DRAFT REVISED RULES ON HORIZONTAL COOPERATION AGREEMENTS BETWEEN COMPANIES

OBSERVATIONS FROM THE ITALIAN ANTITRUST ASSOCIATION

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1. INTRODUCTION

In thanking the European Commission ('Commission') for the opportunity to submit comments to the Horizontal Block Exemption Regulations on Research & Development ('R&D') and Specialisation agreements ('R&D BER' and 'Specialisation BER' respectively, together 'HBERs') and the draft revised Horizontal Guidelines ('Draft Guidelines'), the Italian Antitrust Association ('AAI') particularly welcomes this initiative as it aims to provide greater clarity to businesses regarding the requirements they must comply with in relation to how they can interact and cooperate with each other.

In order to establish a fruitful dialogue with the Commission, the AAI makes the following observations, hoping that they would contribute to the finalisation of a set of guidelines that strike the right balance between ensuring an effective protection of competition and providing legal certainty by assisting businesses – as well as their legal and economic advisers – in the assessment of their horizontal cooperation agreements under the UE competition rules.

For each of the most common types of horizontal agreements, and mindful of the objective of the Green Deal for the European Union, the rest of this submission provides a mixture of high-level comments, including on the expert reports commissioned by the Commission, and more detailed comments on specific points covered in the Draft Guidelines.

2. RESEARCH AND DEVELOPMENT AGREEMENTS

Conscious of the relevance of R&D activities for the purpose of bringing improved or new products and/or technologies to the benefit of consumers and society as a whole, the AAI acknowledge that, in this field, guidance providing **legal certainty** is **pivotal**.

The AAI believes that the current Draft of the R&D agreements' chapter in Horizontal Guidelines and the respective Regulation could effectively serve this goal. However, further steps might be taken for the purpose of providing a **harmonious** yet **flexible** framework adaptable to the incremental rapid pace of innovation.

Since the AAI welcomes the Commission's decision to dedicate a new chapter setting out clear provisions for the assessment of sustainability agreements, the AAI believes that, although paras. 6-9 clarify the concept of 'centre of gravity' and specify how chapter 9 could serve as additional guidance, a direct reference to the treatments of agreements pursuing sustainable objective should be made in the chapter on R&D agreements. This is because **R&D cooperation** could, together with other forms of cooperation between

undertakings, be an important tool for achieving the ambitious **sustainability goals**.

Especially when it comes to competition in **innovation**, the AAI believes that variables other than price, such as the **level of innovation, quality, variety and sustainability**, should be taken into account when assessing the efficiencies stemming from R&D agreements.

Moreover, the AAI acknowledges that the assessment of an agreement between undertakings **competing in innovation** poses significant difficulties to national competition authorities and national courts given the **dynamic nature of competition**. Therefore, the AAI believes that the adoption of a precise threshold (i.e., that of 'three R&D efforts') could provide **effective legal guidance** and solve the current framework's discrepancies regarding **SMEs and start-ups**. However, the AAI also believes that, precisely for the afore-mentioned difficulties, the Commission could further specify the **relevant parameters** to be considered when **defining** whether the three R&D efforts exist in the concerned market. Accordingly, the AAI would suggest that the Commission further clarify the definition of **R&D pole** and **R&D effort**, e.g., by providing more exemplifications in different **sectors of the economy**.

In terms of more specific comments on R&D agreements, the AAI would like to note the following:

- **<u>Interplay and coordination between R&D provisions and sustainability provisions</u>**

  Page 20, para. 57 – the Draft Guidelines, in its introductory provisions of chapter 3, refer to different types of R&D agreements, such as '*[…] outsourcing agreements for certain R&D activities, agreements covering the joint improvement of existing technologies and cooperation concerning the research, development and marketing of completely new products […]*'.

  Conscious of the benefits stemming from a harmonised application of the Guidelines' provisions and the exact definition of the interplay and relationship between the different chapters of the Guidelines, the AAI would suggest adding a reference not only to 'new products' but also to '**new sustainable products and/or technologies**', as well as to provide further guidance for the purpose of identifying the exact provision to be applied in the case of **R&D efforts pursuing sustainability objectives**, thus including a cross-reference to chapter 9.

