APDC

Association des Avocats pratiquant le Droit de la Concurrence

2 May 2022

REPLY TO THE PUBLIC CONSULTATION ON THE DRAFT REVISED HORIZONTAL GUIDELINES AND BLOCK EXEMPTION REGULATIONS

1. In the context of the public consultation launched on 1 March 2022 by the European Commission (the "**Commission**"), the Association of Lawyers Practicing Competition Law (hereinafter, the "**APDC**") welcomes the opportunity to comment on the draft revised Horizontal Guidelines (the "**Guidelines**"), the proposed revised Block Exemption Regulation on R&D agreements (the "**R&D BER**") and the proposed revised Block Exemption Regulation on Specialisation agreements (the "**Specialisation BER**").

2. In this context, the APDC presents the following observations, relating to each section of the Guidelines[1].

1 R&D AND SPECIALISATION AGREEMENTS

3. As a preliminary comment, the APDC welcomes the clarifications and simplification efforts of the Commission in the draft revised Horizontal Block Exemption Regulations (the "**HBER**") and the Guidelines.

4. However, the APDC regrets that the Commission did not take the opportunity of the revision process to question the relevance of having two specific exemption regulations limited to R&D and Specialisation agreements with very narrow scopes and strict conditions and very dense Guidelines covering all types of horizontal cooperation including R&D and Specialisation agreements. The APDC would have welcomed a HBER with a much wider scope covering other types of horizontal cooperation (similar to the Vertical Restraints Regulation) with accompanying Guidelines giving guidance to undertakings to apply the overall HBER.

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[1] The following members of the APDC have contributed to the drafting of this contribution: Guillaume AUBRON, Franck AUDRAN, Eric BARBIER DE LA SERRE, Charlotte COLIN-DUBUISSON, Virginie COURSIÈRE-PLUNTZ, Marie DE DROUAS, Anne-Laure-Hélène DES YLOUSES, Leyla DJAVADI, Guillaume FABRE, Romain FERLA, Marta GINER ASINS, Adrien GIRAUD, Dominique HEINTZ, Marie HINDRE, Clément HUBERT, Michel PFLIEGER, Cynthia PICART, Marie-Cécile RAMEAU, Léna SERSIRON, Yelena TRIFOUNOVITCH, Pierre Zelenko.

5. Beyond this general observation, the APDC provides below more specific comments on the Guidelines and the HBER as regards these agreements.

1.1 R&D AGREEMENTS

6. In its document summarising the main proposed changes in the HBER and Guidelines, the Commission mentions that "*pro-competitive horizontal cooperation in the form of R&D and specialisation agreements covered by the HBER is essential for the digital and green transition and can contribute to the resilience of the internal market*" (see para. 2) and (ii) "*HBER and Horizontal Guidelines are not fully adapted to economic and societal developments of the last ten years*" with some provision in the HBER considered "*rigid and complex, while other were considered unclear and difficult to interpret*". The APDC is fully in line with these observations.

7. In light of these two statements, the APDC is surprised that the Commission did not take the opportunity offered by the revision process to engage in more substantial changes. The APDC believes that the amendments to the R&D BER and Guidelines are to be qualified as clarifications rather than actual changes. Though these clarifications are useful – for example concerning market shares calculation requirements or the grace period –, they will not be sufficient to make a difference in the legal protection provided to R&D agreements.

8. That being said, further clarifications could have been brought by the Commission. For example, the APDC have welcomed clarification on the application of the access requirements, set out in Article 3 and 4 R&D BER, to "paid for R&D" agreements, in which R&D effort is outsourced. In such agreements, it appears questionable to impose such restriction on the undertakings that funds the R&D, which should be able to recoup the entirety of its investment.

9. Furthermore, the APDC would have welcomed clarification on the status of early stages of R&D (particularly basic research).

10. Indeed, the R&D BER links the definition of the R&D agreements to results (Article 1.(1), R&D BER). However, basic research consists of experimental or theoretical work undertaken primarily to acquire new knowledge without considering any particular application or use. When the Commission states that the concept of "*research and development*" means "*activities aimed at the acquisition of know-how relating to existing or new products, technologies or processes, as well as the carrying out of theoretical analyses, studies or systematic experiments*", it might be useful to clarify whether the exemption is also applicable to basic research.

11. Moreover, the wording of R&D BER is not sufficiently clear as to whether and under which conditions the parties have to provide access to the results for "*further research*" when they expressly limit their exploitation of the results, in particular by way of specialisation. It is also not clear as to whether the parties have to provide full access to each other again once the benefit of the exemption has expired.

12. Then, the APDC is surprised to see additional restrictions imposed by the R&D BER. These stricter conditions are linked to the introduction of the following concepts:

   – "*undertaking competing in innovation*" (Article 1.(18), R&D BER);

   – "*R&D pole*" (Article 1.(8), R&D BER);

   – "*new products or technology*" (Article 1.(1), R&D BER).

13. More specifically, the APDC is concerned by the additional condition introduced under Article 6.3 of the HBER to benefit from the exemption (the so- called "*3 plus 1-rule*"). Indeed, in practice, when two or more of the parties to the R&D agreements are undertakings competing in innovation, the safe harbour is now conditioned upon the existence of "*three or more competing R&D efforts in addition to and comparable with those of the parties to the R&D agreement*".

1.1.1 The three competing R&D efforts condition

14. The APDC has questions and comments about this new condition. In substance, it believes that it is simply not a realistic benchmark that would work in practice.

15. *Firstly*, how to define "*competing R&D efforts*" in practice? Under Article 1 R&D BER, it is mentioned that these should encompass: "*the research and development of <u>the same or likely substitutable new products</u> and/or technologies as the ones to be covered by the R&D agreement*" or "*R&D poles <u>pursuing substantially the same aim or objective</u> as the ones to be covered by the R&D agreement*". To what extent future products are *likely* substitutable or R&D poles pursue *substantially* the same aim will be hard to tell without engaging in cost-intensive economic analysis. The APDC would welcome further clarifications based on concrete examples to ease the application of this condition. Without examples, it will prove difficult for undertakings, in particular SMEs, to work around this condition.

16. Furthermore, the Commission indicates that the information to be gathered in order to determine whether a project should be considered as "*competing R&D efforts*" under Article 7.2. R&D BER shall include: "*reliable information concerning elements such as (i) the size, stage and timing of the R&D efforts, (ii) third parties' (access to) financial and human*

resources, their intellectual property, know-how or other specialised assets, their previous R&D efforts and (iii) the third parties' capability and likelihood to exploit directly or indirectly possible results of their R&D efforts on the internal market".

17. The APDC wonders how undertakings will, in real life, have access to such level of information about competing projects. The information required is very extensive, not to mention very sensitive. It is unlikely that it will be available to competing parties (and rightly so). On that basis, the APDC is of the view that the R&D BER fails to provide the intended legal certainty and clarified legal framework which would allow undertakings to increase R&D efforts in the context of digital and green transition reminded above. On the contrary, this condition is likely to hold back undertakings and hamper R&D efforts.

