ICC comments on the revised Research and Development Block Exemption Regulation ("R&D BER") and the revised Specialisation Block Exemption Regulation ("Specialisation BER", together the "HBERs") and Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements ("HGL")

Contents

Introduction

(1) The International Chamber of Commerce ("**ICC**") welcomes the opportunity to provide views on the revised Research and Development Block Exemption Regulation ("**R&D BER**") and the revised Specialisation Block Exemption Regulation ("**Specialisation BER**", together the "**HBERs**") and Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements ("**HGL**"). This submission is made by ICC in response to the European Commission's ("**Commission**") public consultation on the HBERs and HGL published on 1 March 2022.[1]

(2) Overall, ICC supports the changes proposed by the Commission to the existing HBERs and HGL, which will increase clarity and legal certainty, and will provide an updated framework to deal with trends and developments that have emerged since the adoption of the current rules. As outlined below, however, ICC considers that in some areas there is room for further amendments and clarifications, which ICC would encourage the Commission to consider adopting. A number of points made below are also relevant across multiple areas, in particular:

(a) Market share thresholds would benefit from an increase across the board, to improve consistency with other areas of competition law, and allow a greater number of companies to benefit from the rules;

(b) Certain aspects should be further tailored to cater for the specific needs of small and medium sized enterprises ("**SMEs**"), which face considerable practical obstacles in interpreting and applying the rules;

(c) Greater efforts should be made to ensure consistency and a smooth interplay with other relevant Commission's soft law instruments, which will remain applicable alongside the revised horizontal rules; and

(d) In the interest of legal certainty, it would be helpful if the Commission considered increasing its guidance particularly with respect to novel and developing areas, which present unfamiliar challenges for companies, and therefore arguably require a more "assisted" approach.

(3) The remainder of this submission is arranged in nine sections dealing with the following topics: (i) Joint Ventures; (ii) R&D agreements; (iii) specialisation agreements; (iv) purchasing

[1] Unless otherwise stated, in the remainder of this submission all references to the HBERs and HGL should be read as referring to the revised draft HBERs and HGL, as published by the Commission.

agreements; (v) commercialisation agreements; (vi) information exchange; (vii) standardisation; (viii) sustainability agreements; and (ix) procedural aspects.

1. Joint Ventures

(4) ICC welcomes the inclusion of further clarifications on the application of Article 101 TFEU to agreements between parents and their controlled joint ventures. A number of amendments could however be considered in order to further improve clarity.

(5) In particular, as regards the question of whether Article 101 TFEU applies to agreements between parents and their controlled joint ventures, the statement that the Commission will "typically" not apply Article 101 TFEU to agreements and concerted practices between parents and controlled joint ventures, concerning their activity in the relevant market(s) where the joint venture is active, suggests that in certain circumstances the Commission could do so. However, according to the case law cited, where a parent exercises decisive influence over its joint venture the two entities form part of the same undertaking, and as such Article 101 TFEU does not apply. Therefore, unless the Commission considers there to be some exception to this rule (which should be clarified accordingly), the word "typically" should be removed.

(6) Moreover, paragraph 13 HGL states that the Commission will typically apply Article 101 TFEU to agreements between the parents and the joint venture "outside the product and geographic scope of the activity of the joint venture". We assume that this statement refers to the *Sumal* judgment,[2] which however does not appear to be relevant in this context, insofar as it relates to the circumstances in which a subsidiary can be liable for an infringement committed by a parent. Conversely, in our view *any* agreement that a joint venture enters into with a parent should by definition be considered to be within the scope of its activities. As such, we recommend omitting this statement from paragraph 13.

(7) In addition, paragraph 14 HGL suggests that parent companies would themselves be considered to form part of the same undertaking as each other on the markets where the JV is active.[3] In line with the case law,[4] we suggest making clear that, for the purposes of the intra-group exception, parent companies remain independent of each other, and do not form part of the same undertaking in *all* circumstances, including those in which a parent retains activities in the same market as the JV.

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2 Case C-882/19 *Sumal* ECLI:EU:C:2021:800

3 Through the reference to parents being "*independent on all other markets*".

4 Case C-179/12 *Dow Chemical Company*, ECLI:EU:C:2013:605, paragraph 58.

2. R&D Agreements

(8) ICC welcomes 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.

(9) Admittedly, the proposed R&D BER does not constitute a revolution, but rather a (modest) evolution of the previous rules. It appears that the Commission's efforts were focused on simplifying and clarifying a number of issues, which should facilitate the application of the relevant rules in practice. In this respect, we welcome the simplification of the grace period following the seven-year exemption[5]) and the more flexible method when calculating market shares.[6] In addition, we consider the new section of the 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.

(10) However, in our view the Commission risks missing an opportunity to prepare the ground for a real change. The proposed rules are unlikely to 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 true for SMEs in particular, which have great difficulties in applying the existing rules.

(11) We hope that the Commission will be bolder when adopting the final rules and address some of the issues outlined below.

2.1 Concept of innovation markets is difficult / impossible to apply in practice

(12) 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 R&D BER proposes to no longer exempt agreements where less than three competing and comparable R&D efforts would remain in addition to those of the parties to the R&D agreement.[7] In addition to this new 3 plus 1-rule, the 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, and efforts concerning R&D poles pursuing similar aims or objectives as those covered by the R&D

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5 R&D BER, Article 6(5).

6 R&D BER, Article 7.

7 R&D BER, Article 6(3).

agreement. R&D poles refer to R&D efforts directed primarily towards a specific aim or objective arising out of the R&D agreement.

(13) The inclusion of innovation markets in the assessment marks quite a departure from the current R&D BER (which only refers to competition in existing products and technologies for the market share assessment).[8] This concept and the newly introduced 3 plus 1-rule have the potential to limit the application of the block exemption considerably.

(14) 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. As such 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 fail to determine their market position on the respective product and technology markets. An analysis for markets, which do not even exist, appears even more difficult (impossible) to be carried out – indeed, R&D is a dynamic process, and what may have started as R&D for a given product/application may evolve/pivot to pursue a very different product/application (*i.e.* to compete with different "poles").

(15) 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, and certainly not with the level of specificity required by paragraph 151 of the HGL (comparability of competing R&D efforts).[9]

(16) Against this backdrop, we would 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 unlikely to work in practice and has the potential to hinder innovation.

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

(17) The Commission has slightly modified the definition of "potential competitors". Article 1 paragraph 17(b) R&D BER no longer includes a reference to a small but permanent increase in prices.[10] In addition, the HGL include some helpful aspects stemming from examples of the

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8 See Recital 19-21 of the current R&D BER.

9 The problem is greatly exacerbated by the fact that the three competing and comparable R&D efforts under the new 3 plus 1-rule may include not only R&D efforts in which a third party currently engages, but also R&D efforts "*in which a third party is able and likely to independently engage*" (R&D BER, Article 1 paragraph 1(19)).

10 For consistency, paragraph 123 HGL could also note that that for a company to be considered a "potential competitor", it has to be likely that it will undertake the necessary investments *even if* there is no small but permanent increase in relative prices.

EU courts, which may be relevant in the analysis.[11] While the new BER and 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.

(18) In this respect, ICC would welcome more guidance and further simplification by the Commission (including guidance with respect to the evidentiary burden expected of the parties).

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

(19) The Commission has not changed the catalogue of hard-core restrictions.[12] In light of the pro-competitive nature of most of the R&D agreements, ICC would welcome a discussion around eliminating, or at least reducing the catalogue of hard-core restrictions. In our view, for instance, it is not clear why the exemption for price coordination at Article 8 paragraph 3 of the 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.

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

3. Specialisation Agreements

(21) Specialisation agreements have long benefitted from favourable treatment under EU competition rules as a category of agreements worthy of exemption. ICC supports the Commission's decision to continue to treat these agreements favourably, and welcomes the changes and clarifications brought about in the Specialisation BER and accompanying guidance set forth in the HGL.

(22) While ICC overall supports the changes proposed by the Commission, which will arguably simplify and materially improve the regime applicable to specialisation and production agreements, there are certain areas that would benefit from further amendment or clarification, as further detailed below. A number of these are supported by considerations relating specifically to SMEs, which seem particularly necessary in the context of the Commission's policy decision not to introduce any "special treatment" as such in favour of SMEs.

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[11] HGL, paragraph 17.

[12] R&D BER, Article 8. Incidentally, we note that paragraph 170 HGL intends to summarise the hardcore restraint set out at Article 8(6) R&D BER; however, the current drafting could be improved as it does not properly capture the Article 8(6) restraint.

