000 character(s) maximum

The potential benefits and negative effects of joint purchasing agreement will depend on the concrete setup of the joint purchasing as well as the market conditions.

In general, joint purchasing agreements bring significant pro-competitive benefits. They enable companies to join purchasing efforts in particular in industries where scale plays an important role. Furthermore, lower costs resulting from joint purchases may also be relevant, not only in terms of product prices but also in terms of transaction, transportation and storage costs.

Joint purchasing may also create efficiencies in terms of the quality of the products, increased supply, incentives for further innovation and overall service to consumers. This also holds true for suppliers, as higher-volume contracts may support innovation incentives and translate in better products, wider choice and lower prices for consumers.

However, if the joint purchasing is covering a substantial part of the market, it can also have anti-competitive effects.

Joint purchasing agreements should therefore be analyzed on a case-by-case basis. However, it should also be recognized that they generally create pro-competitive efficiencies, that outweigh any competition law concerns pursuant to the assessment under Article 101(3) TFEU unless the combined market share on the purchasing market is too high.

Against this background, the “safe harbor” thresholds are too low and should be increased to 30% (in line with the VBER). The HGL should also distinguish between purchasing agreement in relation to “direct” and “indirect” material. They 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.

6.5) **Horizontal commercialisation agreements**

Commercialisation agreements involve co-operation between competitors in the selling, distribution or promotion of their substitute products. This type of agreement can have widely varying scope, depending on the commercialisation functions which are covered by the co-operation. At one end of the spectrum, joint selling agreements may lead to a joint determination of all commercial aspects related to the sale of the product, including price. At the other end, there are more limited agreements that only address one specific commercialisation function, such as distribution, after-sales service, or advertising.

120) Please explain for which of the following clauses/subjects of commercialisation agreements you consider that further guidance would be necessary in the Horizontal guidelines:

Clauses / Subjects	Yes	No	No opinion
Pricing	◉	○	○
Cross selling	◉	○	○
Data pooling/access to data/data sharing	◉	○	○
Algorithms	◉	○	○
Online sales	○	○	○

121) Please explain your reply.

5000 character(s) maximum

Further guidance on the aspects of pricing, data, and algorithms within commercialization agreements will be useful for digital and technology markets. In any event, as in the case of JVs and parent companies, a case-by-case analysis by the Commission would be welcomed to ensure that the Commission will also recognize the pro-competitive effects of commercialization agreements between companies. For example, when concluding commercialization agreements, companies are currently subject to high compliance costs (e.g. law firm advice and internal resources devoted to the legal and compliance analysis). Combined with the legal uncertainty around these type of agreements, these costs (in terms of money and time it takes to advise businesses) may be prohibitive and prevent companies from engaging in pro-competitive innovation in particular in technology and digital markets, which are generally global and fast-paced. Hence, a swift case-by-case analysis by the Commission would fasten joint initiatives whilst ensuring legal certainty.

In particular, companies have used commercialization agreements to be able to compete more effectively in the field of digital services. Facilitating such kind of horizontal agreements in a proportionate and harmonized way will create pro-competitive efficiencies and encourage digital innovation in the EU.

122) Based on your experience/knowledge, should the **scope of the chapter on commercialisation agreements** of the Horizontal Guidelines be extended in order to include the following categories of agreements?

	Yes	No	No opinion
Industrial Alliances	◉	○	○
Data commercialisation agreements	◉	○	○
Platforms	◉	○	○

123) Please explain your reply and in particular explain whether, for each category, you consider that the inclusion of specific examples in the Horizontal Guidelines would be sufficient to bring clarity and legal certainty to the assessment of these agreements.

5000 character(s) maximum

We welcome more guidance for these types of horizontal cooperation, especially regarding industrial alliances and data, as they are likely to become even more relevant in the coming years.

However, guidance should not be limited to examples, but should also provide specific steps to be followed by market players, to ensure legal certainty when entering into horizontal agreements in fast-paced markets such as technology and digital markets. In addition, guidance in terms of the scope of the horizontal cooperation, type of information to be exchanged, and possible pro- and anti-competitive effects is needed. This will allow companies to compete more efficiently in particular in markets that may be characterized by high investment costs and entry barriers.

Last, the revised Guidelines should include the conclusions of the most recent judgments of EU Courts, as well as acknowledge market developments and new forms of cooperating in the digital economy, including interoperability agreements, infrastructure sharing agreements and contracts regarding IoT or artificial intelligence.

