ICC COMMENTS ON THE EUROPEAN COMMISSION HORIZONTAL BERs AND HGL

CONTENTS

INTRODUCTION

(1) The International Chamber of Commerce ("**ICC**") is pleased to provide its comments on the final updated Guidelines on the applicability of Article 101 TFEU ("**Article 101**") to horizontal co-operation agreements (the "**HGL**"), as well as the revised Research and Development Block Exemption (the "**R&D BER**") and the revised Specialisation Block Exemption Regulation (the "**Specialisation BER**", together the "**HBERs**"). This publication follows ICC's April 2022 submission to the European Commission's (the "**Commission**") public consultation on the HBERs and HGL.

(2) This report has been authored by the ICC Task Force on the EU Horizontal Guidelines (the "**Task Force**").[1]

(3) Overall, ICC supports the changes contained in the HGL and HBERs; indeed, while there have not been a large number of substantive revisions as compared to the draft versions published in 2022, the documents still present an important step forward for the assessment of horizontal agreements as compared to their predecessors, and ICC is pleased to see that several of the changes for which it previously advocated have been adopted in the final documents.

(4) As ICC has stated previously, it is of crucial importance that, as far as possible, the needs of small and medium sized enterprises ("**SMEs**") should be catered for within the HGL and HBERs. Such undertakings often face considerable obstacles in applying the rules, and it would have been a welcome addition to the final versions if their plight was more clearly acknowledged. Still, ICC considers that clearer guidance in general contained within the HGL and HBERs will undoubtedly be of benefit to SMEs, and we welcome the clarification that the Commission's De Minimis Notice will apply to production agreements between SMEs.

(5) ICC continues to believe that there would be considerable advantages to increasing market share thresholds across these instruments so as to maximise the number of companies that can benefit from the rules and thus reap the economic benefits of horizontal agreements. Such changes would also bring more consistency with other areas of competition law.

(6) The remainder of this submission is arranged in seven sections dealing with the following topics: (i) R&D agreements; (ii) specialisation agreements; (iii) purchasing agreements; (iv) commercialisation agreements; (v) information exchange; (vi) standardisation; and (vii) sustainability agreements.

(7) ICC notes that its previous submission included a section devoted to the consideration of procedural considerations in the context of horizontal agreements.[2] ICC noted that in times past the Commission had issued comfort letters and formal exemption decisions declaring that the criteria of Article 101(3) TFEU ("**Article 101(3)**") were met in individual cases. With the adoption of Regulation 1/2003, however, the Commission decided there was no place for this and embarked on an era of self-assessment. ICC maintains that it would not be unreasonable for

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[1] The Task Force thanks its members for preparing this report, in particular Alex Nourry, Emilio Villano, Andreas Traugott, Victoria Newbold, Song Ying, Erik Sóderlind, Jillian Mertsch, Jodie Williams, Simon Holmes, Lauren O'Brien, Nicole Kar, Ian Rose, Maurits Dolmans and Caroline Szyber. The Task Force also thanks Caroline Inthavisay for her contributions and management of the process, as well as Jordan Bernstein for his assistance in preparing the report.

[2] ICC comments on the revised R&D BER and the revised Specialisation BER and HGL, Section 9.

the Commission to re-establish its previous practice of issuing comfort letters, beyond what it exceptionally did in the context of the COVID-19 pandemic.[3]

(8) We note that since our previous submission, while the Commission has withdrawn the Antitrust COVID Temporary Framework, it has adopted a revised Informal Guidance Notice, allowing businesses to "seek informal guidance on the application of EU competition rules to novel or unresolved questions."[4] ICC agrees with the Commission that this is a positive development and will increase legal certainty, and will be "instrumental for businesses involved in emerging ways of doing business, as well as those facing a crisis or other emergencies." ICC anticipates that the new Informal Guidance Notice will be of particular benefit in the context of horizontal cooperation agreements, notwithstanding the fact that the HGL only mention it in the context of sustainability agreements.[5] ICC is further particularly pleased by the legal certainty this will provide to SMEs – often more limited in their ability to self-assess – to access.

(9) In ICC's previous submission, we noted that the draft HGL contained an ambiguity in relation to joint ventures. The draft HGL noted that the Commission will "typically" not apply Article 101 to agreements and concerted practices between parents and controlled joint ventures, while citing case law which has determined that where a parent exercises decisive influence over its joint venture, the two entities form part of the same undertaking, meaning that Article 101 does not apply.[6] It is therefore to be welcomed that the HGL have clarified a number of scenarios where Article 101 may apply notwithstanding the case law, including in cases of "agreements between parent companies and their joint venture concerning products or geographies where the joint venture is not active."[7] This clarification should provide additional guidance to undertakings, including in relation to information exchange which can be very common between joint ventures and their parent companies.

1. R&D AGREEMENTS

(10) The HGL contain helpful guidance on the application of the R&D BER, as well as on the individual assessment of R&D agreements under Art 101 in case the agreement does not fall in the safe harbour of the block exemption. In ICC's previous submission on the draft BERs and HGL, we remarked that the draft R&D BER did "not constitute a revolution, but rather a (modest) evolution of the previous rules", which risked "missing an opportunity to prepare the ground for a real change".[8] Indeed, as it then was, we felt the R&D BER was "unlikely to be sufficient to trigger a boost of innovation across Europe."[9] While there is further helpful guidance in the final

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3 The Commission showed 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 invited queries from parties worried about inadvertent related breaches of competition law and set up a dedicated mailbox for this purpose.