3.1 Market share threshold

(23) We note that the relevant market share threshold (*i.e.* 20%) for the application of the Specialisation BER has remained aligned with the current regime, despite several calls from stakeholders to increase it. In this respect, we would respectfully encourage the Commission to reconsider its position and increase the threshold to at least 25%, if not 30%, as previously requested by several respondents to the Commission's consultations. This would bring it in line with the Commission's approach in assessing horizontal mergers and would allow a greater number of companies to benefit from the efficiencies generated by specialisation.

(24) The increase should similarly apply to the 'safe harbour' set out in the HGL with respect to agreements falling outside the definition of specialisation agreements included in the Specialisation BER.

3.2 Market share calculation

(25) We welcome the additional clarifications set out in the Specialisation BER and HGL with respect to market share calculation. In particular, we support the Commission's proposal to (i) allow companies to calculate shares over a three year period where appropriate, depending on relevant market dynamics; (ii) simplify the "grace period" during which the Specialisation BER continues to apply in case shares are subsequently exceeded, by removing the two steps as well as the 25% cap and specifying that the share increase might affect "*at least one of the markets concerned by the specialisation agreement*"; and (iii) clarify that the market share threshold applies if the agreement concerns intermediary products.

(26) We note, however, that the proposed changes do not fully cater for the difficulties that SMEs typically encounter in calculating market shares. SMEs tend to specialise in niche areas and, in addition, frequently lack the technical skills and/or access to external advice to properly assess their market position, which might discourage them from considering co-operation mechanisms. We understand that the Commission has ruled out granting a general exemption to SMEs, for example through a legal presumption that agreements between SMEs fall below the relevant threshold. However, ICC believes that there would be merit in at least pursuing alternative solutions, as previously brought to the Commission's attention.[13]

3.3 Unilateral specialisation

(27) ICC fully supports the Commission's proposal to expand the definition of unilateral specialisation to agreements between more than two parties. Indeed, the efficiencies and pro-competitive effects brought about by such agreements are similar, if not greater, than those arising when two parties are involved.

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[13] AEDC, *Specialisation Agreements and SMEs – Final Report*, page 26.

3.4 Joint production

(28) ICC would recommend that a further clarification is included with respect to the definition of joint production, which is presently limited and somewhat circular (as it is defined as an agreement by virtue of which parties agree to produce "*jointly*").[14]

(29) Specifically, and consistent with the definition of joint distribution, joint production should be deemed to exist, in the context of otherwise genuine co-operation, even where companies rely on third parties to produce the relevant products. As such, the parties would be free to contract-out production without the specialisation agreement losing its status under the Specialisation BER. As noted elsewhere, this amendment would be particularly beneficial for SMEs, which are usually subject to bigger production constraints or have less manufacturing options.[15]

3.5 Joint distribution

(30) ICC notes that the Specialisation BER continues to allow companies to jointly distribute the relevant goods or services, and in that context agree on resale prices. However, the HGL have also retained the wording that such *"restriction*" is available only if "*the parties would not otherwise have an incentive to enter into the production agreement in the first place*".[16] In this respect, it would be appropriate to clarify that a resale price restriction would be acceptable where limited to the products jointly produced and sold to the immediate customers, in line with the relevant wording of the Specialisation BER,[17] and in circumstances where the joint distribution is necessary for the joint production agreement to exist in the first place.[18]

(31) Moreover, ICC would encourage the Commission to expand the concept of joint distribution to include looser forms of "coordinated" distribution, which as noted elsewhere would be particularly beneficial for SMEs.[19]

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14 Specialisation BER, Article 1(a)(3).

15 AEDC, *Specialisation Agreements and SMEs – Final Report*, page 14.

16 HGL, paragraph 218(b).

17 Specialisation BER, Article 5(1).

18 A cross-reference to paragraph 225 of the HGL could also be contemplated.

19 AEDC, *Specialisation Agreements and SMEs – Final Report*, pages 18-19.

3.6 Subcontracting agreements

(32) ICC fully supports the Commission's proposal to expand the application of the safe harbour set out in the HGL to all types of horizontal subcontracting agreements, including, but not limited to, those aimed at expanding production.[20]

(33) However, as noted above, it would be appropriate for the Commission to also clarify that companies are free to contract-out responsibility for production without the agreement losing its status under the Specialisation BER.

3.7 Concept of potential competitor

(34) ICC welcomes the Commission's additional clarifications brought to the concept of "potential competitor" under the Specialisation BER. We note, however, that additional guidance might be helpful with respect to the circumstances in which "realistic grounds" may be considered to arise, in line with relevant EU case law and practice. By way of example, paragraph 272 of the HGL might be expanded to refer to circumstances where large resources are required to enter a difficult and/or loss-making market, which make entry unlikely to happen;[21] or, conversely, that a major investment, even if subsequently abandoned, may be considered evidence of potential competition.[22] In addition, it should be noted that "realistic grounds" are unlikely to arise if a company has not carried out any internal assessment of the merits of entering a certain markets in the previous three years. Providing additional colour would arguably benefit SMEs in particular which, as noted above, tend to have more limited skills and/or access to external advice to properly assess their position.

(35) Separately, in our view, the appropriate timeframe to assess the likelihood of future entry should be limited to two (instead of three) years.

3.8 Information exchange

(36) We support the Commission's proposal to clarify how information sharing in the context of production agreements should be assessed, *i.e.*, that any negative effects arising from information sharing must only be assessed in light of the overall effects of the agreement, and not also as a standalone competition issue.

(37) In the same vein, it would also be helpful to include some indication of the circumstances in which an exchange of commercially sensitive information could be deemed legitimate to

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[20] The Commission's sub-contracting notice will also continue to be relevant to assess these arrangements (*Commission notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article 85 (1) of the EEC Treaty,* OJ C 1, 3.1.1979, p. 2–3).

[21] Case T-158/00, *ARD v Commission*, [2003] ECR II-000, paragraphs 115-127.

[22] Commission Decision in Case IV/M.1439, *Telia/Telenor*, 13 October 1999.

ensure the proper implementation of a production agreement, as well as the safeguards (beyond the usual clean teams) that the Commission would consider useful or necessary in order to avoid “illegitimate” information exchange in the context of specialisation agreements. Again, additional guidance would especially benefit those companies that have access to limited resources to conduct the assessment.

3.9 Mobile infrastructure sharing agreements

(38) ICC supports the Commission's inclusion in the HGL of a section dealing specifically with the case of mobile infrastructure sharing agreements.[23] The Commission is correct to identify the benefits from such agreements in terms of both cost and quality. The Commission also correctly identifies that such agreements may obviate the need for mergers.

(39) The Commission is, however, right to be wary of the potential anti-competitive effects of such agreements. The HGL note, for example, that there may be resultant limits on parties' ability and incentive to compete, and there may also be limits on decision-making independence and the desire to engage in infrastructure competition.

(40) However, the Commission might want to consider the following points to ensure that the HGL remain relevant throughout the next decade:

(a) Generally, network sharing enables faster roll-out and environmental benefits, such as lower emissions and less production/waste;

(b) The distinction between passive and active RAN and spectrum sharing may not be relevant for future network generations because the hardware will become a commodity. In particular, with the development of Open RAN network operators will no longer distinguish on the standardised hardware elements. As such, it would be more appropriate to distinguish between the hardware elements and the software elements of the network;

(c) Due to coverage obligations, the importance of geographic scope and coverage decreases, and the network coverage no longer plays a role in competitive distinction. In addition, coverage is determined by passive sites, the sharing of which is seen as uncritical , or even mandated;

(d) The distinction between urban and rural is unsuitable for 5G, where sharing in urban areas becomes even more necessary given the characteristics of 5G antennas; and

[23] The Commission should also consider other sectors where network sharing may also be relevant, e.g., energy and transport.

(e) Considering market structure seems inappropriate for an investment-heavy industry such as the mobile telecommunications sector, where the majority of existing mobile network sharing agreements will have a large market share.

(41) The Commission has gone some way to addressing the specific concerns of network operators regarding legal certainty, and the list of the types of considerations that should be taken into account when assessing the respective agreements is well appreciated. It should be noted, however, that some respondents would have liked the Commission to go further and introduce a more formal and expedient process of review of agreements voluntarily submitted by parties. We would encourage the Commission to look more closely at whether the self-review regime remains fit for purpose for network-sharing agreements, particularly in light of the fact that both the COVID pandemic and the crisis in Ukraine have prompted it to create a system for providing such comfort, but in limited circumstances.[24]

4. Purchasing Agreements

(42) By design, joint purchasing aims to reduce the prices paid for inputs, and in many cases pursue entirely desirable, pro-competitive aims. However, recent Commission's decisions and EU case law, including the Commission's recent *Ethylene* infringement decision, as well as the recent stated focus of the Commission on enforcing "buyer cartels", have led to significant uncertainty for businesses active in purchasing markets. Purchasers should benefit from sufficient legal certainty so that their legitimate group activities are not inadvertently caught by the competition rules.