18. *Secondly*, most if not all of the information necessary to the analysis is confidential by its very nature. Even if some R&D players were to announce publicly their intention to engage in a given field of R&D, the information made public in such manner would likely be very limited and contain optimistic projections and/or potentially not entirely reliable figures-so as to present the best possible public profile to investors and analysts. This information would obviously be partial and possibly biased. It should therefore not be considered as entirely reliable sources for the exemption analysis requested under the R&D BER.

19. *Thirdly*, if the undertakings contemplating a R&D cooperation are not aware of such "*competing R&D efforts*" on the market, what should the right reaction be? Not being aware of competing R&D efforts does not mean that such efforts do not exist. A prudent approach would be, absent the information necessary to carry out the analysis, to abandon said R&D efforts. The HBER would therefore paradoxically end up discouraging innovative ventures.

1.1.2 The concept of potential competitor

20. The APDC welcomes the slight broadening of the concept of potential competitor brought about by the amendments to the R&D BER compared to the previous version.

21. The condition of price increase has been removed in the amended R&D BER. Under Article 1 R&D BER: "*potential competitor" means an undertaking that, in the absence of the R&D agreement, on realistic grounds and not just as a mere theoretical possibility, would be likely to undertake, within not more than 3 years, the necessary additional investments or incur the necessary costs to supply a product, technology or process capable of being improved, substituted or replaced by the contract product or contract technology on the relevant geographic market"*.

22. *Firstly*, the APDC however considers that this concept remains very challenging to apply in practice and may lead to great uncertainties in the determination of the safe harbour. In this

respect, the APDC would welcome further guidance and simplification by the Commission (including guidance with respect to the evidentiary burden expected from the parties).

23. *Secondly*, as a matter of consistency and legal certainly, the APDC would suggest referring to the recent *Generics* judgment of the European Court of Justice ("**ECJ**") in which the Court has clarified the notion of potential competitors judging that : "*in order to assess whether an undertaking that is not present in a market is a potential competitor of one or more other undertakings that are already present in that market, it must be determined whether there are real and concrete possibilities of the former joining that market and competing with one or more of the latter given the structure of the market and the economic and legal context within which it operates.*"[2]

24. The APDC believes that the upcoming Regulations and Guidelines should refer to the most recent case law of ECJ for such key concepts as this one.

25. *Finally*, the APDC encourages the Commission to provide clearance as to the notion of potential competition in the context of dual distribution, in which distributors which are customers may also be competitors.

1.1.3 The calculation of market shares

26. Finally, the APDC would welcome further clarifications with respect to the calculation of market shares in innovative markets. More specifically, under Article 6.2. of the R&D BER, parties to an R&D agreement are eligible to the safe harbour provided that their combined market share does not exceed 25%.

27. This market share is to be calculated on a market for innovation encompassing "*undertaking*[s] *competing in innovation*".

28. An undertaking competing in innovation is defined in the R&D BER as "*an undertaking that is not competing for an existing product and/or technology and that independently engages in or, in the absence of the R&D agreement, would be able and likely to independently engage in R&D efforts which concern*" (Article 1.(18), R&D BER). Here again, this definition is hardly workable in practice.

29. *Firstly*, the ability and the willingness of another undertaking to engage in competing R&D is hard, if not impossible, to assess for parties.

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[2] CJ, C-307/18, 30 January 2020, *Generics,* paras. 36, 39.

30. *Secondly*, the reference to the *independence* of competing projects appears insufficiently clear. Whether a potentially competing project is independent when it relies in part on the same funding or intellectual property (as the case may be), or when it is operated by a co-contractor for instance, is uncertain.

31. In consideration of the above, the APDC highlights the difficulty of determining market shares in innovative markets. In substance, a competitive analysis on markets that do not yet exist appears difficult (if not impossible) to carry out. It is already common that parties to R&D agreements are unable to determine with sufficient certainty what their market position is on existing/pipeline products and technology markets. The APDC would therefore welcome more examples-based guidance.

1.2 Specialisation agreements

32. As indicated above, the APDC questions the need to maintain a HBER dedicated to specialisation agreements which is overly restrictive. Indeed, under Article 3 of the Specialisation BER, parties are eligible to the safe harbour provided that (i) their combined market share does not exceed 20%, and (ii) the agreement they wish to engage in do not contain hardcore restrictions.

33. The APDC respectfully encourages 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.

2 PURCHASING AND COMMERCIALISATION AGREEMENTS

34. In its previous contribution, the APDC insisted that the Commission should take into account purchasing alliances in its Guidelines, given their development in Europe and the new legal issues this development entails.

35. The APDC also drew the Commission's attention to the need for a more detailed analysis of the positive and negative effects on competition that purchasing or commercialisation agreements may have as such, in particular in terms of market structure and its impact on the assessment of the risk of foreclosure of competitors (existence or not of barriers to entry, number and power of competitors, etc.).

36. From the point of view of French practitioners, the need for clarification from the Commission is all the more important as the French Competition Authority controls and may be required to conduct a "competitive assessment" of certain joint purchasing agreements under Article L. 462-10 of the Commercial Code.

2.1 USEFUL CLARIFICATIONS MADE BY THE COMMISSION

37. The APDC welcomes the Commission's clarification of the distinction between lawful joint purchasing arrangements and anti-competitive buyer cartels (para. 316 et seq.), as well as the Commission's detailed example on this subject (para. 349).

38. These clarifications are all the more commendable given that purchasing agreements correspond to very heterogeneous situations (as recalled by the Commission in para. 312) for which the application of single and uniform rules is not easy.

39. In particular, the APDC can only agree with the Commission's indications that cooperation between purchasers should not give rise to an exchange of commercially sensitive information between competitors (para. 318) or that a minimal transparency vis-à-vis suppliers and/or control authorities is necessary (para. 319).

40. However, the APDC notes that the Guidelines could gain in consistency. For instance, the Commission explains at para. 319(a) that the fact that a joint purchasing agreement is clearly disclosed to the supplier can be an indicator that the agreement is not a buyer cartel. Yet, in footnote 180, the Commission also states that secrecy is not a requirement for finding a buyer cartel. Furthermore at paras. 316 to 317, the Commission explains that buyer cartels aim at coordinated purchaser's individual competitive behaviours but, at the same time, at para. 319 (a) it foresees that a legitimate purchasing cooperation may bind the parties regarding their individual purchases.

41. On a related note, the APDC welcomes the Commission's extensive discussion of the importance of the criterion of buyer power in examining the competitive legality of purchasing cooperation (paras. 331 et seq.).

42. Indeed, the APDC agrees with the Commission's approach that market power (on the buyer's or supplier's side) is a decisive factor in assessing the potential risk of anticompetitive effects that could arise from a purchasing cooperation.

43. In particular, as the Commission points out (para. 332), restrictive effects on competition are less likely to occur if the suppliers concerned belong to powerful groups with strong bargaining power. On the contrary, such effects are more likely if the purchasing agreement involves many small suppliers or powerful purchasers.

44. Finally, although additional clarifications would be useful (see section 2.3 below), the APDC welcomes the Commission's substantial discussion of bidding consortia (paras. 385 et seq.), supplemented by a relatively illustrative example (para. 404).

