ECLF

European Competition Lawyers Forum

EUROPEAN COMPETITION LAWYERS FORUM

European Commission’s proposed horizontal guidelines

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1. Introduction

[1] The European Competition Lawyers Forum ('ECLF')[1] is delighted to be able to contribute to the final phase of the stakeholder consultation launched by the European Commission (the 'Commission') on 1 March 2022 regarding its published drafts of the revised Block Exemption regulations on Research & Development (R&D) and Specialisation Agreements (the R&D and Specialisation BERs respectively) and draft revised *Horizontal Cooperation Guidelines* ("*the Guidelines*"). The proposed texts of these instruments, which have been critical in the practice of competition law in Europe, take due account of the findings published by the Commission in 2019 and its reflections on the input received from stakeholders in the public consultation which commenced in September that year.

[2] The ECLF believes that the Commission has made great strides in adapting its current rules on the treatment of horizontal market relationships in specific areas where its own evaluation has found that they needed to take into account the types of economic and societal developments that have occurred over the past decade, including the digital and green transitions. Having said that, there remain a number of areas where legal certainty continues to be compromised when applying competition policy to particular types of horizontal agreements.

[3] The structure of this submission follows the analytical structure provided by the Commission in its Annex to the Communication from the Commission on the Guidelines. In relation to each Section of the Commission´s Communication, we consider those aspects of the Commission´s analysis which are most instructive in terms of their practical experience under the current regime, while also noting potential clarifications that can be made by the Commission to address residual uncertainties that might continue to prevail.

[1] The European Competition Law Forum ('ECLF'), founded in 1994, is a group of leading practitioners in EU competition law, which is drawn from law firms across the EU. Its aim is to engage in an open dialogue on topical competition law issues and to consider proposals for reform. This response has been compiled by a working group of ECLF members. A list of working group members is set out at Annex 1. While the response has been circulated within the Working Group for comments, its contents do not necessarily reflect the views of all individual members of the Working Group or their firms.

2. Research & Development Agreements/the R&D Block Exemption Regulation

[4] The importance of innovation and R&D cooperation in the pursuit of European industrial growth is well understood and promoted in a range of EU policies. In this regard, the *R&D Block Exemption Regulation* (the "R&D BER") has provided a useful source of legal certainty since its adoption. This is consistent with the presumption in its Recitals that the benefits of R&D collaboration will generally outweigh any negative effects on competition, absent the existence of significant market power. Indeed, the paucity of enforcement precedents against R&D agreements suggests that this Block Exemption could arguably benefit from its material expansion to cover a broader range of practices.

Welcome changes

[5] Against this background, the ECLF welcomes a number of the changes proposed in Section 2 of the revised Guidelines on R&D and the revised R&D BER itself, namely:

- The additional detail provided in the revised Guidelines constitutes a material improvement on the current version. The Guidelines now offer greater clarity in several areas, including the scope of operation of the R&D BER, the assessment of the existence of competing and comparable R&D efforts (paras 152-155), and the additional case studies (paras 200-202).
- The helpful simplification of the grace period through the removal of the 30% market share cap in Article 6(5), especially in light of the difficulties often associated with accurate market share calculations in many sectors.
- The recognition that market shares in the preceding calendar year will not always be representative of the parties' true market position, with the view that a three-year average could serve as a reasonable alternative basis for calculation.

Less welcome changes

[6] However, the ECLF remains concerned that some of the other changes proposed by the Commission will narrow the coverage provided by the existing R&D BER and/or render it more difficult for businesses to rely confidently on its provisions.

Timeframes for market share measurement

[7] *First*, the inclusion of the three-year market share alternative may in practice make it *more* difficult for parties to conclude safely that a proposed arrangement benefits from the R&D BER, especially where the application of the two methodologies set forth result in share estimates on either side of the 25% threshold. The related commentary in para. 138 of the revised Guidelines is welcome, but we feel that there is merit in the Commission addressing this issue more comprehensively. Otherwise, the change proposed could have the unexpected outcome of diluting the practical effectiveness of the R&D BER.

The "indispensability" criterion

[8] *Second*, the current R&D BER provides in its Recital 11 that the "*joint exploitation should relate to products, technologies or processes for which the use of the results of the research and development is decisive*". The Revised R&D BER amends this important limitation to R&D that is "*indispensable*". On balance, the ECLF is of the view that the "indispensability" threshold is set at an inappropriately high level, especially given the uncertainties that are inherent in the R&D process, the various safeguards set out in the BER which arguably render recourse to such a standard unnecessary, and the onerous evidentiary connotations associated with such a legal standard according to EU precedents.

The "three poles" approach

[9] *Third*, and most importantly, we take the view that the proposed disapplication of the R&D BER because of the Commission´s expressed concern where there are fewer than three competing R&D efforts in the market seems to be exaggerated, with the Commission´s proposals raising several concerns insofar as:

- Parties to a potential R&D agreement will often not have adequate insight into the number of competing R&D efforts available in the market, and even less insight in a way that would enable the qualitative assessment envisaged under Article 7(2). In such circumstances, it will often not be possible for parties to rely on the R&D BER in confidence.
- Even where the parties can meaningfully undertake such an assessment, the proposed "three pole" methodology proposed by the Commission is somewhat of a blunt instrument that does not take account of the relative importance of competing R&D efforts (or indeed the closeness of the parties' respective stand-alone efforts). It may be, the case for example, that adequate competition is provided by one or two projects that are particularly advanced or well-resourced (or that 'innovation competition´ cannot be materially affected given the important differences that may exist in the respective parties' collaborative efforts, which is acknowledged in Recital 14). Yet, as currently drafted, the proposed methodology does not take these important issues into account. This omission seems to be at odds with the market share-based tests used in other contexts in this and in other Block Exemptions.
- As a threshold matter, we question whether the proposed disapplication is an overly conservative step in light of the Commission´s overriding philosophy, given that it may have the effect of discouraging parties from engaging in certain R&D collaborations that would otherwise benefit consumers.

