RESPONSE TO EU HORIZONTALS CONSULTATION

APRIL 2022

1. Introduction

1.1 Baker McKenzie welcomes the opportunity to provide views on the Draft Research and Development Block Exemption (R&D BER), the Draft Specialisation Block Exemption (Specialisation BER) (together the HBERs), and the draft horizontal co-operation guidelines (Draft HGL).

1.2 We wish to submit comments in relation to: (i) the centre of gravity of the cooperation; (ii) agreements between joint ventures and parents; (iii) the Specialisation BER; (iv) the R&D BER; (v) information exchange; (vi) joint purchasing; (vii) consortia arrangements; and (viii) sustainability.

2. Centre of gravity

2.1 We consider that it makes sense for the prevailing centre of gravity for the entire cooperation to take priority. We welcome the clarifications in paragraph 7 of the Draft HGL, which now provide that the guidance on R&D agreements will prevail in relation to horizontal agreements involving both R&D and joint production, where the joint production would only take place if the joint R&D is successful. However, we consider that the HGL should also make it clear that, similarly, R&D should be the relevant centre of gravity in relation to agreements involving both joint R&D and joint commercialisation.

2.2 Collaboration agreements are increasingly complex and typically involve a combination of R&D, joint production/specialisation, distribution etc. The word "decisive" at paragraph 7 of the Draft HGL is unhelpful - the requirement that the results of the R&D are "decisive" for the joint production, in order for the "centre of gravity" of the agreement to be on R&D seems excessive. As long as there is meaningful R&D at the centre of joint R&D efforts, the R&D BER and HGL should apply. And meaningful R&D means that there should be uncertainty as to whether the product in question will ever reach market authorization stage.

3. Agreements between joint ventures and parents

3.1 We welcome the inclusion of paragraphs 12 - 14 in the Draft HGL on agreements between joint ventures and parents, in particular the statement in paragraph 13 that "*when it is demonstrated that the parents exercised decisive influence over the joint venture, the Commission will not typically apply Article 101(1) to agreements and concerted practices between the parent(s) and the joint venture.*." However, we do not agree with the second part of that sentence: "*…concerning their activity in the relevant market(s) where the joint venture is active*.", nor with the third bullet in that paragraph which states that the Commission will typically apply Article 101(1) to agreements between the parents and joint venture "*outside the product and geographic scope of the activity of the joint venture*." In our view the HGL should make clear that Article 101(1) will not apply to any agreements at all between the parent(s) and the joint venture where there is sufficient evidence that they have (i) the ability to exercise decisive influence over the conduct of the subsidiary and (ii) actually exercised decisive influence.[1] This would include agreements that do not concern their activity in the relevant markets where the joint venture is active.

3.2 In particular we invite the Commission to explicitly confirm that Article 101 does not apply to agreements between a JV and its 50:50 parents; and to agreements between a JV and a parent who exercises decisive influence via a minority shareholding in the JV.

3.3 Treating agreements between the JV and its parents as intra-group that fall outside of Article 101 is supported by the CJEU judgment in *Dow v Commission*[2]. This judgment confirms that each 50:50 parent can be liable for the conduct of their JV, and that the JV and each parent are part of the same undertaking. See also *Avebe*, which confirms that a JV forms a single undertaking with a parent that exercises decisive influence over it.[3]

3.4 We have considered a number of scenarios, each of which could be seen as falling outside of Article 101, on the basis that the JV is part of the same undertaking as each of its parents that jointly exercise decisive influence and effective control over it, and would be grateful for clarification in the HGL:

[1] C-172/12 P *EI du Pont de Nemours v Commission* EU:C:2013:601, para. 42; T-104/13 *Toshiba v Commission*, EU:T:2015:610, para.94.
[2] C-197/12; EU:C:2013:605.
[3] T-314/01 *Avebe v Commission* EU:T:2006:266 paras. 138, 139.

- A and B set up a JV, AB, with which they do not compete. AB imposes RPM onto A.
- A and B set up a JV, AB. A and B are competitors but only A remains in the same market as AB:
    (i) AB sends pricing information up to each of A and B
    (ii) AB and A coordinate joint sales
- A and B set up a JV, JV1. B is in another JV with C, called JV2. On the basis that the two JVs are part of the same economic entity, please confirm that any agreement between JV1 and JV2 would be outside the scope of Article 101.

4. SPECIALISATION

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

Objective criteria for counterfactual

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

4.3 In paragraph 227 the Draft HGL propose that restrictive effects are unlikely when the agreement enables the parties' launch of a product or service which they would otherwise, on the basis of objective factors, not have been able to. (Missing) technical capabilities of the parties are named as the only example. In practice, often more important is the economic viability of a launch. It might be technically possible, in the near or at least mid-term, for each party to independently invest and launch a product or service. However, the investment costs and uncertainties associated with the launch of such a new product or service would likely lead them to abandon them.

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

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

4.5 More clarity would be helpful with respect to the question when, according to the Commission, production represents the "main economic activity" (cf. paragraph 240 of the Draft HGL) and when exactly the Commission considers that the production costs represent a "large proportion" of the variable costs (cf. paragraph 246,). The share provided in example 3 (paragraph 308) as a singular example provides insufficient guidance in relation to a question that is highly relevant in practice and often comparatively easy for undertakings to estimate.