45. In its previous contribution, the APDC had indeed regretted that the previous guidelines (the "**2011 Guidelines**") did not provide any guidance on how consortia should be treated when they are created to respond to a call for tenders or a public contract. In general, the APDC felt that joint bidding issues would benefit from further exploration in the Guidelines.

46. The APDC is pleased to have been heard by the Commission.

47. In particular, like the developments on the clarification of the distinction between lawful purchasing agreements and buyer cartels, the distinction made by the Commission between lawful bidding consortia and bid-rigging is welcome, since the limits between both are not always easy to find for operators.

48. The Commission's reminder of the efficiency gains that can be generated by such groupings (paras. 395-396) is also welcome, given the advantages that this type of agreement can bring (for the bidders, the contracting entity and ultimately the consumer) when it is economically justified.

2.2 NEED OF A REAL "SAFE HARBOUR" AND OF A HIGHER THRESHOLD

2.2.1 Establishment of a real « safe harbour »

49. Companies' self-assessment of their purchasing agreements and commercialisation agreements need more legal certainty. Currently, the Guidelines do not provide such a safe harbour.

50. Regarding purchasing agreements, paragraph 329 of the Guidelines states that « […] *in most cases it is unlikely that market power exists if the parties to the joint purchasing arrangement have a combined market share not exceeding 15% on the purchasing market or markets as well as a combined market share not exceeding 15% on the selling market or markets. In any event, if the parties' combined market shares do not exceed 15% on both the purchasing and the selling market or markets, it is likely that the conditions of Article 101(3) are fulfilled.* »

51. As for commercialisation agreements, paragraph 378 of the Guidelines states « *in most cases, it is unlikely that market power exists if the parties to the agreement have a combined market share not exceeding 15% in the market where they jointly commercialize the contractual*

products. In any event, if the parties' combined market share does not exceed 15%, it is likely that the conditions of Article 101(3) are fulfilled. »

52. Far from providing a safe harbour, these paragraphs of the Guidelines rather lay down a presumption of lack of market power for agreements whose parties' aggregate market share are below 15% on the purchasing market(s) and on the selling market(s). This presumption is not equivalent to a safe harbour as can be found in the R&D block exemption regulation.

53. The analysis of purchasing and commercialisation agreements is particularly difficult, as it entails an assessment on both horizontal and vertical levels. It therefore needs a clearer analytical framework including a real exemption giving self-assessing undertakings legal certainty.

54. This has to be noted as it seems the Guidelines have taken a step further away from the recognition of a real safe harbour. Indeed, regarding purchase agreements, paragraph 209 of the 2011 Guidelines reads « *[…] A joint purchasing arrangement which does not fall within that safe harbour requires a detailed assessment of its effects on the market […]* ». The corresponding paragraph 330 of the Guidelines is now drafted as follows : « *A joint purchasing arrangement with a combined market share above that threshold requires a detailed assessment of its effects on the market […]* ». Regarding commercialisation agreements, paragraph 241 of the 2011 Guidelines also mentions the safe harbour (« *If the parties' combined market share is greater than 15 %, their agreement will fall outside the safe harbour of paragraph 240 […]* ») whereas paragraph 379 of the Guidelines does not (« *If the parties' combined market share is greater than 15%, it is not possible to presume that their agreement will not have restrictive effects and thus the likely impact of the joint commercialisation agreement on the market must be assessed.* »).

55. This tendency away from legal certainty also seems to be supported by the replacement of the word « unlikely » by the words « less likely », of paragraph 212 of the 2011 Guidelines into paragraph 337 of the Guidelines which now reads : « *However, if competing purchasers that cooperate are not active on the same relevant selling market (for example, retailers which are active in different geographic markets and cannot be regarded as potential competitors), the joint purchasing arrangement is less likely to have restrictive effects on competition in the selling market. […]* ».

2.2.2 Increase in the market share threshold

56. The decision practice of the Commission and the national competition authorities (the "**NCAs**") shows a clear tendency towards narrower definitions of product markets as well as geographical markets. The undertakings' market shares thereby cross the 15% thresholds in a much more systematic manner, excluding the agreements from the presumption of lack of

market power, hence giving rise to legal certainty concerns for undertakings as they need to self examine the agreements they enter into. This is emphasised by the fact that the aggregate market shares of all undertakings parties are taken into account.

57. Moreover, diverging interpretation between the Commission and NCAs, as well as between NCAs, regarding both product and geographic market definitions, add to that legal uncertainty. While in some cases, the definitions may be broad, some other instances have shown a narrower assessment of the relevant markets. Undertakings have also faced diverging interpretations regarding merger control and regarding anticompetitive practices, and even between different anticompetitive practices, such as practices relating to article 101 TFEU and 102 TFEU, or vertical and horizontal practices. This lack of predictability has led undertakings to adopt a very conservative approach towards purchase and commercialisation agreements, especially given the risks involved.

58. In light of these elements, the APDC suggests the Commission to:

- introduce a real safe harbour expressed in terms of thresholds below which agreements would be exempted instead of a presumption of lack of market power, which leads to legal uncertainty;

- increase these thresholds to 25%:

    - this level would help correct the over narrowing of the relevant market definitions and the uncertainty resulting from a diverging practice between NCAs and the Commission;

    - a 25% threshold is already applied as a safe harbour in the R&D block exemption regulation. This regulation applies to some horizontal agreements and it would be reasonable and consistent for the Guidelines to set a safe harbour at that level;

    - a 25% threshold still remains below the 30% threshold of the vertical block exemption regulation covering vertical agreements;

    - a 25% threshold would also put the appraisal of such horizontal agreements in coherence with the appraisal of horizontal concentrations. Indeed, the Commission considers that a concentration where the parties' combined market share does not exceed 25% may be presumed as not impeding effective competition (see Commission's guidelines on the assessment of horizontal mergers, para. 18). Therefore, if below such a 25% threshold, a merger (i.e. the combination of the entire activities of several previously independent competing companies) does not raise difficulties from the point of view of

competition law, it should be possible to presume that a cooperation agreement limited to purchasing or commercialization activities alone should not have a negative effect on competition either.

2.3 Clarification of the definition of bidding consortia that do not restrict competition

59. The Guidelines provide a definition of bidding consortia that do not restrict competition at paragraph 391: « *A joint bidding consortium agreement – irrespective of its legal qualification – does not restrict competition if it allows the undertakings involved to participate in projects that they would not be able to undertake individually. As the parties to the consortium agreements are therefore not potential competitors for implementing the project, there is no restriction of competition within the meaning of Article 101(1). This can be the case of undertakings that produce different services that are complementary for the purposes of participation in the tender. Another possibility is when the undertakings involved, although all active in the same markets, cannot carry out the contract individually, for example due to the size of the contract or its complexity.* ».

60. The criterion is therefore that the undertakings parties to the consortium are not able to participate in the project on their own. The Guidelines provide examples of circumstances where bidding consortia do not restrict competition: where the undertakings parties are complementary or where they cannot carry out the contract on their own due to its size or complexity.