4 Commission press release, 3 October 2022, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5887. It should be noted that the Informal Guidance Notice explicitly seeks to avoid "re-introduc[ing] a system that would be inconsistent with the self-assessment framework of Regulation 1/2003." (Informal Guidance Notice, para 4).

5 HGL, para 515.

6 ICC comments on the revised R&D BER and the revised Specialisation BER and HGL, Section 1.

7 HGL, paras 12(c).

8 ICC comments on the revised R&D BER and the revised Specialisation BER and HGL, para 9.

9 ICC comments on the revised R&D BER and the revised Specialisation BER and HGL, para 10.

version, ICC overall suggests more could have been done to advance and aid innovation. Overall, the new R&D BER contains no major changes to its predecessor.

1.1 Applicability to innovation competition

(11) Some changes in the R&D BER are to be welcomed. In the previous draft, the Commission proposed that the R&D BER shall only apply to agreements on the level of competition for new innovations if there are at least 3 or more competing R&D efforts. This gave rise to much criticism in the consultation process. Not only is it difficult to identify such R&D efforts since research is often carried out in a confidential manner, but the requirement to identify at least 3 competing R&D efforts would have constituted a very high barrier for any joint innovation efforts. It is therefore an improvement that the Commission did not pursue this concept in the final version, as well as the concepts of "undertaking competing in innovation" and "competing R&D effort", as was recommended by ICC.[10]

(12) The R&D BER explicitly clarifies that it is applicable to innovation competition, irrespective of market shares and without the need to identify competing R&D efforts.[11] However, if the existence of the R&D agreement would substantially restrict innovation competition in a particular field, the Commission has the power to withdraw the benefit.[12]

1.2 'Potential competition'

(13) In ICC's previous submission, it was remarked that the concept of a 'potential competitor' was still challenging to apply in practice, and could lead to great uncertainties in the application of the safe harbour provided by the block exemption.[13] In the absence of changes to the R&D BER on this point, ICC notes that these difficulties could still arise notwithstanding the outline in the HGL of how to assess whether an undertaking can be considered as a potential competitor.[14] In this respect, further guidance and simplification, tailored to R&D agreements, would have been welcomed.

1.3 An R&D 'transition period'

(14) The R&D BER enters into force on 1 July 2023 and shall apply until 30 June 2035. There is a transition period of two years (until 30 June 2025) for R&D agreements that became effective no later than 30 June 2023.[15] For this transition period, the old R&D BER[16] still applies to the extent that it is more favorable than the new R&D BER. This may for instance be relevant for the application of the market share threshold, since the old R&D BER provided for more flexibility in case the 25% market share threshold has been exceeded in some years.

1.4 Withdrawal of the benefit

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10 ICC comments on the revised R&D BER and the revised Specialisation BER and HGL, para 12-16.

11 R&D BER, recitals 16 and 21.

12 R&D BER, Article 10(2).

13 ICC comments on the revised R&D BER and the revised Specialisation BER and HGL, para 17.

14 HGL, para 16.

15 R&D BER, Article 12.

16 Regulation (EU) No 1217/2010.

(15) The provisions regarding withdrawal of the benefit of the R&D BER have been directly incorporated into the new R&D BER,[17] although reference is still made to the general power of the Commission and national competition authorities to withdraw the benefit of exemption regulations.[18] In addition, the new R&D BER specifies in detail when the Commission is entitled to withdraw the benefit of the exemption in individual cases.[19]

(16) It is to be welcomed that the Commission explicitly clarifies that agreements relating to innovation competition are covered by the exemption. It remains to be seen whether the Commission is prepared to make use of its power to withdraw the benefit of the exemption in individual cases in the future (especially if it considers the existence of the R&D agreement as a substantial restriction of competition in innovation). So far, withdrawal proceedings have not occurred in practice.

1.5 Market share

(17) While as a general principle, market shares shall still be calculated on the basis of the market sales value, the new R&D BER will now allow for greater flexibility if such data is not available. In such a case, the parties to the R&D agreement may also rely on other reliable market information, such as the expenditures on R&D or R&D development capabilities.[20]

(18) In addition, the new R&D BER deviates from the general rule that market shares shall be calculated on the basis of the data of the preceding year, if such data are not representative. In this case, market shares shall be calculated as an average of the last 3 calendar years. In this respect, the HGL note that this could be relevant in (i) bidding markets; (ii) markets characterized by "large, lumpy orders"[21]; and (iii) where there is a supply or demand shock in the calendar year preceding the agreement.[22]

(19) The new rules relating to R&D agreements also include a modification to the process of calculating market shares in technology markets. Under the old HGL, market shares on a technology market were to be calculated primarily on the basis of the royalty fees. In practice, this has proven to be very difficult to apply, since usually such data is not available. Now, the Commission has not only adopted the view that a calculation based on royalties may underestimate a technology's position on the market,[23] but has stated that market shares on the level of the technology market shall – in line with the method used under the existing Technology Transfer Block Exemption Regulation – be calculated on the basis of all sales by the licensor and its licensees' products, incorporating the licensed technology, as a share of all sales of competing products.[24] This is irrespective of whether the competing products are produced using the technology that is being licensed.

