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EU CONSULTATION RESPONSE

AIM's Comments on the draft Horizontal Cooperation Guidelines and R&D Block Exemption Regulation of 1st March 2022

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AIM's Comments

on

the Commission's draft Horizontal Cooperation Guidelines of 1st March 2022

Chapter 4 – Purchasing Agreements

Chapter 6 – Information Exchange

Chapter 9 – Sustainability Agreements

and

the Commission's draft R&D Block Exemption Regulation of 1st March 2022

INTRODUCTION

This submission provides comments from Association des Industries de Marque – the European Brands Association ("**AIM**") on the Commission's draft Horizontal Cooperation Guidelines of 1st March 2022 (the "**Draft Guidelines**"). AIM is grateful for the opportunity to submit observations and looks forward to continuing the discussion on the Draft Guidelines.

AIM represents manufacturers of branded consumer goods that are active in Europe and contribute substantially to the European economy. AIM's members produce products that millions of European consumers value and have made part of their daily life.

The Draft Guidelines cover issues that have the potential to impact significantly manufacturing and supply of consumer products in Europe. AIM will focus its comments on those chapters of the Draft Guidelines that are most relevant to its members — Chapter 4 – Purchasing Agreements (**Section 1**), Chapter 6 – Information Exchange (**Section 2**), Chapter 9 – Sustainability Agreements **Section 3**), and on the R&D Block Exemption Regulation (**Section 4**). AIM's comments on Chapters 4 and 6 of the Draft Guidelines are complemented by a redline that is attached as **Annex 1** (**Section 5**).

SECTION 1

Chapter 4 – Purchasing Agreements

1.1. AIM recognises that the Draft Guidelines include a number of relevant and useful revisions on the analysis of joint purchasing agreements. At the same time, AIM is concerned that the Draft Guidelines treat cooperation among purchasers too permissively, without proper differentiation and rigorous analysis. The Draft Guidelines fail to distinguish properly between different forms of buy-side cooperation. They do not fully capture the potential competitive risks associated with such forms of cooperation and they overestimate the potential for pro-competitive benefits.

1.2. AIM believes that these issues can be addressed with limited additional revisions. AIM sets out its recommendations for changes to the Draft Guidelines' discussion of joint purchasing below.

1.3. ***Definition of joint purchasing agreements*.** The Draft Guidelines seek to define what constitutes joint purchasing in paras 312 and 316. AIM agrees that it is useful to define joint purchasing and distinguish it from other forms of cooperation among purchasers. However, as currently worded, the definition provided in the Draft Guidelines is overly broad. At para. 316, the Draft Guidelines suggest that arrangements that "*truly concern joint purchasing*" cover any collective negotiation of "*one or more trading terms*" with a supplier. However, the language in para. 316 fails to specify the agreement whose "trading terms" are the subject of the joint negotiation. Similarly, the discussion in para. 312 does not specify the agreement that is subject to the joint negotiation.

1.4. The definitions in paras 312 and 316 therefore lack precision and do not properly distinguish arrangements that truly concern joint purchasing. Without specifying the type of agreement whose terms are subject to joint negotiation, the definition is overly broad. On its face, the current definition would for example also cover the joint negotiation of terms under which the cooperating undertakings supply, rather than purchase, a product or service. Yet, the joint negotiation of an agreement under which the cooperating parties sell rather than buy cannot possibly qualify as a joint purchasing arrangement.

1.5. These issues can be readily addressed by clarifying in para. 316 that cooperation between purchasers amounts to true joint purchasing if:

> *the joint purchasing arrangement involves collective negotiation, on behalf of purchasers, with any given supplier of one or more substantive terms of the supply agreement that applies between the supplier and the cooperating purchasers*.

Equivalent language should be added to para. 312.

1.6. If the cooperating purchasers neither purchase together nor jointly negotiate the substantive terms of a supply agreement between the supplier and the cooperating purchasers, then it is difficult to see how the cooperation arrangement can reasonably be qualified as an arrangement that truly concerns joint purchasing.

1.7. We propose edits reflecting this point for paras 312 and 316 of the Draft Guidelines in **Annex 1**.

1.8. ***Forms of buyer cooperation*.** The Draft Guidelines seem to envisage only two possible forms of buyer cooperation: joint purchasing arrangements and buyer cartels, but there are other conceivable forms of cooperation between purchasers.

1.9. For example, a group of purchasers might condition their purchases on a supplier concluding an agreement that is distinct from the supply agreement and under which the purchasers might act as suppliers rather than buyers. Such arrangements require a distinct competitive analysis and the Draft Guidelines should not exclude the possibility of forms of purchaser cooperation that are neither true joint purchasing arrangements nor buyer cartels.

1.10. In addition, given the expansive definition of joint purchasing arrangements in paras 312 and 316, the analysis of these arrangements must take into account the scope and structure of the particular arrangement at issue. The concept of joint purchasing as described in the Draft Guidelines covers a wide range of arrangements with varying degrees of integration running from actual collective purchasing to joint negotiation of some terms of a supply agreement. These differences in scope and structure are likely to impact the competitive analysis.

1.11. We propose revisions reflecting these points to paras 315a and 316 of the Draft Guidelines in **Annex 1**.

1.12. ***Anticompetitive object*.** The Draft Guidelines' discussion of possible restrictions by object under paras 323-325 is too narrow. Restrictions by object may also arise where purchaser cooperation does not involve true joint purchasing or goes beyond the scope of the joint purchasing to serve as a mere coercion instrument. In such instances, the arrangement, by its very nature, operates to distort the outcome of the normal competitive process.[1] We suggest changes to reflect this point in para. 322a of the Draft Guidelines in **Annex 1**.

1.13. ***Anticompetitive effects*.** The Draft Guidelines do not discuss all conceivable anticompetitive effects that may be associated with purchaser cooperation or do not accurately discuss these effects. We note three main points:

1.14. First, the Draft Guidelines correctly identify the potential for restrictive effects on competition among suppliers upstream in para. 331. However, the Draft Guidelines then go on to suggest in para. 332 that the risk of whether such concern might materialise depends on the size of the companies involved. This is misconceived because size is not a meaningful competitive parameter and is dissociated from the relevant markets where harm might occur.

1.15. What matters in the present context is the relative bargaining power of the negotiating parties in the relevant market. Bargaining power, in turn, depends on the share of sales that each of the negotiating parties generates via the other party in the relevant market. If a supplier generates a large share of its sales via the cooperating purchasers in the relevant market while the cooperating purchasers generate a comparatively smaller share of their sales via the supplier, the

[1] Case law makes clear that undertakings should not coordinate to achieve "*conditions of competition which do not correspond to the normal conditions of the market in question*" (see *e.g.*, Case 172/80 Züchner EU:C:1981:178, para. 14). Arrangements that exceed the scope of a true joint purchase negotiation and merely serve as a coercion mechanism to achieve market outcomes that deviate from the normal competitive process therefore restrict competition by object.

cooperating purchasers will have bargaining power over the supplier[2] and the risk of adverse effects from purchaser cooperation is higher. The possibility that the supplier might be larger in absolute terms, *e.g.*, because it has activities in other – unrelated – geographic markets, does not change this conclusion and has no bearing on the competitive analysis of the purchase cooperation.

1.16. For the same reason, the reference to products that distributors "*need to have*" to compete downstream in the Draft Guidelines is not meaningful and does not add anything. The only relevant question is whether the retailer loses more by losing the supplier's product compared to what the supplier loses by losing access to the retailer. If the Commission nonetheless would want to maintain this concept, it would be useful to clarify it in line with these principles.

1.17. Second, the Draft Guidelines fail to discuss the potential for restrictive effects that may arise from arrangements where the cooperating purchasers collectively require a supplier – as a condition for doing business – to enter into distinct agreements under which they act as sellers of products or services. These arrangements impose distinct agreements on suppliers. To the extent that these arrangements do not restrict competition by object, they may well have the effect of restricting competition upstream by increasing the cost of suppliers' market access. They may also restrict competition downstream by rendering it less likely that the advantages obtained via the distinct agreements are passed on to consumers in the form of lower prices.

1.18. Third, the Draft Guidelines overlook the potential for restrictive effects in situations where the cooperating purchasers compete with their own products downstream against the supplier's products (*e.g.*, retailers competing with their private label products). In such situations, purchaser cooperation might operate as a mechanism that constrains the ability of the supplier's products to compete against the cooperating buyers' products.

1.19. We propose changes in paras 332, 332a, 333, and 337a of the Draft Guidelines in **Annex 1** to reflect these points.

1.20. ***Collective purchase stops.*** The Draft Guidelines suggest at para. 343 that collective commercial actions designed to enforce purchaser demands, such as collective purchase stops, are never restrictions by object and instead should be assessed as part of the overall review of the joint purchasing arrangement under an effects analysis. The Draft Guidelines therefore appear to treat collective purchase stops as inherently ancillary to the joint purchasing arrangement. This position is problematic because it ignores that the purchase stop may *overshoot* by going beyond the scope of the joint purchase negotiation.