61. It appears however that the criteria used to assess whether an undertaking can compete individually in the tender could be specified, extended and/or clarified. In particular, additional mention should be made to the level of financial risk induced by the project as well as the level of the investments required for the contract. These elements in fact are able to prevent a company to participate in a tender and introducing them in the Guidelines would go towards more legal certainty for undertakings.

2.4 Other comments

62. The APDC considers that the reasoning of the Commission relating to some anticompetitive effects of joint purchasing agreements needs to be clarified.

2.4.1 Clarification of the reasoning around exclusive purchasing obligations

63. In paragraphs 325, 335 and 347 of the Guidelines, the Commission states that exclusive purchasing obligations may cause negative effects on competition because they may reduce purchased volumes, lead to collusion on the downstream selling market and disincentivize lowering sales prices to the benefit of consumers:

   - Paragraph 325 states that "*exclusive purchasing obligations, whereby the members of a joint purchasing arrangement are obliged to purchase* ***all or most of their requirements*** *through the arrangement, may have negative effects on competition and require an assessment in the light of the overall effects of the joint purchasing arrangement*";

   - Regarding price competition on the downstream selling market, paragraph 335 states that the risk of coordination on the downstream selling market is "*particularly high if the joint purchasing arrangement limits (or disincentivizes) the ability of its members to independently purchase* ***additional volumes of the input*** *in the purchasing market, either through or outside the joint purchasing arrangement. An obligation on the members of a joint purchasing arrangement to purchase* ***all or most of their requirements*** *through the arrangement requires an assessment of the restrictive effects on competition. Such assessment takes account of, in particular, the extent of the obligation, the market share of the joint purchasing arrangement on the selling market and the degree of concentration of suppliers on the purchasing market and whether such obligation is necessary in order to ensure a sufficiently strong negotiation position of the arrangement towards strong suppliers.*";

   - Regarding the analysis of efficiency gains passed on to consumers, paragraph 347 concludes that "*Finally, lower sales prices for consumers are particularly unlikely if the joint purchasing arrangements that limit the independent ordering of* ***additional volumes*** *by its members provide an incentive to raise sales prices.* ***This is because jointly limiting the purchase of inputs*** *may also have the effect of limiting the volume of sales in the selling market or markets*".

64. To increase legal certainty, the APDC suggests that the Commission clarifies these paragraphs in which a rather strong stance is taken against all obligations of the members of

a joint purchasing arrangement to purchase most or all of their purchase volumes within the arrangement.

65. *Firstly*, the scope of the exclusive purchasing obligations that concern the Commission is not clear. The broad terms used (*e.g.* "*additional volumes of the input*") potentially apply to very different exclusivities, from an obligation to jointly purchase any product in all product categories to exclusivities limited to certain categories of products, potentially narrowly defined, and/or to certain suppliers. In practice, exclusive purchasing obligations often apply to the negotiations with only certain suppliers of branded products. In that case, parties to the joint purchasing arrangement cannot negotiate independently "*additional volumes of the input*" if "*input*" is to be understood as the specific products supplied by the suppliers considered. However, parties negotiate independently the purchasing conditions for other products and/or with other suppliers.

66. In this respect, the lack of coherence in the wordings used in the above-mentioned paragraphs does not help to understand the scope of what the Commission targets: paragraph 325 mentions "*all or most of their requirements*" whereas the expressions "*additional volumes of the input*" and "additional volumes" are respectively used at paragraphs 335 and 347.

67. The APDC would thus welcome further clarification, wordings alignment and better articulation between those paragraphs to ensure more legal certainty and appropriate advice in the drafting and assessment of joint purchasing agreements.

68. In particular, it suggests that the Commission clarifies in the above-mentioned paragraphs the scope of exclusive purchasing obligations which it considers may have negative effects on competition. The APDC notes in this respect that paragraph 335 mentions that the assessment of effects would take into account "*the extent of the obligation*" but considers that further details would be welcomed in this respect and that, at the very least, equivalent details be mentioned in paragraphs 325 and 347 as well.

69. The APDC also notes that the assessment of the scope of the exclusivity obligation must be balanced with the necessity to ensure proper functioning and meet the core objectives of purchasing arrangements, which requires that the parties be guaranteed that each of them "contributes" a sufficient volume of purchasing to the joint negotiations. The APDC welcomes in this respect that paragraph 335 mentions "*whether such obligation is necessary in order to ensure a sufficiently strong negotiation position of the arrangement towards strong suppliers*" among the criteria to be taken into account in the assessment of effects.

70. *Secondly*, the APDC suggests that the Commission clarifies the economic rationale supporting the reasoning set out at paragraph 347 of the Guidelines.

71. Indeed, the statement "*this is because jointly limiting the purchase of inputs*" seems to assume that an exclusivity agreed within a purchasing arrangement automatically limits or reduces the overall purchased volumes. Yet, it does not seem obvious that a purchaser would have an incentive to reduce the volumes of its purchases because of such exclusivity in a joint purchasing arrangement.

72. The APDC would therefore welcome a clarification – or reconsideration – of the premise of the Commission's reasoning according to which an exclusivity would create an incentive to reduce purchase volumes, hence to reduce selling volumes and ultimately to raise sales prices.

73. For the above-mentioned reasons, based on the current wording of the Guidelines, certain purchasers risk being wrongly disincentivized to set out exclusive purchasing obligations in future joint purchasing agreements. This could in turn reduce incentives to enter into such arrangements since, as mentioned, it contractually guarantees that each partner will bring sufficient volume to the joint negotiations is key in this respect. The APDC therefore considers that the Commission should further clarify its analysis of exclusive purchasing obligations in joint purchasing agreements and specify the precise circumstances under which such obligations may raise negative effects on competition.

2.4.2 Clarification of indicators increasing the risk of collusive outcome

74. In paragraph 338, the Guidelines provide that "*A collusive outcome is also more likely if the joint purchasing arrangement includes a significant number of undertakings in the selling market and extends beyond the mere joint negotiation of purchasing terms and conditions (for example by fixing the purchasing volumes of its members), thereby limiting significantly the scope for the parties to the arrangement to compete on the selling market*".

75. As rightfully demonstrated in Example 3 at paragraph 351 of the Guidelines, the number of undertakings members of a joint purchasing arrangement is of little relevance to assess market power and collusion risk. The intensity of competition exerted on the selling market by competitors which are not parties to the joint purchasing arrangement is a better criterion in this respect. The APDC therefore considers that it would be more appropriate to refer to a high combined market share of the members of a joint purchasing arrangement as an indication of a higher likelihood that a collusive outcome might stem from the arrangement.