[10] To the extent the Commission nevertheless seeks to retain the proposed "three pole" regime, the ECLF takes the view that the legal definitions found in Article 1 relating to an "*undertaking competing in innovation*" and a "*competing R&D effort*" respectively be at least amended in two key respects:

- Although the draft definitions currently require, *inter alia*, that a party "*would be able and likely to independently engage*" in R&D, we take the view that to be more coherent they should mirror the more demanding standards set out with respect to product market competition (*i.e.*, the likelihood of engaging in R&D should be based on "*realistic grounds and not just as a mere theoretical possibility*" and the effort should be undertaken within a period of not more than three years).

- The draft definitions relating to the R&D of "*the same or likely substitutable new products or technologies*" seems to be overly broad, especially given the uncertainties inherent in most R&D ventures. We therefore suggest that the definition be revised so that it refers to "*substantially the same products or technologies*", which is in turn more consistent with the language used in Articles (1)(18)(b) and (1)(19)(b).

Changes not implemented

[11] Practical experience among ECLF members also suggests that there are also other areas in the R&D BER which have raised practical problems in terms of interpretation, and which could arguably have benefited from Commission clarification in its proposal. For example:

- The current drafting of Article 2 only foresees access to R&D results for co-developers but makes no specific reference to ownership, which the ECLF considers may operate as a disincentive to joint R&D development and which may raise questions regarding the ownership of results developed by the parties jointly. Accordingly, there may be great benefit in simply clarifying in the proposed Article 3 (the equivalent to current Article 2), to the effect that parties participating in joint R&D projects will not only have *access* to the resulting rights but will also have *ownership rights* over such results.
- In re-considering the emphasis on ownership rights to proprietary technology generated by an R&D project, it would also be helpful if ownership rights can be extended not only to financial contributions but to *other contributions in kind*, including the making available of assets, personnel or other elements which have a monetary value. These types of contributions can be just as important in any joint project being successful.
- In our view, it is discouraging to innovation if one of the parties to the collaborative effort could make available the results of joint R&D to third party competitors. It would therefore be sound policy to extend expressly the enforceability of non-compete obligations for the exploitation of jointly developed R&D where one of the parties to the R&D collaboration does not permit its partner to license the jointly developed R&D to a competitor. In this sense, the proposed

new Article 9.1(b) of the R&D BER should explicitly cover a non-compete restriction in the above circumstances, rather than having it being caught under the new Article 8.4 of the R&D BER. Such a limitation should apply for at least the period in which the products would be jointly exploited, and we take the view that this restriction should extend even for a reasonable time thereafter. Such an approach would, in our view, be in accordance with the policy that underlies the application of the ancillary restraints doctrine.

3. Production Agreements /the Specialisation Block Exemption Regulation

[12] The ECLF broadly supports the changes reflected Section 3 on Production Agreements in the revised Guidelines and in the related revised Specialisation BER. Given our more extensive observations on other aspects of the consultation, we have limited our comments in this area to the most important issues.

[13] We consider that the additional detail and length of the revised Guidelines reflect a material improvement on the current version. Greater clarity is provided in relation to several areas, including: the calculation of market shares in the Specialisation BER (paras 274-277); the types of efficiencies that may be considered for the purposes of Article 101(3) TFEU exemptions (para. 288); and the additional case studies cited by the Commission (paras 306-310).

[14] The revised Specialisation BER also contains several welcome drafting refinements, including: the expansion of the definition of "*unilateral specialisation agreements*"; the expansion of the BER to include *horizonal subcontracting*; and the simplification of the grace period mechanism through the removal of the 30% market share cap in the new Article 4(4).

[15] As in the case with the R&D BER, however, the ECLF is concerned that the provision of an alternative market share methodology may make it *more* difficult for some parties to conclude with confidence that a proposed arrangement would benefit from the Specialisation BER, especially where the two methodologies result in market share estimates falling on either side of the 20% threshold. The related commentary in para. 275

of the revised Guidelines is welcome in this respect, but we would encourage the Commission to address this issue more comprehensively and explicitly; to do otherwise might have the unexpected outcome of diluting the practical effectiveness of the Specialisation BER.

[16] Finally, as regards the prominence afforded to mobile network sharing agreements, there are a number of observations which the Commission should take on board:

- *First*, the unique characteristic of these types of arrangements do not lend themselves in every respect to the traditional analysis of a "production" arrangement. Cooperation between mobile operators is designed to reduce costs, speed up network deployment schedules and (more recently) address environmental concerns, all of which funnel their way into individual competitiveness at the retail level, rather than any form of "production" of infrastructure services at the wholesale (infrastructure) level. Wholesale competition in the mobile sector is usually an artificial construct based on a range of interventions such as regulatory intervention under the SMP regime that applies in the electronic communications sector, licensing obligations to provide access to third parties under later generation mobile licences, or as a result of remedies imposed to address competition concerns under a merger review analysis. Accordingly, the exceptional nature of mobile network sharing agreements in this Section of the discussion in the revised Guidelines should in our view be emphasised.

- *Second,* any theories of harm outlined by the Commission in the revised Guidelines (at paras 302-303) should be set against the backdrop provided by the European Electronic Communications Code and other supporting legal policy statements, according to which National Regulatory Authorities can impose passive infrastructure sharing obligations and in other ways reduce the costs of deployment of very high capacity networks. Relegating these provisions to a footnote status (fn 166) does not seem to be appropriate, given the unique dynamics of the sector and the importance of regulation on the sector in terms of wholesale competition.

- *Third*, given that the Commission is seeking to update the Guidelines with a view to the future, it makes sense that the Commission´s analysis take due account of the possibility that the widespread adoption of Open RAN technology. The technical characteristics of Open RAN technology might require a complete re-think of our current frame of reference for understanding the types of competitive harms that might flow from mobile network sharing (and the types of minimum requirements for exemption set forth in para. 304), which is likely to be in greater focus as a result of the deployment of 5G technology. Given that the Commission´s recent review of a mobile sharing agreement in the Czech Republic was expressly phrased to exclude any findings in relation to 5G networks, the Commission has already indirectly constructed itself a platform to consider the impact of next generation technology on mobile network sharing arrangements.