1.21. For example, if the cooperating purchasers jointly negotiate a discount for listing a supplier's new products, it would go beyond the joint cooperation to threaten the stop of purchases of the supplier's existing products. Similarly, if the joint negotiation concerns discounts for supplying sales data, it would go beyond the joint negotiation to stop purchases of products, as opposed to not providing the sales data that are the subject of the negotiation. Likewise, if an international retailer alliance negotiates a fee for mediation services provided by the alliance, it would exceed the scope of the joint negotiation for the retailer members collectively to stop purchases, rather than for the alliance to stop providing the mediation service.

[2] This is because, in that case, the supplier faces a greater loss from a failure to reach agreement than the cooperating purchasers.

1.22. It is a well-established principle of European competition law that a measure cannot be qualified as ancillary if it is disproportionate relative to the underlying main agreement.[3] Accordingly, collective purchase stops that exceed the scope of the joint negotiation, or are otherwise disproportionate, cannot reasonably be treated as ancillary to the joint negotiation. Rather, such measures are naked coercion measures akin to collective boycotts that, by their nature, distort competition and therefore restrict competition by object.

1.23. The determinative criterion for the analysis of collective commercial actions, such as purchase stops, is therefore whether the collective action remains within the scope of the joint negotiation or exceeds that negotiation.

1.24. By contrast, the distinction that the Draft Guidelines seem to draw between temporary and permanent purchase stops is not meaningful. *Ex ante*, it is not known whether a purchase stop will be temporary or permanent. Rather, any purchase stop will be potentially permanent if the parties do not manage to reach an agreement.

1.25. Finally, for those collective commercial actions that should be assessed under an effects analysis, the Draft Guidelines omit to identify criteria that are relevant for such an analysis. It would be helpful that the Draft Guidelines spell out factors that are relevant for assessing the effects of collective commercial actions, such as the duration of the action, the products covered by the action, the availability of alternative outlets for the products affected by the action, and the probability that consumers will switch to these alternative outlets.

1.26. We address these points with proposed changes in paras 343, 343a, and 343b of the Draft Guidelines in **Annex 1**.

1.27. ***Exemption.*** The Draft Guidelines note at para. 347 that companies normally have an incentive to pass on variable cost reductions. The Draft Guidelines, however, omit a series of factors that may impact the probability of pass on, including asymmetry in cost reductions among rivals, how the cooperation is structured, the nature of the concessions that are obtained by the cooperating purchasers, and how these concessions are paid out and processed.

1.28. We include references to these factors in our proposed changes to para. 347 of the Draft Guidelines in **Annex 1**.

1.29. ***Discussion of international retailer alliances.*** In para. 350, the Draft Guidelines discuss the example of a European retail alliance. In our view, this example is problematic because it does not reflect how European retail alliances generally operate when engaging with suppliers of branded products:

- International alliances do not typically negotiate discounts in return for promotions, as the example suggests.[4]

[3] See for example Case T-208/13 *Portugal Telecom*, para. 97, and Case C-382/12 *Mastercard*, para. 89 and the case law cited there.

[4] Findings from the French ministry of economy confirm that suppliers do not obtain promotions in return for the payments that they make to the alliance. See French Ministry of Economy and Finance, Assignation de l'enseigne Intermarché pour des pratiques commerciales abusives, 19 February 2021.

- They charge fees for notional services that the alliance ostensibly provides.

- They do not commit retailers to provide promotions (or other services). Suppliers must contract and pay for such services separately by negotiating individually with each retailer at the local level.

1.30. As such, the negotiations that international alliances typically conduct are not joint purchase negotiations on behalf of retailers but distinct arrangements that fall outside the concept of joint purchasing and must be assessed separately. We therefore suggest deleting this example.

1.31. In the alternative, if the example is maintained, it should be substantially revised. In particular:

- The example should be adjusted so as to make the collective commercial action consistent with the scope of the joint negotiation.

- The example should properly identify the potential restrictive effects that might arise from the collaboration of the participating purchasers. As currently written, the example underplays the potential for restrictive effects.

- The reference to cooperating retailers acting individually in selecting products subject to the collective action is potentially confusing. The competitive analysis cannot turn on whether the purchasers act individually or collectively in selecting affected products if they decide collectively to take commercial action.

- The example should properly recognise the potential for consumer harm arising from the collective action. As written, the Draft Guidelines wrongly suggest that consumer harm is unlikely.

- The example should not simply assume that consumers may benefit from the arrangement via pass on. Rather, the probability of a pass on would, among other things, depend on how the arrangement is structured and would ultimately have to be evidenced by the participating purchasers.

- Finally, the example would also benefit from a more precise explanation of how the alliance is organised and what its negotiation covers, in particular:

    - What is the exact scope of the negotiations that the alliance is running?

    - Does the alliance conclude a separate agreement or negotiate all or parts of the agreement between the purchasers and the supplier?

    - Does the alliance's negotiation bind the participating purchasers?

1.32. We suggest revisions reflecting these points in para. 350 of the Draft Guidelines in **Annex 1**.

SECTION 2

Chapter 6 – Information Exchange

2.1. The Draft Guidelines largely reaffirm established principles on information exchanges. AIM agrees that these principles remain relevant. AIM has the following observations and suggestions on this matter:

2.2. ***State intervention.*** The Draft Guidelines suggest at para. 411 that Article 101 TFEU applies to information exchanges even if participating undertakings are obligated by public authorities to engage in the exchange. This is inconsistent with well-established case law, which holds that Article 101 TFEU does not apply to conduct that is compelled by the State. We propose a change to clarify this point in **Annex 1**.

2.3. ***Commercially sensitive information*.** The Draft Guidelines use the term "*commercially sensitive information*" to denote potentially problematic information that should not be shared among competitors. "Commercially sensitive information" includes information, such as technical know-how or trade secrets, whose exchange is not competitively harmful or, in fact, pro-competitive. It would therefore be preferable and more accurate to speak of "*competitively sensitive information*". We reflect this suggestion in **Annex 1**.

2.4. ***Algorithms.*** The Draft Guidelines include an example at para. 418 where the use of algorithms that detect price changes is said to increase the risk of a collusive market outcome. We understand that the example is not meant to suggest that the use of algorithms to collect and analyse publicly available online price data is unlawful. Rather, as we understand it, the example seeks to express that the use of such algorithms is a factual circumstance that might reinforce the effects of an illicit information exchange. In our view, this point could be made more clearly. We suggest edits to that effect for para. 418 of the Draft Guidelines in **Annex 1**.

2.5. ***Data aggregation.*** The Draft Guidelines correctly explain at para. 428 that data aggregation may reduce the sensitivity of the information that is exchanged. The Draft Guidelines however focus on aggregation across different competitors and overlook other dimensions of aggregation that may also reduce competitive sensitivity. For example, if data are aggregated across multiple products, the competitive value of the information diminishes, especially if the products have different characteristics or belong to different markets. We suggest adding this point in para. 428 of the Draft Guidelines in **Annex 1**.

2.6. ***Unilateral communications.*** The Draft Guidelines state at para. 432 that "it is irrelevant" for the application of Article 101 TFEU whether only one competitor reveals sensitive information to others. Consistent with well-established principles, however, the Draft Guidelines should make clear that an addressee of such a unilateral communication is not liable for such an exchange if it clearly distances itself from it. The Draft Guidelines should also make clear that posting information on a website can be problematic only if this occurs on a *non-public* website. We propose changes to para. 432 of the Draft Guidelines in **Annex 1** to reflect these points.

2.7. ***Exchange in hybrid vertical/horizontal relations.*** In hybrid relations where an intermediary, such as a distributor or platform, competes with its own products as a seller downstream, there is horizontal, *interbrand*, competition between the products of those of the intermediary and those that the intermediary disseminates on behalf of third parties. Without prejudice to the application

of the Vertical Restraints Block Exemption Regulation and on the rules applicable to dual distribution relationships, the exchange of information between the parties in such a hybrid vertical/horizontal arrangement may therefore require assessment under the principles that govern horizontal relations.

2.8. The Horizontal Guidelines should recognise that it is legitimate for the supplier in such a hybrid relation to provide competitively sensitive information that is necessary for the vertical relation (such as information on launch plans for new products, promotion campaigns, or sales forecasts). The exchange of such information therefore should not in itself be qualified as anti-competitive.

2.9. At the same time, the Horizontal Guidelines should make clear that the intermediary receiving such competitively sensitive information is expected to implement appropriate measures that protect the sensitive information of its partner and prevent a misuse of that information by those business units that are responsible for the intermediary's own rival products. Absent such protection measures, there is a risk that the intermediary might use competitive sensitive information that it obtains from the third-party supplier in ways that impair competition between the supplier's and the intermediary's own products.