3 INFORMATION EXCHANGE

3.1 LEGAL CERTAINTY

76. Whilst the APDC welcomes some useful clarifications in the Guidelines, it notes that the drafting of some sections is at times rather open-ended, if not excessively vague and imprecise. This could defeat the purpose of providing legal certainty to undertakings. Examples may include:

- Paragraph 409, where the Commission states that "*if the information exchange [that is part of another type of horizontal agreement] does not exceed what is necessary for the legitimate cooperation between competitors, then even if the exchange has restrictive effects on competition within the meaning of Article 101(1), the agreement is more likely to meet the criteria of Article 101(3) than if the exchange goes beyond what is necessary to enable the cooperation*". Yet, the Commission does not explain how, in those circumstances (*i.e.*, when a horizontal agreement is legitimate and the information exchange does not go beyond what is necessary to enable the cooperation), the exchange of information could fall within the scope of Article 101(1) TFEU. Therefore, the Guidelines should specify that when the information exchange is indispensable (and proportionate) to a main, legitimate operation, it may not only be valid under Article 101(3) TFEU but also constitute an ancillary restraint not caught by Article 101(1) TFEU ("*If the information exchange does not exceed what is necessary for the legitimate cooperation between competitors, then even if the exchange has restrictive effects on competition within the meaning of Article 101(1), the agreement is more likely to constitute an ancillary restraint not caught by Article 101(1) TFEU and/or meet the criteria of Article 101(3) than if the exchange goes beyond what is necessary to enable the cooperation*");

- Paragraph 411, where the Guidelines should make it clearer that an information exchange is not caught by Article 101(1) TFEU if it is required by law, and that when Article 101(1) TFEU does not apply, undertakings are, by definition, not required to implement precautionary measures: "*Information exchange may also stem from regulatory initiatives. Even though undertakings may be encouraged or obliged to share certain information and data in order to comply with Union or government requirements, Article 101(1) continues to apply to the part of the exchange of information that is not required by legislation. In practice, this means that those subject to regulatory requirements must not use these requirements as a means to infringe Article 101(1). They should restrict the extent of the information exchange to*

what is required on the basis of the applicable regulation ~~and~~ or they may have to implement precautionary measures in case commercially sensitive information is exchanged";

- Paragraph 413, where the Commission sets out that the concept of concerted practice applies when three cumulative conditions are met: (*i*) a concertation between undertakings; (*ii*) subsequent conduct on the market; (*iii*) causation between the two. The Commission then spells out the cases in which there is a presumption that such conditions are met. Yet nowhere does it explain how undertakings could rebut that presumption or the cases in which this presumption would not apply[3];

- Paragraph 425, where the Commission explains that when the information exchanged is genuinely public, this "***may*** *decrease the likelihood of a collusive outcome on the market to the extent that non-coordinating undertakings, potential competitors as well as customers* ***may*** *be able to constrain potential restrictive effects*". Yet, the Commission does not provide any precedent where the exchange of genuinely public information would have resulted in a collusive outcome in the market. By contrast, the case-law to which the Commission refers sets out that "*It has been held that such a system for exchanging [public] information* ***cannot*** *infringe the Treaty competition rules*"[4]. It is thus detrimental to legal certainty that the Commission opens the possibility that the exchange of genuinely public information could amount to concerted practices;

- Paragraph 426, in the example, where the Commission notes that exchanges of non-public information can "*create a climate of mutual certainty*" that is likely to lead to a collusive outcome. It is unclear why the Commission refers to the creation of such a climate, in a section where it is discussing the distinction between (*i*) genuinely public; and (*ii*) not-genuinely public information. Merely pointing out to the existence of costs to collect information should suffice to its example. By contrast, referring to a notion as vague as a "*climate*" as a means of assessing an exchange of information appears ill-suited to provide legal certainty.

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[3] Cf. *infra*, in relation to hub and spoke situations.

[4] TEU, T-191/98, T-212/98 to T-214/98, 30 September 2003, *Atlantic Container Line and Others v Commission*, , para.1154.

3.2 HUB AND SPOKE

77. The APDC would like to comment specifically on exchanges in mixed vertical/horizontal relations, and to the applicable legal standard to conclude to the existence of an infringement.

78. *Firstly*, the Commission seems to apply the same legal standard to indirect exchanges of information and to exchanges in mixed vertical/horizontal relations. Yet, the two are very different in practical and economic terms:

   – in a mixed vertical/horizontal relation, suppliers or customers generally have diverging incentives[5] and sharing commercially-sensitive information is inherent to vertical relationships[6];

   – by contrast, indirect exchanges through any conduit, be it an algorithm or an agency, are not economically different from direct exchanges between competitors. Competitors sharing an algorithm operated by a third party is not different from competitors directly sharing the same algorithm – the algorithm is merely a tool for direct exchanges of information. The third party may however adapt this tool, so as to prevent anticompetitive exchanges using *chinese walls* or aggregated data.

79. Secondly, and precisely given the specific role of each participant in a mixed vertical/horizontal relationship, the APDC welcomes the Commission's position that the assessment of such exchanges includes "*a case by case analysis of the role of <u>each participant</u> [...] to establish whether the exchange concerns an anti-competitive agreement or concerted practice and who bears responsibility for the collusion*" (para. 436 of the Guidelines). This is also fully in line with the Court's case law which requires that each participant "*intended to contribute by its own conduct to the common objectives pursued by all the participants*"[7].

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[5] *E.g.*, a customer's incentives should be to emulate competition between suppliers to capture the greatest possible part of the added-value for the products or services at hand.

[6] This is what the French Competition Authority noted in a decision 20-D-04 dated 16 March 2020 relating to practices implemented for the distribution of Apple products: "*concerted practices could be found to exist where the exchange of information between a supplier and a retailer goes beyond what is commercially legitimate to exchange in a vertical agreement, thus giving rise to a horizontal exchange of information*" (para. 586).

[7] CJ, C-49/92 P, 8 July 1999, *Commission / Anic Partecipazioni*, para. 87. In a decision adopted on 21 December 2020, the Portuguese Competition Authority fined suppliers and retailers for a hub and spoke agreement. In this case, and based on the Authority's press release, it appears that the Authority

80. Yet, whereas the Commission points to this legal condition at the paragraph 437 of the Guidelines, it goes on to state that "*the condition would be met if the undertaking receiving or transmitting the information could reasonably have foreseen that the third party would share its commercial information with its competitors and if it was prepared to accept the risk which that entailed*". Merely requiring that a transmission of information is "*reasonably foreseeable*" covers legitimate exchanges of information, without any intention to contribute to anti-competitive objectives. For instance, in some markets, clients quasi-systematically share price information of one supplier with its other suppliers. This is not done in pursuit of anticompetitive objectives but to exert competitive pressure on prices. In such circumstances, a supplier can "*reasonably foresee*" that the client will share its commercial information with its competitors. Yet, its incentives diverge from that of the client. And whereas it does not wish to contribute to any anticompetitive common objective, it cannot not provide its client with a quote. Accordingly, the Commission should clarify as follow, that an undertaking receiving or transmitting the information: "*could reasonably have foreseen that the third party would share its commercial information with its competitors in pursuit of anti-competitive objectives and if it was prepared to accept the risk which that entailed*".

81. *Thirdly*, the presumption of conduct on the market caused by an exchange of information referred to at paragraph 413 of the Guidelines should not apply in mixed vertical/horizontal cases. Since in such cases the information that is shared is *necessary* to the vertical relationship, its mere transmission does not reveal the existence of a shared anticompetitive objective, contrary to the situation of direct exchanges between competitors. Having to prove subsequent conduct on the market caused by the exchange of information could allow competition authorities to distinguish illegal hub and spoke situations from procompetitive exchanges of commercial information. Also, applying a presumption would not lead undertakings to change their behaviour (*i.e.* they have to provide the information to their client).