124) **Consortia arrangements**. *According to paragraph 237 of the Horizontal Guidelines, consortia arrangements that allow the companies involved to participate in projects that they would not be able to undertake individually normally are not likely to give rise to competition concerns, as the parties to the consortia arrangement are not potential competitors for implementing the project. However, the Horizontal Guidelines do not provide any guidance on consortia arrangements among competitors (i.e. where the parties can compete on their own or are able on their own to meet the tender requirements)*. Based on your experience, do you consider that introducing a specific example regarding a consortium among competitors would provide sufficient guidance?

- (●) Yes
- ( ) No
- ( ) No opinion

125) Please explain your reply and, in particular, explain which specific aspects should be expressly assessed in the example.

5000 character(s) maximum

We would welcome the introduction of examples and further guidance on consortia agreements (e.g. in cases of joint bidding), in particular in terms of scope of cooperation, possible pro- and anti-competitive effects, and the type of information to be exchanged.

Overall, we believe that it is essential that the Horizontal Guidelines 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.

6.6) **Sustainability**

The evaluation of the current Horizontal Guidelines suggested that there is need for more guidance on the assessment of horizontal cooperation agreements that pursue sustainability objectives. The term sustainability objective for the purpose of this survey pertains to economic, social and environmental goals set out in Article 3(3) of the Treaty on European Union.

126) Have you been a party to cooperation agreements that pursue **sustainability objectives** or do you intend to conclude such agreements in the near future?

- (●) Yes
- ( ) No
- ( ) Not applicable

127) Could you please briefly describe the cooperation agreement(s) that you have concluded, or you want to conclude, and what sustainability objectives they pursued/would pursue?

5000 character(s) maximum

To tackle climate change, water pollution, loss in biodiversity and other sustainability challenges, businesses need to do their part. Reliance on European and European State initiatives will not be sufficient. As indicated in our initial submission on the EC consultation process on the review of the two Horizontal Block Exemption Regulations for horizontal cooperation agreements, the EC has a unique opportunity to be “part of the solution”. It shall encourage companies to cooperate by providing guidance on the circumstances in which joint efforts comply with EU competition law.

ICLA is of the view that the current Horizontal Guidelines must be reviewed to provide more detailed guidance, as well as more flexibility, when it comes to competitors working together to contribute to the EC “Green” agenda. In-house competition lawyers have a clear interest in a competition law regime that prioritises certainty, minimises costs and does not represent a disproportionate demand on businesses’ time and resources.

The five scenarios below are examples of possible cooperation among competitors which could help companies furthering their sustainability objectives and bring significant benefits from a sustainability perspective. These examples are provided for illustrative purposes and do not necessarily reflect actual agreements.

Scenario 1:

Faced with stringent new emissions targets to be complied with in five years time as part of the European Green deal climate package, a number of competitors in the chemicals sector consider collaborating in order to more quickly be able to achieve such targets. All companies individually will be able to comply with the targets by the deadline, but they believe that a collaboration could led to complying with the targets in three years time, generating both sustainability and customer benefits. Lowering emissions even further would require very significant investments, both collectively and (to an even greater extent) individually. The competitors do not propose to address what activities, if any, can or should be taken after the collaboration.

Scenario 2:

Aircraft engines present different levels of fuel efficiency. New technologies, aerodynamic designs and

materials have the potential to decrease greenhouse gas emissions significantly. Aircraft engine manufacturers would like to consider the following joint initiatives:
- Cooperate on R&D and the market deployment of new engines and other environmentally friendly technologies; and concomitantly
- Cease producing certain types of engines to achieve 20 percent lower fuel consumption and CO2 emissions by 2050 through their renewed range of engines.

These joint initiatives could ultimately lead to increased efficiency, less emissions and improved durability.

Scenario 3:

Several airlines are considering “zero waste” options. To multiply the benefits of their initiatives, they consider agreeing on big goals and in particular the two following initiatives:
- Reduce their reliance on single use plastics by 70% by 2030; and
- Charge passengers for the use of certain disposable items such as in-ear headphones, which are often left behind by passengers and not reusable by airlines.

The airlines would not discuss the types of single use plastic items they will remove or the price they intend to charge the passengers for the disposable items.

Scenario 4:

Two major aircraft engine manufacturers agree to pool their R&D efforts into more fuel-efficient engines by setting up a joint venture to complete the R&D and produce a new generation of engines. Their agreement prevents them from developing engines which would be more fuel-efficient than the ones developed by the joint venture, even if they are capable to do so.

Scenario 5:

Several airlines agree at a trade association meeting to (i) reduce their use of single use plastics by 70% by 2030 and (ii) charge passengers for the use of certain items, which are often left behind by passengers and not reusable by airlines (e.g., headphones). The first agreement will result in increased costs for the airlines and will indirectly impact the airline catering companies. The second agreement will result in passengers being charged for some services.