4. Purchasing Agreements

[17] The ECLF broadly welcomes Section 4 of the revised Guidelines which deals with purchasing agreements. The Commission´s comments are particularly timely as many sectors seek to address instances of strong monopsony power, on the one hand, and the need for joint purchasing by small firms to cut costs (and serve environmental goals), on the other. In particular, the ECLF supports the Commission´s initiatives that:

- bring significantly enhanced clarity to the distinction between a *buyer cartel* (a "by object" restriction) and *legitimate joint purchasing arrangements* (assessed on the basis of its market effects), particularly in its incorporation of case-law emerging from recent enforcement action by the Commission against a number of buyer cartels (paras 316 *ff*);
- provide guidance on the exercise of negotiating power between retail purchasing alliances and suppliers around the issue of temporary purchasing and supply stops, confirming that these are "*typically part of a bargaining process*" (para .343);
- confirm expressly that an agreement not to purchase products from certain suppliers because such products are unsustainable does *not* in principle

have the "object" of excluding those suppliers from the market and is instead subject to an analysis of its market effects (para. 333); and

- include some new and helpful examples of specific factual scenarios and how these are to be analysed. In fact, we would suggest supplementing these with other examples set out by Whish and Bailey in their report (pp. 60-62), in particular those which help explain where exactly the border lies between "object" and "effects" restrictions in situations not clearly covered by the guidance preceding the examples (*e.g*. examples 4 and 5).

4.1 Safe harbour market share threshold

[18] However, the ECLF reiterates its suggestion – already made in an earlier consultation in the present review process - that the current safe harbour market share threshold for joint purchasing agreements of 15% in the upstream and downstream markets be increased to at least 25%.

[19] The Commission's Horizontal Merger Guidelines (para .18) provide a presumption that concentrations where the combined market share of the undertakings concerned does not exceed 25 % are not liable to impede effective competition. Given that joint purchasing involves less coordination than a full merger, it is unlikely to have any material anti-competitive effect if it is below a 25% market share threshold (*cf.* OFT's comments in its Short Opinion in *P&H/Makro*). In the alternative, the ECLF asks that, at a minimum, an increase of the market share threshold to 20% be considered. This level would be in line with the threshold for using the simplified Form CO procedure under the EU merger control regime and is well below the Horizontal Merger Guidelines' threshold.

4.2 Separate threshold where cooperating purchasers are not competitors on their selling market(s)

[20] In addition, the ECLF suggests that specific guidance, and in particular an appropriate safe harbour, be given for situations in which the purchasers that are cooperating are not active on the same selling market(s). The purchasers might, for example, be retailers which are active in different geographic markets and cannot be regarded as realistic potential competitors, or manufacturers that use the purchased input to produce different and non-competing products.

[21] The revised Guidelines (para. 337) recognise that in this situation "*the joint purchasing arrangement is less likely to have restrictive effects on competition in the selling market*" and that such arrangements are only likely to lead to restrictive effects on competition "*if they have such a significant position in the purchasing markets that it may harm the competitive process for other players in the purchasing markets*". The ECLF considers that this reference to "*such a significant position*" suggests that, in cases which the undertakings involved are not downstream competitors, a safe harbour market share threshold should be set at level significantly higher than the currently proposed 15% threshold. Absent any overlap on the downstream markets, a separate higher level of market share threshold for the safe harbour (for instance, one set at 30% or even higher if the threshold ultimately chosen for para. 18 discussed above is set at 25%, as advocated by ECLF) could be foreseen to reflect the fact that joint purchasing between non-competing businesses on downstream markets will only lead to a restrictive effect on competition in exceptional circumstances on upstream markets where the joint purchasing arrangement would create a significant buying position vis-à-vis small and/or weak suppliers.

5. Commercialisation Agreements

[22] While the ECLF is in broad agreement with the Commission´s comments in Section 5 of its revised Guidelines, there are a few points which could, in our view, benefit from further elaboration:

- In the early stages of the discussion, a cross-reference to the discussion in Section 9 on Sustainability Agreements is arguably desirable, given the relative importance of "Green Deal" goals when parties are pursuing a range of commercialisation deals. This cross-referencing should also occur in relation to the discussion on efficiency gains (para. 380).
- The discussion of the restrictive effects on competition refers to the fact that affected neighbouring markets may be "*horizontally or vertically related to the market where the cooperation takes place*" (para. 370). While this observation clearly holds true in the sphere of industrial products, there may be a need to consider drawing the concept of "*neighbouring markets*" more broadly to take into account the greater importance of digital markets in modern commerce (*i.e.*, where anti-competitive leveraging into conglomerate markets is a primary concern).

- When discussing collusive outcomes in light of a growth in the relevance of the "*commonality of variable costs*" among the participating firms (para. 374), it would be helpful if the Commission were to provide some guidance on the quantum of costs it envisages.
- As noted in other contexts (see above), the 15% market share threshold (paras 378-379) is set at too low a level to reflect material competition concerns that would occur above such a threshold. Accordingly, we believe that this market share threshold should be raised, as the 15% level would in all likelihood only be meaningful where the number of sellers was highly concentrated.

[23] The Commission´s discussion on bidding consortia (para. 386 *ff*) is particularly helpful, but we believe that the guidance would be even more helpful to firms if reference was made to the type of evidence that would be most persuasive in persuading the Commission that the parties to a bidding consortium were not realistic individual bidders who could either win the bid individually or deliver the contents of the successful bid individually in the event of being awarded the contract.

[24] A major omission in this Section of the revised Guidelines is the lack of a reference to joint sales of IP or media rights by companies such as sporting clubs, given that these types of arrangements may characterised by the pursuit of legitimate public policy goals that fall outside the remit of competition rules *stricto sensu*. The ECLF considers that a separate discussion of such issues is warranted in the final version of the Guidelines.