3.3 ALGORITHMS AND DIGITAL DATA

82. The application of Article 101 TFEU to algorithms and the competitive significance of big data has been the topic of much debate amongst practitioners and academics. Yet, there seems to be little legal guidance available from competition authorities or courts in relation to these questions. This is why the APDC welcomes the inclusion of certain clarifications in the Guidelines.

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had in its file various emails exchanged between the participants showing an anticompetitive intention on the part of all undertakings participating to align prices and avoid competition.

83. The Commission now makes clear that sharing digital data falls within the scope of the Guidelines. Yet, it chose not to devote a section to digital data sharing in a systematic and consistent manner. Rather, it only clarifies a few aspects here and there. This piecemeal approach does not do justice to the specificities of sharing digital information and to some of its pro-competitive aspects. In particular:

   – the Commission notes in a footnote that sharing data is encouraged by the European Strategy for Data. Yet, it does not draw on this initiative and on the ways in which it recognises that sharing data may be beneficial;

   – situations where sharing digital data could be procompetitive could include: (*i*) situations where smaller players try and match the competitive advantage that a bigger player may derive from its access to superior amount of data; (*ii*) situations where a platform shares price information collated across its user base with all undertakings using its services to create competitive pressure on prices. A more specific definition of situations where such procompetitive effects of data would apply may be beneficial as well.

84. The Commission's piecemeal approach can also create issues of consistency and clarity. For instance, the Commission provides explanations in relation to algorithms at various junctures of the draft:

   – at paragraph 418, it explains that the use of algorithms "*may, for example, increase the risk of collusive outcome in the market*" and it distinguishes "*algorithmic collusion*" from "*collusion by code*";

   – at paragraph 412, to recognise that sharing information may allow undertakings to "*train algorithms on a broader, more meaningful basis*";

   – at paragraphs 432-433, to (*i*) explain that concerted practices may arise from using a shared algorithmic tool; and (*ii*) establish that a firm will be presumed to have taken account of information received from a competitor through an algorithm;

   – at paragraph 435, where it equates sharing information *via* an algorithm to indirectly sharing information *via* a third party, and states that "*the aggregation of sensitive information into a pricing tool offered by a single IT company to which various competitors have access could amount to horizontal collusion*".

The interaction between these various notions is not always clear. "*Algorithmic collusion*" entails an assessment of the "*specific designs of the algorithms*" (*i.e.* of the way the algorithm

was coded). Yet, according to the Commission, it is distinct from "*collusion by code*". This distinction may not be clear in practice. At the same time, it seems that "*algorithmic collusion*" would be different from sharing algorithms and that "*using publicly available data to feed algorithmic software is legal*". In other words, "*algorithmic collusion*" could apply to competitors using different algorithms in a way that would be more than merely "*using publicly available data to feed algorithm software*", but without entailing collusion by code. It would therefore be useful for the Commission to include a more detailed description /definition of the various notions it refers to and to explain in further details how they relate to one another.

This example shows that more consistent and in-depth guidance in relation to digital data, algorithms and platforms is called for.

3.4 Restriction by object.

85. At paragraph 448, the Commission defines which exchanges can amount to a restriction by object by reference to two cumulative conditions. Both conditions relate to whether the exchange of information removes uncertainty as to competitors' future conduct but are drafted in slightly different terms:

   - at paragraph 448, the Commission explains that an exchange of information will amount to a restriction by object if (*i*) the information is "*commercially sensitive*"; and (*ii*) the exchange 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*";

   - at paragraph 423, the Commission provides a definition of "*commercially sensitive*" information. It is information that is "*likely to influence the commercial strategy of competitors. This is the case if information once exchanged, reduces uncertainty regarding one or several competitors' future or recent actions in the market and regardless of whether the undertakings involved in the exchange obtain some benefit*".

86. How to articulate one condition with the other does not appear clearly:

   - is the Commission's position that all exchanges of commercially sensitive information that are also sufficiently precise in terms of "*timing, extent and details*" of future market conduct amount to a restriction by object?

– yet, at paragraph 424, under the definition of commercially sensitive information, the Commission notes that "*information that has been considered to be particularly commercially sensitive and the exchange of which was qualified as a by object restriction, include the following […]*". This seems to provide another definition of a restriction by object for exchanges of information (*i.e.*, the exchange of *particularly* sensitive information, which would then relate to the various examples provided by the Commission at this paragraph[8]);

– in other parts of the Guidelines, the Commission seems to consider that it should be assessed whether the exchange of commercially sensitive information has restrictive effects (for instance, in relation to joint purchasing agreements at paragraph 342), which seems to imply that not all exchanges of commercially sensitive information amount to a restriction by object.

87. All in all, the two notions appear to overlap significantly whilst not being identical. In this context, it could be useful for the Commission to provide further clarity on what it considers to be an exchange of information that restricts competition by object.

It would be all the more important to have clear guidance as the characterisation of a restriction by object has important consequences for undertakings. Also, the notion of restriction by object is subject to a narrow interpretation. Accordingly, the Commission should identify, based on its experience[9], the type of exchanges that amount to restriction by object in a clear and unambiguous manner.

4 STANDARDISATION AGREEMENTS

88. In its previous contribution, the APDC insisted that the Commission should adapt and clarify the valuation method for FRAND in its Guidelines, given the importance of that notion for the self-assessment of standardisation agreements.

89. In that respect, the APDC welcomes the efforts made by the Commission to provide more elements for assessing whether a proposed licensee fee is FRAND or not.

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[8] These examples of "particularly commercially sensitive information" at para. 424 would then be meant to replace the reference to individualised and future information on price and quantities in the previous 2011 Guidelines.

[9] CJ, C-67/13 P, 11 September 2014, *Groupement des cartes bancaires c/ Commission*, para. 51.

5 SUSTAINABILITY AGREEMENTS

5.1 CONCRETE GUIDANCE ON COOPERATION EXAMPLES

90. The APDC regrets that the Commission did not address concrete examples of cooperation relating to sustainability goals. Indeed, the assessment of practical situations may provide undertakings with a more practical guidance on this new section.

91. The Commission could draw on the following examples.

92. **Blacklisting**. Firstly, the Commission should address concrete situations in which trade associations ask their members to disclose supply chain due diligence with external third parties, in order to identify the suppliers that are connected with unethical behaviours (e.g., deforestation). This could lead to the associations pressuring market players to remove goods that are linked to such unethical behaviours, or creating "blacklists" of unethical suppliers, in order to recommend their members not to purchase from them.

93. **Boycott in the framework of trade associations**. Secondly, the Commission should assess the situation in which a trade association forces market players to source their products in a more sustainable manner (e.g., mining using a less polluting technique), which involves higher costs, and thus higher purchase prices. In this example, the association members would boycott suppliers that use the less sustainable technique.

94. **Industry-wide agreements on the insertion of new environment-friendly materials**. Thirdly, the Commission should consider industry-wide agreements that aim at changing a specific component of all manufactured products on a given market, by replacing it with a new, environment-friendly but also more costly material. Such agreements would necessarily increase costs, which could then be passed onto consumers.