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

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

Joint Production and Joint Distribution

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

4.9 In this respect, it should be useful for the Commission to explore why the R&D BER allows joint exploitation by virtue of *one party* as the sole distributor (Art. 3 (5)), as opposed to an exploitation "only" by a team, organisation, undertaking or third party under the Specialisation BER (cf. Art. 2 (4) (b) in the Draft Specialisation BER).

Safe harbour threshold

4.10 We suggest reconsidering the 20% 'safe harbour' thresholds in the HGL /Specialisation BER, which has remained unchanged in the draft version of the revised HGL. As previously suggested, the threshold should be increased to 25% which is, after all, a safe harbour for transactions under EU merger control.

5. R&D

5.1 We welcome the efforts of the Commission to revise the rules of the existing R&D BER. In our view, additional guidance in this area is important, since companies are often reluctant to collaborate in the field of R&D in light of the threat of a competition law infringement. In addition, the current rules are complex and difficult to apply in practice.

5.2 The Draft R&D BER does not constitute a revolution but rather a (modest) evolution of the previous rules. The focus of the Commission is to simplify and clarify a number of issues, which should facilitate the application in practice. In this respect, we welcome the simplification of the grace period following the seven-year exemption (Art. 6 paragraph 5 Draft R&D BER) and the more flexible method when calculating market shares (Art. 7 Draft R&D). In addition, we consider the new section of the Draft HGL dealing with R&D to be very helpful for understanding and applying the rules of the R&D BER, including its various concepts and definitions in practice.

5.3 However, the Commission is missing an opportunity to prepare the ground for real change. The proposed rules will not be sufficient to trigger a boost of innovation across Europe by removing costly compliance bottlenecks and freeing exploitation of the results of costly and risky R&D efforts. We consider it crucial to provide greater certainty to market players when cooperating in the R&D space in the future. This holds in particular true for small and medium sized enterprises ("SMEs"), which have great difficulties in applying the existing rules.

5.4 We hope that the Commission will be bolder when adopting the final rules, also addressing some of the issues outlined below:

Concept of innovation markets difficult / impossible to apply in practice

5.5 According to the Commission, the evaluation showed that the text of the R&D BER is not sufficiently adapted to agreements for the development of new products, technologies and processes and for R&D effort directed primarily towards a specific aim or objective (so – called "R&D poles"). In this respect, the Draft R&D BER proposes to no longer exempt agreements where less than three competing R&D efforts would remain in addition to and comparable with those of the parties to the R&D agreement (see Article 6 paragraph 3 Draft R&D BER). In addition to this new 3 plus 1-rule, the Draft R&D BER defines the terms "competition in innovation" and "R&D poles". Innovation competition refers to R&D efforts for new products and/or technologies that create their own new market. R&D poles refer to R&D efforts directed primarily towards a specific aim or objective arising out of the R&D agreement.

5.6 The inclusion of innovation markets in the assessment marks quite a departure from the previous block exemption (which only referred to competition in existing products and technologies for the market share assessment, see recital 19-21 of Regulation 1217/2010). This concept and the newly introduced 3 plus 1-rule has the potential to limit the application of the block exemption considerably.

5.7 While in theory it is appropriate to also assess the competitive landscape on the innovation markets, the concept is extremely difficult to apply in practice. First, R&D efforts are often carried out in a confidential manner, so that the relevant information is simply not available. Secondly, it is very difficult (or even impossible) to assess the level of competition at the very early stage of R&D efforts. In practice, parties to R&D agreements (often) already fail to determine their market position on the respective product and particular technology markets. An analysis of markets, which do not even exist, appears even more difficult (if not impossible) to carry out.

5.8 In addition, the reference to at least three competing R&D efforts is simply not a realistic benchmark which is workable in practice. In fact, it will be very difficult for the parties of the R&D agreement to identify any competing R&D efforts at all.

5.9 Against this backdrop, we ask the Commission to reconsider the inclusion of competing R&D efforts, in particular establishing a 3 plus 1-rule, since this new concept is not workable in practice and has the potential to hinder innovation.

Revised definition of "potential competition" does not sufficiently address the shortcomings of the current test / additional guidance needed

5.10 The Commission has slightly modified the definition of “potential competitors”. Article 1 paragraph 17 item b) Draft R&D BER no longer includes a reference to a small but permanent increase in prices. In addition, the Draft HGL include some helpful aspects (stemming from examples of the EU courts), which may be relevant in the analysis (paragraph 17 Draft HGL). While the Drafts for the new BER and the HGL have addressed some of the concerns, the concept of a "potential competitor" is still very challenging to apply in practice and leads to great uncertainties in the application of the safe harbour provided by the block exemption.

5.11 In this respect, we would welcome more guidance and further simplification by the Commission (including guidance with respect to the evidentiary burden the parties have to meet).

Catalogue of hard-core restrictions in R&D efforts should be removed/reduced at least for SMEs

5.12 The Commission has not changed the catalogue of hard-core restrictions (now in Article 8 of the Draft). In light of the pro-competitive nature of most of the R&D agreements, we would welcome the elimination of, or at least reducing, the catalogue of hard-core restrictions. In our view, for instance, it is not consistent that the exemption for price coordination at Art. 8 paragraph 3 of the Draft R&D BER does not cover joint exploitation by way of specialisation and requires the existence of a joint team or entrustment to a third party.