6. Information Exchange

[25] The ECLF welcomes the discussions in the revised Guidelines which explicitly address the key issue of data pooling and the competition-enhancing benefits of data sharing in today's economy, and that recognise the importance of "clean teams" for facilitating information exchange in a manner which means it falls outside 101(1) TFEU. However, there remain several areas where the revised Guidelines would benefit from additional clarity or coherence.

[26] Perhaps more than any other topic discussed in the Guidelines, the information exchange provisions of Section 6 need to be readily understood by personnel who are not themselves competition experts, so that the rules can be applied by those very same

personnel in their day-to-day business dealings without the need for continuous monitoring by competition experts. The ECLF takes the view that there are a number of areas in the Guidelines that could benefit from further clarity:

- ***Influence of the information exchange (para. 410):*** The revised Guidelines set what appears to be an unjustifiably low bar for determining anti-competitive information exchange. It is unreasonable to conclude that merely "*influencing the conduct*" of a competitor renders an information exchange anti-competitive. Similarly, it is unrealistic that the test should envisage a reversion to "*normal*" market conditions. In both cases, the analysis should be couched in terms of the identification of *adverse* market impacts.

- ***Interplay between merger control and Article 101 TFEU (para. 410):*** It is inherent in M&A activity that information is shared between the potential parties to the transaction. It is also well understood that M&A activity does not provide *carte blanche* for the sharing of information between competitors. However, the revised Guidelines offer little in the way of clarity as to where to draw the line between anti-competitive and legal information exchange. In practice, this means that the rules are interpreted restrictively, resulting in the implementation of inefficient and costly due diligence processes. Indeed, the brief mention on M&A activity is one of several areas (see also, *e.g.*, paras 304(c), 342, 409) where the revised Guidelines discuss the concept of *"**necessariness**" (sic.)* and could benefit from a further elaboration of what that concept means in practice. It would be important to amplify that the concepts of "necessary" or "indispensable" should not require a demonstration by the parties *ex post* that the proposed cooperation / M&A would have been *impossible* to achieve without that information being exchanged (as a different conclusion of practical impossibility may have been arrived at legitimately on an *ex ante* basis).

- ***Information exchange absent collusion:*** The revised Guidelines consider information exchange to be anti-competitive in essentially one of three scenarios: (i) where there is a likelihood of foreclosure (resulting from failure to exchange information with competitors); (ii) where the exchange

constitutes an integral aspect of the collusion (where the information exchange is evidence of, or used to monitor, that collusion); or (iii) where the exchange results in a collusive outcome *via* the information exchange (*i.e.*, where there is no *per se* collusion, but the fact of the information exchange results in that anti-competitive market outcome). Whilst the dividing line between rationales (i) and (ii) is self-evident, the guidance on whether firms can fall into category (iii) absent any actual collusion found in scenario (ii) is blurred at best. As it is a reasonable working assumption that most types of collusive practices are anti-competitive, it would therefore be helpful for the revised Guidelines to be as clear as possible in all circumstances where a given type of information exchange would of itself be anti-competitive absent any other evidence of collusion (as it does, *e.g.*, in Example 1 at Section 6.4, but see *para.* 429 and paras 418-419, which focus on information exchange used to monitor collusive outcomes).

- ***Algorithms (*****para.** ***418):*** It is helpful that the revised Guidelines outline the four cumulative conditions that are necessary for algorithmic collusion to be possible. It would, however, be important to understand – at least by way of example – what type of "*specific design*" the Commission has in mind as regards the type of circumstances that would (and would not) satisfy the first of these conditions.

- ***Foreclosure (para. 421):*** It should be made clear to potential data access seekers that "*access is [not] prevented*" when third parties are equally able (in terms of cost) to access the data.

- ***"By object" categories of information (para. 424):*** The examples cited by the Commission as "by object" infringements will be of critical importance in guiding business conduct. This Section would therefore be made far more useful if it described the categories of information which the Commission regards as anti-competitive by object (accompanied by illustrative examples, wherever helpful) rather than simply describing in very general terms the characteristics of past cases, which may be difficult to apply to other market circumstances. Given the very open-ended nature

of each of the concepts cited by the Commission, three categories on which it relies are particularly ambiguous, namely:

(i) the types of "*arrangements*" envisaged which relate to current/future demand;

(ii) the intended conduct that falls within the idea of the "*current state*"; and

(iii) the scope of conduct that is intended to be caught by the expression "*future product characteristics which are relevant for consumers*".

In a similar vein, it is unclear why the strategies at auctions should be limited to those "*for financial products*".

[27] Paragraph 448 confirms that, in order to give rise to a "by object" infringement, the information needs to remove uncertainty about the **timing, extent** and **details** of the affected competitor's conduct on the market. Thus, it should only be where competitor A is able to discern all three of those characteristics (with details defined accordingly) *vis-à-vis* competitor B that the information exchange should fall into the "by object" classification. However, outside para. 448, the revised Guidelines (including para. 424) appear to cast the infringement net much wider.

[28] As regards the use of ***public information*** *(at paras 425-426),* it is not uncommon for an industry body or other businesses to collate market data which either not all participants or not all customers choose to access. It should be made clear that this choice should not render the data collation exercise problematic, nor should it be the case that those parties who do not wish to participate in that exercise can "free ride" on those who do. In the travel industry, for example, there are some competitors who provide their fares to distribution systems and others who do not. For example, some travel agents access such data while individual consumers choose not to do so. The existence of such data collation options is important for the functioning and connectivity between participating service providers, and they should not be penalised for others' choices not to participate.

[29] Commonly asked questions on information exchange relate to the minimum level of **aggregation of data** and its **age** when determining whether its exchange is likely to be problematic in competition law terms (see paras 429-430). It is a pity that the revised Guidelines do not shed any further light on how these two critical principles should be applied in practice. In this regard, it is notable that *no* worked example is provided by the

Commission on the first of these issues and the example provided on the second issue is a relatively obscure one.