(43) ICC welcomes the Commission's aim of improving clarity regarding the rules applicable to joint purchasing arrangements. However, the HGL fall short and lack sufficient clarity in a number of key areas. In particular, it would be helpful if the Commission articulated more clearly the circumstances in which joint purchasing is likely to amount to an object infringement.

4.1 The application of the market share thresholds

(44) The HGL set out the theories of harm that are applicable to joint purchasing, namely that if the parties to a joint purchasing arrangement have a significant degree of buying power on the purchasing market, there is a risk that they may harm competition upstream, which may ultimately also cause competitive harm to consumers further downstream. Similarly, the HGL note that collusion can also be facilitated if the parties achieve a high degree of commonality of costs through joint purchasing, provided the parties have market power in the selling market (and the market characteristics are conducive to coordination).[25]

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24 See, further, Section 8 below.

25 HGL, paragraph 339.

(45) The Commission's assessment of the potential for joint purchasing arrangements to have negative effects on competition therefore turns on the extent to which there is "significant market power" on the purchasing and/or the downstream selling market.

(46) In this respect, it is disappointing therefore that the combined market share thresholds below which competition concerns are deemed unlikely to arise have remained set at only 15%, unlike other areas of EU competition law (indeed, the threshold for specialisation agreements is set at 20%, although it should be higher); [26] and it is not apparent why joint purchasing should be treated differently. While noting that an assessment of the potential anticompetitive effects of joint purchasing requires both an assessment of the vertical and horizontal elements of the agreement, the HGL do not also explain why the 30% thresholds, as specified in the Vertical Agreements Guidelines, are not appropriate as a measure of potential market power on either the upstream or downstream market in these circumstances.

4.2 The distinction between joint purchasing and buyer cartels

(47) It would be helpful it the HGL addressed in more detail the reasons why purchasing "cartels" are sufficiently harmful to competition so as to be viewed as object infringements. The EU case law is clear that when deciding whether an agreement is restrictive of competition by object, *"regard must be had to the content of [the agreement's] provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question".*[27] The essential criterion for ascertaining whether coordination between undertakings involves a restriction by object is the finding that such coordination reveals in itself a sufficient degree of harm to competition, with the result that there is no need to examine its effects. The judgment of the ECJ in *Cartes Bancaires* confirms that a restrictive approach must be applied to determining when conduct should be viewed as a "by object" restriction and that the agreement must be considered in light of its proper economic context and objectives.

(48) Joint purchasing arrangements usually aim at the creation of a degree of buying power against larger suppliers that individual members of the joint purchasing arrangement would not attain if they acted separately instead of jointly. By combining their purchasing efforts, they are more likely to achieve a better price than if they negotiated individually. The joint purchasing arrangement is thus, by design, intended to lead to lower prices on the purchasing market, a clearly pro-competitive aim; and an objective that is the polar opposite of a cartel, where the objective is to increase prices on the supply side. The latter is more likely to lead to consumer

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[26] See paragraph 19 above.

[27] Case C-67/13, Judgment of the Court of 11 September 2014, *P Cartes Bancaires v Commission*, EU:C:2014:2204.

harm, whereas with respect to the former, the prospect of consumer harm is significantly more remote. The two are not directly comparable.

(49) The HGL refer to a number of criteria when drawing the distinction between a buyer cartel (an object infringement) and a joint purchasing arrangement (to be assessed on an effects basis), in particular whether the supplier has knowledge and awareness of the joint arrangement, or whether the purchasers subsequently act independently, or jointly, in their purchasing decisions. As regards the former, the HGL confirm that secrecy is not necessarily a requirement for finding a buyer cartel, [28] whilst in the case of the latter, the HGL clarify that this relates to purchasers first fixing the purchase price among themselves and each of the purchasers subsequently negotiating and purchasing individually from the supplier. To support this distinction, a more extensive use of applicable case law should arguably be made in the HGL, which give an example of a "buyer cartel" which appears to be based on the recent car battery case.[29] However, the HGL do not sufficiently explain how this scenario gives rise to a sufficiently harmful impact on consumer welfare, so as to be sufficiently injurious to competition that it must be considered an object infringement compared to the scenario where the parties to the joint purchasing arrangement act jointly. Moreover, the HGL do not sufficiently clarify how joint purchasing decisions are more likely to lead to consumer harm than independent purchasing decisions. The approach taken seems to address issues of perceived fairness in commercial dealings, rather than whether the behaviour is more likely to lead to consumer harm.

(50) It is notable that, when speaking about "buyer cartels", Commissioner Vestager previously stressed that for these to be anticompetitive, the cartelists do not need to be competitors on the downstream market[30] (see, for example, the Commission's decision in *Ethylene*, where not all parties subject to the decision were present on the same downstream chemical market(s)).[31]

(51) Finally, the HGL do not include an example of when a "wage fixing" arrangement might be viewed as a "buyer cartel" and when undertakings can legitimately work together to discuss wages with others.

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28 HGL, footnote 180.

29 HGL, paragraph 349.

30 Commission's Executive Vice-President Margrethe Vestager, *A new era of cartel enforcement*, 22 October 2021 (see https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-m-vestager-italian-antitrust-association-annual-conference-new-era-cartel-enforcement_en).

31 Commission Decision in Case AT.40410, *Ethylene*, 14 July 2020.

4.3 Purchasing agreements between non-competitors

(52) The HGL do not fully articulate the potential harm of a joint purchasing arrangement between non-competitors, where there can be no coordination on the downstream selling market. In particular, since the HGL specify that the existence of market power appears to be the determining factor for downstream harm, e.g., as to whether or not cost savings are passed on to consumers, it is unclear how such harm could occur where the parties to the agreement do not compete and where their commercial incentives cannot be aligned.

(53) Again, the HGL do not address when a wage fixing agreement between non-competitors might be treated as an object infringement.

4.4 Interactions with sustainability objectives – sustainable purchasing agreements

(54) Joint purchasing is further addressed at section 9 of the HGL regarding sustainability. This notes that joint arrangement between purchasers to only purchase sustainable products must be assessed in light of the principles set forth in section 4 of the HGL.

(55) Sustainable purchasing agreements typically involve purchasers in a downstream market agreeing among themselves not to deal with certain suppliers in the upstream market where those products are not sustainable (or to only purchase certain categories of sustainable products). By entering into these types of agreement, purchasers are not attempting to protect themselves from competition at their own level of the market, *i.e.*, the object of the agreement is not a restriction or distortion of competition. Instead, a sustainable purchasing agreement pursues a legitimate and desirable aim, implemented in the form of a vertical purchasing restriction relating to firms in an upstream market, where the detriment to competition is less obvious. In these circumstances, an effects analysis would appear to be more appropriate.

(56) Generally, we consider that the fact that an agreement which genuinely pursues a sustainability objective may be taken into account when determining whether the restriction in question is a restriction by object or a restriction by effect within the meaning of Article 101(1) TFEU is helpful. However, the HGL should be rebalanced in favour of more strongly protecting competition for sustainable, rather than unsustainable, goods.[32]

(57) Moreover, in the context of "sustainability-driven" purchasing agreements, the HGL do not adequately explain why such an approach is warranted with regards to sustainability objectives, but not when it comes to the aim of lowering purchasing prices. In addition, the HGL do not provide sufficient clarity as to when joint purchasing in these circumstances would amount to a group/collective boycott, which is viewed as an object infringement of Article 101.

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[32] See, further, Section 8 below.

4.5 Negotiation tactics

(58) ICC welcomes the Commission's acknowledgement that when negotiating terms and conditions with suppliers, a joint purchasing arrangement may threaten suppliers to abandon negotiations or to stop purchasing temporarily unless they are offered better terms or lower prices and that such threats are typically part of a bargaining process. The Commission notes that "such threats do not usually amount to a restriction of competition by object and any negative effects arising from such collective threats will not be assessed separately but in the light of the overall effects of the joint purchasing arrangement".[33]

(59) It would be helpful, however, if the Commission could state more clearly that such tactics cannot amount to an infringement of competition *in themselves*, and that potential negative effects, if any, would rather arise as a result of the buyer group's conduct.