5.13 In addition, we advocate for a general exemption for SMEs (also from the restrictions listed in Article 8 of the Draft BER), since the collaboration of small market players in R&D generally does not have a negative effect on competition.

6. Information Exchange

6.1 In its Inception Impact Assessment, the Commission acknowledges "*some additional potential problems that could be tackled through a revision of the texts*" without specifying what these are, apart from an adaptation to recent developments relating to digitisation and the pursuit of sustainability goals; in addition, it acknowledges that the evaluation identified areas in the HBERs and HGLs that are "*not always perceived as coherent with enforcement decisions and case law issued since their adoption*".

6.2 In that regard, and as set out in our previous submissions, we want to reiterate that we still see a need for coherence with enforcement decisions and case law at national level. As we have already laid out in our previous consultation responses of February 2020 and October 2021, we see that there is an inconsistent application of competition law with regard to information exchange by NCAs. The HGL should address, in particular, whether past information exchange, not related to price or quantity, should be subject to an "effect assessment" rather than a "by object" assessment. The Draft HGL in paragraph 448 provides little guidance referring to any exchange of competitively sensitive information ***capable of*** removing

uncertainty between participants as a by object restriction. And there must be a consistent approach in relation to “hub-and-spoke" scenarios".

6.3 We have already commented in our previous submissions on the need to clarify whether the principles set out in paragraph 74 of the HGL on "by object" restrictions could also apply to other forms of information exchange. The Draft HGL in paragraph 450 now clarifies when forms of information exchange constitute a cartel, but just as important is clarity on when information exchange is, in and of its nature not in the "by object assessment.". It should be clear and self-evident why a practice is assumed by the Commission to be harmful to competition, and the Draft HGL do not provide this clarity.

6.4 In that regard, and in addition to the comments we have already made, the Commission should address on a general and broader level in a revised section on information exchange in the HGL where and why it considers information exchange particularly harmful.

6.5 It should draw, in particular, a distinction between purpose and mere awareness as well as a direct involvement in a horizontal information exchange as opposed to the role of a facilitator or "hub" in a "hub-and-spoke-scenario". The Commission should clarify that the potential level of harm caused by the facilitator should not be assessed at the same level as that for the competitors involved in the "hub- and-spoke" arrangement[4].

Information exchange in relation to dual distribution

6.6 We recommend an amendment in relation to the treatment of information exchange in the dual distribution context, specifically paragraph 48 of the Draft HGL which contains a reference to dual distribution scenarios but does not currently explain that information exchange in that context will fall to be assessed exclusively under the VBER and Vertical Guidelines subject to certain exceptions. We therefore suggest the following amendments to paragraph 48:

48. "[…]However, to the extent that vertical agreements, for example, distribution agreements, are concluded between competitors, the effects of the agreement on the market and the possible competition problems can be similar to horizontal agreements. Therefore, vertical agreements between competitors fall under these Guidelines, ***unless they fall under the VBER or the Vertical Guidelines. Where competitors enter into a non-reciprocal vertical agreement and one of the conditions in Article 2(4), points (a) or (b) apply, such an agreement is exclusively assessed under the VBER and the Vertical Guidelines (see Article 2(4) of the VBER), and not under these Guidelines****. This also applies to any exchange of information between the parties, which is exclusively assessed under the VBER and the Vertical Guidelines, except for information exchange that is not covered by Article 2(5)[5] of the VBER or the Vertical Guidelines.***

6.7 We also note that the heading of section 6.2.4.2 refers to "Indirect information exchange and exchanges in mixed vertical/horizontal relations", while the section itself only addresses the indirect exchange of information. We therefore recommend that the heading is limited to “Indirect information exchange”.

6.8 Finally, we suggest the amendment below to make it clear that situations of dual distribution (within the meaning of Article 2(4) VBER) will be assessed exclusively under the Vertical Guidelines even where they are not technically ‘covered by the VBER’ because of the supplier’s market share for example. We believe that this was the Commission’s intention (since it would not make sense to treat a ‘vertical’ dual distribution agreement as having been transformed into a ‘horizontal’ relationship simply because the supplier’s market share exceeded 30 per cent). However, we would be grateful if the Draft HGL were amended to make this clear.

357. The only exception to the two-step process mentioned in the previous paragraph is in case of non-reciprocal distribution agreements between competitors where (a) the supplier is a manufacturer, wholesaler, or importer and a distributor of goods, while the buyer is a distributor and not a competing

[4] Cf. ECJ C-194/14 P - *AC-Treuhand v. Commission*.

[5] As regards the actual text of Article 2(5) of the VBER, we strongly recommend that Article 2(5) be amended in order to operate as a broader exemption for information exchange in the vertical context with specific carve-outs for specific exchanges in a dual distribution scenario which would instead fall to be considered under the Horizontal Guidelines.

undertaking at the manufacturing, wholesale or import level, or, (b) the supplier is a provider of services at several levels of trade, while the buyer provides its services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services ~~that are covered by the VBER~~, to which these Guidelines do not apply. Paragraph 48 provides additional guidance on the general relationship between these Guidelines with the VBER and the Vertical Guidelines

7. Joint Purchasing

7.1 We generally support the Commission's revised approach to joint purchasing agreements in the Draft HGL. We welcome the clarification that the HGL will apply to joint purchasing arrangements in all sectors.