2.10. This is consistent with principles that apply, for example, for joint ventures or standard setting arrangements. In those cases, the underlying agreements are recognised to be compatible with Article 101 TFEU, provided that participants implement protection measures to prevent anti-competitive outcomes.

2.11 We propose to discuss these issues in a new para. 438a of the Draft Guidelines in **Annex 1**.

SECTION 3

Chapter 9 – Sustainability Agreements

3.1. AIM welcomes the Commission's section on sustainability agreements in the Draft Guidelines. The climate and biodiversity crises are existential issues for our society and indeed for humankind. IPCC's most recent Sixth Assessment Report warns that "*Without urgent, effective and equitable mitigation actions, climate change increasingly threatens the health and livelihoods of people around the globe, ecosystem health and biodiversity.*"[5]

3.2. Regulation, emissions taxation, and emissions trading rights are needed to abate the climate crisis, but because of the shortfall of effective regulation with worldwide effect,[6] private sector cooperation and coordination is necessary as a complementary tool to combat the climate emergency.

3.3. The IPCC Report "*highlights the growing role of non-state and sub-national actors including … businesses, … and public-private entities in the global effort to address climate change*."[7] Indeed, "*Emissions intensive and highly traded basic materials industries are exposed to international competition, and international cooperation and coordination may be particularly important in enabling change.*"[8] The Commission's recent proposal for a Directive on Corporate Sustainability Due Diligence, Article 8(3)(f), will in fact *require* companies to "*collaborate with other entities, including, where relevant, to increase the company's ability to bring the adverse impact* [on human rights or the environment] *to an end, in particular where no other action is suitable or effective*."

3.4. AIM firmly supports the idea of adjusting competition policy in the EU and elsewhere to enable the private sector to take its responsibility. Companies should be put in a position to be able to act together where market failures (including free rider concerns and first mover disadvantages) reduce firms' incentives to take sustainability steps individually, or where acting together would lead to significant efficiencies in meeting sustainability goals.

3.5. In order to encourage companies to take on these challenges, they need as much certainty as possible that their actions will not be prosecuted under competition law. They need clear guidelines of what they can and cannot do. For multinationals, those guidelines need to be global. AIM therefore strongly encourages the Commission to advocate actively for a worldwide adoption of sustainable competition policies through the ICN, the OECD and otherwise.

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[5] IPCC Sixth Report, Summary for Policy Makers, p. SMP-52.

[6] While regulation has grown, "*By 2020, over 20% of global GHG emissions were covered by carbon taxes or emissions trading systems, although coverage and prices have been insufficient to achieve deep reductions… Policy coverage remains limited for emissions from agriculture and the production of industrial materials and feedstocks.*" Summary for Policy Makers, p. SMP-15.

[7] IPCC Sixth Report, Summary for Policy Makers, p. SMP-2 and SMP-59. "*Reducing industry emissions will entail coordinated action throughout value chains to promote all mitigation options, including demand management, energy and materials efficiency, circular material flows, as well as abatement technologies and transformational changes in production processes*." See Summary for Policy Makers, p. SMP-38.

[8] IPCC Sixth Report, Summary for Policy Makers, p. SMP-38.

1. AIM Broadly Supports the Draft Guidelines for Horizontal Agreements.

3.6. AIM agrees with the approach in the Draft Guidelines, subject to the comments and proposals below. AIM in particular welcomes:

- ***Integration of sustainability in competition policy***: AIM agrees with the Commission that sustainability is an EU policy priority (para. 542), that individual production and consumption decisions can involve negative externalities that are not sufficiently taken into account by consumers or producers, and are not reflected in the price that is paid (para. 545), and that cooperation may become necessary if there are residual market failures that are not fully addressed by public policies and regulations (para. 546). In fact, Article 11 TFEU requires all European institutions to integrate environmental protection requirements both in the definition and the implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.

- ***Agreements outside Article 101 TFEU***: AIM agrees with the Commission's confirmation that sustainability agreements may fall outside the scope of the prohibition of Article 101 TFEU, when they do not appreciably affect price, quantity, quality, choice or innovation (para. 551 and following).[9] This covers, for instance, agreements to create a database containing information about sustainable suppliers and associated benchmarking (para. 553); agreements for organising industry-wide or consumers' awareness campaigns (para. 554); and agreements covered by block exemptions (para. 556 and following).

  AIM welcomes in particular the comment that genuine sustainability agreements are to be assessed "by effect" rather than as restrictions "by object" (para. 560 and 570); the relatively wide definition of "*sustainability standard setting*" as including phase-out agreements (para. 561 and following); and the provision of a "*soft safe harbour*" for such sustainability standard setting (para. 568 and following).

- ***Application of Article 101(3) TFEU:*** AIM agrees with the Commission's proposal that, in the application of Article 101(3) TFEU, it is appropriate to take account not only of "*individual use value benefits*" (para. 590), but also of "*individual non-use value benefits*" (para. 594), and especially "*collective benefits*" (para. 601), subject to the comments below.

2. AIM's Recommendations for Changes

3.7. AIM's recommendations for further changes of the Draft Guidelines are as follows:

3.7.1. Principles. Para. 556 could be misread to suggest that the preceding chapters of the Draft Guidelines have precedence over the analysis in the chapter on sustainability agreements. In fact, they should be read together. AIM therefore requests that para. 556 be clarified to explain that sustainability improvements need to be taken into account in the analysis under the other chapters as well, if the cooperation at stake addresses sustainability issues.

[9] Para. 552 of the Draft Guidelines is ambiguous. It could be misread to relate to unilateral conduct or an intra-enterprise agreement rather than an agreement between independent economic units. The example should be clarified to refer more clearly to agreements between competitors that do not bear upon their core commercial activities (*e.g.*, agreements to reduce the use of certain inputs not used in the production chain).

3.7.2. Agreements outside Article 101 TFEU: The examples of agreements outside the scope of Article 101 TFEU should include the example mentioned by the Dutch Authority for Consumers and Markets, relating to compliance agreements to comply with laws and regulations in countries where these are not adequately enforced. An example could be an agreement to follow deforestation rules in Brazil. Violation of laws and regulations is not a legitimate parameter of competition. An agreement to comply with law therefore does not constitute a restriction of legitimate competition.

3.7.3. Albany and Wouters case law. In para. 548, the Draft Guidelines state that "*Agreements that restrict competition cannot escape the prohibition of Article 101(1) for the sole reason that they are necessary for the pursuit of a sustainability objective*". AIM submits that this should be revised to accommodate the case law of the Court of Justice in *Albany*, *Wouters* and *Meca-Medina.* The Court in these cases accepts rules that "*were adopted […] for competitive sport to be conducted fairly*" in order to "*ensure healthy rivalry between athletes*" and "*to safeguard equal chances, […] the integrity and objectivity of competitive sport and ethical values in sport*" without doping, as outside Article 101(1) TFEU. Similarly, collective rules to safeguard sustainable business practices (maintaining efficient competition by avoiding exploitation of the commons, and avoiding negative externalities) should also be allowed. This is the more so if they are part of a broader agreement with stakeholders, as in *Albany*. It is not appropriate for the Horizontal Guidelines to exclude this approach wholesale.[10] Accordingly, AIM requests that this sentence in para. 548 be restated as follows:

> "*Agreements that are necessary and proportionate for the pursuit of a legitimate sustainability objective ~~restrict competition cannot escape~~ (including restrictions that are ancillary to such a sustainability agreement) may fall outside the prohibition of Article 101(1) TFEU even if they restrict competition. These guidelines do not affect the case law of the EU Court of Justice*." The footnote can be maintained.

3.7.4. *Sustainability standards*. The Draft Guidelines suggest that "*an agreement between the parties to the sustainability standard to put pressure on third parties to refrain from marketing products that do not comply with the sustainability standard restricts competition by object*" (para. 571). This could be misread to suggest that sustainability standard agreements not to use unsustainable inputs (*e.g.*, soy or beef from deforested areas, or high-emission intensive raw materials) or the provision of incentives to use sustainable inputs would be prohibited because they put "pressure" on upstream suppliers of unsustainable inputs. Such an interpretation would undermine the effectiveness of sustainability standards. AIM therefore requests that this sentence in para. 571 (and the second condition of the soft safe harbour) be clarified so as to avoid this misreading.

- Such a clarification would also be necessary to maintain consistency with para. 333 of the Draft Guidelines (chapter on joint purchasing), which suggests that it may be permissible for purchasers to agree not to buy non-sustainable input products, in particular where "*the suppliers concerned have customers other that those that are party to the joint purchasing arrangement (including customers in other markets) or can easily decide to start also producing sustainable products"*. AIM proposes to include this example also in the soft safe harbour.

[10] See also Inderst & Thomas, *'Sustainability and Competition: How Competition Law Enforcement Needs to be Overhauled to Achieve Sustainability Goals'* (2022).