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17 R&D BER, Articles 10 and 11.

18 Regulation 1/2003, Article 29.

19 R&D BER, Article 10.

20 R&D BER, Article 7(2).

21 The HGL give the example of where sales data for the previous calendar year are not representative because no large orders were placed that year.

22 HGL, para 95.

23 HGL, para 96.

24 HGL, para 96.

1.6 Catalogue of hard-core restrictions

(20) In ICC's previous comments, it was noted that the Commission had not changed the catalogue of hard-core restrictions contained in the previous R&D BER,[25] and there have again not been material changes in the final version.[26] Aside from a general desire to limit the list of hard-core restrictions with a view to maximizing the benefits that can be reaped from R&D agreements, ICC would once again advocate for a general exemption for SMEs – including from the hard-core restrictions – since the collaboration of small market platers in R&D generally does not have a negative effect on competition.

2. SPECIALISATION AGREEMENTS

(21) New rules on specialisation are found both in the HGL and the Specialisation BER. The Specialisation BER covers situations where actual or potential rivals agree that each will focus on the production and supply of particular goods and services and, either unilaterally or multilaterally, withdraw from an existing market.

2.1 Welcome changes

(22) The new Specialisation BER expands the definition of 'unilateral specialisation agreements' to cover agreements that include more than two parties, which is a welcome recognition of the potential efficiency gains of such additional types of agreements.[27]

(23) The new Specialisation BER also simplifies the grace period that applies when the parties exceed the market share thresholds after having entered the agreement; in such a case, it allows for market shares to be calculated on the basis of a three-year average in appropriate circumstances.[28]

(24) As well as containing new guidance on how to apply the Specialisation BER, the HGL now make it clear that the Specialisation BER covers all types of horizontal subcontracting agreements, not just those that aim to expand production.[29]

2.2 Withdrawal of the benefit

(25) As with the R&D BER, the Specialisation BER also explicitly refers in its preamble to the powers of the Commission and national competition authorities to withdraw the benefit of the block exemption in individual cases.[30] In a development from the draft version, the articles dealing with withdrawal of the benefit in individual cases make reference to withdrawal where the relevant market is highly concentrated and competition is already weak, including, for example, due to links between the parties and other market participants.[31] An example of this would be

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25 ICC comments on the revised R&D BER and the revised Specialisation BER and HGL, para 19.

26 R&D BER, Article 8.

27 Specialisation BER, article 1.

28 Specialisation BER, article 4(b).

29 HGL, paras 178 and 179.

30 Specialisation BER, paragraph 17.

31 Specialisation BER, articles 6 and 7, in particular article 6(2)(c).

where one or more of the parties to a specialisation agreement is party to separate specialisation agreements with other parties;[32] ICC commends the inclusion of this factor, since it is clearly relevant to the overall effects that the specialisation agreement will have.

2.3 Catalogue of hard-core restrictions

(26) As was the case with the R&D BER, ICC notes that there have been no material changes to the list of hard-core restrictions in the Specialisation BER.[33] In that context, ICC notes that the Specialisation BER continues to allow companies to jointly distribute the relevant goods or services, and in that context agree resale prices to intermediate customers. The key change to the provision in the HGL which provides guidance on the application of this provision is that such resale price maintenance must be "proportionate to attain the objectives" of the agreement, rather than simply being "necessary" (now "objectively necessary").[34] However, it would have been useful for the Commission to take the opportunity to clarify that the exemption only applies in circumstances where the joint distribution is necessary for the joint production to take place.

(27) ICC would also encourage the Commission to expand the concept of joint distribution to include looser forms of "coordinated" distribution, which may be of particular benefit to SMEs more reliant on such agreements.

2.4 Mobile infrastructure sharing agreements

(28) A new section has been added to Chapter 3 of the HGL to deal with mobile infrastructure sharing agreements,[35] with the principle being that individual instances of these will be addressed on their own facts, and on the benefits which they bring.

(29) ICC concurs with the Commission that such agreements deserve particular attention when assessing them under Article 101(1) TFEU ("**Article 101(1)**"). As the Commission correctly identifies, such agreements can bring benefits in terms of cost and quality, and may also obviate the need for mergers.

(30) The need for assessment is essentially borne of the fact that such agreements "do not restrict competition by object within the meaning of Article 101(1) unless they serve as a tool to engage in a cartel" and they can also "give rise to restrictive effects on competition."[36] The relevant factors for the assessment of the agreements include factors such as the "type and depth of sharing" as well as the number of agreements in the relevant market and the number and identify of participating network operators, meaning that what may be a reasonable pro-competitive agreement in one area may not be considered so in another.[37]

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32 HGL, para 214.

33 Specialisation BER, Article 5.

34 HGL, para 223(b).

35 That is, as per HGL para 258, "agreements under which mobile telecommunications network operators share the use of parts of their network infrastructure, operating costs and the cost of subsequent upgrades and maintenance."

36 HGL, para 261.

37 HGL, para 264.

(31) ICC also welcomes the general guidance that passive sharing (i.e. sharing of basic site infrastructure) is "unlikely to give rise to restrictive effects on competition",[38] whereas active sharing agreements (i.e. sharing of the radio access network) are more likely to do so.[39]

2.5 Factors for future consideration

(32) In general, ICC very much commends the final Specialisation BER and Chapter 3 of the HGL. 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 by the new rules, including those changes summarised above. There are, however, ways in which the Commission could have gone further.