Definition of joint purchasing

7.2 We fully endorse the approach that the guidance applies not only to actual joint purchases (i.e. the pooling of actual purchases through the joint arrangement) but also to joint negotiations (including by licensees of a SEP license) where the actual purchases are left to individual members of the joint purchasing arrangement. This is a very important and helpful clarification. Joint negotiations are key to enabling buyers to exert collective bargaining power in order to obtain more favourable prices or other terms, and offering significant cost savings which may be passed on to consumers. It would be helpful to rename the section in the final guidelines as "Purchasing Agreements and Negotiations, as this would make it even more clear that the section applies to joint negotiations as well as joint purchasing.

7.3 We agree with the clarification that a joint purchasing arrangement may also engage in additional activities such as joint distribution, quality control, and warehousing. However, we would welcome explicit recognition in the HGL that such "additional" elements will not shift the centre of gravity where the joint purchasing is at the centre of the collaboration.

7.4 Regarding paragraph 314 of the Draft HGL, whilst we agree with the approach in principle, we consider that the HGL should also include guidance on the principle of objective necessity and how it could apply to the assessment of a joint purchasing arrangement. This would be consistent with the judgment in *Gottrup Klim*[6], which says that an exclusivity restriction does not fall within Article 101(1) if it is limited to what is necessary to ensure that the arrangement functions properly and maintains its contractual power in relation to producers. In that case, the exclusivity restriction was not assessed as a vertical restriction but as an ancillary restriction. We are concerned that the absence of any narrative on objective necessity in paragraph 314 could be seen to imply that the doctrine is not applicable to the assessment of a joint purchasing arrangement. We note that objective necessity is mentioned later in paragraph 325, but further guidance on how it could apply in practice would be welcome. It would be helpful to include examples of restrictions in joint purchasing agreements that could be regarded as ancillary to the functioning of legitimate purchasing groups.

Buyer cartel vs. legitimate joint purchasing arrangements

7.5 As is clear from the comments provided by many stakeholders in the previous consultations on the HGL, it is important that the Commission distinguishes legitimate joint purchasing from an outright buyer cartel, particularly given that the Commission has taken enforcement action against a number of purchasing cartels recently (AT.40018 *Car Battery Recycling*; AT.40410 *Ethylene*; AT.40547 *Styrene Monomers*; AT.40466 *French Supermarkets*).

7.6 Paragraphs 316 - 322 of the Draft HGL are a significant improvement on the current HGL, which do not offer any meaningful guidance on the difference between a purchasing cartel and legitimate joint purchasing. We agree that a "restriction by object" categorisation should be reserved only for discussions/agreements between competitors on purchase prices which have no connection whatsoever to any conceivable (joint) purchasing initiative. The key difference between legitimate joint purchasing and a purchasing cartel is that in the latter, there is no actual joint purchasing or joint negotiation. We agree

[6] C-250/92; *Gøttrup-Klim and Others Grovvareforeninger v Dansk Landbrugs Grovvareselskab*; ECLI:EU:C:1994:413

that, absent a legitimate reason (i.e. to enter into joint purchasing or joint negotiations), a discussion on purchase prices is likely to amount to a cartel.

7.7 We would welcome an explicit statement in the HGL that genuine joint purchasing arrangements should always be analysed "by effect" and subject to assessment under the HGL.

7.8 Paragraph 319(a) of the Draft HGL indicates that where the joint purchasing arrangement has not made it clear to suppliers that it jointly negotiates and binds its members on terms and conditions of their individual purchases or purchases jointly for them, this could be relevant to the finding of a buyer cartel. We consider that it would be simplistic to conclude that an element of secrecy is determinative to finding a "by object" restriction. Not only is secrecy not a requirement of a finding of a by object restriction; it is also not a sufficient condition for such a finding. We do not agree with the last sentence in paragraph 319(a). As long as suppliers are aware that an amount of pooling is being done (even if that knowledge is indirectly through third parties or press reports), this should be sufficient. . We note that footnote 180 of the Draft HGL states that secrecy is not a requirement for finding a buyer cartel. We recommend that this be moved to the main text of the HGL.

7.9 We agree with the proposal in paragraph 319 (b) that a written agreement between the parties in relation to the joint purchasing agreement may be relevant to the assessment. This would be a prudent step for the parties to take. However, the HGL should nonetheless make clear that the absence of a written agreement does not necessarily indicate a buyer cartel.

7.10 We do not find the wording in paragraph 321 helpful, in particular the word "disguised". Whilst purported to address joint purchasing, the harm that this paragraph describes is in fact a downstream cartel. This conduct would be more accurately described as a spillover, rather than a disguised buyer cartel, and should be subject to its own separate analysis, distinct from the joint purchasing arrangement.