128) Could you please specify the type of agreement(s) that you have concluded or intend to conclude? Please choose one or more of the following:

- [x] Joint Research & Development
- [x] Standard Setting
- [ ] Standard terms
- [x] Joint Production
- [x] Joint Purchasing
- [x] Joint Commercialisation
- [x] Information exchange
- [ ] Other
- [ ] Not applicable

130) Could you please explain your motivation/incentives/purpose to conclude such cooperation agreements? Please choose one or more of the following:

- [ ] Contributing to sustainability objectives
- [ ] Improving reputation
- [ ] Profit making
- [x] Contribution to sustainability objectives and profit making
- [x] Contributing to sustainability objectives and improving reputation
- [ ] Profit making and improving reputation
- [x] Required by law/regulation
- [x] Other
- [ ] Not applicable

131) If you replied 'Other', please specify.

5000 character(s) maximum

Besides contributing to sustainability objectives and improving reputation, some contemplated collaborations are also aimed at:

- Pooling knowledge and expertise, raising the funds available, and sharing the risks, especially when the initiatives and investments are associated with uncertain results; or
- Building standards which will apply across the industry or the supply chain, allowing the relevant stakeholders to monitor and evaluate the impact of their initiatives on the environment.

132) Are you required by law/regulation to comply with certain sustainability targets? Please explain what law/regulation and what sustainability targets you are bound by.

5000 character(s) maximum

An increasing number of governments and regulators around the world (consider) implement(ing) sustainability commitments with legally binding targets.

For instance, the EU is developing legislation to mandate the use of sustainable fuels in the aviation sector (ReFuelEU initiative).

Furthermore, companies that employ some of ICLA's members do not belong to sectors subject to binding targets, but have nevertheless established internal sustainability commitments to meet environmental and investment objectives.

133) Please indicate whether your company has tried to pursue the stated sustainability objective on its own before considering cooperating with competitors?

- (•) Yes
- ( ) No
- ( ) Not applicable

134) Please explain what prompted you to consider cooperation with your competitors instead of pursuing the stated sustainability objective on your own and why the agreement was necessary to reach that objective.

5000 character(s) maximum

Through product, service, price or image differentiation, a business will be able to provide superior value to customers and differentiate itself from its competitors, thus gaining a competitive advantage. Businesses increasingly incorporate sustainability in their differentiation strategies, i.e., they seek to provide customers with something unique in terms of sustainability and different from their competitors' products and services. Thus, whenever possible, businesses will prefer to approach sustainability initiatives on a unilaterally basis. In some instances, however, if there is a risk that (i) a unilateral move results in only negligible effects on, e. g., carbon emissions and/or (ii) the company's initiative translates into a competitive disadvantage because it is the only one pursuing a certain sustainability objective (e.g., because of the significant costs associated with it), there is a possibility that the company will not pursue that objective. In such circumstances, a company may be interested in exploring opportunities for collaboration with its competitors as a way to achieve scale and/or overcome this first mover disadvantage.

135) Do you have the means and methods to measure or assess the **positive and /or negative impact** of your agreements on sustainability?

Impact of your agreement on sustainability	Yes	No	Not applicable
Positive impact	◉	○	○
Negative impact	◉	○	○

136) If your reply was 'yes', please could you give concrete examples?

5000 character(s) maximum

In order to track their achievements vis-à-vis their sustainability goals, some businesses have developed key metrics and collect data to measure the impact of their activities on sustainability. Governments and regulators have also come up with methodologies and calculators.

For example, methodologies have been developed to calculate the carbon dioxide emissions from air travel, based on the aircraft load factor, the aircraft fuel burn, etc. The impact of an agreement among airlines to fly more slowly could potentially be measured using these methodologies.

In the telecommunications sector, companies follow standards of the Scope 3 emissions, according to the GHG Protocol. Similarly, under the Eco-Rating initiative, which seeks to provide information on the environmental impact of producing, using, transporting, and disposing of smartphones, operators measure environmental impacts according to the improvements of mobile handset rating over time.

138) Have you abstained from concluding an actual cooperation agreement that pursued sustainability objectives for fear that you may breach competition rules (e. g. Article 101 TFEU that prohibits anti-competitive agreements)?

◉ Yes

○

No

Not applicable

139) If your reply was ‘yes’, please explain what concerns you have had and what specific aspect(s) of the rules you have been afraid you might breach.

5000 character(s) maximum

On a number of occasions, companies that employ ICLA members have abstained from concluding (or even discussing) cooperation agreements that pursued sustainability objectives for fear that they could breach competition rules.

The main hurdle to sustainability cooperation is probably the lack of legal certainty. ICLA members call for the EC to provide guidance on the assessment of agreements that serve sustainability objectives. Today, many initiatives are abandoned at inception phase because of fear of competition law implications. Companies (and in particular their in-house counsels) need detailed guidance setting out the main criteria that the EC will follow in assessing sustainability cooperation projects under Article 101 TFEU (including Article 101(3) TFEU).