[30] An important if uncontroversial addition to the revised Guidelines clarifies the point that **Clean Team** measures may prevent commercially sensitive information influencing a competitor´s behaviour because its members "*are not involved in the day-to-day commercial operations and are bound by strict confidentiality protocols with regard to the commercially sensitive information"* (Box, at para. 440).

[31] Taken together (and notwithstanding the email-not-presumed-to-have-been-read example), paras 432 and 434 could be interpreted as imposing on competitors a duty to distance themselves from another competitor's **website postings** (and therefore a duty to be monitoring them in the first place). As this cannot in our view be the intention of the guidance, there would be merit in clarifying the language used and explaining the types of circumstances in which a unilateral and truly public disclosure of information could result in a finding of a concerted practice.

[32] The revised Guidelines suffer from their **"goldilocks" assessments** in several places where the layperson will struggle to make practical judgements as to whether a given category of information falls on the right side of the law, either because they have engaged in too much or not enough of certain types of conduct. Notable examples include the discussions in para. 428 which speaks of data being potentially problematic if it is either too aggregated or not sufficiently aggregated, and paras. 454-455 on the other hand, which can presumably be read in a diametrically opposed fashion if approaching from the perspective of either collusion or foreclosure.

7. Standardisation Agreements/Standard Terms

[33] The importance of the discussion in the revised Guidelines on standardisation and standard terms in the coming years cannot be understated. Technological innovation (including increasing automation), the emergence of the Internet of Things (IoT), globalisation and the continued surge in online sales and services mean that undertakings

will increasingly seek guidance on these types of agreement. It is therefore crucial that the Sections 7 and 8 of the Guidelines are clear and straightforward for undertakings and their advisers to apply.

[34] The revision of the Guidelines also needs to be seen in parallel with other initiatives adopted in this area. For example, the Commission sought feedback on a potential new framework for standard-essential patents (**SEP**s) in February 2022. In its call for evidence for an impact assessment, the Commission notes that the initiative could comprise both legislative and non-legislative action. The latter course of action might be based on revisions *inter alia* to the Guidelines. It is therefore essential that the revised guidance on standardisation agreements in the Guidelines be consistent with the broader framework developed under the SEP initiative and related amendments to other antitrust materials.

[35] On the whole, the ECLF welcomes the general tenor of the proposed revisions to the Guidelines, which add a degree of clarity that will help firms and their advisers to apply the Commission´s guidance. Despite these improvements, however, the guidance remains relatively brief and in some important respects is pitched at a high level which does not sit comfortably with most firms´ compliance concerns. There could, for example, be more guidance on the interaction between Articles 101 and 102 TFEU, given that much of the case-law dealing with standardisation agreements has so far been concerned with the application of Article 102 TFEU. Also, the drafting of Chapters 7 and 8 seems to avoid tackling issues that are likely to become important in the immediate future in the field of standardisation and standard terms, whether by reason of technological innovation and changing business practices, preferring to focus predominantly on a summary of existing practice. Moreover, a greater breadth of industries could also be considered in the guidance. We set out below some more specific comments on where we consider additional guidance would be helpful.

Drafting Improvements/Clarifications

[36] Given the importance of the subject matter covered in Section 7 of the revised Guidelines, the clarification of a number of drafting nuances may be in order. Thus:

- The penultimate sentence in para. 468 should say "*Preventing the development of other technologies…*".

- Although para. 469 notes that integrated undertakings have mixed incentives and may "*use their IPR defensively*" and/or "*value their IPRs through methods other than royalties*" a further explanation, supported by examples, would be helpful regarding what constitutes a 'defensive' use of IPR in this context, along with an elaboration of the relevant alternative valuation methodologies that can be used.

- While paras 473 and 500 discuss the disclosure of "*most restrictive licensing terms*", it would be extremely helpful if the Commission could confirm explicitly what such disclosure would include. We assume it would include terms relating to pricing, parity, exclusivity and duration, but it would be important to confirm this in the revised Guidelines and to clarify whether any other licensing terms falling within this category.

- At para. 482, it is specified that "*the IPR policy would need to require participants wishing to have their IPR included in the standard to provide an irrevocable commitment in writing to offer to license their essential IPR* ***to all third parties*** [emphasis added] *on fair, reasonable and non-discriminatory terms ('FRAND commitment')*". While there has been much debate as to how to interpret the expression "*all third parties*" in this context, including the issue of whether or not it obliges IPR holders to license at all levels of the supply chain, clarity from the Commission on this point would be welcome.

Important clarifications

[37] The ECLF agrees with the inclusion of "hold-out" as a strategy that could give rise to antitrust concerns, and not only "hold-up" (para. 470). This reflects an evolution in the Commission´s approach in recent years (as well as developments in national case-law) and complements its 2017 Communication on SEPs (COM (2017) 712 final, 29.11.2017).

[38] The clarification in para. 476 that the non-fulfilment of any or all of the principles in Section 7.3.3 of the revised Guidelines does not lead to any presumption of a restriction of competition is welcomed.

Specific IPR Disclosures

[39] The Commission proposes at para. 483 that the specific disclosure of IPRs is required (such as the patent number/patent application number), as opposed to blanket disclosure (where a participant declares that it is likely to have IPR claims over a particular technology without identifying specific IPR claims or applications). The ECLF has a number of observations in this respect:

- We acknowledge the Commission´s position that specific disclosure aims to increase transparency and may more effectively achieve the objectives of: (i) enabling the industry to make an informed choice of technology to be included in a standard; and (ii) assisting in achieving the goal of effective access to the standard. Having said that, we have some concerns that this approach might turn out to be extremely costly and administratively burdensome in practice. A requirement to update the disclosure each time the standard develops would add to that level of cost/burden. As a result, it is not unlikely that some IPR holders may be discouraged from participating in the standard. Accordingly, encouraging standardisation organisations to use a disclosure model that is not specifically provided for in the revised Guidelines without fear of infringing Article 101 TFEU would, in our view, be a welcome addition to the Guidelines. An alternative option that would increase transparency would be to have standardisation organisations keep track of specific disclosures in a regularly updated and published database.