7.11 We endorse the statement in paragraph 322 that a joint purchasing arrangement aimed at excluding an actual or potential competitor from the same level of the selling market amounts to a collective boycott and a "by object" restriction. This is consistent with previous case law, such as *Pre-Insulated Pipe Cartel.*[7] The reference in this paragraph to "the same level of the selling market" is important. We think it would be helpful for the HGL to expand this paragraph to make clear that such horizontal boycotts are a restriction "by object", whereas a vertical boycott, which involves purchasers in a downstream market agreeing among themselves not to deal with certain suppliers in the upstream market, should be subject to an effects analysis.[8]

Market power

7.12 In our view, paragraph 324 should make it clear that that competition concerns are less likely where the parties do not compete in selling market(s) and not just where they do not have market power in such markets. We also consider that the current market share thresholds of 15% in the upstream and downstream markets are too low and we urge the Commission to consider raising them. We note that in *Gottrup Klim*, the market shares were significantly higher (over 30%). We consider that the market share threshold should be increased to 30%, which would be in line with *Gottrup Klim* and the safe harbour under the current and the revised draft EU Verticals Block Exemption Regulation (which includes dual distribution and intra-brand- akin to intra-purchasing collaborations). An analogy can be made between the effects of joint purchasing and mergers - joint purchasing involves less coordination than a full merger - if no anti-competitive effects would arise from a merger, it is unlikely that any would arise under a joint purchasing agreement. At the very least, the Commission should consider increasing the market share threshold to 25%, in line with the safe harbour for EU merger control under the EU Horizontal Merger Guidelines, on the basis that a joint purchasing agreement can be no more restrictive of competition than a merger of its members.

7.13 The revised guidance in paragraphs 331 - 337 on how market power may be assessed is welcome.

[7] OJ [1999] L 24/1

[8] See Horizontal Guidelines on Delineation between purchasing agreements: by object and by effect restrictions; Whish & Bailey. paragraph 2.34 kd0722013enn_purchasing_agreements.pdf (europa.eu)

Commonality of costs

7.14 We broadly agree with the revised section on collusive outcome. However, the relevance of commonality of costs (and how this is assessed in practice) should be further explored in order to provide more useful guidance. Throughout the draft HGL, there are references to "high" or "significant" commonality of costs without any concrete guidance on what this actually means. For example, in paragraph 351, 50% of commonality of costs is considered to be high, whilst in the example at paragraph 352, 80% is considered as significant.

7.15 In practice, it is difficult to assess whether cost commonality is significant, and will usually be industry-specific e.g. 80% commonality of costs in a highly competitive market may not necessarily raise competition concerns. After ten years of practice under the current HGL, it would be useful to understand how the Commission would assess commonality of costs in practice. At an OECD meeting in 2010, the Commission was asked "*how the EU would assess whether common costs raise concerns in the downstream market. What factors can be used…to determine whether common costs significantly influence price?*" The Commission responded that "*there is no specific percentage that can be used to define what significant means. One has to look at the major components of the downstream price, the abilities of the companies to shift the other components, and the importance of the component that is fixed and common to all*."[9] It would be useful to understand how the Commission has developed its thinking since then.

8. Consortia arrangements

8.1 We agree with the proposal to include a dedicated section on joint bidding/bidding consortia in the HGL, given the importance of this area. Clear guidance is necessary, given the prevalence of practice and lack of case-law in this area. We welcome the distinction that the Commission makes between bid-rigging and joint bidding, and that it recognises that joint bidding should be treated more leniently.

8.2 Paragraph 394 of the Draft HGL states that joint bidding can sometimes be an object restriction of competition and sometimes an effects restriction. We disagree with this approach. In our view, the HGL should expressly acknowledge that joint bidding arrangements whereby companies pull their resources together in order to submit an improved offer, even between actual or potential competitors, should not be deemed 'by object' restrictions, but rather should always be assessed against an effects standard. In our experience, economic theory, empirical research and past experience does not support the categorisation of joint bidding (even between actual or potential competitors) as a by object restriction of competition.

8.3 If the Commission decides to maintain the current approach in the Draft HGL, we consider that it is important to explain as clearly as possible the circumstances in which joint bidding will amount to an object restriction of competition and the circumstances in which it will be assessed as an effects restriction, illustrated with case studies). This needs to be clear for businesses and their advisors, given the significant consequences of the distinction. Paragraph 394 does not offer any real guidance on that and it simply refers to the general criteria for assessing commercialisation agreements.

8.4 It is also important for businesses to understand how to assess, in the specific context of joint bidding, whether they are actual or potential competitors. The current guidance (paragraph 237[10]) is helpful in the sense that it seems to focus on the practical reality: only treating as competitors companies that could bid individually for a particular contract. However, further guidance is needed on, for example, how to assess whether a company has the ability to bid individually. The Commission could break this down further by explaining that 'ability to bid' means the ability to meet the tender specifications – in terms of having sufficient spare capacity, equipment, staff, regulatory permits, quality certifications, etc. We do not think that a company should be treated as a competitor where it does not have sufficient capacity to bid individually and could only acquire such capacity by assuming significant financial risk. .