(33) ICC notes that the relevant market share threshold for the application of the Specialisation BER – as well as the 'safe harbour' set out in the HGL with respect to agreements falling outside of the definition of specialisation agreements included in the Specialisation BER – has remained aligned with the current regime (i.e. 20%).[40] ICC maintains, as set out in its response to the earlier consultation, that increasing this threshold to 25% or 30% would have not only brought it in line with the Commission's approach to assessing horizontal mergers, but would have allowed for a greater number of companies to benefit from the efficiencies generated by specialisation.[41] While perhaps more flexibility could have been granted to undertakings in *calculating* market shares for the purposes of applying the Specialisation BER, as in the case of the R&D BER (see above), it is still useful that in the absence of market sales value data, "estimates based on other reliable market information, including market sales volumes, may be used."[42]

(34) As set out in its previous submission, ICC would also have welcomed further clarity on exactly what joint production constitutes. It is still defined with some circularity, being where "two or more undertakings agree to produce certain products jointly."[43]

(35) Finally, ICC would have welcomed more support and clarity for SMEs as part of the final Specialisation BER and Chapter 3 of the HGL. While there is a welcome addition to clarify that production agreements between SMEs will often fall within the scope of the De Minimis Notice,[44] this does not account for SMEs which enter into agreements with larger companies in order that one or both may achieve efficiencies. For such situations, it would have been useful to take account of the particular issues which SMEs have in calculating market share thresholds,[45] and to acknowledge that joint production can be deemed to exist even where the contracting parties

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38 HGL, para 266(a).

39 HGL, para 266(b).

40 HGL, para 202.

41 ICC comments on the revised R&D BER and the revised Specialisation BER and HGL, para 23.

42 Specialisation BER, Article 4.

43 ICC comments on the revised R&D BER and the revised Specialisation BER and HGL, para 28; HGL, para 174.

44 HGL, footnote 167.

45 Short of granting a general exemption to SMEs, which we understand the Commission has already ruled out.

outsource production of the relevant products (SMEs generally being subject to larger manufacturing constraints).[46]

(36) ICC does, however, welcome the addition of an example in the HGL dealing with 'potential competitors', which goes some way to achieving the desire expressed in ICC's response to the consultation on the draft HGL.[47] The example provides further colour to the concept in order to give greater guidance to market players, such as SMEs, who may have more limited skills and/or access to external advice to properly assess their position.

3. PURCHASING AGREEMENTS

(37) ICC welcomes the Commission's changes to the Joint Purchasing section of the HGL, which do go some way to addressing concerns with the previous draft text.

3.1 Welcome changes

(38) In particular, ICC welcomes enhanced clarity in a number of areas, including:

(a) clarification that the definition of joint purchasing comprises both joint purchases and joint negotiations;[48]

(b) recognition of the different types of retail cooperation (including retail alliances);[49]

(c) the distinction between a buyer cartel and a joint purchasing agreement;[50]

(d) clarification of a necessary two-step analysis where joint purchasing agreements involve both horizontal and vertical agreements;[51]

(e) clarification that vertical boycotts are generally less likely to amount to a restriction of competition by object, with reference to sustainability;[52]

(f) further guidance on collusive outcomes;[53]

(g) clarification that clean teams and confidentiality rules can be used to protect against the exchange of competitively sensitive information;[54]

(h) further illustration on analysis of indispensability under Article 101(3);[55] and

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46 *See* ICC comments on the revised R&D BER and the revised Specialisation BER and HGL, para 29.

47 HGL, para 271.

48 HGL, para 274.

49 HGL, para 274.

50 HGL, para 279.

51 HGL, para 276.

52 HGL, para 284.

53 HGL, para 299.

54 HGL, para 302.

55 HGL, para 306.

(i) clearer worked examples.[56]

3.2 Considerations for future developments

(39) However, the revised chapter does fall short in a number of respects.

(40) First, the HGL still fail to articulate why a buyer cartel is so injurious to competition and consumer harm (on either the purchasing market or the downstream selling market) so as to amount to an object infringement, particularly where the purchasers do not compete on the downstream selling market.

(41) Further, ICC welcomes the additional guidance on collective negotiation threats, in clarifying when the refusal to purchase gives rise to anticompetitive effects.[57] However, the HGL note that such threats will not appreciably affect competition in the downstream selling market where retailers continue to offer products that are substitutes of the products in question, and to the extent customers in the selling markets can purchase these products or substitute products from competitors of the members of the joint purchasing arrangement. The HGL fail to clarify why a temporary pause in the availability of products is sufficiently harmful to customers, particularly if competing products are available, and taking into account a counterfactual scenario where the successful negotiation subsequently results in lower prices or better terms and conditions. The HGL do not account for the prospect that members may not produce or purchase substitute products, and do not clarify why competition from competitor retailers is not sufficient to negate any potential anti-competitive effects associated with a short term pause in supply. ICC hopes that future case law and guidance develop this point and perhaps allow for the inclusion of alternative scenarios, i.e. where retailers continue to offer substitute products and/or customers can purchase these products or substitutes from competitors.