- The statement that a blanket disclosure would be sufficient where specific information is not publicly available is a welcome addition.

- The guidance (at para. 483) suggests a disclosure obligation based on "*reasonable endeavours to identify IPR reading on the potential standard*". The precise meaning of the concept of "reasonable" in these circumstances is open to debate and would benefit from more detailed guidance, ideally supported by case examples.

- We believe it would aid in the interpretation of the revised Guidelines if *fn* 282 could also set out the procedural steps specified by Court of Justice in *Huawei Technologies Co. Ltd* v *ZTE Corp. and ZTE Deutschland GmbH*.

FRAND

[40] The ECLF would welcome the inclusion of more examples of factors/methods for assessing whether or not a proposed licence fee satisfies the FRAND standard referred to in paras 486-488, taking into account that more than one method can be used (assuming that the "*same spirit of the described methods*" can be achieved - see *fn* 287) and that the methods described in the revised Guidelines are not intended to be exhaustive.

[41] Despite the addition of these elements, in our view the revised Guidelines do not give sufficient guidance on what amounts to FRAND. Although the Commission proposes retaining the statement in the existing Guidelines to the effect that "*Compliance with Article 101 by the standard development organisation does not require the standard development organisation to verify whether licensing terms of participants fulfil the FRAND commitment*" (para. 485), there is insufficient guidance on how the FRAND standard can be satisfied. Absent further guidance, the alternative could be to encourage standardisation organisations to provide sector-specific guidance on the FRAND standard and on the methods used for the assessment of whether a proposed licence fee is FRAND-compliant.

Standards organisations

[42] It would be helpful if the statements made by the Commission in para. 492 could reflect the statement made earlier in the revised Guidelines at para. 483 on disclosure (*i.e.*, in a similar way to the text found at para. 507 on participation, which is reflected in footnote 294). According to para. 492: "*Standard development agreements providing for the disclosure of information regarding the characteristics and value-added of the IPR to a standard and, thereby, increasing transparency to parties involved in the development of a standard will not, in principle, restrict competition within the meaning of Article 101(1).*"

[43] The Commission proposes a more flexible approach to the issue of participation in the development of a standard. However, the ECLF takes the view that the approach

proposed by the Commission makes a number of points that could benefit from certain clarifications:

- The guidance in para. 493 is unclear and could be replaced by this alternative text: "*Preventing certain undertakings from being able to influence the choice and definition of the standard is (except as described in paragraph 496) likely to result in a restrictive effect on competition. By contrast, if participation in the standard development process is open, the risks of a restrictive effect on competition are lower*."

- While para. 496 provides examples of situations where restricted participation is not likely to have restrictive effects on competition, the guidance provided may not be straightforward to apply in practice. For example, it is not clear how many standards/standardisation organisations would constitute "*several*" such organisations under clause (i) when considering the level of competitiveness available for standard-setting. Further clarification on this point would therefore be welcome.

- Restricting participants for a limited period of time and with a view to progressing quickly is cited in para. 496 as an example of a situation that may not have a restrictive effect on competition. However, it is uncertain whether the critical caveat of "*as long as at major milestones all competitors have an opportunity to be involved*" can be applied in practice. The involvement of firms that do not have the benefit of ongoing knowledge could slow down the process significantly and/or could lead to sub-optimal outcomes, while it is not obvious that the exclusion of such firms would harm competition.

- While the point made in para. 500 that the inclusion of a statement that *ex ante* disclosure of a maximum accumulated royalty rate by all IPR holders will not in principle restrict competition under Art 101(1) TFEU, this type of disclosure does not disguise the joint fixing of prices (see *fn* 298). The revised Guidelines could therefore usefully indicate a process to ensure that individual maximum royalties are not (inadvertently) shared. It would also be helpful if the guidance were to set out any other factors relevant to the

assessment of whether and when the disclosure of the maximum accumulated royalty rate might restrict competition.

[44] The Commission should also consider providing specific guidance on information sharing within the context of the standard-setting process, irrespective of the separate discussion on information sharing in Section 6 of the revised Guidelines. At its extreme, this process may require the creation of clean teams or the use of equivalent measures. To ensure legal certainty and to enable the standardisation process to work as efficiently and effectively as possible, it would be welcome if the Commission could indicate that information exchanges in these specific circumstances could in principle be permissible if appropriate guidelines were followed.

[46] While understanding that competition *between* standards can be an essential part of innovation, the Commission might wish to re-consider if the approach taken in para. 498 could be framed less restrictively. As currently drafted, it risks incentivising the development of standards which might be ineffective (*e.g.*, due to the small degree of market coverage). We would welcome an approach where the Commission replaces the first part of the paragraph with an explanation that smaller market shares of undertakings involved could be used as a *shield* against allegation anti-competitive practices if firms with larger market shares are present, rather than necessitating a review and analysis of market shares by default.

Standard terms

[47] As noted above, likely technological progress in the coming years is bound to cause a wider adoption of standard terms, as set out in Chapter 8 of the revised Guidelines. In particular, it is expected that the further development of ´smart´ contracts and the wider use of machine learning/semi-autonomous systems in customer-facing roles will lead to commercial pressures to automate and standardise the terms and conditions used by firms (while also reducing the ability of consumers to renegotiate such terms). The use of standard terms and boiler-plate language in legal documentation can also be expected to rise because technological systems are not (yet) sufficiently sophisticated to enable bespoke solutions. Hence, the wider use of standard terms prepared by trusted associations is likely to occur and is something that could also potentially benefit consumers if an

effort is made to render such agreements more balanced between producer and customer (*i.e.*, in a similar fashion to standard terms have in the business-to-business setting).