- In fact, AIM's understanding of the second condition of the soft safe harbour is that a sustainability standard that is binding on the parties can still benefit from the soft safe harbour provided that the other six conditions set out in para. 572 are met.[11] An explicit recognition that a binding sustainability standard whereby companies that participate in the agreement commit not to manufacture or buy outside of a label falls outside Article 101(1) would be very helpful for firms that wish to pursue sustainability goals through standards, but that are concerned about first-mover disadvantage.

3.7.5. The third condition of the soft safe harbour requires that "*participating undertakings should remain free to adopt for themselves a higher sustainability standard than the one agreed with the other parties*". It should be clarified that this condition should apply only to the extent that the possible adoption of higher standards does not risk jeopardising the overall sustainability goals of the agreement, for example by undermining certain necessary levels of consistency amongst participants, or interoperability. A hypothetical example could be an agreement not to introduce materials that are incompatible with agreed recycling standards.

3.7.6. The sixth condition of the soft safe harbour suggests that, if there is a "significant" increase in price or "significant" reduction of choice, the agreement must be analysed as to its effects. AIM requests a clarification that (a) an anticipated average price increase below a certain percentage of sales prices (*e.g.*, between 5% and 10%) is not deemed "significant"; and (b) a significant increase in price is not expected if the sustainability standard does not result in a commonality of variable costs at a level that is likely to lead to a collusive outcome (cf. para. 374) and the price increase is less than the increase in net input costs resulting from the sustainability standardisation (on the understanding, of course, that there is no collusion in the input product).[12]

3.7.7. Without prejudice to the above, it should also be clarified that a temporary price increase or reduction of choice on the market, during the initial period a new sustainability standardisation agreement is adopted by companies that need to adapt their production, would not be deemed "significant" if it can be reasonably expected that the level of pricing and/or choice on the market will go back to insignificant, or similar pre-agreement levels after such initial adjustment period and/or once the expected economies of scale or scope (para. 573) materialise.

3.7.8. Finally, AIM recommends that example 1 in para. 617 be made more helpful by making the following changes:

- (a) the facts as currently drafted suggest that an obligation was imposed on the manufacturers ("*they have collectively agreed*" and "*have implemented the agreement*") although the analysis of this example later suggests that no obligation was imposed on the suppliers. It is therefore unclear if an obligation was imposed or not. It is helpful to give an example indicating that sustainability standards are allowed even if mandatory. AIM therefore proposes to make the following change: "*requiring all participants* ~~*allowing*~~

[11] In other words, competing undertakings could agree not to manufacture or buy outside of a label, provided that the sustainability standard (i) is open and transparent; (ii) does not impose on third-party companies outside the agreement any obligation to comply with the standard; (iii) leaves the parties to the sustainability agreement free to abide by higher sustainability standards; (iv) does not allow the exchange of competitively sensitive information; (v) is open and non-discriminatory to third parties who might wish to join later; (vi) does not lead to a significant price increase or reduction of choice; and (vii) is subject to a monitoring mechanism to ensure compliance with it.

[12] The underlying idea for the second criterion is that a price increase that is less than a net input cost increase resulting from a switch to sustainable input should not be deemed to result from a desire to fix prices so as to increase profits.

~~everyone~~ *to adopt the approach without* <u>*imposing pressure on non-participants*</u> ~~*imposing an obligation*~~ *to do so.*"

- (b) In addition, it would be useful to make an explicit reference to a "first mover disadvantage" in the example, for instance by adding a sentence "*Breakfast cereal producers are concerned that individually reducing package size makes their product look less attractive to consumers compared to those of competitors who continue to use larger boxes; a first mover disadvantage*". In AIM members' experience, this can be a real issue.

3.7.9. Article 101(3) assessment -- Burden and standard of proof. According to Article 2 of Regulation 1/2003, the burden of proof under Article 101(3) rests on the undertaking(s) invoking the benefit of the exception rule. AIM is concerned that the imposition of a heavy standard of proof for meeting the conditions of Article 101(3) TFEU for sustainability agreements will not create sufficient legal certainty and will undo the benefits of sustainability guidelines. Proving a negative, like the absence of an effective alternative arrangement in the context of "necessity", can be difficult and indeed impossible. Accordingly,

- AIM submits that these guidelines should provide that there is no need to show that the conditions are met by "*preponderance of the evidence*", "*beyond a reasonable doubt*", by "*cogent evidence*" or "*clear and convincing evidence*", or by evidence leading to "*firm conviction*", but that it should be enough that (a) the parties show "*arguments and evidence*"[13] that are capable of confirming that they sought sustainability benefits; (b) the agreement was capable of achieving those benefits; and (c) the conditions of Article 101(3) could reasonably apply."[14] The Dutch ACM appropriately suggests that it may be enough to "*make a plausible case*".[15]

- As to the type of proof, AIM requests the Commission to reflect the comments included by the Dutch ACM in its Guidelines, to the effect that:

> *"Sometimes, a description of the benefits will have to remain qualitative. Benefits with regard to innovation or animal welfare are more difficult to quantify, for*

[13] Case T-168/01, *GlaxoSmithKline v Commission*, ECLI:EU:T:2006:265, para. 235; confirmed by Joined Cases C-501/06P, C-513/06P, C-505/06P and C-519/06P, *GlaxoSmithKline ea v Commission*, ECLI:EU:C:2009:610). The Court referred in those cases to "convincing" arguments and evidence, but later clarified that "*by convincing evidence, of the circumstances which allegedly produce those effects, it by no means added a condition relating to the requisite standard of proof but merely drew attention to the essential function of evidence, which is to establish convincingly the merits of an argument*". Case C-12/03 P *Commission v Tetra Laval*, ECLI:EU:C:2005:87, para. 41. The word "convincing" therefore should not be read to qualify the standard of proof required, and should not be included in a description of the requisite standard of proof.

[14] *GlaxoSmithKline*, above, paras 82-83. This is consistent with the case law of the Court of Justice, to the effect that the burden of proof thus falls on the undertaking requesting the exemption under Article 81(3) EC, but that if a reasonable beginning of proof is provided, the burden switches to the other party, *e.g.,* the Commission, to show why the agreement should not be allowed." See also the Guidelines on application of Article 102 TFEU: "It is incumbent upon the dominant undertaking to provide all the evidence necessary to demonstrate that the conduct concerned is objectively justified. It then falls to the Commission to make the ultimate assessment of whether the conduct concerned is not objectively necessary and, based on a weighing-up of any apparent anti-competitive effects against any advanced and substantiated efficiencies, is likely to result in consumer harm." Communication from the Commission—Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009) OJ C 45/7, para. 31.

[15] ACM, para. 65.

example. The description of such benefits will therefore focus on identifying the nature of the benefits as much as possible. In any case, it is also important to shed light on the likelihood of those benefits actually being reaped. … It is usually possible to conclude that an agreement meets the second criterion of paragraph 3 [that consumers will receive a fair share of the benefits] without quantifying the effects of an agreement [where] (i) he undertakings involved have a limited, combined market share; (ii) the harm to competition is, based on a rough estimate, evidently smaller than the benefits of the agreement."[16]

3.7.10. ***Article 101(3) assessment -- The condition of "indispensability***: Para. 583 of the Draft Guidelines suggest that "*where EU or national law requires undertakings to comply with concrete sustainability goals, cooperation agreements and the restrictions they may entail, cannot be deemed indispensable…*" It is important to recognise that there are different types of regulation, and that this reasoning applies only if and to the extent that the regulation imposes binding, specific, and individual obligations on each firm independently. This is not the case, for instance, if the regulation is sector-specific. Accordingly, AIM requests that para. 583 be adjusted as follows:

> *"where EU or national law requires undertakings to comply with concrete, binding, and individually applicable sustainability obligations ~~goals~~, cooperation agreements and the restrictions they may entail, cannot be deemed indispensable for the goal to be achieved. This is because the legislator has already decided that each undertaking alone is required to achieve the goal individually."*

3.7.11. The Draft Guidelines recognise that cooperation agreements can be indispensable to reach a sustainability goal in a more cost-efficient way (para. 582), to overcome supply-side market failures (para. 584), to achieve economies of scale (para. 585), or to overcome demand-side market failures (para. 586). This is appropriate, but the revised Horizontal Guidelines should more clearly acknowledge that agreements may be allowed also:

- (a) if they are reasonably necessary to achieve goals (including regulatory goals) *more quickly* than is possible without cooperation (which can be done in para. 582). Accordingly, para. 582 and 583 should provide that *"cooperation agreements may be indispensable for reaching the goal more quickly or in a more cost efficient way"*, and

- (b) where firms seek to *exceed* the regulatory targets, and give examples of agreements going beyond regulatory goals (which can be done in para. 583). This is necessary in particular given that regulation is currently inadequate to ensure achievement of the goals of the Paris Agreement, and where public policies and regulations do not fully resolve market failures;

- (c) where they pre-date regulation or exceed the product or geographical or sustainability scope of the regulation. For instance, if firms create a recycling network and cooperate to create awareness around this network and the need to recycle, that cooperation should be allowed to continue even if the recycling becomes mandatory, or is converted into a public service.