(42) Additionally, the revised HGL clarify that collective negotiation threats can be considered to form an integral part of a joint purchasing arrangement only where they concern the products that are subject to the negotiations.[58] By preventing the purchasing group from threatening to pause purchases of additional products, without rationale as to why this would restrict competition, the HGL deprive the joint purchasing group of the opportunity to benefit from a legitimate negotiating tactic and thus ignore the commercial reality of negotiations.

(43) The HGL still do not include specific guidance applicable to the joint purchasing of services, and indeed the section relating to jointly negotiated licensing agreements has been removed. We would hope that future guidance may clarify this point, in connection with the Technology Transfer Guidelines.

(44) ICC is disappointed 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 20%), and it is not clear why purchasing agreements should be treated differently. [59]

(45) Finally, the guidelines do not provide sufficient guidance on what restrictions in conjunction with joint purchasing agreement are usually tolerable under Article 101(3), placing the legal certainty

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[56] HGL, para 310ff.

[57] HGL, para 304.

[58] HGL, para 304.

[59] HGL, para 291.

provided by the HGL under strain. ICC would hope in time for further explanation of relevant circumstances based on the Commission's practice. 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.[60]

3.3 Purchasing agreements between non-competitors

(46) 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.[61]

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

3.4 Purchasing agreements and sustainability

(48) Joint purchasing is also addressed in the section of the HGL dealing with sustainability, which uses as an example "an agreement between competitors to jointly purchase as an input for their production only products that have a limited environmental impact, or to purchase exclusively from suppliers that rest certain sustainability standards."[62] The HGL make clear that such agreements are to be assessed using the section focussed on purchasing agreements, while also taking into account the specific guidance on sustainability agreements.

(49) Purchasing agreements aimed at sustainability can certainly have significant positive externalities, such as climate change mitigation, preservation of biodiversity and reduction of large-scale pollution. Such benefits do not just accrue to the parties in question or a set of consumers (as is the case, for example, in agreements aimed at lowering prices), but all consumers and indeed society as a whole. ICC agrees that this is a key reason why purchasing agreements with sustainability objectives should benefit from better treatment under competition law.

3.5 Insufficient response to the digitalisation of the economy

(50) As in the draft version, the HGL scarcely address the context of the digital economy in connection with purchasing agreements, such as joint purchase of copyright by content platforms, which are increasingly influencing consumers' daily lives.

(51) 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 have been helpful for the Commission to have considered providing greater guidance in the area of consumption or purchase of digital contents and copyright.

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60 HGL, para 276.

61 See for example HGL, para 294.

62 HGL, para 524.

4. COMMERCIALISATION AGREEMENTS

(52) ICC welcomes the Commission's adaption of the HGL and the clarifications of the rules applicable to commercialisation agreements, particularly in connection with bidding consortia.

(53) In ICC's opinion, bidding consortia enhance efficiency and are generally unproblematic from a competition law perspective, particularly where they (i) enable parties that would not have been able to submit individual offers to participate in the tender process; and (ii) help 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). This notwithstanding prima facie concerns that commercialisation agreements, given that they effectively limit output, must be treated carefully.

(54) 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, as per paragraphs 55 and 56 below. ICC is pleased that the final wording of the chapter has improved the HGL further in this regard compared to the draft.

4.1 The definition of a bidding consortium

(55) ICC welcomes the fact that the HGL explicitly include within the definition of bidding consortia cooperation where one party submits the bid, and one or more other parties participate as sub-contractors.[63] This clarification removes a serious cause of uncertainty in relation to the use of sub-contractors in bidding processes.

(56) As stated in ICC's comments on the draft guidelines, a situation with a subcontractor could provide more procompetitive benefits compared to a situation where the parties agree to submit a joint bid.[64] 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.

4.2 The definition of competitors and the importance of the conditions imposed by the purchaser in the tender process

(57) ICC considers that the definition of competitors had been helpfully developed already in the draft guidelines and is pleased to note that further clarifications haves been given in the definitive version.[65]

(58) ICC is pleased that the HGL make clear that the first consideration, when analysing whether two parties are competitors in a tender process, is the terms of the tender. This clarifies that the scope for competition is decided by those terms. If the terms of a tender make it unrealistic for an undertaking to participate individually, that undertaking is not a competitor in the tender process.[66] This clarification removes serious uncertainty.

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63 HGL, footnote 222.

64 ICC comments on the revised R&D BER and the revised Specialisation BER and HGL, para 69.

65 HGL, footnote 22.

66 HGL, para 353.

(59) As to changes compared to the draft, ICC in particular welcomes the clarification that the parties to a bidding consortium are seen as competitors only where each party is realistically capable of completing the contract on its own.[67]

(60) Thus, in regard to situations where a bidding consortium is formed by one party that could submit a tender on its own and one (or more) parties that lack this capability (which is not uncommon), the clear statement that such parties are not considered competitors is most helpful.

(61) ICC also welcomes the further clarification on how to address the question of whether an undertaking should be viewed as a competitor; the HGL clarify that such a question should be answered based on an assessment of whether the undertaking is realistically capable of completing the contract on its own considering the specific circumstances of the case.[68] ICC interprets this wording to mean that an undertaking must have a real possibility of entering a tender on its own, i.e., that entering the tender process with a separate bid would be an economically viable option for it.