[9] https://www.oecd.org/competition/cartels/49139867.pdf

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

8.5 It would be helpful to include in the HGL a list of practical steps that companies can take in order to reduce the risk that a joint bid breaches competition law. For example (i) how to manage the risks involved in information exchange between competitors at each stage of a project and (ii) what information should, in the interests of transparency, be provided to the purchasing body (e.g. the fact a bid is, in fact, a joint bid; the extent to which members may be participating in more than one consortium etc.)[11]

8.6 The Draft HGL only includes one case study which focuses on how joint bidding would be assessed under Article 101(3) TFEU. We consider that more case studies on bidding consortia would be helpful. These could provide examples of how to assess whether companies are actual or potential competitors, and whether specific joint bidding restrictions amount to an object or an effects restriction.

9. Sustainability

9.1 We welcome the re-introduction of a chapter on sustainability agreements. We consider that this represents a significant step forward in unlocking the benefits of sustainability collaborations for society and consumers. It sends a signal to businesses that the Commission encourages co-operation which some may not yet have contemplated due to perceived antitrust concerns.

9.2 In particular, we recognise a number of important policy advances:

- A broad definition of sustainability which extends to social objectives (e.g. labour and human rights) (para 543). This makes sense for businesses for whom the goals are often connected: projects that pursue social or economic objectives can make it easier to achieve green objectives, and the impact of climate change can disproportionately affect those in disadvantaged areas
- Explicit recognition that cooperation agreements may be necessary to fill the gap which remains when residual market failures are not solved by public policy and regulation (*para. 546, Draft HGL*)
- Recognition that first-mover concerns can restrain individual action *(para. 585)*
- The internalisation of negative externalities as benefits in the sense of Art. 101 (3) TFEU *(para. 578*/*579*) and the taking into account of the collective impact of those benefits (in principle) in the Article 101 (3) assessment (*Section 9.4.3.3*).
- The taking into account of whether an agreement genuinely pursues a sustainability objective when determining whether or not a restriction is anticompetitive by object. (*para 559*)

9.3 Overall, we think the chapter is a laudable contribution to the debate and we hope it will inspire other antitrust authorities outside the EU to provide guidance under their own national laws. We also highlight the areas below for further consideration and extra guidance.

More guidance on when an agreement will have no impact on competition

9.4 The Draft HGL contain a reminder that sustainability agreements will not be anticompetitive if they do not affect parameters of competition such as price, quality, quantity, choice or innovation. However, the subsequent examples (e.g. relating to internal conduct or industry-wide awareness raising) are relatively narrow.

9.5 We therefore encourage the Commission to provide more guidance on collaboration which will fall outside Article 101.1.

9.6 For example, the HGLs could make a more general statement that, when the agreement has no impact on the parties' market conduct, either because there is no individual obligation placed on the parties, or because the parties are only loosely committed to contributing to the attainment of a sector-wide environmental target, the agreement is not caught by Article 101(1). That is because of the full discretion that is left to the parties as regards the means technically and economically available to attain the joint objective and the agreement has no impact on the market. This would be

[11] See for example paragraph 3.10 of the Irish Competition and Consumer Protection Commission's guidance on consortium bidding: TCA Report Template (ccpc.ie).

in line with the example set out in para. 553, according which to which sustainability agreements for the mere creation of databases with suppliers that have sustainable value chains, or use sustainable inputs, will not raise competition concerns under Article 101(1) if they do not require the parties to purchase or sell from these third party suppliers or distributors.

9.7 In addition, the scope of sustainability agreements that fall outside Article 101(1) could be further expanded based on case law. The HGLs could codify the principle that horizontal commitments agreed on a sector-wide basis do not fall within Article 101(1) – as it was held in key illustrative cases: *ACEA, JAMA/KAMA*[12] and *CEMEP*[13]. These are particularly on point – e.g. JAMA relates to commitments to reduce carbon dioxide emissions from new passenger cars.

Last, further guidance is needed on when sustainability efforts will not have an appreciable effect on price competition to consumers and will therefore fall outside Article 101(1). In particular, it would be helpful to focus on when an increase in cost would not be expected to result in a price increase to consumers because of its *de minimis* size or because the highly competitive conditions in the upstream market mean that any price increase would be unlikely to be passed on to consumers. This guidance could also explain when sustainability cooperation would not be expected to have an appreciable impact on competition because of a low degree of commonality of costs.[14]

Compliance with legal / regulatory norms

9.8 The HGL should confirm that where compliance with sustainability goals set by the government is not self-evident (e.g. due to a lack of oversight and enforcement, corruption), cooperation, agreements among direct or indirect importers in Europe aimed at local compliance would not fall within Article 101.1 (consistent with the idea that competition law does not seek to protect illegal competition).

Public interest considerations

9.9 While footnote 315 refers to the *Wouters* line of case law, the text suggests that the Commission interprets this case law very restrictively ("legitimate objectives pursued by certain professions") *(para. 548 and footnote 315)*.

9.10 We think there are strong parallels between sustainability and the objectives protected in this line of cases.[15] Further, Advocate General Mazak's opinion in *Pierre Fabre* was that 'private voluntary measures' may fall outside the scope of Article 101(1) pursuant to the *Wouters* doctrine, provided the limitations imposed are appropriate in the light of a legitimate objective sought and do not go beyond what is necessary in accordance with the principle of proportionality.