4.6 Definition of retail alliances

(60) The HGL now expressly refer to "retail alliances", adopting the definition applied by the Commission in its Joint Research Centre Report.[34]

(61) However, the HGL do not recognise that there are many forms of retailer co-operation, from highly informal to a fully integrated entity, for example, retail alliances can be classified into: (i) groups of independent retailers; (ii) national retail alliances; and (iii) European retail alliances. Retail alliances do not of themselves engage in purchasing. Rather, they provide a forum facilitating retailers coming together to form groups for this purpose.

4.7 Insufficient response to digitisation of the economy

(62) The HGL scarcely address the tendency and scenarios of digital economy in connection with purchasing agreements such as joint purchase of copyright by content platforms, for example video and music platforms, which are increasingly influencing consumers' daily life.

(63) In the digital economy, the relevant markets are often concentrated due to network effects, so that typically it would be difficult for such agreements to fall within the market share threshold. It would be helpful if the Commission could consider providing greater guidance in in the area of consumption or purchase of digital contents and copyright.[35]

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33 HGL, paragraph 343.

34 I.e., "*horizontal alliances of retailers, retail chains or retailer groups that cooperate in pooling some of their resources of activities, most importantly relating to sourcing supplies*"; see L. Colen, Z. Bouamra-Mechemache, V. Daskalova, and K. Nes, *Retail alliances in the agricultural and food supply chain*, EUR 30206 EN, Publications Office of the European Union, Luxembourg, 2020, (see https://publications.jrc.ec.europa.eu/repository/handle/JRC120271).

35 See, further, Section 8 below.

4.8 Issues to be further clarified

(64) The HGL recognise “one purchaser or negotiator representing a group of purchasers as one form of joint purchasing arrangement” at paragraph 311. However, the genuine joint purchasing is described in paragraph 316 as “the joint purchasing arrangement involves collective negotiation and conclusion of an agreement on behalf of its members. Further clarification on whether the physical collective negotiation is necessary or one member negotiating with the suppliers on behalf of the members are also acceptable.

(65) The HGL in paragraph 319 stress that “a written agreement for the purpose of joint purchasing arrangement” is a key factor to assess on a case-by-case basis, so that its compliance with Article 101(1) TFEU can be verified ex-post and checked against the actual operation of the joint purchasing agreement. Nevertheless, given that SMEs are not usually sophisticated market players, it would be helpful if further guidance was given on what forms of communication can be recognised as '*qualified written form*' (e.g., emails and electronic communications such as instant messaging) and what other contents in addition to its scope and its functioning are necessary to be included in the agreement.

5. Commercialisation Agreements

(66) ICC welcomes the Commission's aim of clarifying the rules applicable to commercialisation agreements, particularly in connection with bidding consortia. Bidding consortia enhance efficiency and are generally unproblematic from a competition law perspective given that they enable parties that would not have been able to submit individual offers to participate in the tender process. This is also true in cases where a bidding consortium helps the parties to submit an offer that is more competitive than the offers that they would have been able to submit individually (provided that the presence of other viable participants ensures that benefits of the co-operation is passed on to the buyer).

(67) The fact that the HGL seek to address and clarify how joint bidding consortia should be analysed from a competition law perspective represents a significant improvement. Nevertheless, ICC would encourage the Commission to consider making the following further changes.

5.1 The definition of bidding consortium

(68) In the HGL, the term 'bidding consortium' refers to a situation where two or more parties co-operate to submit a joint bid in a public or private procurement competition. It would be helpful if the definition of a joint bid was to be developed further. Notably, it should be clarified that

situations where one party submits the bid with one or more other parties openly declared as subcontractors in the bid is also covered by the definition.[36]

(69) We agree that a situation with subcontractors could be less straightforward to analyse from a competition perspective than a situation with traditional joint bidders. However, a situation with a subcontractor could provide more procompetitive benefits compared to a situation where the parties agree to submit a joint bid. For example, a particular undertaking might be the best provider of a certain part of a project, and it could be procompetitive if multiple bidders could submit offers with this undertaking declared as the subcontractor for the part in question.

(70) As such, we submit that the wording in paragraph 388 should be revised to draw a clearer distinction between subcontracting and bid rigging. One possible way of amending paragraph 388 could be as follows:

> *"Bid-rigging generally does not involve openly declared joint participation in a tender process. It is typically a hidden or tacit agreement between potential participants to coordinate their apparent individual decisions with respect to the participation in the tender process. However, in some cases the distinction between bid-rigging and legitimate forms of joint bidding is not straightforward, Thus, in certain cases openly declared joint participation in a tender process could in fact be part of a bid-rigging scheme. For example, cases where two tenderers enter into reciprocal subcontracts may be a potential indication of such collusion, given that such subcontracting agreements usually allow the parties to know each other's financial offer, thus calling into question the parties' independence in formulating their own tenders*."

5.2 The definition of competitors and the importance of the tender rules

(71) ICC considers that the definition of competitors has been helpfully developed in this section as compared to the current HGL. However, the wording still only cover situations where none of the parties could have submitted individual offers. This is often not the case as one party may not have the possibility to submit an offer on its own whilst another party can. It is not clear from the HGL if these two parties would be considered competitors or not. Such asymmetric situations are not uncommon, and guidance as to how such situations should be analysed would be helpful. Indeed, the HGL could clearly state that two joint bidders cannot be considered competitors where at least one of them would not have been able to undertake the tender individually.[37]. Further guidance as to the possibility to individually submit an offer

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[36] To this end, paragraph 386 HGL could be expanded using some of the wording included at footnote 190.

[37] In this respect, if only one of the two (or more) joint bidders is a competitor regarding the specific tender, by definition there cannot be a restriction of competition between the joint bidders. This also finds support on paragraph 372 HGL, which states that "*[a] commercialisation agreement is normally not likely to give rise to competition concerns if it is objectively necessary to allow one party to enter a market it could not have entered individually* […]".

(e.g., what criteria would theoretically need to be met with respect to the quality of the offer, timing, etc.) would also be useful.

(72) Moreover, paragraph 392 HGL deals with the assessment of when a party is able ti compete in a tender individually. [38] Although the paragraph is helpful, it should be made clear that to determine whether an undertaking is a competitor in a specific tender, it must be established that there are "real concrete possibilities" for the undertaking to enter the tender on its own, and that entering the project on its own would be "economically viable".[39] There should also be a reference to how the geographic area may impact the assessment.[40]

(73) However, it is a clear improvement that the requirements included in the tender rules are mentioned specifically as the first consideration when analysing whether two parties are competitors in a tender process or not. It is thus clear that it is the tender rules that decide the scope for competition.

5.3 Bidding consortia between competitors

(74) The HGL helpfully clarifies that bidding consortia, where the participants are competitors, often fulfil the criteria for exemption in Article 101(3) TFEU. However, while we agree that it is necessary to fulfil the criteria, *i.e.*, that the joint participation allows the parties to submit an offer that is more competitive than the offers they would have submitted alone, we also believe that this, in and of itself, should be sufficient proof that the benefits outweigh the restrictions to competition in the tender process. It is only if further negative effects outside of the tender process are identified that additional proof should be required.

5.4 Market share threshold

(75) The relevant market share threshold (*i.e.* 15%) for commercialisation agreements remains aligned with the current regime. It is unclear, however, why this threshold should be lower compared to other agreements. ICC would respectfully encourage the Commission to reconsider its position and align this threshold with the one applicable to specialisation

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[38] In addition, paragraph 393 HGL notes that "[i]*n cases of calls for tenders where it is possible to submit bids on parts of the contract (lots), undertakings that have the capacity to bid on one or more lots – but assumedly not for the whole tender – have to be considered competitors*." It would be helpful to clarify that where the procurement procedure permits submitting bids for one or more individual lots, as opposed to forcing tenderers to submit a single bid for the entire contract, the assessment as to whether or not joint bidders are competitors should take place at the level of each individual lot, and not for the overall contract.

[39] Paragraph 392 HGL rightly indicates that the assessment should consider the specific circumstances of the case. Such circumstances should include any regulatory permits or quality certifications required to perform a project, i.e., whether the undertaking has such permits or certifications, and – if not – whether it would be both realistic and economically viable for the undertaking to timely obtain them for the tender.

[40] In this respect, where a call for tender relates to a product market in which an undertaking is active but covers a geographic area in which such undertaking is not active, it should be determined whether it would be both realistic and economically viable for such undertaking to expand its business to enter the relevant geographic area.

agreements, which as noted above should be to at least 25%,[41] in line with the Commission's approach in assessing horizontal mergers.