4.3 Bidding consortia between competitors

(62) ICC finds it helpful that the HGL clarify that bidding consortia, where the participants are in fact competitors, nevertheless often fulfil the criteria for exemption in Article 101(3).[69] ICC interprets the content of the HGL to entail that the conditions for an exemption are fulfilled provided that (i) the joint participation allows the parties to submit an offer that is more competitive than the offers they each would have submitted alone; provided that (ii) the competitive pressure exerted by other viable participants ensures that benefits of the co-operation are passed on to the buyer. ICC believes that it is only where further negative effects outside of the tender process are identified that additional proof should then be required to dislodge the application of the exemption.

4.4 Market share threshold

(63) ICC is disappointed that the market share threshold for commercialisation agreements remains aligned with the previous regime at 15%.[70] In line with ICC's previous recommendations elsewhere, increasing the threshold would have aligned the regime with the Commissions' assessment of horizontal mergers, which is significant insofar as bidding consortia more obviously replicate the effects of horizontal mergers on tender markets.

4.5 Examples

(64) ICC believes that examples are an effective way to illustrate how the HGL are to be understood in relation to various kinds of co-operations. Further, ICC believes that the changes in the examples, as compared to the draft, make the HGL more coherent.

Example 3 – joint internet platform[71]

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67 HGL, para 353.

68 HGL, para 353.

69 HGL, para 358.

70 HGL, para 339.

71 HGL, para 362.

(65) As stated already in ICC's comments on the draft, it is difficult to understand why small local speciality shops should be viewed as competitors in this example. ICC therefore welcomes the inclusion of the words "Assuming that the speciality shops are competitors" at the beginning of the analysis section of this example.

Example 4 – joint internet platform 2

(66) In the draft, this example referred to a co-operation between a number of small independent bookstores to create an electronic web-based platform to be able to compete with larger players. In ICC's submission regarding the draft guidelines we expressed that we found it difficult to view the small individual book shops as competitors.[72] ICC is therefore pleased to note that this example has been removed.

5. INFORMATION EXCHANGE

5.1 Detailed lists

(67) The HGL include a thoroughly revised and expanded section on the assessment of exchanges of commercially sensitive information ("**CSI**") between competitors, and the factors that are relevant to determining whether such exchanges are anticompetitive. One of the main additions is further guidance and a detailed list of concrete data examples that the Commission considers to be CSI (e.g., costs, capacity, production, quantities, market shares, customers, market entry/exit plans)[73] and those that it does not (e.g., issues relevant to the industry in general, such as general functioning of the industry, public policy/regulatory matters, standards or health and safety matters, general promotional opportunities and non-strategic educational, technical or scientific data with consumer benefits).[74]

(68) The clarity provided by this expanded section is to be welcomed for the fact that it should fundamentally assist businesses which need to self-assess potential disclosures, and so must have a clear framework for doing so. All the while, however, this genuine business need can be seen as carefully balanced against the objectives of the Commission to ensure effective competition in the Internal Market.

5.2 'By object' infringements

(69) One aspect of this balancing act can be seen in the concession to the Commission's enforcement needs through the expansion of the category of exchanges of CSI between actual or potential competitors that will be considered to be a particularly harmful "by object" infringement. Under the previous guidelines, the category was limited to disclosures of future intentions regarding prices or output volumes. In line with subsequent case law of the EU courts, the revised HGL now make it clear that any exchange of CSI will be considered to be a by object restriction, if it "is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market".[75] Consequently, depending on the circumstances, exchanges

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72 ICC comments on the revised R&D BER and the revised Specialisation BER and HGL, paras 79-84.

73 HGL, para 385.

74 HGL, para 386.

75 HGL, para 413.

of information on current pricing, capacity or output, demand forecasts and characteristics of future products could all be treated as by object infringements, to the extent that they reveal indications about a party's likely future market conduct. That said, there have not to date, been any cases in which the Commission or the EU Courts have found that disclosures of current pricing or output data, in isolation, have been found to amount to a by object infringement.

5.3 Benchmarking

(70) The provisions on benchmarking in the HGL are particularly useful.[76] Such provisions represent a welcome recognition from the Commission that information exchange can be used as a tool to improve internal efficiency through knowledge of the best practice of others.[77] It is necessary, however, to undertake careful analysis where benchmarking is claimed as an efficiency. ICC therefore welcomes the fact that the HGL's example on benchmarking notes that even where benchmarking is claimed as an efficiency, (i) the contents, objectives and context of the exchange itself may suggest a by object infringement; and (ii) the pro-competitive effects must be demonstrated to be relevant, specifically related to the exchange, and "sufficiently significant to justify a reasonable doubt as to whether the exchange causes a sufficient degree of harm to competition."[78]

5.4 Public announcements

(71) The HGL also draw on recent cases to explain the circumstances in which companies' public announcements (such as market disclosures, press releases or interviews with executives) might infringe competition law. As a general rule, any public disclosure of CSI should be assessed for compliance with the competition rules, and the HGL make clear that this is the case even if the disclosing business has a legitimate desire to inform shareholders, potential investors or the general public about its future market conduct, provided it would not disclose that CSI to its competitors in a market with effective competition.[79]

(72) The HGL also state that unilateral public announcements of e.g., future pricing intentions or likely reactions to possible conduct of rivals, may be considered to be a by object infringement, if those public disclosures do not clearly benefit customers.[80] This will be a particular risk for announcements of uncommitted pricing intentions, i.e., where the discloser is free to change its announced prices if rivals do not follow suit.[81]

(73) In such instances, the HGL state that it is (somewhat counter-intuitively) not only the disclosing business that is considered to commit an infringement, but also rivals that become aware of the disclosures and do not act to "distance" themselves from it, e.g., by responding with a clear statement to the discloser that they do not wish to receive such information, or by reporting the disclosure to competition authorities.[82]

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76 See for example HGL, para 474.