9.11 It is true that the Advocate General added that the legitimate objective sought must be of a public law nature and therefore be aimed at protecting a public good. However, it would seem reasonable for *Wouters* to be invoked where firms enter into agreements pursuant to a clearly articulated public policy.[16]

9.12 We would therefore encourage the Commission to at least indicate that it will consider if legitimate sustainable considerations exclude the application of Article 101 on a case-by-case basis.

The soft safe harbour requires some clarifications

9.13 Our reading of para. 572 – second indent is that a sustainability standard that is binding on the parties can still benefit from the soft safe harbour provided that the seven conditions set out in para. 572 are met. In other words, competing undertakings could agree not to manufacture or buy outside of a label, provided that the sustainability standard is (i) open and transparent; (ii) does not impose on third party companies

[12] Case COMP/37.634 JAMA and Case COMP/37.612 KAMA (1999), Commission Press Release IP/99/922, 1 December 1999
[13] CEMEP (2000), Commission Press Release IP/00/508, 23 May 2000.
[14] See for example the arguments contain in this Opinion: https://api.fairwear.org/wp-content/uploads/2016/06/OpiniontoFWF-TheApplicationofEUCompetitionLawtoFWFLivingWageStandardfinal1.pdf
[15] In *Meca-Medina*, the rules were to safeguard "equal chances, […] the integrity and objectivity of competitive sport and ethical values in sport". The concept of "ethical values in sport" is analogous to the values inherent in sustainability objectives.
[16] In any event, even under a more restrictive interpretation, query why a business organisation such as one under a UN charter whose remit is to combat climate change should not be treated any less favourably that the Dutch bar or a 'mere' sporting organisation such as the IOC or International Skating Union.

outside the agreement any obligation to comply with the standard; (iii) leaves the parties to the sustainability agreement free to abide by higher sustainability standards; (iv) does not allow the exchange of competitively sensitive information; (v) open and non-discriminatory to third parties who might wish to join later; (vi) does not lead to a significant price increase or reduction of choice; and (vii) there is monitoring mechanism to ensure compliance with the sustainability standard. .

9.14 An explicit recognition that a binding sustainability standard whereby companies that participate in the agreement commit not to manufacture or buy outside of a label falls outside Article 101(1) would be very helpful for firms that wish to pursue sustainability goals through standards but concerned about first-mover disadvantage. However, the HGLs should clarify that this is the intended meaning so as to avoid any perceived ambiguity. The current drafting also leaves room for confusion when citing that companies are "*free to also operate outside the label*" as a reason why a collaboration may lack appreciable anti-competitive effects *(para. 575),* and when stating that the "*non-exclusive*" nature of a sustainable label is one of the factors making appreciable negative effects unlikely *(page 146)*.

'By object' analysis

9.15 The Draft HGL identify as a 'by object' restriction an "agreement between the parties to the sustainability standard to put pressure on third parties to refrain from marketing products that do not comply with the sustainability standard" (*para. 571*).

9.16 We do not consider this to be inherently anti-competitive:

(a) If by "third parties" the Commission is referring to competitors, we would point out that having market-wide standards is not necessarily harmful where parties can compete on other elements (as is clear from the soft safe harbour). Free-riding can occur where sustainable and non-sustainable standards co-exist.

(b) If "third parties" is a reference to distributors or suppliers, we would argue that it can be imperative for companies to ask those parties to comply with the standard in order for the sustainable benefits of the agreement to arise.

9.17 Consequently, we consider that the last sentence of paragraph 571 should be removed. Failing that, we consider that the HGL should clarify what is meant by pressurising or obliging third parties to comply with a standard and how this will be assessed.

'Benefits' (not 'efficiencies') and pass-on to consumers

9.18 As a general point, it would be helpful for the Commission to emphasise in para. 576 that the Chapter 9 Article 101(3) framework applies to all agreements that pursue sustainability as one or more of their objectives, even if the agreement is covered by another chapter of the HGL.

9.19 The Draft HGL use the term "*benefits*" as well as "*efficiencies*". We consider "*benefits*" to be more accurate because this corresponds to the wording of the TFEU, and allows a wider range of improvements in the sustainability context to be more readily recognised as relevant. This includes cleaner technology, less pollution and water contamination (*paras. 577 and 578*).

9.20 We also welcome the Commission's recognition (consistent with the 2004 exemption guidelines) that it is not always necessary to carry out a detailed assessment where "*the competitive harm is clearly insignificant compared to the potential benefits*" (para 589). This will often be the case particularly in relation to cooperation to fight climate change (see, for example, paras 53 to 56 of the ACM draft guidelines[17]).

9.21 Individual non-use benefits: it is very encouraging that the Commission recognises that fact that consumers may derive value from knowing that a product benefits others. However, it is unlikely to be useful while it is tied to consumers' willingness to pay:

[17] See https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf,

(a) Collaborative projects may not get started out of fear that, where consumers are willing to pay for more sustainability, they will fail to qualify as indispensable under Article 101(3).

(b) Negative externalities "*are not sufficiently taken into account by the economic operators or consumers that cause them*" *(para. 545)*. As the Commission acknowledges, there can be striking differences between stated and revealed preferences, *(paras. 597-598)*.