5.5 Examples

(76) We believe that examples are a good way to illustrate how the HGL are to be understood in relation to different kinds of co-operations. However, we find that, in particular, examples 3 and 4 are too restrictive an interpretation.

5.5.1 *Example 3 – joint internet platform*

(77) In this example, which remains unchanged from the current HGL, a number of small speciality shops throughout a Member State join an electronic web-based platform for the promotion, sale and delivery of gift fruit baskets. Orders through the platform are allocated to the speciality shop closest to the recipient.

(78) It is difficult to see why small local speciality shops should be viewed as competitors in this example – it is much more likely that their individual operations are confined to local markets and accordingly are not competitors. The Analysis section of the example should therefore be amended to indicate this possibility. One possible way of amending could be as follows:

> ***"Analysis:*** *Given the local nature of the typical market for speciality shops of the kind described in the example, it must first be analysed if the shops are competitors or if they are active in different geographical markets. That must be assessed in light of the overall effects of the agreement. If this analysis results in a finding that they are not competitors, the co-operation is pro-competitive since it offers the participants a possibility to offer their services to a wider range of customers than they would have been able to reach individually. However, if they are deemed to be competitors the co-operation will have to be analysed further. Thus, although……"*

5.5.2 *Example 4 – joint internet platform 2*

(79) In this example, which is new, a number of small independent bookstores create an electronic web-based platform. According to the example the bookstores continue to compete with each other both as to the books they sell and the prices they offer for their books. However, they agree on the charge for delivery – including cost of packaging – for orders through the platform. Further, they agree on how to calculate the fee participating bookstores shall pay towards the costs of the platform.

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[41] See paragraph 19 above.

(80) Again, it is difficult to follow the analysis section of this example, as it is difficult to see the small individual book shops as competitors when they set up a joint Internet sales channel in order to be able to compete with larger players.

(81) In the example, the shops have nevertheless opted for a model where they continue to compete both as to the books offered and the price at which the books are offered through the joint platform. However, they have, agreed on the terms for delivery of books through the platform and, how the contributions to the cost of the joint platform shall be calculated. This is analysed as if this could be a problem under Article 101(1) TFEU.

(82) It is thus stated that the "setting of the price for packaging and delivery of orders, as well as a fee based on a percentage of the retail price, Article 101(1) TFEU may be applicable."

(83) We believe that a better starting point for the analysis would be that agreeing on how to calculate each participants contribution to the costs of the joint platform should be viewed as, not a restriction of competition but as a necessary part of the co-operation and thus ancillary.[42]

(84) Accordingly, we find that the Analysis section of the example should be amended to include a first sentence to indicate this possibility. One possible way of amending could be as follows:

> *"**Analysis:** it is in most cases pro-competitive where small independent undertakings co-operate through setting up a joint web solution in order to compete effectively with large internet operators. In the example the participating book shops have agreed on how to calculate each participants contribution to the cost of the joint platform as a percentage of turnover achieved through the platform, this should be viewed as a necessary part of the co-operation and thus ancillary (See paragraph 39 above). However, the agreement also involves the setting of the price […]."*

6. Information Exchange

(85) Information exchange represents a challenging area of competition law since there is a fine line between legitimate and potentially anticompetitive conduct, which companies frequently struggle to distinguish. On balance, therefore, the ICC welcomes the clarifications proposed by the Commission to this important section of the HGL. Certain areas, however, may benefit from further improvement, as set out below.

6.1 By object infringements

(86) The current HGL set out a relatively simple test for when information exchange would be considered a by object infringement, stating that "[a]*ny information exchange with the objective of restricting competition on the market will be considered as a restriction of competition by*

[42] HGL, paragraph 39.

object."[43] The current HGL are then largely focused on exchanges regarding future pricing intentions[44].

(87) The HGL, however, depart from this approach: whilst some guidance is offered in the new paragraph 424 regarding certain categories of information "*considered to be particularly commercially sensitive and the exchange of which was qualified as a by object restriction*", we are overall presented with a much less clear test, the concept of 'commercially sensitive information' itself being highly ambiguous.

(88) There are, moreover, potential internal inconsistencies. Whilst the analysis of the Commission's *Example 1* at section 6.4 notes that an exchange of "present data" alone will not be a restriction of competition by object, the new paragraph 424 cites the "*exchange with competitors of an undertaking's current state and its business strategy*" as an example of a restriction by object (through the exchange of commercially sensitive information). In suggesting that exchange of "current" data alone can amount to a restriction by object, the latter passage appears unduly restrictive. As noted recently in the case law,[45] information exchanged concerning a party's "*current state and its business strategy*" may be problematic to the extent that it is "*inherently confidential and commercially sensitive*" and is "*capable of influencing the conduct of its competitor*"; there is however no implication that *all* information regarding a party's current state and business strategy is commercially sensitive, and thus improper to disclose. This consideration should also encourage the Commission to remove the reference to "customers" in paragraph 435 of the HGL.

(89) ICC respectfully submits that the current wording of the HGL, which looks to the objective of the information exchange when assessing whether there has been a by object infringement, is correct. Exchange of current information could amount to a restriction by object only *insofar* as it might give an indication as to future conduct on the market, and thus influence market behaviour. This appears to be the proper reading of recent case law referred to above,[46] and is also in line with previous cases.[47] As such, in defining the circumstances in which

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43 Current HGL, paragraph 72.

44 Current HGL, paragraph 73 ("[e]*xchanging information on companies' individualised intentions concerning future conduct regarding prices or quantities is particularly likely to lead to a collusive outcome*").

45 Case T-758/14 RENV, Judgment of the General Court of 8 July 2020, *Infineon Technologies v Commission*, EU:T:2020:307, paragraph 70.

46 Ibid.

47 Notably, the General Court previously held that "[a]*n exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings*"; see Case C-8/08, Judgment of the Court of 4 June 2009, *T-Mobile Netherlands and Others*, EU:C:2009:343, paragraph 43. Moreover, this is also consistent with the General Court's judgment in *HSBC Holdings* deciding that disclosure of trading positions did not amount to a by object restriction where that information did not cover the pricing or extent of the positions concerned, since this could not be said

information exchange may amount to a by object infringement, emphasis should be put on the potential effects on future market conduct.

(90) Focussing on potential effects and an intention to influence market conduct will also provide legal certainty to parties entering into horizontal co-operation agreements. Parties will become less wary of, for example, exchanging the sort of information necessary for cooperating in sustainability agreements if they know that such exchange will be unproblematic so long as all relevant guidelines are followed.

(91) We also consider that additional guidance should be provided on the notion of "*genuinely public*" information. The new paragraph 426 states that "[f]*or information to be genuinely public, obtaining it should not be more costly for customers and undertakings that do not participate in the exchange than for the undertakings exchanging the information*." We consider, however, that in the vast majority of the cases access to publicly available information is inherently more costly for consumers than for undertakings that, in their normal course of business, may request access to such information on regular basis and in high volumes. Thus, the costs (considered in a broad sense that includes, for instance, the investment of financial resources, time, etc.) for obtaining publicly available information will almost invariably be higher for consumers than for undertakings. A clarification on the true meaning of the words "more costly for customers" would, therefore, greatly reduce uncertainty in case of exchanges of publicly available information.

6.2 Raw data

(92) We note that the Commission has introduced guidance on exchange of raw data, which it explains should be distinguished from, and may be less problematic to exchange than, "*data that was already processed into meaningful information*".[48] Since market participants typically have the tools and methodologies with which to interpret raw data, the suggestion that processed data could be "more commercially sensitive" seems unduly restrictive. However, if the exchange also implies the disclosure of the *method* of interpretation, then we would agree that disclosing interpreted data would be more problematic than disclosing raw data alone. If this is what the Commission is attempting to outline, we would suggest that it is stated explicitly.

6.3 Unilateral disclosures

(93) The HGL state that even unilateral disclosures of commercially sensitive information, where the receiving party accepts such information, can reduce market uncertainty and increase the

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to reduce or remove the degree of uncertainty as to the operation of the market in question (Case T-105/17, Judgment of the General Court 24 September 2019, *HSBC Holdings plc and Others v Commission*, paragraph 193).

48 HGL, paragraph 428.

risk of limiting competition on the market.[49] They then add that where "*an undertaking receives commercially sensitive information from a competitor*", for example in an email, "*it will be presumed to take account of such information and adapt its market conduct accordingly, unless it responds with a clear statement that it does not wish to receive such information or reports it to the administrative authorities*."