[16] ACM, paras 41 and 54.

3.7.12. ***Article 101(3) assessment -- "Fair Share to Consumers" for "Individual Non-Use Value Benefits"***: The Draft Guidelines suggest that individual non-use value benefits (altruism) can be determined by consumer "willingness to pay" surveys and that "*the parties to an agreement need to provide cogent evidence demonstrating the actual preferences of consumers*" (para. 597 and following). AIM submits that (a) the standard of evidence required should not be too high (*i.e.*, should be "*plausible*" or "*arguments and evidence*" as discussed above) so as not to undermine the effectiveness of this provision, and (b) the revised Horizontal Guidelines (para. 598 and following) should explain that such surveys should be adequately designed to avoid demand-side market failures.

- For instance, a consumer may say in a survey that they are willing to pay for sustainable consumption and convey a positive impact on others *only* if others do the same – but not if others continue to buy non-sustainable products, and thus nullify the positive impact that the consumer would seek. A survey based on answers suggesting that other consumers continue to buy non-sustainable products will understate willingness to pay – and relying on it would effectively deprive the recognition of individual non-use value benefits of all meaning, and lead to the prohibition of effective sustainability agreements.

3.7.13. ***Article 101(3) assessment -- "Fair Share to Consumers" for "Collective Benefits"***: The Draft Guidelines (para. 601) suggest that "*collective benefits … objectively can accrue to the consumers in the relevant market if the latter are part of the larger group of beneficiaries,*" and that "*efficiencies achieved on separate markets can be taken into account, provided that the group of consumers affected by the restriction and benefiting from the efficiency gains is substantially the same*" (para. 602). The objective of these requirements – repeated in conditions (c) and (d) in para. 606 – is to ensure that the affected consumers in the relevant market are fully compensated for any price increase they pay as a result of a sustainability agreement that creates collective benefits.

- In other words, the Draft Guidelines suggest that these consumers must be *paid* to eliminate the damage that they impose on others and on society.

3.7.14. AIM does not support this limited interpretation. The Commission should not insist that, for an agreement to benefit from Article 101(3) TFEU, consumers must be fully compensated for reduction of choice or price increases (if there are any). Article 101(3) refers to a "fair share", not "full compensation". AIM refers to the legal memorandum from the Dutch Authority for Consumers and Markets (ACM) on the concept of "fair share for consumers". Accordingly, the words "*the overall effect on consumers in the relevant market is at least neutral*" should be deleted from para. 588. Instead, AIM submits that the analysis should proceed as follows – and AIM invites the Commission to adjust Section 9.4.3.3 (Collective benefits) in the revised Horizontal Guidelines accordingly:

- Step 1: "Fairness" requires for the purpose of the analysis that the full social cost of production and consumption is internalised in transactions with the consumer *before* any assessment of the benefit to consumers. That includes the costs of climate change, large-scale pollution, loss of biodiversity, and other costs imposed on society that are currently not included in the price ("externalities"). This is also required by the "polluter pays" principle enshrined in Article 191(2) TFEU. It would be unfair – and therefore inconsistent with Article 101(3) TFEU – to carry out the analysis assuming that producers and consumers should be allowed to impose such significant costs on society (or on individuals who do not consume), or to insist that producers and consumers be paid or compensated for avoiding

to impose significant sustainability costs on others. They should *pay* for damage that they cause, not *be paid* for *not* causing damage.

- Step 2: *After* verifying that (for the purpose of the analysis) the externalities are internalised, it should be assessed – in accordance with the criteria set by the EU Court of Justice in *Mastercard* (para. 234) – whether the agreement confers "*appreciable objective advantages of such a character as to compensate for the disadvantages which that agreement entails for competition [Consten & Grundig]*". Para. 588 of the revised Horizontal Guidelines should be amended to reflect the *Mastercard* judgement properly:

> *"Consumers receive a fair share of the benefits when the benefits deriving from the agreement constitute appreciable objective advantages for the consumers affected by the agreement of such a character as to compensate for the disadvantages which that agreement entails for competition ~~outweigh the harm caused by the same agreement, so that the overall effect on consumers in the relevant market is at least **neutral***" *Compensation need not be full, but must be fair. Therefore, sustainability benefits that ensue from the agreements have to be related to the consumers of the products covered by those agreements. Climate change abatement and mitigation, the protection of biodiversity, and the reduction of large scale pollution qualify as appreciable objective advantages that "relate" to the consumers – in the sense that they affect everyone including the consumers."*

The revised Horizontal Guidelines should explain that this does not require that benefits must be within the same market as where the costs are imposed, and does not require "full" compensation such that the effects on affected consumers are "neutral". The *Mastercard* judgement refers to the "character" of the benefits, *i.e.*, the "quality" of the benefits rather than their "quantity".

- This approach should be carried over to the section on "collective benefits". Para. 603 of the Draft Guidelines provides that "*where consumers in the relevant market **substantially overlap** with, or are **part of** the beneficiaries outside the relevant market, the collective benefits to the consumers in the relevant market occurring outside that market, can be taken into account if they are **significant** enough to compensate consumers in the relevant market for the harm suffered.*" This should be clarified to explain that (a) "compensation" does not mean "full compensation", but "fair compensation", in accordance with Article 101(3) TFEU, and (b) "significance" also has qualitative aspects, and not only a quantitative one.

    - In the assessment of "significance" under para. 603 mentioned above, the benefits to society should be fully counted, and not allocated proportionately to individual consumers. By way of illustration, if an agreement requiring airlines to use 20% sustainable fuel reduces greenhouse gas emissions by 200 million tons, that benefit should be fully counted, rather than just counting 2 million tons (on the ground that only less than 1% of the world's population fly regularly), or just counting 400,000 ton on the ground that only 20% of frequent fliers are European consumers – and then prohibiting the agreement because a reduction of 400,000 tons is not enough to justify the price increase to EU frequent fliers. This approach would lead to the prohibition of effective and beneficial agreements simply because they benefit the

world's society as a whole rather than just the EU. There is only a global climate crisis and not a separated EU one.

- This point is even more pressing where immediate beneficiaries are completely different from the affected consumers, as in the example of sustainable cotton in para. 604. This situation may be expected to arise very frequently as multinational companies seek to improve sustainability in complex, global and lengthy supply chains. The benefits to cotton growers, not being affected by dangerous chemicals following an agreement to avoid these chemicals, should be fully recognised as "individual non-use benefits" or "collective benefits". Prohibiting agreements that reduce very serious harm outside the EU creates the impression that it is acceptable to cause harm so long as the harm does not affect EU citizens, and that it is appropriate to agree to limit serious harm but only if it benefits EU consumers.

3. *A Block Exemption Regulation for Climate Change Abatement Agreements*

3.8. AIM recommends to adopt a block exemption regulation for climate change abatement standards agreements below a 30% market share ceiling, reflecting the essence of the December 2021 introduction of Article 210a of Regulation 1308/2013 establishing a common organisation of the markets in agricultural products, as follows:[17]

'Vertical and horizontal initiatives for sustainability

1. *Article 101(1) TFEU shall not apply to agreements, decisions and concerted practices of ~~producers of agricultural products~~ undertakings ~~that relate to the production of or trade in agricultural products and~~ that aim to apply a sustainability standard or type, or a sustainability standard higher than mandated by Union or national law, provided that those agreements, decisions and concerted practices only impose restrictions of competition that are indispensable to the attainment of that standard.*

2. *Paragraph 1 applies to agreements, decisions and concerted practices ~~of producers of agricultural products~~ to which several producers are party or to which one or more producers and one or more operators at different levels of the production, processing, and trade in the ~~food~~ supply chain, including distribution, are party.*

3. *For the purposes of paragraph 1, "sustainability standard" means a standard which aims to contribute to ~~one or more of the following objectives:~~ environmental objectives, including climate change mitigation and adaptation, the sustainable use and protection of landscapes, water and soil, the transition to a circular economy, including the reduction of food waste, pollution prevention and control, and the protection and restoration of biodiversity and ecosystems~~; (b) he production of agricultural products in ways that reduce the use of pesticides and manage risks resulting from such use, or that~~*

[17] See the consultation on new guidelines for sustainability agreements in agriculture. Footnote 315 of the Guidelines suggest that exceptions from application of competition law is not possible outside the agricultural sector (or for agreements of general economic interest), but the proposal here is not for an exception, but a block exemption for an agreement for the application of sustainability standards or types, which would be covered by Council Regulation 2821/71 of 20 December 1971 on application of Article [101] (3) of the Treaty to categories of agreements, decisions and concerted practices, and (to the extent it involves vertical agreements) Regulation No 19/65/EEC of 2 March of the Council on application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices.