- **Further guidance for defining competition in innovation**

  Page 20, para. 59 – the Draft Guidelines state that '*R&D cooperation may not only affect competition in existing product or technology markets, but also competition in innovation'*.

  The AAI deems it necessary to further exemplify the case in which the co-operation may also affect competition in a **new product market** (i.e. 'competition in innovation'). In fact, the AAI believes that is precisely for these markets that guidance will be furtherly needed in order to better analyse the competitive dynamics. Therefore, the AAI proposes to **extend** this paragraph by adding the wider provisions of the previous version of these Guidelines (e.g., paras. 119 and 121, 2011 Horizontal Guidelines).[1]

- **On the definition of 'independence'**

  Page 22, para. 74 – the Draft Guidelines refer to the definition and competitive assessment of parties carrying out '*R&D independently*'.

  The AAI suggests modifying para. 74 to provide more clarity on the assessment conditions. In fact, to guarantee an effective safe harbour, it is crucial to understand whether each part of the agreement could carry out the R&D independently. For this purpose, the AAI would propose adding, also to this paragraph, the legal test set out in para. 124 of the Draft Guidelines regarding the definition of whether two or more undertakings are potential competitors, providing that '*the decisive*

[1] Para. 119, 2011 Horizontal Guidelines provides the following with reference to new product markets: '*This is the case where R&D co-operation concerns the development of new products or technology which either may – if emerging – one day replace existing ones or which are being developed for a new intended use and will therefore not replace existing products but create a completely new demand. The effects on competition in innovation are important in these situations, but can in some cases not be sufficiently assessed by analyzing actual or potential competition in existing product/technology markets. In this respect, two scenarios can be distinguished, depending on the nature of the innovative process in a given industry*', while para. 121 provided that '*besides the direct effect on the innovation itself, the co-operation may also affect a new product market. It will often be difficult to analyze the effects on such a market directly as by its very nature it does not yet exist. The analysis of such markets will therefore often be implicitly incorporated in the analysis of competition in innovation. However, it may be necessary to consider directly the effects on such a market of aspects of the agreement that go beyond the R&D stage. An R&D agreement that includes joint production and commercialization on the new product market may, for instance, be assessed differently than a pure R&D agreement*'.

question is whether ***each party independently*** *has the* ***necessary means as regards assets, know-how and other sources****'* .[2]

- **<u>On the new test for competition in innovation</u>**

  Page 30, para. 120 – the Draft Guidelines provides that '*The R&D BER relies on two metrics for capturing those R&D agreements that remain below a certain level of market power: (i) a market share threshold for undertakings competing for existing products and/or technologies; and (ii) a* ***threshold*** *for undertakings* ***competing in innovation*** *based on the existence of a minimum number of competing R&D efforts (three in addition to the one of the parties to the R&D agreement)*'.

  While appreciating the positive effects in terms of legal certainty resulting from the adoption of a precise threshold (i.e., that of 'three R&D efforts') also for the case of undertakings competing in innovation, the AAI deems necessary, for the purpose of fully addressing any situation of legal uncertainty, that the Commission **further specifies** the **evaluation** that it would carry out to assess whether, in these new markets, the interested undertaking/s have successfully proved the existence of the required minimum number of competing R&D efforts. In particular, it is suggested to specify the **standard of evidence** to be considered for this purpose and to provide a more precise and **exemplified** definition of **R&D pole** and **R&D effort** in different **economic sectors**, in which indeed R&D activities may be carried out in different forms. In this respect, AAI would suggest that the Commission considers incorporating the **parameters** proposed by the **Professor Lundqvist** to identify competing R&D efforts into the Guidelines.[3]

- **<u>R&D and non-price variables and sustainability-related efficiencies</u>**

  Page 43, para. 188 – the Draft Guidelines refer to the '***efficiency gains****'* to be considered while assessing an R&D agreement under article 101(3).

[2] Para. 124 of the Draft Guidelines provide that '*Potential competition has to be assessed on a realistic basis. For instance, parties cannot be defined as potential competitors simply because the cooperation enables them to carry out the R&D activities. The decisive question is whether each party independently has the necessary means as regards assets, know-how and other resources'*.