95. **Agreements to support sustainable upstream supply**. Fourthly, the Commission may assess agreements between competitors to support sustainable supply (e.g., sustainable or organic farming techniques), by agreeing on each purchasing a certain amount of products from specific suppliers (farms). The agreement may also concern purchase prices of such products.

96. The APDC welcomes the inclusion of a new section dedicated to sustainability agreements that aims to provide guidance to undertakings in assessing whether or not an agreement between competitors that pursue one or more sustainability objectives infringes Article 101(1) and the conditions in which it can be justified under Article 101(3).

97. However, the APDC has some reservations as to whether this new section goes far enough to allow essential cooperation agreements to develop in the future. Climate change and the race for sustainability probably constitute the most important challenge faced by all countries today, and it is likely that a significant share of the solutions to this crisis will emerge from cooperation agreements between economic operators. As practising competition lawyers, we have seen in the last years an increase in the number of cooperation projects, and we believe that the flexibility of competition law should be used to enhance these projects, instead of constituting a hurdle.

98. It is our view that the Guidelines should be more innovative and progressive in taking into account the specificities of sustainability agreements. The review of the Guidelines represents a unique opportunity to propose a more innovative and efficient assessment frame, in order to facilitate the design and implementation of such agreements.

99. This flexible application is compatible with the need to avoid "greenwashing" initiatives, quite the contrary. The use of "green" initiatives as a cover for other purposes poses a significant danger to the attainment of sustainability objectives, not only at the European level but also around the world, and should not be allowed. A few comments on this issue are included in section 5.2 below, relating to the assessment of sustainability agreements under Article 101(1).

100. The APDC does not suggest that an exception should be made to the application of competition rules: as rightly pointed out by the Guidelines[10], this would not be possible in view of the provisions of the TFEU. However, the APDC believes that a more pragmatic and flexible approach in the application of Article 101(3) would be appropriate in this area.

5.2 Comments on the assessment of sustainability agreements under Article 101(1)

5.2.1 The APDC would welcome additional guidance regarding restrictions of competition by green quality labels

101. Citizens and companies are increasingly concerned about choosing or providing sustainable products and thus reducing negative impacts on the environment without waiting for a public intervention. Over the last months, the EU has seen the emergence of a growing number of

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[10] See Guidelines, footnote 315.

private green labels/quality marks/logos/brands (hereinafter "labels") in order to meet market demand by both citizens and companies.

102. It should be noted that the Guidelines rightly recognise that labels are important for competition and a key factor to inform consumers of the choice available to them. Therefore, sustainability agreements that do not restrict competition but which instead allow competition to take place should be encouraged. However, the Guidelines also rightly note that labels can sometimes cover up a restriction of competition. On this topic, additional guidance on what constitutes a pro-competitive label would be useful for companies.

5.2.1.1 Geographic scope

103. For example, the APDC suggests that the geographic scope of a green label may be a criterion for analysing the risk that such a label may restrict competition. In particular, a label that would be developed only by local, regional and even national players should a priori be more closely examined than a label developed at an EU-wide or worldwide level. Indeed, in the first case, the market is smaller the risk is increased that the local/regional/national players may seek to instrumentalise the creation of the green label in order to exclude market players from other regions or Member States (*e.g.* by willingly setting eligibility conditions that cannot be met by them), thus restricting competition.

104. The Guidelines could therefore indicate that a worldwide or an EU-wide green label should a priori be less likely to restrict competition than a local or national label.

105. In this respect, the APDC encourages the Commission to closely cooperate on enforcement policy regarding standardisation agreements with national and regional competition authorities around the world to ensure legal certainty.

5.2.1.2 Safe harbour

106. The APDC welcomes the approach of defining a soft safe harbour approach for sustainability standardisation agreements falling outside the scope of Article 101(1): this sets a clear framework for a number of agreements.

107. However, it would be useful to further clarify certain conditions of the safe harbour mechanism:

108. The second condition of the Guidelines safe harbour could be clarified, as the notion of 'obligation' (to comply with the sustainability standard) is not defined. Indeed, it is not specified whether or not the obligation is *de jure* or *de facto*. APDC believes that it is

important for the Guidelines to specify that the 'obligation' to comply with a sustainability standard can take many different forms and may in particular be a *de facto* obligation.

5.2.1.2.1 Second condition

109. For instance, if a sustainability standard or label covers over 50 % of a given market (for example because it is developed and/or promoted by market players that represent half of the market), there is a strong likelihood that the companies that do not yet comply with this sustainability standard will be obliged to comply with it.

110. This *de facto* obligation may be reinforced if the sustainability standard or green label is launched by a national organisation that is also endowed with public service missions. Indeed in such a case there is a strong likelihood that the sustainability standard or green label will benefit from a better image in the public, derived from its public service missions[11]. *De facto* obligations may also appear where public authorities or governmental organisations promote a sustainability standard, for example by publicly taking position in its favour and/or by encouraging public administrations or public undertakings to comply with this sustainability standard by including it in their public procurement procedures.

111. Therefore, in presence of any *de facto* obligation to comply with a sustainability standard, it should be acknowledged that such a standard does not to meet the second condition set out by the soft safe harbour. As a result, such a sustainability standardisation agreement should not be considered as escaping Article 101(1) automatically.

5.2.1.2.2 Sixth condition

112. The APDC considers that sustainability standards leading to an increase in price should not be automatically excluded from the soft safe harbour mechanism: it is likely that the adoption of certain sustainability standards will lead to an increase in prices, but as pointed out by the Guidelines, a number of consumers may be willing to pay this increased price. The label may be useful to consumers to understand the cause for the price increase.

[11] Opinion No 15-A-16 of 17 November 2015 of the French Competition Authority reviewing standardisation and certification processes in the light of competition law

5.2.2 The Guidelines do not address the issue of the communication of environmental performance

113. As detailed above, green labels will become increasingly important and it is logical that eligible undertakings will want to advertise about the fact that they are eligible to that label. Such advertising by eligible undertakings may raise competition issues if they somehow lead to a harmonisation of communication around environmental performance.

114. The French competition authority rendered a decision in which it considered that companies that had entered into an agreement preventing participants from advertising on the individual environmental impact of their respective products and only communicated on their environmental performance through joint data sheets produced by their trade association infringed competition law[12].

115. In light of the above, if the holders of a green label communicate only on their environmental performance through a reference to an average collective value, competition is restricted as the individual environmental performance of each holder of the label is then hidden behind an average collective value, thus preventing competition among label holders on an increasingly important competition parameter.

116. In this regard, guidance concerning the way in which operators may collectively communicate on sustainability goals or labels would be welcome.

5.3 On the Assessment of sustainability agreements under Article 101(3)

5.3.1 Efficiency gains

117. The Guidelines appear to leave more room for consideration of indirect effects of the agreement (*e.g.* cleaner production, avoid supply chain disruptions, better quality products), provided efficiencies are substantiated with objective, concrete and verifiable evidence and are not merely assumed.