~~*reduce the danger of antimicrobial resistance in agricultural production*~~*; and (b) animal health and animal welfare.*

4. *[provision on 30% market share ceiling]*

5. *Agreements, decisions and concerted practices that fulfil the conditions referred to in this Article shall not be prohibited, no prior decision to that effect being required.*

3.9. This amendment assumes appropriately that, where the agreement is "necessary" and the market share ceiling is not exceeded, (a) consumers will receive a fair share of the resulting benefit of climate change abatement – the reduction of an existential threat to our society, economy, and security – and there will be residual competition, and (b) the residual competition from non-participants (together reflecting 70% market share) can be reasonably expected to ensure that the benefits of the agreement are significant enough to justify any restrictions. A safeguard clause allowing withdrawal of the block exemption can be included to manage marginal cases where the block exemption is not justified.

4. International cooperation

3.10. Finally, there is a concern that EU-wide guidelines are inadequate to encourage effective climate cooperation by global multinationals. Agreements that are permissible under EU competition law might be seen to violate competition law elsewhere, like in the UK, the US, India, China, Brazil, Russia, or Australia. AIM is concerned about a scenario where under EU Guidelines manufacturers may agree on a standard and therefore cease buying from upstream suppliers that do not fulfil that standard. However, in some countries this could be seen as an illegal group boycott or demand pooling, which might also lead to private damages litigations. AIM therefore strongly encourages the Commission to advocate actively for a worldwide adoption of sustainable competition policies through the ICN, the OECD and otherwise.

SECTION 4

R&D Block Exemption Regulation

4.1. The draft R&D Block Exemption Regulation introduces a new condition for exemption by requiring the presence of multiple comparable R&D efforts. At the same time, the draft R&D Block Exemption Regulation maintains principles that limit the exemption of joint selling of jointly developed products. These elements substantially narrow the scope of the exemption and reduce its practical utility.

4.2. ***New requirement for minimum number of R&D efforts.*** Article 6(3) of the draft R&D Block Exemption Regulation provides that, if the parties to the R&D agreement compete in innovation, the exemption shall apply only if, at the time of entering into the R&D agreement, there are three or more competing R&D efforts in addition to and comparable with those of the parties to the R&D agreement.

4.3. This requirement creates difficulties for companies carrying out a self-assessment. The extent and nature of rival R&D efforts will often not be in the public domain. It will therefore not be possible for a company to ascertain how many other R&D efforts are underway, let alone whether these efforts are comparable.

4.4. This criterion is therefore inherently unsuited for defining the safe harbour of the R&D Block Exemption Regulation. It would introduce serious legal uncertainty as to the validity of R&D cooperation, and as such it would discourage investment in R&D.

4.5. It is widely recognised that R&D cooperation can achieve significant efficiencies by sharing the risks associated with R&D and accelerating development. These benefits arise regardless of the number of parallel R&D efforts that exist in the industry. In fact, if anything, the pro-competitive benefits of R&D cooperation may be the highest precisely in areas where there is little or no R&D because of the associated risks and difficulties. It would therefore be deeply counterproductive to condition block exemption on the number of parallel R&D efforts.

4.6. We therefore recommend deleting Art. 6(3) of the draft R&D Block Exemption Regulation.

4.7. ***Joint distribution of R&D efforts.*** The draft R&D Block Exemption Regulation exempts, in principle, joint distribution of jointly developed products. Article 1(1)(10) and (14) of the Regulation make clear that joint distribution may take place via specialisation (for example by allocating responsibility for distribution in different territories between the parties). However, Article 8(2) and (3) declare joint setting of sales targets and prices to be a hardcore restriction, unless joint distribution takes place via a joint team or a third-party. Therefore, key elements of a joint distribution arrangement are not exempted if the joint distribution takes place in the form of specialisation.

4.8. There is no good basis for excluding joint distribution in the form of specialisation from exemption that is available to joint distribution via joint teams and via third-parties. Just as in the exempted scenarios, cooperating parties in a specialisation scenario have a legitimate interest to jointly decide sales targets and prices. This is because the parties will often share profits from the fruits of their joint investment and work. They will therefore want to have a say over factors that influence the return from the jointly developed product. By contrast, denying exemption to joint

exploitation in the form of specialisation significantly reduces the incentives of companies to enter into joint R&D arrangements in the first place and therefore is liable to restrict innovation.

4.9. We therefore propose to delete Article 8(2)(a)(ii) and 8(3)(a)(iii).

4.10. ***Specialisation*****.** The definition of specialisation in the context of exploitation as set out in Article 1(1)(14) could bring out more clearly that specialisation also covers a scenario where one party produces the outcome of the joint R&D and then exclusively supplies that product to the other party, either for distribution or for incorporation into a product produced by that second party. While AIM understands that this scenario is already covered by the current language, it would be helpful to make this more explicit. A possible clarification could therefore could read as follows:

> "*specialisation in the context of exploitation' means that the parties allocate between them individual tasks such as production or distribution, or impose restrictions upon each other regarding the exploitation of the results such as restrictions in relation to certain territories, customers or fields of use; this includes a scenario where only one party produces and distributes the contract products on the basis of an exclusive licence granted by the other parties,* ***or where one party produces the contract products and exclusively supplies the contract products to the other party for distribution or for incorporating in the other party's final products***;

4.11. ***Passive sales prohibitions*****.** Article 8(4), which treats passive sales restrictions as hardcore restrictions, should clarify that this provision is without prejudice to the exceptions set out in Article 8(2). In particular, where the parties specialise by allocating production to one party and distribution to one or more other parties, it should be permissible to prohibit the producing party from selling the product to any customers other than the distributing party or parties. The arrangement is then similar to a legitimate toll manufacturing arrangement where the IP in question is licensed solely for the purpose of producing for the benefit of the licensor. While Article 8(4) reserves the possibility of exclusively licensing the results to one party, this reference does not bring out that point clearly.

4.12. ***Active sale prohibitions*****.** Article 8(5) qualifies active sales restrictions as hardcore restrictions unless they relate to territories or customers that are exlcusively allocated to one party. There is no good reason to treat non-exclusive arrangements more strictly than exclusive arrangements. If anything, non-exclusive arrangements are less restrictive. Article 8(5) should therefore be revised in line with the draft Vertical Restraints Block Exemption Regulation, which modifies the rules on active sales restrictions.

SECTION 5

Annex 1 – Suggested Edits to Chapters 4 and 6 of the Draft Guidelines

[***Paras 1-310***]

4. PURCHASING AGREEMENTS

4.1. Introduction

[***Para. 311***]

312. [Joint purchasing arrangements] can also be limited to jointly negotiating the purchase price, certain elements of the price, ~~or~~and other terms and conditions of the agreement under which a supplier sells to the cooperating purchasers, while leaving the actual purchases, pursuant to the jointly negotiated price and terms and conditions, to its individual members. [...] Groups of potential licensees can also jointly negotiate licencing agreements for standard essential patents with licensors in view of incorporating that technology in their products (sometimes referred to as licensing negotiation groups). [...]

[***Paras 313-314***]

4.2. Assessment under Article 101(1)

4.2.1. Main competition concerns

315. Purchasing agreements may lead to restrictive effects on competition on the upstream purchasing and/or downstream selling market or markets, such as increased prices, reduced output, product quality or variety, or innovation, market allocation, or anti-competitive foreclosure of other possible purchasers or suppliers.

315a. In assessing possible anticompetitive outcomes of purchasing arrangement, the Commission will take into account, among other things, the scope of the arrangement, the way it is structured, how it operates in practice, and the market power of the parties involved.

4.2.2. Restrictions of competition by object

316. Joint purchasing arrangements normally do not amount to a restriction of competition by object if they truly concern joint purchasing, that is to say if the joint purchasing arrangement involves collective negotiation ~~and conclusion of an agreement~~, on behalf of ~~its members~~ purchasers, with any given supplier of one or more substantive ~~trading~~ terms of the supply agreement that applies between that supplier and the cooperating purchasers. Such arrangements need to be distinguished from arrangements that do not involve true joint purchasing, including buyer cartels. Buyer cartels are ~~, that is to say agreements or~~ concerted practices between two or more purchasers aimed at, [(a) …, and (b)...]

[***Paras 317-320***]

321. Joint purchasing arrangements can also lead to a restriction of competition by object if they serve as a tool to engage in a disguised cartel, that is to say, an agreement between purchasers fixing prices, limit~~at~~ing output or sharing markets or customers on the downstream selling market or markets.

[***Para. 322***]

322a. Likewise, cooperation among purchasers that does not involve true joint purchasing or oversteps the scope of such joint purchasing and instead merely serves as a mechanism for coercion may constitute a restriction by object.