[48] In light of the above, the revised Guidelines could have sought to provide a platform for the Commission to define its approach to standard terms more specifically. Thus far, however, the draft Chapter 8 does not attempt to develop the policy agenda any further. This may be an opportunity lost, as the Chapter appears to focus solely on traditional sectors (*e.g.*, electricity distributors, quotes for construction works and insurance contracts). In order to be more forward-looking, the ECLF proposes that at least the following items could be considered and possibly elaborated upon by the Commission in its revised Guidelines:

- Some guidance on the design of standard terms needed to enable new types of products (*e.g.*, the provision of smart contracts, automated negotiating tools, *etc.*) would be welcome. For example, it is possible that competitors may use the same service providers across a range of offerings, and therefore might be subjected to the same standard terms in their smart contract offerings. In addition, a similar range of issues to those that are currently being debated in relation to algorithmic collusion might arise. An approach that competitors should not use the same service providers would run the risk of hindering the adoption of new technologies, while in practice not providing many benefits in terms of the protection of competition.

- Standard terms could be designed to protect the interests of consumers. The volume of legal drafting in consumer contracts has increased over time and will be likely only to increase further. The wider use of standard terms could work towards reducing the information overload to which consumers are subject, for example if service providers incorporate a specific set of contractual terms into their agreements and then make reference to those specific types of standard terms (as is common in business-to-business agreements for some sectors). For large segments of goods/services, modern supply agreements contain provisions that are neither reviewed nor compared with those of other service providers (instead, consumers merely scroll through and click to accept). In practice, this may mean that no

competition between undertakings on this aspect of contracting occurs (*i.e.*, the use of common standard terms for some part of the legal relationship does not lead to any real reduction in competition). Instead, trust creating/enabling standard terms (if it can be ensured that the interests of consumers are taken into account) could signpost the content of the agreement, while reducing the information overload. This could potentially increase transparency and enable competition between firms in this area. The revised Guidelines do not provide an opportunity for this type of approach to be adopted. Instead, the wording of para. 529 – which implies the possibility of collusion arising via the use of standard terms – will likely lead in practice to a reduction in the use of common standard terms. In turn, this will result in a myriad of different boiler-plate agreements that will in practice not be reviewed by consumers (thus maintaining the impression of competition occurring on the merits, while in effect no such competition would actually be taking place). Moreover, practical experience suggests that it is highly unlikely that any *cartel via standard terms* cases can be identified.

8. Sustainability Agreements

[49] The ECLF warmly welcomes the inclusion Section 9 on Sustainability in the revised Guidelines. There is much constructive and positive thinking that has been provided by the Commission. However, if the new Section is to have a realistic chance to have the dynamic effect which we all desire, it will need to be bolder in a number of respects. We focus our comments below on that larger picture.

[50] The discussion begins with a welcome invocation of sustainability in the broad sense of the United Nations sustainable development goals, noting that the notion extends to both environmental matters and social matters, with the latter including labour and human rights. Animal welfare is also mentioned. It is with disappointment, therefore, that one discovers that the entire focus of the chapter is on environmental/green issues, with no further reference to sustainability in its wider sense. Without in any way wishing to downplay the significance of the green agenda, the omission of social sustainability issues

(whether relating to slave labour, child labour or living income initiatives) from the list of policy priorities is all the more surprising given the recent interest in antitrust enforcement in employment-related matters. Animal welfare is mentioned only once in the revised Guidelines, and in passing. None of the examples given at the end of the chapter go beyond environmental issues. In our view, it makes little sense for the revised Guidelines to introduce sustainability in its broader sense but then proceed to elaborate on principles which focus narrowly on the environment.

[51] A litmus test for the likely usefulness of the revised Guidelines will be whether they are likely to incentivise businesses to take on the challenge of promoting sustainability agreements. Experience to date has been that the type of bold initiatives which may be transformative of an industry have simply not emerged. Antitrust counsel, both external and in-house, have not been able to advise with confidence that the time and resources to be invested in developing a sustainability initiative will be rewarded. The revised Guidelines, as drafted, offer hope in relation to initiatives in fragmented markets with a diversity of players, where sustainable products will compete with non-sustainable products. The revised Guidelines appear wanting, however, in relation to industry initiatives that will be truly transformative of an industry.

[52] There are a number of policy levers available that could arguably transform the potential of the revised Guidelines to foster an environment in which transformative change can occur.

[53] The first of these would be to assess industry initiatives in the broader context of existing sustainability obligations, aspirations and frameworks, and to offer positive encouragement to firms to work towards those goals. Starting simply at the EU level, other branches of EU law (*e.g.*, the ESG taxonomy) present a relevant contextual setting. Similarly, the proposal should be assessed in relation to supply chain due diligence initiatives. Beyond these issues, it cannot be forgotten that the EU is a party to wider set of international commitments, as are its individual Member States. The international aspirational environmental targets set at COP conferences, plus the fact that Member States are signatories to the European Convention on Human Rights and the Universal

Declaration of Human Rights, establish commitment benchmarks, which industry players seek to satisfy, even if the targets they set are not strictly legally binding on them. It is therefore unfortunate that the revised Guidelines refer to the *Wouters* and *Meca-Medina* Judgments only in passing (see *fn* 315) with no attempt to explore the potential of these precedents in light of these international targets. It is our view that it is entirely open to the Commission to state its position on the interpretation and extrapolation of these Judgments, thereby affirming its willingness to provide constructive guidance, and offering reassurance that it would not take antitrust enforcement action against firms acting *bona fide* in pursuit of such published guidance.

[54] Cooperation agreements are recognised in para. 546 of the revised Guidelines as potentially playing a role where public "policies" and regulations have failed to deliver results that ameliorate instances of "residual market failure". The concept of "policies" should, in our view, be developed into something more explicit and much wider so as to embrace international commitments. At the same time, cooperating firms pursuing such goals should be able to benefit from an exclusion from Article 101(1) TFEU pursuant to the principles set forth in *Wouters.* Abstracting this to a higher level, the revised Guidelines would be immeasurably improved by a widening of the categories of agreements that may be considered to be entirely outside Article 101(1) TFEU. This would obviate the need and complexity in performing the balancing judgements required under an Article 101(3) TFEU analysis.