(94) Such a proposition, however, appears to be at odds with the case law, which explicitly states that the presumption of innocence – a general principle of EU law – precludes one from *"inferring that the mere dispatch*" of information suggests that "*the parties ought to have been aware"* of the information.[50] Receipt of a message *alone,* therefore, cannot create a presumption as indicated in the HGL; this could instead arise from receipt in conjunction with "*other objective and consistent indicia*", pointing to the fact that the receiver was aware of the information.[51] The Commission might also consider offering further guidance on how receivers of commercially sensitive information can rebut such presumption.

6.4 'Hub and spoke' information exchanges

(95) We would encourage the Commission to consider removing the reference to "*customers*" in the context of listing the parties through which an indirect information exchange between competitors can take place.[52] It is common practice for customers to disclose a supplier's pricing information to other suppliers during negotiations. As such, the new guidance risks endangering legitimate market practice, and could prevent customers from receiving lower prices. Whilst paragraph 436 HGL states that "*indirect exchange of commercially sensitive information*" will be subject to a "case by case analysis of the role of each participant", it should be stated explicitly that a customer's pursuit of lower prices in this manner is not prohibited by competition law, and that disclosure by a customer of one supplier's prices to another will not typically be considered problematic, unless it is apparent that the customer had actual awareness of anticompetitive collusion between its suppliers, and knowingly intended to contribute to it.

(96) Moreover, we note that in markets that heavily rely on online comparing platforms (in particular, utilities and telecommunication), the indirect and involuntary exchange of commercially sensitive information (e.g., prices, supply conditions, rebates, etc.) through the online comparison platforms is an integral part of the mechanism underlying the functioning and the success of these platforms. The information made available, almost in real time, by online comparison platforms often falls within the definition of "*particularly commercially*

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[49] HGL, paragraph 432.

[50] Case C-74/14 , Judgment of the Court of 21 January 2016, *Eturas and others*, EU:C:2016:42, paragraphs 38 and 39.

[51] Ibid., paragraph 40.

[52] HGL, paragraph 435.

sensitive" information[53] and, at the same time, in the definition of "*genuinely public*" information.[54]

(97) While it may be argued that only customers who are genuinely attempting to restrict competition would be caught by the restriction, this is not so. As clarified in case law, "*an undertaking may, in principle, be held liable…[if] that undertaking could reasonably have foreseen the anti-competitive acts of its competitors…and was prepared to accept the risk*" of the subsequent anticompetitive conduct.[55] Without clarifying that customers cannot be held liable for information exchange between competitors, the HGL would appear to limit not only customers passing information to suppliers, but also any supplier passing information to a customer.

(98) Similar concerns also arise in connection with paragraph 437 HGL, which should clarify that, in the context of price negotiations with customers, it is not enough that the passing on of a pricing offer by a customer is reasonably foreseeable, and that the supplier must also intend to contribute to a wider collusion with its competitor(s) with respect to *other* customers. In addition, paragraph 437 appears to conflate the required level of awareness of the supplier and that of the recipient of information, and would therefore benefit from greater clarity.

6.5 Assessment under Article 101(3) - efficiency gains

(99) In light of the recent legislative initiatives aimed at further regulating digital markets and defining the position of so-called "gatekeepers", we would have expected the Commission to provide clearer guidance on the efficiency gains that the exchange of information may provide in markets where gatekeepers are present and have a significant advantage over non-gatekeepers in accessing information. We would encourage the Commission to consider analysing this scenario and providing additional guidance on whether the exchange of information between competitors aiming at levelling the playfield in markets where gatekeepers enjoy a significantly broader access to information might be justified.

6.6 Pass-on

(100) Assessing whether efficiency gains attained by indispensable restrictions are passed on to consumers to an extent that outweighs the restrictive effects on competition caused by an information exchange is seldom an easy task. This assessment also cannot be performed purely from a theoretical standpoint. However, we consider that the Commission could have taken a more courageous approach in the HGL in view of providing undertakings with at least

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53 HGL, paragraph 423.

54 HGL, paragraph 426.

55 Case C-542/14, Judgment of the Court of 21 July 2016, *SIA 'VM Remonts' (formerly SIA 'DIV un KO') and Others v Konkurences padome*, paragraph 33.

some guidance on the methodology to be used to assess whether efficiency gains are passed on to consumers to a sufficient degree to outweigh the restrictive effects on competition.

7. Standardisation Agreements

(101) ICC commends the Commission for maintaining a balanced approach towards standardisation. We recognise that there are a number of differences of opinion between ICC members on issues involving "Fair Reasonable and Non-Discriminatory" licensing within standardisation agreements. ICC is of the view that the proposed revisions are consistent with the Commission's balanced approach towards standardisation and licensing generally. We would encourage the Commission to continue to promote a balanced viewpoint regarding standardisation agreements. Against this background, we offer the following suggestions.

7.1 Evidence based approach

(102) We note that paragraph 474 now places more emphasis on the evaluation being evidence based emphasised by the wording "*including by taking account of….*". We commend this revision as an evidence-based approach is always helpful.

7.2 Openness

(103) Paragraph 478 mentions the criteria used to assess whether the development process allowed for unrestricted participation in standards development. This includes having rules to ensure that all competitors in markets affected by the standard can (i) participate in the process leading to the selection of the standard and (ii) ensure there are objective and non-discriminatory procedures for allocating voting rights.

(104) In that context, we would encourage the Commission to follow the example of the U.S. Standards Development Organization Advancement Act of 2004 (15 U.S.C. §§ 4301– 4306, https://uscode.house.gov/statutes/pl/108/237.pdf) which clearly defines the term "standards development activity":

> *"The term 'standards development activity' means any action taken by a standards development organization for the purpose of developing, promulgating, revising, amending, reissuing, interpreting, or otherwise maintaining a voluntary consensus standard, or using such standard in conformity assessment activities, including actions relating to the intellectual property policies of the standards development organization."*

(105) It would be helpful to add a similar footnote to the HGL (which would also allow for better trans-Atlantic harmonisation).

7.3 Restriction of participation in standards development

(106) Paragraph 496 helpfully provides for some flexibility that may allow development activities with restrictive participation. However, the requirement that "all competitors" will have an opportunity to be involved "at major milestones" may not be sufficient to prevent anticompetitive effects. This is both because certain players may want to participate who are not direct competitors of those in the group, and because participation in "major milestones" may not ensure effective participation in the development of the standard. We would therefore recommend that the closing sentence of paragraph 496 refers to all competitors having an

opportunity to effectively participate in the development of the standard in line with the criteria set out in the WTO TBT Code of Good Practice and Regulation (EU) No 1025/2012.

8. Sustainability

(107) Ensuring that the EU, and businesses in the EU, can combat climate change and achieve Net Zero and other sustainability objectives (particularly in line with the objectives of the Green Deal for the European Union) requires a supportive regulatory environment – and competition law has an important role to play in facilitating this.

(108) Therefore, ICC welcomes the re(introduction) of the chapter on sustainability agreements in the HGL and the guidance provided therein for the assessment of agreements that pursue one or more sustainability objectives. This is a significant step forward for companies needing or wishing to collaborate to achieve sustainability goals and this will ultimately benefit society and consumers. Whilst we recognise and support the progress the Commission has made in this area, we also consider that there are a number of elements of the HGL that would benefit from further clarification or amendment, as outlined below.[56]

8.1 Generally, the guidance on sustainability agreements is helpful and welcomed

(109) We agree with the broad definition of sustainability used in the HGL, and are encouraged by the fact that this goes beyond environmental factors, including respecting human rights, fostering resilient infrastructure and innovation, reducing food waste, facilitating a shift to healthy and nutritious food, and ensuring animal welfare. We also agree that many collaborations that pursue these aims will not impact competition and, therefore, will fall outside the scope of Article 101 completely.[57]

(110) While it is useful that the Commission has set out examples of agreements that fall outside the scope of Article 101, some of the categories of sustainability agreements that do not raise competition concerns, for example agreements on internal corporate conduct that do not concern the economic activity of competitors,[58] appear to involve unilateral corporate conduct. It would be helpful if the Commission outlined further categories of sustainability agreements that fall outside Article 101, for example by reference to the five categories set out in the Dutch Authority for Consumers & Markets' (the "**ACM**") Guidelines on Sustainability Agreements.[59]

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[56] This supplements the ICC's paper "*Competition Policy and Environmental Sustainability*" of 26 November 2020.

[57] HGL, paragraph 551.