5.3.2 Indispensability

118. The test for indispensability in the context of sustainability agreements is set at the paragraph 581 of the Guidelines: "*To satisfy this condition, the parties to the agreement need to*

[12] French Competition Authority (2017), Decision 17-D-20 of 19 October 2017 regarding practices implemented in the hard-wearing floor covering sector.

demonstrate that their agreement as such, and each of the restrictions of competition it entails, are reasonably necessary for the claimed sustainability benefits to materialize and that there are no other economically practicable or less restrictive means of achieving them".

119. The Guidelines go on to state that cooperation agreements are not indispensable where there is demand for sustainable products (para. 582) and where public policy and regulations address negative externalities (para. 583). This reads in both paragraphs like an absolute rule until the reader reaches the last sentence, which provides an exception for achieving the sustainability objective in a "*more cost-efficient way*", thus confusing the message to companies considering cooperation.

120. More generally, the possibility of cooperating to achieve the sustainability objectives in a "more cost-efficient way" should be clarified. Indeed, cooperation, insofar as it involves the pooling of resources, will in all cases lead to a reduction in the costs of the sustainability initiative for the cooperators. Is acceptable "*cost-effectiveness*" therefore limited to the situation where the restrictive agreement is necessary to achieve economies of scale to cover the fixed cost of setting up, running and monitoring the joint sustainability initiative?

121. It appears that a restrictive interpretation of this condition would be detrimental to a number of agreements which may allow to attain objectives even if not in a more cost-efficient way, at least in a shorter delay, or in more secure ways (*e.g.* by allowing the sharing of technical tests).

5.3.3 Pass-on to consumers

122. This condition is the one that requires the most adaptation of the classic 101(3) test, since taking into account a benefit for sustainable development requires in many cases taking into account the benefit of the cooperation for beneficiaries other than the consumers of the products, whether it be future generations, people who benefit from the initiative outside the (EU) territory where the sustainable product will be offered or the non-sustainable product phased out, or even animals in the case of animal welfare.

123. Yet, the Commission still looks to base its assessment on the idea that "*sustainability benefits that ensue from the agreements <u>have to be related</u> to the consumers of the products covered by those agreements*" (Guidelines, para. 588 - we underline). This leads the Commission to overvalue the subjective appreciation of consumers on the altruistic dimension of their purchase and to impose an overlap sub-condition which excludes taking into account the benefits on beneficiaries for whom consumers are not ready to pay an additional price or to accept a reduction in the product offering.

124. The evaluation of the "*pass-on to consumers*" condition is indeed based on the assessment of three types of potential benefits:

- Analysis of (direct) Individual use value benefits which cover the benefits that a consumer typically derives from the consumption or the use of the sustainable product or service (improved product quality or product variety, price decrease as a result of cost efficiencies) ;

- Analysis of (indirect) Individual non-use value benefits which are solely based on the demonstration of consumers' altruistic appreciation of the impact of their sustainable consumption on others ;

- Analysis of (indirect) *Collective benefits* which are brought about by the internalization of negative externalities (pollution, greenhouse gases emissions, soil erosion, poor working conditions) through the cooperation and which accrue to a larger group of the society. However, such benefits can be taken into account irrespective of the consumer's individual appreciation provided that consumers acquiring the product or services are substantially part of the larger group of beneficiaries (sub-condition of substantial overlap –Guidelines para. 601 et seq).

125. The articulation between the analysis of *Individual non-use value benefits* and *Collective benefits* is explained by the Commission in the examples given in paragraph 604: for the purchase of a garment using sustainable cotton produced outside the territory of the EU (*e.g.* Chad), the ecological benefit of the introduction of a sustainable cultivation method benefiting this country cannot be taken into account, unless a large portion of European consumers value this production method, in which case the sustainability benefit will be taken into account as an *Individual non-use value benefit*.

126. It is clear that the "substantial overlap" sub-condition, while allowing the Commission to stick to its traditional assessment of the "pass-on to consumers" condition, leads to aberrations and misses the global sustainability challenge by overvaluing the individual choices of European consumers towards a sustainable economy. While the Commission itself states not all negative externalities can be cured through voluntary individual actions of consumers (Guidelines para. 601), by excluding collective benefits not valued by consumers, it risks disregarding positive externalities on developing countries, the needs of future generations or animal welfare.

127. Consequently, the test proposed by the Commission at the paragraph 606 of the Guidelines needs to be revised to replace conditions (c) (*"demonstrate that the consumers in the relevant market substantially overlap with the beneficiaries or are part of them"*) and (d) (*"demonstrate what part of the collective benefits occurring or likely to occur outside the*

relevant market accrue to the consumers of the product in the relevant market") with a condition that it must be possible to clearly foresee that the cooperation will have an identifiable positive impact – and not only a marginal one – on one or more sustainability goals as described in paragraph 543 of the Guidelines.

128. Additionally, in relation to consumer preferences, the Guidelines should recognize that the production of consumer surveys may be difficult, particularly for innovative products, which may go beyond the current state of consumer perceptions and preferences. The Guidelines state in paragraph 599 that "*parties to the agreement should avoid superimposing their own preferences on consumers*": whilst the APDC agrees with this principle, it also believes that the need to create consumer awareness should be taken into account.

5.3.4 No elimination of competition

129. The APDC welcomes the new approach to this condition proposed by the Commission in relation to sustainability agreements. Whereas it is traditionally considered that the "no elimination of competition" condition cannot be fulfilled if the parties are afforded the possibility of eliminating competition in respect of a substantial part of the products concerned by the cooperation (see. Guidelines, paras. 194, 295, 348, 385, 461), the test proposed for sustainability agreements is innovative.

130. Indeed, the Commission proposes to consider that the "no elimination of competition" condition may be satisfied even if the agreement restricting competition covers the entire industry, as long as the parties to the agreement continue to compete vigorously on at least one important aspect of competition (such as price, quality or variety) or on other products variants individually proposed on the relevant market (Guidelines, paras. 611 to 613).

131. It also proposes to consider that a temporary elimination of competition will not be an obstacle to meeting the condition, provided that it is necessary to bring about the sustainability benefit (Guidelines, paras. 614).

132. The APDC suggests that the assessment of the "no elimination of competition" condition for other forms of cooperation should evolve to also take into account situations where the parties to the cooperation continue to compete vigorously on at least one important aspect of competition.

5.4 GUIDANCE REQUESTS

133. The Guidelines provide useful guidance for the assessment of sustainability agreements; however, given the evolving nature of the subject, it is likely that parties to agreements will meet certain questions that will find no response in the Guidelines.

134. In this respect, Commission members have encouraged operators to reach out to obtain informal guidance. However, in the absence of any "immunity" mechanism, economic operators will probably be reluctant to contact the Commission, thus jeopardising the implementation of potentially beneficial agreements.

135. We understand that it is not envisageable to implement a notification system like the one existing prior to Regulation 1/2003. However, the Commission could specify in the Guidelines a number of conditions subject to which the Commission would not, in principle, open an infringement procedure. For example, this might be the case for agreements which have been discussed but not yet implemented, provided that parties have not exchanged sensitive information.

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