9.22 Willingness-to-pay is therefore an unsuitable measure to assess individual non-use benefits. It will therefore be very difficult to engage in collaborations with confidence on the basis of non-value benefits while they are tied to willingness to pay. This is likely to be particularly damaging

9.23 Collective benefits: this category of benefits is particularly important given the difficulties described above. However, the Commission's apparent requirement that full compensation of the direct users in the relevant market is required (*para. 603*) is in practice extremely limiting.

9.24 This is inconsistent with the "polluter pays" principle and effectively introduces a "polluter-must-benefit" requirement-which is highly undesirable from a policy perspective and not supported by Treaty provisions. It disregards the protection of those who must pay the cost for unsustainable consumption but cannot reduce it. The restrictive notion of collective benefits adopted by the HGL would result, in many cases, in geographic and social boundaries being drawn around issues for which collective responsibility should be taken.

9.25 In that connection, we agree with the ACM's conclusion in its Legal Memo[18] that out of market benefits are relevant and full compensation of directly affected consumers is not required in all cases – and not supported by the text of Article 101(3) TFEU (which requires only "fair", not "full" share to consumers) and the case law of the Court of Justice in *Mastercard* requiring no more than "*appreciable objective advantages*" for the affected consumers. We strongly encourage the Commission to consider this and refer to fair compensation or the wording of *Mastercard* in the HGL.

9.26 We also query what will count as "collective benefits" and how they will be measured. The more benefits that are taken into account, the greater the chance of a positive environmental impact, so it is hoped that the Commission will take into account all global benefits that objectively occur – i.e. that accrue to society as a whole.

Indispensability: more examples of indispensable cooperation are needed

9.27 The draft HGLs state that where EU or national law requires undertakings to comply with concrete sustainability goals, cooperation agreements and the restrictions they may entail, cannot be deemed indispensable for the goal to be achieved, unless such coordination is indispensable for reaching the goal in a more cost-efficient way. (See para. 583)[19] In our view, this is too broad an assumption. Many regulations are intended to address sustainable initiatives, and the Draft HGL's assumption would make it highly risky to collaborate in the same space. In reality, legislation may be insufficient, especially where regulatory standards reflect the lowest common political denominator achievable at the time of their introduction.

9.28 The Draft HGL's assumption also contradicts the concept of residual market failure that the Commission very helpfully introduces into the draft HGLs (*para. 586*). Where neither individual action nor regulation effectively remedies the consequences of unsustainable business and related negative externalities, collaboration should be allowed to fill the gap – in these instances, banning additional standards, notably those more stringent than required the law, would lead to absurd results.

[18] ACM Legal Memo, 27 September 2021, What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context?

9.29 In any event, cooperation may be justified in order to achieve a concrete goal either more quickly[20] or to go beyond that goal. Therefore, the HGL should be explicitly extended to include situations where collective efforts ensure that the improvements obtained are more effective or can be delivered sooner, or exceed the goals, as recognised by the ACM.[21]

State compulsion –more flexibility needed

9.30 We consider that the HGL could set forth a more generous approach to the state compulsion defence in relation to sustainability agreements without the risk of giving rise to a blanket defence We consider that where corporate action conforms to clear and precise government policy, there should at least be a defence in the sense that no resulting coordination is considered a 'by object' infringement.

9.31 In its equivalent guidelines, the ACM states that with regard to sustainability agreements that have been made public, and where its guidelines have been followed in good faith, but which later turn out not to be compatible with the Dutch Competition Act, adjustments to such agreements may be agreed on in consultation with ACM, or following an ACM intervention. In such cases of *bona fide* sustainability agreements, the ACM has also said that it will not impose any fines.[22]

9.32 It would be very helpful and welcome if the Commission would also provide reassurance to businesses that it will not impose fines in cases where businesses genuinely follow the HGLs in good faith to pursue sustainability goals.

The examples of Sustainability Agreements require refinement

9.33 Example 4: we do not agree with the Commission's analysis/conclusion that the described cooperation would not meet the criteria under Article 101(3):

(a) The analysis does not recognise that competition between the producers that are proposing the standard has, so far, only led to 20% of their output coming from sustainable wood. This in itself is strong evidence that an agreement is needed and could be considered to be "indispensable" to achieve sustainability goals.

(b) The analysis also relies on a very narrow approach to the "willingness to pay" principle and ignores benefits of such agreement to other consumers (as a result of slowing down deforestation).

9.34 Example 5: we note that this is a pared-down version of *CECED*. That is because not all machines are being phased out; the net benefit on price/costs on its own is positive (even before the collective benefits are taken into account); and only the collective environmental benefits to these consumers are taken into account. In *CECED*, the Commission held that "the environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers"[23]. We therefore consider that the Commission should present an example which reproduces the key elements of *CECED*.

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[20] For example, attaining legally mandated recycling targets (e.g. via plastic taxes) may require industry players to jointly source recycled plastics, thus inciting recyclers to increase currently scarce plant capacities, or to align packaging materials or formats to ensure a more effective national recycling system.

[21] See https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf, Section 5.

[22] See https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf, Section 6.

[23] CECED 1999 L187/470 OJ 2000