[58] HGL, paragraph 552.

[59] See https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf, Section 4.

For instance, agreements to comply with the law in countries where the law is not adequately enforced (such as deforestation rules in Brazil) fall outside the scope.

(111) We also consider that the fact that an agreement which genuinely pursues a sustainability objective may be taken into account when determining whether the restriction in question is a restriction by object or a restriction by effect within the meaning of Article 101(1) is helpful.[60] However, the HGL should be rebalanced in favour of more strongly protecting competition for sustainable, rather than unsustainable, goods:

(a) Competition principles such as the "As Efficient Competitor Test" recognise that consumers are not best served by protecting inefficient competitors - we believe the same applies for sustainability standards: just as competition policy should not protect inefficient competitors, it should also not protect unsustainable production and consumption – with "unsustainable" including the concept of "inefficient when externalities are taken into account". We would therefore recommend removing "*foreclosure of alternative standards*" as an anti-competitive effect, where those standards are unsustainable and competition for sustainable products within the standard remains;[61] and

(b) The HGL suggest that the Commission does not consider that the *Albany*, *Wouters* and *Meca-Medina* case law can extend to sustainability agreements.[62] However, these cases recognise that agreements fall outside Article 101 if the anticompetitive restrictions are inherent or necessary for a legitimate objective to be pursued. We think there are very strong parallels between sustainability and the objectives protected in these cases (such as, in *Meca-Medina*, the rules to safeguard "*equal chances, […] the integrity and objectivity of competitive sport and ethical values in sport*"). The concept of "ethical values in sport" could be said to be analogous to the values inherent in sustainability objectives. 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. This might be the case, for example, where stakeholders other than competitors are part of the agreement, such as consumer associations, environmental organisations, or governmental agencies.

60 HGL, paragraph 559.

61 HGL, paragraph 569.

62 HGL, paragraph 548 and footnote 315.

(112) We would also suggest that the HGL incorporate a more general recognition of the positive competitive impacts of sustainable collaborations beyond sustainability standards similar to the effects recognised in paragraph 568.

8.2 Sustainability standardisation agreements and the soft harbour

(113) With regard to sustainability standardisation agreements, the recognition that such agreements often have positive effects on competition is helpful.[63] Such standards are essential for businesses to reach sustainability goals and the guidance will provide a useful roadmap. There are also some key amendments to the HGL that would assist businesses in agreeing such standards in practice.

(114) While the cumulative conditions for the soft safe harbour to apply are helpful,[64] we note that in our members' experience, mandatory standards agreed by participants are critical for successful sustainable collaborations, notably where investments in adherence to the standard are substantial; this is typically the case for the most impactful sustainability industry co-operations. We welcome the clarification that the sustainability standard should not impose on undertakings that do not wish to participate in it an obligation to comply with the standard, which means that the participants in the standard *can be* obliged to comply with it. This is essential for the standard to work and should be articulated explicitly.

(115) We note that there is a potential tension between the statement that an agreement between parties to "*put pressure on third parties to refrain from marketing products that do not comply with the sustainability standard restricts competition by object*",[65] and the positive statement in relation to industry-wide awareness campaigns discussed earlier,[66] which are deemed to fall outside Article 101. In addition, we do not think that such conduct is anti-competitive by nature. For example, if "third parties" is a reference to competitors, having market-wide standards is not necessarily harmful where parties can compete on other parameters of competition. Further, free-riding can occur where sustainable and non-sustainable standards co-exist.[67] Similarly, if "third parties" refers to distributors or suppliers, 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 manifest. In addition, paragraphs 571 and 572 should be clarified to explain that

63 HGL, paragraph 568.

64 HGL, paragraph 572.

65 HGL, paragraph 571.

66 HGL, paragraph 554.

67 HGL, paragraph 605.

agreements not to purchase goods not complying with the sustainability standard are necessarily in breach of competition law.

(116) The general view expressed in the HGL is that the potential anticompetitive effects of a sustainability standard will increase with the proportion of the market that agree to apply such standard.[68] We understand this point but, even where standards have a high market coverage (and thus potentially a particularly positive sustainability impact), they can remain competitively neutral if the standard leaves room to compete on at least another key parameter of competition, such as price, volume, manner of implementation of the standard, and other qualitative elements. Where more than one of those parameters is present, then cumulatively they place even greater competitive pressure on undertakings which comply with the standard. Equally important is the fact that, the greater the market coverage, the greater the sustainability benefits and (other things being equal) the greater the likelihood that the agreement meets the criteria for an exemption.

8.3 Assessment under Article 101(3) and benefits

(117) The Commission's discussion of the benefits of sustainability agreements is welcomed and rightly recognises the significant benefits they can bring to consumers and society more broadly.

(118) Regarding the first condition of Article 101(3), the HGL use the term "*benefits*" as well as "*efficiencies*". We consider "benefits" to be more accurate in a sustainability contest. It not only corresponds to the wording of the TFEU, whilst also encompassing "efficiencies", but it also allows a wider range of improvements to be more readily recognised as relevant. This includes cleaner technology, less pollution, improved conditions of production and distribution, more resilient infrastructure or supply chains, better quality products, etc.[69]

(119) We welcome the Commission's recognition, consistent with the 2004 exemption guidelines,[70] that it is not always necessary to carry out a detailed assessment (and even less to attempt to quantify everything) where "*the competitive harm is clearly insignificant compared to the*

[68] HGL, paragraph 575.

[69] HGL, paragraphs 577 and 578.

[70] Commission, *Guidelines on the application of Article 81(3) of the Treaty*, OJ C 101, 27.4.2004, p. 97–118.

potential benefits".[71] This will often be the case particularly in relation to co-operation to fight climate change.[72]

(120) In relation to initiatives that are indispensable,[73] we agree that collaborations may be indispensable to ensure that consumer-supported sustainable goals can be achieved in a more cost-efficient way. In addition, an agreement may also be indispensable where there is demand for sustainable products (*i.e.,* not just where the sustainability goal can be reached in a more "cost efficient" way, but, most obviously, where current demand leads to insufficient market coverage or minimum economies of scale and there is a need to transform a whole sector of the economy).

(121) We appreciate the Commission's view that an agreement may not be necessary to the extent there is already a specific EU or national law in place requiring companies to comply with concrete sustainability goals.[74] However, co-operation may be justified in order to achieve that goal either more quickly or to go beyond that goal.[75] 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.[76] Meaningful sustainability improvements often require scale not only to overcome first mover disadvantages related to costs increases, as the Commission recognises, but also in order for environmental or social benefits to materialise as broadly as possible. We would also encourage the Commission to avoid a narrow focus on "cost efficiencies" and "naked" price effects, e.g., by allowing to balance realistic sustainability goals against possible price

71 HGL, paragraph 589.

72 See, for example, paragraphs 53 to 56 of the ACM Guidelines on Sustainability Agreements.

73 HGL, paragraph 582.

74 HGL, paragraph 583.

75 This would be consistent with EU state aid law.

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

increases and, in the interest of legal certainty, clarify which criteria exactly will ultimately govern the legality of sustainability-related collaborative initiatives.[77]

(122) The HGL take important steps to reject a narrow view of pass-on benefits, by recognising collective benefits[78] and benefits to indirect users.[79] However, we consider that the approach remains too limited, and that the concept of "consumers" is too narrowly defined.

(123) In relation to individual benefits, we agree that consumers value more than just their own individual benefit, and the recognition of individual non-use value benefits is therefore, in principle, helpful. However, tying these benefits to the willingness to pay principle materially undermines their use.

(124) While consumers are increasingly conscious of sustainability issues, an inherent challenge that is recognised by the Commission is that negative externalities, "*are not sufficiently taken into account by the economic operators or consumers that cause them*".[80] As acknowledged by the Commission itself, willingness to pay is therefore an unsuitable measure to assess individual non-use benefits. This is further supported by the fact that the Commission also acknowledges that there is often a difference between what consumers say their preferences are and what their purchasing behaviour indicates, [81] and that consumer statements change if they are adequately informed of the consequences their consumption choices have on society, the environment, ecosystems, or the climate.

(125) We consider that the most important issue to be addressed in the HGL is the Commission's treatment of collective benefits. While we commend the fact that the Commission has included collective benefits as a concept worthy of exemption under Article 101(3), the Commission's apparent requirement that full compensation of the direct users in the relevant market is required is very limiting and contrary to the progressive position taken by other authorities,[82]

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77 We would encourage the Commission to further amend the final part of paragraph 573 (in the part that reads "[…] *sustainability standards may often lead to price increase. However, where the standard is adopted by undertakings representing a significant part of the market, significant economies of scale may be achieved, allowing undertakings to preserve the previous price level or to apply only an insignificant price increase*"), by clarifying the criteria to assess sustainability-related conduct with possible price effects, in order to facilitate companies' self-assessment.