77 As acknowledged in HGL, paragraph 373.

78 HGL, para 429.

79 HGL, para 387.

80 HGL, para 416.

81 See the example at HGL, para 431.

82 HGL, para 397.

5.5 Data sharing and foreclosure risk

(74) ICC welcomes the expanded section within the HGL on anti-competitive foreclosure, with a new narrative focussing on foreclosure in the context of data sharing.[83] ICC believes the Commission has done well to expand upon the benefits of such data sharing since it can, *inter alia*, "facilitate market entry". At the same time, ICC is pleased to see that the positive effects are balanced against the possibility that shared databases can restrict competition when judged on their own facts. It is certainly true, for example, that "a database that covers a significant part of the relevant market and to which access is denied or delayed for other competitors may create an information asymmetry, placing those other competitors at a disadvantage compared to the undertakings that participate in the database." It therefore makes sense that such agreements should be subject to a "by effect" assessment.

6. STANDARDISATION AGREEMENTS

(75) ICC commends the Commission for maintaining a balanced approach towards standardisation. ICC recognises that there are a number of differences of opinion between ICC members on issues involving “Fair, Reasonable and Non-Discriminatory” ("**FRAND**") licensing within standardisation agreements. ICC is of the view that the revisions in the HGL 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.

6.1 Restriction of participation in standards development

(76) The HGL helpfully provide for some flexibility that may allow development activities with restrictive participation.[84] 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. ICC would therefore have recommended that the closing sentence of the relevant paragraph refers to all competitors having an opportunity to effectively participate in the development of the standard in line with the criteria set out by the World Trade Organisation ("**WTO**").[85] ICC hopes that this may be the approach taken in practice.

(77) It is in the spirit of open participation that ICC welcomes the requirement that intellectual property rights ("**IPRs**") policies of standards development organisations ("**SDOs**") should require good faith disclosure by participants of their IPR that "may be essential for the implementation of the standard under development."[86] It is certainly the case that this could be

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83 HGL, Section 6.2.2.2.

84 HGL, para 470.

85 WTO TBT Code of Good Practice and Regulation (EU) No 1025/2012.

86 HGL, para 457.

relevant to both enable the industry to make an informed choice about the technology to be included in the standard, and to achieve the goal of effective access to the standard. [87]

(78) To this end, the HGL set out specific disclosures that participants in the standard development process are required to make, including disclosures necessary for the implementation of the standard (e.g., patent or patent application numbers). "Blanket" disclosure (where the participant simply declares that it is likely to have IPR claims over a particular technology) should only be allowed where such specific information is not yet publicly available. In this case, participants should be encouraged to update their disclosures before the standard is adopted.[88]

(79) It is also useful that the HGL set out the circumstances in which disclosures mandated by participants in standards development agreements will, in principle, be considered to fall outside the prohibition on anticompetitive agreements. These include disclosures of information regarding the characteristics of and value added by each IPR belonging to a standard, and requirements that participating IPR-holders make ex-ante disclosures of their most restrictive licencing terms, including the maximum cumulated royalty rate for standard essential IPR.[89]

7. SUSTAINABILITY

(80) Unlike the 2010 HGL, the new HGL contain a whole chapter (Chapter 9) on “sustainability agreements”.

7.1 Key Message to Businesses

(81) The HGL set out how businesses can work together to fight climate change; put their industry on a more sustainable basis; and achieve broader social sustainability objectives. While not perfect (and the Dutch and UK draft guidelines go further, at least for climate agreements), the HGL provide a clear framework by which businesses can enter into agreements on things such as green production, phasing out the use of dirty fuels, and sourcing inputs on a more sustainable basis.

(82) The HGL do not (and could not) provide answers to all the questions businesses will have on what they can, and cannot, do in this area. However, the Commission sets out an “open door” principle, emphasising that it is willing to provide “informal guidance” on individual sustainability agreements. This is welcome and we call on ICC members to take real life concerns and examples to the Commission (or other relevant competition authorities) with a view to developing the guidance and increasing legal certainty in this evolving area.

(83) Businesses should ensure that agreements can clearly be seen to be focussed on sustainability. That said, while there may be cases where detailed scientific evidence is needed to substantiate sustainability claims, ICC very much hopes that in most cases this will not be necessary and that authorities take a flexible and proportionate approach to the evidence needed (including accepting qualitative evidence).