4.2.3. Restrictive effects on competition

[***Paras 323-325***]

4.2.3.1. Relevant markets

[***Paras 326-328***]

4.2.3.2. Market power

[***Paras 329-331***]

332. The risk that a joint purchasing arrangement could discourage investments or innovations benefitting consumers may be larger for large purchasers that jointly account for a large proportion of ~~purchases~~ a supplier's sales – in particular when that supplier accounts for a comparatively smaller share of the purchasers' sales ~~dealing with small suppliers~~. In that case, the ~~Such~~ supplier~~s~~ may be particularly vulnerable ~~for~~ to a reduction in profits by a joint purchasing arrangement with a significant market share on the purchasing market or markets~~, especially when small suppliers have made specific investments for supplying the members of a joint purchasing arrangement~~. Restrictive effects on competition are less likely to occur if suppliers have a significant degree of countervailing seller power (which does not necessarily amount to dominance) on the purchasing market or markets, for example, because their products account for a large share of a purchaser's sales ~~they sell products or services that purchasers need to have in order to compete on the downstream selling market or markets~~.

332a. A risk of restrictive effects may also arise if cooperating purchasers, as a condition for agreeing to a supply agreement, collectively require the supplier to enter into distinct agreements under which the cooperating purchasers act as sellers of products or services. Such arrangements could have the effect of restricting competition upstream by increasing the cost of suppliers' market access. They could also restrict competition downstream by rendering it less likely that the advantages obtained via the distinct agreements are passed on to consumers in the form of lower prices.

333. ~~For instance, a~~An agreement between the members of a joint purchasing arrangement to no longer purchase products from certain suppliers because of particular product characteristics, for instance because the ~~such~~ products are unsustainable whereas the purchasing arrangement wants to buy only sustainable products, may lead to a restriction of competition in terms of price and choice. [...]

[***Paras 334-337***]

337a. In addition, if the cooperating purchasers compete in the downstream market with their own products against suppliers' products, the cooperation may harm competition between purchasers' and suppliers' products.

4.2.3.3. Collusive outcome

[***Paras 338-340***]

341. [...] Spill-over effects from the exchange of commercially sensitive information can be minimised, for example, where data is collated by the joint purchasing arrangement which does not pass on the information to the parties thereto or by ~~putting in place~~ limiting access to the information to individuals with sole responsibility for purchasing through technical or practical measures to protect its confidentiality. [...]

[***Para. 342***]

343. When negotiating terms and conditions with suppliers, a joint purchasing arrangement may threaten to take collective commercial action, such as ~~suppliers to~~ abandoning negotiations or ~~to~~ stopping purchasing ~~temporarily~~ unless they are offered better terms or lower prices. Such threats ~~are typically~~ may be part of a bargaining process and may involve collective action by purchasers when a joint purchasing arrangement conducts the negotiations. Strong suppliers may use similar threats to stop negotiating or supplying products in their bargaining with purchasers. Such threats do not usually amount to a restriction of competition by object, if they correspond to the scope of the joint negotiation. ~~and a~~If that is the case, any negative effects arising from such collective threats will not be assessed separately but in the light of the overall effects of the joint purchasing arrangement. By contrast, if a collective commercial action, such as a purchase stop, exceeds the scope of the joint negotiation or is otherwise disproportionate, the measure may constitute a restriction by object as it would serve as a coercion mechanism that is dissociated from the joint negotiation.

~~**Fn. 184** Temporary stops by retailers in orders of certain products from suppliers should be distinguished from so-called 'delisting', that is to say a measure whereby a retailer permanently removes certain products of a supplier from its assortment and gives up the associated space on its shelves.~~

343a. For example, if members of a retail alliance are jointly negotiating a discount for providing a supplier with sales data, a threat to stop purchases of the supplier's products in the case of a failure to reach agreement would go beyond the scope of the joint negotiation. It may therefore amount to a restriction by object. On the other hand, a collective threat not to provide the sales data that is the subject of the joint negotiation would be assessed as part of the overall review of the joint negotiation under an effects analysis. ~~An example of such bargaining threats concerns temporary stops by the members of a retail alliance in ordering certain products, selected by each of the members individually for its own shops, from a supplier during their negotiations about terms and conditions for their future supply agreement. Such temporary stops may result in the products selected by the individual members of the alliance being unavailable on the retailers' shelves for a limited~~

~~period of time, namely until the retail alliance and the supplier have agreed on the terms and conditions of future supplies.~~

343b. Relevant criteria to assess the potential for restrictive effects associated with a collective purchase stop include the percentage of the supplier's products that are affected, the duration and frequency of the stops, the timing of the stop relative to the seasonality of the product, and the ability and probability of consumers to obtain the affected products from other channels.

4.3. Assessment under Article 101(3)

4.3.1. Efficiency gains

[***Para. 344***]

4.3.2. Indispensability

[***Para. 345***]

4.3.3. Pass-on to consumers

[***Para. 346***]

347. [...] Moreover, pure reductions in fixed costs (such as lump-sum payments by suppliers) may be unlikely to be passed-on to consumers, as they normally do not provide companies with an incentive to expand output. Other factors that may impact pass-on include the asymmetry in cost reductions, the nature of the concessions that are obtained by the cooperating purchasers, and how these concessions are paid out to and processed by purchasers. A careful assessment of the specific joint purchasing arrangement is therefore required to assess whether it generates an economic incentive to expand output and thus pass-on cost reductions or efficiencies. [...]

4.3.4. No elimination of competition

[***Para. 348***]

4.4. Examples

[***Para. 349***]

350. Joint negotiation by a European retail alliance
[Delete this example or alternatively adjust as suggested below]

Example 2

Situation: A European retail alliance, having as its members seven large retail chains, each from a different Member State, jointly negotiates with a large brand manufacturer ~~of confectionery products some~~ additional terms ~~and conditions~~ for their future supply agreement. The alliance has a market share of no more than 18% on each relevant purchasing market ~~for confectionary~~ and each of its members has a market share of between 15% and 20% on the retail markets in their respective Member State. The

negotiations cover in particular an additional rebate from the manufacturer's normal list price in return for ~~certain promotional services~~ providing sales data covering the seven Member States in which the members of the alliance are active on the selling market. Both sides drive a hard bargain to get the best possible deal. At some point during the negotiations, the retail alliance threatens and subsequently decides to ~~temporarily~~ stop ~~ordering certain products from the manufacturer~~ providing the sales data to increase the pressure. ~~In implementing this decision, each member of the alliance decides individually which products from the manufacturer it stops ordering during the deadlock in the negotiations.~~ Eventually, after another round of negotiations, the manufacturer and the alliance agree on the additional rebate that will apply to the subsequent individual purchases by its members and they restart ~~their orders of the entire range of products from~~ provision of the sales data to the manufacturer.

Analysis: The European retail alliance qualifies as a joint purchasing arrangement even if it jointly only negotiates certain terms ~~and conditions~~ of the supply agreement with the manufacturer on behalf of its members based on which they individually purchase their required quantities. The national retail chains that are members of the alliance are not active on the same selling markets. Therefore, the joint purchasing arrangement is less likely to have restrictive effects in the relation between the participating retailers ~~on competition downstream to the extent that they face sufficient competitive pressure from competing retailers~~. It would, however, have to be examined whether the arrangement is liable to have ~~Any~~ negative effects on competition for manufacturers upstream from the additional rebate (for instance in terms of innovation by suppliers). In addition, it would have to be examined whether the negotiation of the additional terms is structured in a manner that reduces the probability of pass on to consumers and therefore is liable to restrict competition downstream. Any possible adverse effects from the collective stop of providing sales data would be part of the overall assessment of the arrangement. ~~have to be assessed in the light of the overall effects of the joint purchasing arrangement. The temporary stopping of orders does not appear to harm consumers in the short term, insofar as they have other competing retailers where they can purchase the same products or substitutable products, and may benefit consumers in the long term through lower prices.~~

[***Paras 355-405***]

6. INFORMATION EXCHANGE

6.1. Introduction

[***Paras 406-408***]

409. Information exchange can be part of another type of horizontal cooperation agreement. The implementation of such a horizontal cooperation agreement may require the exchange of competitively ~~commercially~~ sensitive information. [...]

[***Para. 410***]

411. 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 unless they are compelled to do so. 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 they may have to implement precautionary measures in case competitively ~~commercially~~ sensitive information is exchanged.

[...] *Undertakings participating in exchanges foreseen by regulation must therefore not give out competitively ~~commercially~~ sensitive information that reveals their market strategy or technical information that goes beyond the requirements of the regulation. Undertakings may be able to reduce the frequency of the exchange in order to make the information less competitively ~~commercially~~ sensitive to the extent that this does not prejudice the regulatory objective. Where possible, aggregated information or ranges should be used in order to avoid exchange of individual or more detailed figures.* [...]

6.2. Assessment under Article 101(1)

6.2.1. Introduction

[***Para. 412***]

413. [...] In case an exchange of competitively ~~commercially~~ sensitive information between competitors takes place in preparation of an anti-competitive agreement, this suffices to prove the existence of a concerted practice within the meaning of Article 101(1). [...]

[***Paras 414-415***]

6.2.2. Main competition concerns related to information exchange[203]

6.2.2.1. Collusive outcome

416. By artificially increasing transparency between competitors in the market, the exchange of competitively ~~commercially~~ sensitive information can facilitate coordination of undertakings' competitive behaviour and result in restrictions of competition. [...]