[55] Complementing this, the Commission could consider a widening of the potential availability of an exemption under Article 101(3) TFEU. The analysis to be performed in this scenario would focus upon the recognition of collective (*i.e.*, societal) benefits. A convenient device to measure such benefits is to identify the altruistic willingness of a consumer to pay more for products, based on the notion of "Individual Non-use Value Benefits". Importantly, however, given that the sustainability goals are truly international in scope, such a mechanism would lack the potential to recognise the interest in facilitating ESG progress beyond the geographic confines of the EU. Individual non-use value benefits may ultimately be of little value, especially if they would be limited by "willingness to pay" studies (which have shown themselves to be of uncertain value in

practice). By far the biggest challenge is to incorporate collective benefits generally into an exemption analysis. This requires that competition authorities need to move away from a narrow requirement of overlap in the consumers carrying the cost and receiving the benefits. There is nothing in the Treaty requiring a rigorous segregation of the population into narrow consumer groups. Rather, the relevant population affected by sustainability targets is that of the Member States, the EU as a whole and indeed the global population. The ECLF does not anticipate that the European courts would reject a more resolute position of the Commission in this sense, and we propose that the revised Guidelines should foresee the possibility of the Commission adopting such a broader view.

[56] It is surely relevant at this point to invoke the Commission's role as a leader in international antitrust policy matters, and the interest in having sustainability agreements be maintained beyond the borders of the EU. Multinational players will wish to roll out their sustainability initiatives far beyond the EU, and compatibility with EU competition policy will go a long way to ensuring that sustainability goals are pursued globally. The idea that collective benefits can be legitimately assessed at the global level will be an important tool in building the necessary international consensus that can drive sustainability policies. Accordingly, the ECLF invites the Commission to be bolder in relation to sustainability. While the ECLF considers that the Commission´s discussion on sustainability is in itself a great leap forward, the greater challenge is for the Commission to pioneer an approach at a global level that can satisfy the goals of sustainability policy, understood in its broadest sense.

9. Specific Issues Under Article 101(3) TFEU

[57] The ECLF sees the revised Guidelines as a missed opportunity to clarify the application of 101(3) TFEU. Against the backdrop of an assumed impossibility in practice for efficiency arguments to be accepted in merger cases, there is a growing reluctance to rely on countervailing benefits in the assessment of commercial cooperation, despite this being clearly written into the law, and supported by antitrust economics. Such reluctance is perhaps not wholly surprising given that backdrop and reasoning seen in the context of commercialisation agreements sees the "pass on" criterion for 101(3) TFEU benefits being only "likely" to be met where the parties' combined share is <15% (para.

384). Yet it is conceded that in these circumstances (see para. 378) it is unlikely their cooperation would harm competition in the first place, which would mean that there is no need to conduct an analysis under Article 101(3) TFEU.

[58] The recent debate on the manner in which competition law has held back advances in sustainability has been well-documented (see also Section 9 on Sustainability), which in principle should have meant that the revised Guidelines would have provided the ideal opportunity to reset the bar on this topic, particularly given the limited remit of Section 9 of the revised Guidelines which means that, for the many agreements which would produce real and tangible benefits for the future of the planet (see, *e.g*., para. 380), the scope for relying on 101(3) TFEU benefits in the future is no better (and arguably by analogy even narrower) than it has been till now.

[59] In our view, there are two particular areas where further consideration should be prioritised:

- ***Efficiency gains / types of benefit:*** The recognition that efficiency gains need not be financial is important. This is consistent with the description of 101(3) TFEU in para. 577 but the same language and approach is not then adopted throughout the revised Guidelines as it should be, including prominently in the general discussion in section 1.2.7. on Article 101(3) TFEU. A corollary of this point would be the explicit recognition that a benefit does not need to have a € value (or € equivalent value) in order to be taken into account.

- ***Consumers who must benefit:*** Para. 41 states that the notion of "*consumers*" encompasses the "*customers, potential and/or actual, of the parties to the agreement*". By contrast, para. 588 defines that same concept differently so that it encompasses "*all direct or indirect users of the products covered by the agreement*". Whilst consistency is needed at a minimum, it is not clear that either definition is correct. Indeed, both seem to paint an overly narrow picture of the types of consumers who should benefit. While it is accepted that the benefits of the agreement cannot be pocketed solely by the cooperating firms, there should nevertheless be some scope – consistent with economic theory – that the "greater good" can

triumph. This could be achieved either by a broader framing of the "*harm vs benefit*" debate or in any event by a clearer explanation of what constitutes a "*fair share*" of benefits, and the extent to which that fair share needs to be enjoyed by *some* - *rather than all* - of the same group (that are assumed to be) harmed.

- Similarly, it should be clear that there *can* be a temporal gap between the harm occurring and the benefit to be realised – it is logical that "Future Me" can accept trade-offs against "Me of Today". One does not need to be a devotee of the neo-Brandeisian school to be able to make that temporal leap.

10. Conclusions

[60] Despite the length of its submission, the ECLF wishes to emphasise its overwhelmingly positive disposition towards what the Commission has sought to achieve under the revised Guidelines. Our comments have primarily been directed towards points in the revised Guidelines where the Commission´s guidance could be made clearer, whether through proposed drafting changes or through the addition of further case studies, or through greater cross-referencing between the various Sections of the revised Guidelines to ensure greater consistency and a more holistic approach to the Commission´s analysis.

[61] An additional area of enquiry explored by the ECLF is those critical points in its draft text where both the Commission and industry (and its legal advisors) can benefit from the Commission being more ambitious and expansive in its approach. This is important in the view of our members because, if the Guidelines are to be a forward-looking instrument, as opposed to one which merely synthesises existing administrative practice, the opportunity is ripe to explore new policies in key fields such as sustainability and standardisation arrangements, on the one hand, and to bring a fresh perspective to the measurement of "efficiencies" and to the identification of longer term benefits to consumers on the other.

Annex 1: List of Working Group Members

Chair: Peter Alexiadis **Kings College London**

- **Allen & Overy**: Dominic Long
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- **Dechert LLP**: Alec Burnside
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