7.2 “Sustainability”

(84) The HGL cover more than environmental sustainability (although in practice this is at their heart). As the Commission’s FAQ paper explains, sustainability agreements “typically pursue

87 HGL, para 457.

88 HGL, para 457.

89 HGL, para 474.

goals aimed at economic, environmental and social development such as combatting climate change, reducing pollution, limiting the exploitation of natural resources, upholding human rights, ensuring a living income, protecting animal welfare and reducing food waste".[90]

7.3 What do the HGL cover?

(85) First, the HGL set out explicitly that competition law only applies to an agreement if it affects a parameter of competition (price, quality etc) and gives examples of sustainability agreements that fall outside Article 101(1) completely.[91]

(86) Secondly (and as part of the above), the HGL set out a "safe harbour" for agreements that set a minimum sustainability standard and which meet six cumulative conditions. Importantly, they also make clear that there is no presumption that an agreement falling outside the safe harbour is problematic (on the facts it may still fall outside Article 101(1) and, even if it does on the face of it restrict competition, the agreement may still benefit from an exemption under Article 101(3)).[92]

(87) Thirdly, the HGL provide guidance on how sustainability agreements should be assessed for compliance with each of the four cumulative conditions for an exemption under Article 101(3): relevant benefits; (i) contribution to improving production or distribution, or promoting progress; (ii) indispensability; (iii) fair share for consumers; and (iv) no elimination of competition. This is a detailed and complex section,[93] but the key points are:

(a) Sustainability agreements may generate traditional benefits, termed "individual use benefits", such as improvements in product quality or variety or price reductions;[94]

(b) Sustainability agreements may also give rise to "individual non-use benefits", i.e., those where the consumer values the sustainable qualities of the product even though these do not improve the objective quality or reduce the price (for example because the consumer values the fact that production of the product polluted less, or did not give rise to deforestation or habitat loss, or saw those who produced it paid a living wage;[95]

(c) The third category of benefits are "collective benefits", where "the sustainability impact from individual consumption accrues not necessarily to the consuming individual but to a larger group". The most obvious example is an agreement which reduces the emission of greenhouse gases ("**GHGs**").[96]

7.4 Some Limitations of the HGL on Sustainability

(88) As welcome as the HGL is, there are still some serious limitations and they are less ambitious than the draft UK and Dutch guidelines (note the Dutch have indicated that they will now bring their draft Guidelines into line with the HGL). Central to this is the Commission's view that the

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90 See also HGL, paras 516-521.

91 HGL, paras 527-555.

92 HGL, paras 537-555.

93 HGL, paras 556-596.

94 HGL, paras 571-574.

95 HGL, paras 575-581.

96 HGL, paras 582-589.

consumers buying a product (so-called “in market” consumers) must be no worse off as a result of the agreement (the “full compensation” principle) so that the “overall effect on consumers in the relevant market is at least neutral”.[97]

(89) That said, the HGL set out various ideas that mitigate the negative impact of this stance.

(90) First, where the consumers in the relevant market “substantially overlap with, or form part of, the group outside the relevant market” collective benefits accruing to the latter can be taken into account.[98]

(91) Secondly, it may be possible to add to these the individual use and non-use value benefits accruing to consumers in the relevant market; “indirect, non-use value benefits accrue to consumers within the relevant market via their individual valuation of the effect on others, including on non-users outside the relevant market.”[99] An example might be a product that involved less harm to tropical rainforests. Consumers in Europe benefit from the continuing ability of those forests to capture carbon and reduce the emission of GHGs, but they may also value the product purchased knowing that it helped preserve natural habitats.

(92) It remains to be seen how much use will be made of these possibilities as decisional practice develops. ICC hopes that application of the HGL, and the calculation of consumer benefit, will take proper account of the "polluter pays" principle in Article 191(2) TFEU, which is binding for Commission competition policy.[100] Clearly, there is an opportunity (and, indeed, onus) on ICC members to discuss instances where these issues arise with the Commission.

7.5 Improvements to the draft HGL

(93) There are several improvements relative to the draft HGL for which the ICC Sustainability Taskforce advocated.

(94) For example, there is clear recognition that a sustainability agreement may be necessary to achieve a sustainability goal more quickly (not just more efficiently).[101] Similarly, there is recognition that the presence of regulation is not necessarily a bar to a sustainability agreement – for example if the agreement leads to a higher sustainability standards or achieves the regulatory goal more quickly.[102]

(95) Another example is something for which the ICC Sustainability Taskforce pressed: agreements to comply with prohibitions in “legally binding international treaties, agreements or conventions” which are "not fully implemented or enforced by a signatory State".[103] These fall outside Article

97 HGL, para 569.

98 HGL, paras 583-585.

99 HGL, paras 587(d) and 577.

100 “Union policy on the environment (…) shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay”.

101 HGL, para 562.

102 HGL, para 565.

103 HGL, para 528.

101(1) completely. Examples include prohibitions on child labour, logging of tropical forests and the use of pollutants.

(96) A final example of an improvement is that an agreement may still fall within the safe harbour for sustainability standardisation agreements even if it leads to a significant increase in price or a significant reduction in quality, so long as the parties involved have, together, less than 20% of the relevant market.

7.6 Concluding Comment

(97) The section of the HGL dealing with sustainability agreements is most welcome and gives the "green light" (pun intended) to many forms of sustainability agreements. There is now clearly an opportunity for businesses to enter into these and consult with the Commission where the HGL do not give sufficient comfort. These informal consultations should create a bank of precedent cases which will show the Commission's approach to assessment and further enhance certainty in the area of sustainability and other horizontal agreements.