417. An exchange of competitively ~~commercially~~ sensitive information in itself may allow undertakings to reach a common understanding on the terms of coordination which can lead to a collusive outcome on the market. [...]

418. The exchange of competitively ~~commercially~~ sensitive information can also be used as a method to increase the internal stability of an anti-competitive agreement or concerted practice on the market. [...]

The use of algorithms by competitors may, for example, increase the risk of a collusive outcome in the market arising from an information exchange. Algorithms can allow competitors to increase market transparency, to detect price deviations in real time and to make punishment mechanisms more effective. [...]

[***Para. 419***]

6.2.2.2. Anti-competitive foreclosure

[***Para. 420***]

421. Foreclosure on the same market can occur when the exchange of competitively ~~commercially~~ sensitive information places competitors that do not take part in the exchange at a significant competitive disadvantage as compared to the undertakings affiliated within the exchange system. [...]

[***Para. 422***]

6.2.3. The nature of the information exchanged

6.2.3.1. Competitively ~~Commercially~~ sensitive information

423. Article 101(1) applies if an exchange of competitively ~~commercially~~ sensitive information is likely to influence the commercial strategy of competitors. [...] Information on pricing is, for instance, competitively ~~commercially~~ sensitive, but Article 101(1) also applies if the exchange does not have a direct effect on the prices paid by end users. [...]

424. Information that has been considered to be particularly competitively ~~commercially~~ sensitive and the exchange of which was qualified as a by object restriction, include the following: [...]

6.2.3.2. Public information

425. [...] As the information is publicly accessible, it may have lost its competitively ~~commercially~~ sensitive nature. [...]

[***Paras 426-427***]

6.2.3.3. Aggregated/individualised information and data

428. The competitively ~~commercially~~ sensitive nature of information depends also on the usefulness it has to competitors. Depending on the circumstances, the exchange of raw data may be less competitively ~~commercially~~ sensitive than an exchange of data that was already processed into meaningful information. Similarly, raw data may be less competitively ~~commercially~~ sensitive than aggregated data, while it may allow undertakings to obtain more efficiencies by exchanging it. At the same time, the exchange of genuinely aggregated information that loses its competitive value, for example because ~~where the~~ recognition of individualised company level information is sufficiently difficult or uncertain or the data are aggregated across a broad range of different products, especially if they have different characteristics or are from different markets, is much less likely to lead to a restriction of competition than exchanges of company level information.

[***Para. 429***]

6.2.3.4. The age of the information

430. In many industries, information becomes historic relatively quickly and thus loses its competitively ~~commercially~~ sensitive nature. [...]

431. [...] *For example, if undertakings typically rely on data about consumer preferences (purchases or other choices) over the last year in order to optimise their brands' strategic business decisions, information covering this period will generally be more competitively*

~~commercially~~ *sensitive than older data. The information over the last year is then not considered 'historic'.*

6.2.4. The characteristics of the exchange

6.2.4.1. Unilateral disclosures

432. A situation where only one undertaking discloses competitively ~~commercially~~ sensitive information to its competitor(s), who accept(s) it, can constitute a concerted practice. Such disclosure could occur, for example, through posts on non-public websites, (chat) messages, emails, phone calls, input in a shared algorithmic tool, meetings etc. [...] When one undertaking alone reveals to its competitors competitively ~~commercially~~ sensitive information concerning its future commercial policy, that reduces strategic uncertainty as to the future operation of the market for all its competitors and increases the risk of limiting competition and of collusive behaviour, unless competitors clearly distance themselves from the disclosure.

For example, participation in a meeting where an undertaking discloses its pricing plans to its competitors without competitors distancing themselves is likely to be caught by Article 101(1), even in the absence of an explicit agreement to raise prices. [...]

433. When an undertaking receives competitively ~~commercially~~ sensitive information from a competitor (be it in a meeting, by phone, electronically or as input in an algorithmic tool), it will be presumed to take account of such information and adapt its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such information or reports it to the administrative authorities.

[***Para. 434***]

6.2.4.2. Indirect information exchange and exchanges in mixed vertical/horizontal relations

435. Exchanges of competitively ~~commercially~~ sensitive information between competitors can take place via a third party (for instance a third party service provider, including a platform or third party optimisation tool provider), a common agency (for instance a trade organisation), via one of their suppliers or customers, or via a shared algorithm (together referred to as the 'third party'). [...]

436. In case of an indirect exchange of competitively ~~commercially~~ sensitive information, a case by case analysis of the role of each participant is required to establish whether the exchange concerns an anti-competitive agreement or concerted practice and who bears liability for the collusion. [...]

Other indirect information exchanges may involve reliance between (potential) competitors on a shared optimisation algorithm that would take business decisions based on competitively ~~commercially~~ sensitive data- feeds from various competitors, or the implementation in the relevant automated tools, of aligned/coordinated features or mechanisms of optimisation. [...]

437. An undertaking that indirectly receives or transmits competitively ~~commercially~~ sensitive information may be held liable for an infringement of Article 101(1). [...] This would apply,

if the undertaking expressly or tacitly agreed with the third party provider sharing that information with its competitors or when it intended, through the intermediary of the third party, to disclose competitively ~~commercially~~ sensitive information to its competitors. [...] On the other hand, the condition is not met when the third party has used an undertaking's competitively ~~commercially~~ sensitive information and, without informing that undertaking, passed this on to its competitors.

438. Similarly, a third party that transmits competitively ~~commercially~~ sensitive information may also be held liable for such infringement if it intended to contribute by its own conduct to the common objectives pursued by all the participants to the agreement and was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or could reasonably have foreseen this and was prepared to take the risk.

438a. In mixed vertical/horizontal relations that involve an intermediary, such as a distributor or platform, that competes with its own products downstream, it may be necessary for a supplier to share competitively sensitive information about its products with the intermediary, which the intermediary could use to harm interbrand competition between the supplier's and the intermediary's products. In such situations, the exchange of the information, as such, may be legitimate if it is needed for the vertical relation. However, concerns may arise if the intermediary fails to implement measures that protect the sensitive information of its partner and that preclude possible misuses by individuals responsible for selling rival products downstream.

6.2.4.3. Frequency of the exchange of information

[***Para. 439***]

6.2.4.4. The measures put in place to limit and/or control how data is used

440. Undertakings that want to (or need to) exchange information can put measures in place to restrict the access to information and/or control how information is used. Such measures may prevent that competitively ~~commercially~~ sensitive information ~~can~~ influence a competitor's behaviour.

Undertakings can for instance use clean teams to receive and process information. A clean team generally refers to a restricted group of individuals from an undertaking that are not involved in the day-to-day commercial operations and are bound by strict confidentiality protocols with regard to the competitively ~~commercially~~ sensitive information. [...] Technical and practical measures can ensure that a participant is unable to obtain competitively ~~commercially~~ sensitive information from other participants. [...]

6.2.4.5. Access to information and data collected

[***Paras 441-442***]

6.2.5. Market characteristics

[***Paras 443-447***]

6.2.6. Restriction of competition by object

448. An information exchange will be considered a restriction by object when the information is competitively ~~commercially~~ sensitive and 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. [...]

[***Paras 449-450***]

6.2.7. Restrictive effects on competition

[***Paras 451-456***]

6.3. Assessment under Article 101(3)

6.3.1. Efficiency gains

[***Paras 457-458***]

6.3.2. Indispensability

[***Para. 459***]

6.3.3. Pass-on to consumers

[***Para. 460***]

6.3.4. No elimination of competition

[***Para. 461***]

6.4. Examples

Example 1

[...] Therefore, the incremental information that is non-publicly exchanged between the hotels is competitively ~~commercially~~ sensitive. [...]

Example 4

[...] **Analysis**: the data gathered is competitively ~~commercially~~ sensitive and, if exchanged between the producers, would be 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. [...]

In order to avoid the risk of collusion, several measures could be taken. If an exchange of competitively ~~commercially~~ sensitive information between the producers is absolutely required beyond the information that would be collected and~~s~~ shared in aggregated form by the industry association and the consultancy (for instance, to jointly identify where to best switch production or increase capacity), such exchanges would need to be strictly limited to what is indispensable for effectively achieving the aims. [...] Only the consultant

would receive the competitively ~~commercially~~ sensitive data and be charged with aggregating it. [...]

[***Paras 462-621***]

About AIM

AIM (Association des Industries de Marque) is the European Brands Association, which represents manufacturers of branded consumer goods in Europe on key issues that affect their ability to design, distribute and market their brands.

AIM comprises 2500 businesses ranging from SMEs to multinationals, directly or indirectly through its corporate and national association members. Our members are united in their purpose to build strong, evocative brands, placing the consumer at the heart of everything they do.

AIM's mission is to create for brands an environment of fair and vigorous competition, fostering innovation and guaranteeing maximum value to consumers now and for generations to come. Building sustainable and trusted brands drives the investment, creativity and innovation needed to meet and exceed consumer expectations.

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