78 HGL, Section 9.4.3.3.

79 HGL, paragraph 588.

80 HGL, paragraph 545.

81 HGL, paragraphs 597 and 598.

82 HGL, paragraph 603.

including the ACM, and the Commission's own position in connection with agricultural agreements.

(126) 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 is only fair that where demand for products and services is driving, e.g., greenhouse gas emissions, it should bear (at least) some of the costs. 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.

(127) As set out in the ACM's Legal Memo, following discussions of the text of Article 101(3) and the case law of the CJEU, the sustainability context "*is generally that of initially negative but potentially (once remedied) positive externalities affecting society as a whole. Where sustainability issues result from negative externalities, consumers in the relevant market are also polluters who have a choice to modify their behaviour or not. The out of market consumers share in the negative effects of the pollution without having this choice or the option of forcing in market consumers to modify their polluting behaviour*."[83] We agree with the ACM's conclusion that out of market benefits are relevant and full compensation of directly affected consumers is not required in all cases. Full compensation is also not supported by the text of Article 101(3) TFEU (which requires only a "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 reflect it in the final HGL.[84]

8.4 The examples of sustainability agreements

(128) The practical examples elaborated in the HGL are a useful start to frame the analysis of certain types of sustainability agreements,[85] but we think that they could benefit from some clarifications, as discussed in more detail below. In addition, as a more general point, we note

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[83] ACM Legal Memo, *What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context?,* 27 September 2021, available at https://www.acm.nl/sites/default/files/documents/acm-fair-share-for-consumers-in-a-sustainability-context.pdf.

[84] At the very least, we would encourage the Commission to conform paragraph 602 (which refers only to "*the group of consumers affected by the restriction and benefitting from the efficiency gains [being] substantially the same*") and paragraph 604 (which refers to "*substantial overlap*") with the better expressions in paragraphs 603 and 606(c), which helpfully refer to the in-market consumers substantially overlapping or being "*part of*" the larger group of beneficiaries. Paragraph 601 should also be consistent and refer to both concepts (substantial overlap and part of).

[85] HGL, Section 9.6.

that the examples are very focussed on manufacturing and would benefit from also considering other areas of the economy such as sustainable finance.

(129) **Example 2**: While this example is useful, we would argue that the Commission should come to the same conclusion even if the market share were higher, especially due to the fact that the parties are free to compete outside the standard if they wish. As discussed above, a mandatory standard can be very impactful from a sustainability perspective, and the parties are still free to compete on other parameters of competition.

(130) **Example 4**: The analysis under this example appears to be wrong, as is the conclusion that it does not meet the criteria under Article 101(3). The analysis fails to recognise that competition between producers has only led to approximately 20% of the market consisting of furniture grown 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. 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).

(131) **Example 5**: We consider that this example takes a step back from the CECED case for a number of reasons: (i) not all machines are being phased out; (ii) the net benefit on price/costs on its own is positive (even before the collective benefits are taken into account); and (iii) only the collective environmental benefits to these consumers are taken into account which is narrower than the CECED case.[86]

(132) Furthermore, we note that there was specific evidence that less restrictive efforts to move to a more sustainable basis had failed - this might have been implied from the fact that inefficient washing machines were still widely prevalent in the market (if there had been competition on sustainability criteria). This is relevant to the indispensability of the co-operation.

9. Procedural Aspects

(133) Since the entry into force of Regulation 1/2003, companies have been required to conduct a self-assessment of whether agreements comply with EU competition rules. At that time, the Commission stated that there was "*no place any more… for exemption decisions nor their*

[86] Commission Decision in Case IV.F.1/36.718, *CECED*, 24 January 1999. 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" (emphasis added).

informal replacement, 'comfort letters'" which the Commission used to issue, in addition to adopting formal decisions, to confirm that the criteria set out in Article 101(3) were met.[87]

(134) While this system has now been in place for nearly twenty years, in our view there is today an argument for the Commission to properly re-establish its previous practice of issuing comfort letters, beyond what it exceptionally did in the context of the COVID-19 pandemic and following the current situation in Ukraine,[88] and more generally, in the interest of legal certainty, increase its guidance with respect to novel and developing areas, which present unfamiliar challenges for companies. This might be a specific area which the Commission could contemplate in the context of its recently announced review of Regulation 1/2003.[89]

9.1 Comfort letters during the COVID-19 pandemic

(135) In response to the COVID-19 outbreak, in 2020 the Commission set up a temporary framework (the "**Framework**"),[90] which covers the possible forms of co-operation between undertakings in order to ensure the supply and adequate distribution of essential scarce products and services during the pandemic. The Framework thus aimed to address the shortages of such essential products and services resulting first and foremost from the rapid and exponential growth of demand.[91]

(136) Importantly, the Framework also outlines the provision, where appropriate, of comfort letters to undertakings in relation to specific and well-defined co-operation projects during the COVID-19 outbreak. Specifically, the Commission noted that it is willing to provide guidance on specific co-operation initiatives with an EU dimension between competitors or non-competitors, where (i) such agreements need to be swiftly implemented to effectively tackle

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87 In order to benefit from the Article 101(3) TFEU exemption, companies had to notify the Commission in order to receive either a formal statement (decision) or a comfort letter. To obtain the latter, companies would complete what was known as a Form A/B. As part of this form, the parties provided details of the provisions in the agreement which may have restricted the parties in their ability to make independent commercial decisions. The parties would also need to indicate whether they would be satisfied with a comfort letter, rather than a formal decision.

88 The Commission has shown further willingness, beyond the pandemic, to issue advice to parties on an ad-hoc basis. In the context of the current situation in Ukraine, the Commission is aware that many companies will want to adjust their business dealings, for example to shift away from Russia. The Commission has invited queries from parties worried about inadvertent related breaches of competition law and has set up a dedicated mailbox for this purpose.

89 Commission's Executive Vice-President Margrethe Vestager, *Competition and regulation in disrupted times*, 31 March 2022.

90 Commission, *Temporary Framework for assessing antitrust issues related to business co-operation in response to situations of urgency stemming from the current COVID-19 outbreak*, 2020/C 116 I/02), available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020XC0408(04)&from=EN.

91 Framework, paragraph 4.

the COVID-19 pandemic, and (ii) where there is uncertainty about whether such initiatives are compatible with EU competition law.[92]

9.2 Sustainability agreements – non-prosecution and comfort letters

(137) As done in the context of the COVID-19 crisis, it would be very helpful and welcome if the Commission could provide ad-hoc guidance with respect to sustainability agreements, as well as potentially general reassurance to businesses that it will not prosecute in cases where businesses genuinely follow the HGL in good faith to pursue sustainability goals.

(138) In this respect, we welcome Commissioner Vestager's statements that the Commission would be willing to provide guidance to businesses on specific initiatives.[93]

(139) We also note that, in its equivalent guidelines, the ACM states that with regard to sustainability agreements that have been published, 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 the 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.[94]

9.3 A new era for "comfort"?

(140) More generally, it would be helpful if the Commission could acknowledge that, going forward, there is a place for comfort letters in the context of novel and developing areas (and, where appropriate, Article 10 decisions). We would also be grateful if the Commission could publish regular insights into its thinking as its practice and experience develops. Indeed, given that certain horizontal co-operation agreements will require significant investment, companies should have the ability to minimise risk as far as possible.

(141) This could be through the use, as during the COVID-19 pandemic and the Ukraine crisis, of a dedicated mailbox specifically for queries on horizontal agreements. The Commission could even create a framework detailing the circumstances where the pursuit of such comfort is

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92 Since then, the Commission issued two comfort letters under the Framework. In the second and latest instance, the Commission stated that if direct competitors were to consider that exchanging confidential business information in relation to competing products would be indispensable to finding solutions for scaling-up production or supply of COVID-19 vaccines, they should contact the Commission for specific guidance at least 24 hours before engaging in any such exchange.

93 Commission's Executive Vice-President Margrethe Vestager, *The Green Deal and Competition Policy*, 22 September 2020.

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

more appropriate, so as to stave off the possibility of all agreements – even entirely unproblematic ones – being sent for consideration.

(142) Alternatively, a system closer to the ACM's, where agreements which have been published and agreed in good faith would be subject to adjustment after consultation, could be another way of pursuing this goal.

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