Another major concern is the EC’s approach to the criteria set out in Article 101(3) TFEU. For instance, paragraph 49 of the current Horizontal Guidelines provide that the concept of “consumers” encompasses the customers, potential and/or actual, of the parties to the agreement (see also paragraph 219 of the current Horizontal Guidelines). That narrow interpretation seems difficult to reconcile with the EC’s ambitions and the climate urgency we are facing. ICLA calls for the definition of consumer in the current paragraph 49 to include the future generation(s) of consumers in line with the 2030 and 2050 milestones of the EU Green Deal. We note in this regard the recent publication by the EC of the Competition Policy Brief No 1/2021, which is confusing in some aspects. It is for instance indicated that benefits achieved on separate markets could be taken into account “provided that the group of consumers affected by the restriction and the group of benefiting consumers are substantially the same”, while stressing that these are sound principles which “allows [sic] sustainability benefits that accrue for the benefit of society as a whole, to be taken into account.”

140) Based on your experience, please indicate any concrete provisions in the current Horizontal Guidelines that in your view need to be revised to facilitate cooperation agreements pursuing sustainability objectives. Please explain your reply.

5000 character(s) maximum

In addition to the provisions identified above, ICLA calls for the following changes:
- 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 examples that “future generations of consumers will benefit from a lower consumption of fuel by 2030”).
- 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).
- 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.

141) Please indicate in which chapter(s) of the current Horizontal Guidelines it would be helpful to have more specific guidance on the assessment of agreements pursuing sustainability objectives? Please explain your reply.

5000 character(s) maximum

ICLA calls for the EC to introduce a separate chapter on environmental agreements as it was the case in the 2001 Guidelines.
The content of this new chapter could come from both the standardisation chapter of the current Guidelines (with some amendments) as well as from some best practices at national level or examples shared by companies in response to the EC’s consultations. It should also clarify the conditions as to when cooperations will likely fall outside the scope of Article 101(1) TFEU, rather than defaulting to a detailed Article 101(3) effects analysis. ICLA would also welcome a strong message that sustainability collaboration is actively encouraged as no one can achieve the goal alone.
The new chapter could 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 and that collaborations that contribute to these goals can more easily be exempted.

142) Do you have any additional comments that you want to make in relation to the assessment of cooperation agreements pursuing sustainability objectives?

5000 character(s) maximum

ICLA members are of the view that climate change, water pollution, loss in biodiversity and other sustainability challenges call for the possibility to exceptionally and voluntarily ask and get comfort letters in order to have legal certainty for these often massive investments and cooperations with competitors to tackle these emergencies and effectively contribute to the Green Deal. Those reassurances should be provided in a timely manner without the need for extensive investigations, to make sure that companies maintain the incentives to promote the Commission’s and their own sustainability objectives. It should be clear relatively early whether the objectives that are being promoted are genuine, and do not seek to hide a series of anti-competitive outcomes.
In the above-mentioned Competition Policy Brief, EC officials indicated that “the Commission remains ready to consider requests for individual guidance letters in relation to sustainability initiatives that raise novel issues.” ICLA welcomes this announcement and would like the Commission to consider the publication of those guidance letters if the parties agree to it, or at least publish aggregated and anonymized decision practice that could benefit a broader group of market players – without revealing factual details about the envisaged cooperation in case those are confidential. Over time, the boundaries of permissible sustainability cooperation will become clearer and the need for, e.g., comfort letters will likely decrease. Yet, as things currently stand, any additional guidance provided by the EC would certainly be a welcome development for in-house lawyers.

7 Additional remarks

143) Please feel free to **upload a concise document**, such as a position paper, explaining your views in more detail or including additional information and data. Please note that the uploaded document will be published alongside your response to the questionnaire that is the essential input to this open public consultation. The document is an optional complement and serves as additional background reading to better understand your position.

Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

144) Do you have any **further comments** on this initiative on aspects not covered by the previous questions?

5000 character(s) maximum

Legal certainty and procedural issues

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.

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 the following tools should be used or introduced, to be available to companies in addition to self-assessments:

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.
Applying these procedures would also create more decisional practice which could be made available to third parties subject to confidentiality concerns, and will facilitate the self-assessment of companies.

When introducing these tools, it is of utmost importance that any guidance by the Commission will be provided within a reasonably short time in view of the fast-moving pace of some markets.

145) Please indicate whether the Commission services may **contact you** for further details on the information submitted, if required.

- (•) Yes
- ( ) No

THANK YOU FOR YOUR COOPERATION

Contact

COMP-HBERs-REVIEW@ec.europa.eu