[3] See, Björn Lundqvist, 'R&D cooperation agreements concluded by SMEs – Exempted under the R&D Block Exemption Regulation', p. 35. For Professor Lundqvist if two or more R&D efforts have similar (a) aim and strategy; (b) access to financial support; (c) access to intellectual property; (d) skilled personnel; (e) other specialized assets; (f) timing; and (g) general ability they may be rival R&D efforts.

The AAI understands that by maintaining the thresholds of 'three R&D efforts', several R&D co-operation agreements may not be exempted under the BER and thus may be subject to an assessment under 101(3). Acknowledging the significant positive effects that certain agreements may have on the market and to consumers, the AAI considers it advisable to **broaden** the notion of **efficiency gains** by including effects on **'non-price variables'**, such as **variety**, **quality** and **sustainability gains**[4] brought about by cooperation between undertakings in the R&D sector. The above additions would be useful to increase legal certainty, thus encouraging undertakings to enter into R&D agreements having environmental objectives, in line with the priorities established in the European Green Deal.[5]

On the Draft Regulation on R&D

- **Page 4, para. 23** – the Draft Regulation provides that '*The benefit of this Regulation may be withdrawn pursuant to Article 29 (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty'*.

  The AAI suggests extending the Recital commented hereto by adding the extensive descriptive provisions of **Recital 21** of the 2010 R&D BER as further guidance could help to understand when the exemption can be applied or when not.

3. PRODUCTION AGREEMENTS

In terms of more specific comments on production agreements, the AAI welcomes the adjustments made to chapter 3 of the Draft Guidelines, and in particular the clearer wording and explanatory notes, as well as the introduction of **para. 3.4** (dealing with 'Agreements covered by the Specialization BER') and **para. 3.6** (dealing with 'Mobile infrastructure sharing agreements').

4. PURCHASING AGREEMENTS

While the Draft Guidelines provide a non-exhaustive list of factors that may help businesses to assess whether an agreement to which are party and/or an

[4] Accordingly, see AAI's suggestions on 'commercialisation agreements sustainability-related efficiencies'.

[5] https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en

agreement that they would like to get into, together with other purchasers, qualifies as a buyer cartel, the Commission clarifies that such factors have to be assess on a case-by-case basis (see para. 319). The AAI welcomes this approach and the greater clarity provided by the Commission on the **definition of a buyer cartel**, as well as the discussion on the factors that should considered to assess whether a joint purchasing agreement amounts to a buyer cartel.

Similarly, the AAI agrees that an **effects-based approach** is appropriate to assess the actual and likely effects on competition of a joint purchasing arrangement.

As for the use of indicative thresholds of market shares - which continue to be set at 15% - beyond which the parties to a joint purchasing arrangement can be presumed to have market power such that they can restrict competition, the AAI encourages the Commission to **further relax the use of market shares as a tool to assess the degree of market power**. Just like a market share above that threshold in one or both the purchasing and the selling markets does not automatically indicate that the joint purchasing arrangement is likely to give rise to restrictive effects on competition - as rightly acknowledged by the Commission (see para. 330) - a market share below the threshold may have likely effects on competition. For example, in the context of a market where the parties to a joint purchasing agreement compete against a fringe of competitors, a cumulative market share close to, yet lower than 15% may be sufficient to distort competition. Similarly, in highly dynamic industries, where market shares are likely to change as a result of successful research and innovation, or in bidding markets where companies compete irregularly for large contracts, market shares computed at a given point in time may not be reflective of the degree of market power.

Rather than using market shares, the AAI would encourage the Commission to consider an assessment of market power guided by the key principles of the **bargaining theory**, which in our view better addresses the nature of competition in intermediate markets such as those where joint purchasing agreements take place - where the traditional notions of supply and demand do not necessarily hold.

To assess the extent of the relative bargaining power between a seller and a joint group of suppliers, one needs to consider the **value of the alternatives available to the negotiating parties** in the case of both a permanent and a temporary breakdown in negotiations. This exercise would allow assessing **who holds more bargaining power**. In other words, a sound assessment of bargaining power requires an analysis of how easily and at what costs the negotiating parties could permanently substitute for particular counterparts, as

well as to consider the parties' respective capabilities to react to a temporary breakdown in negotiations.

Bargaining power of non-members of the joint purchasing agreement should also be assessed when the theory of harm involves the risk of foreclosure of competing rivals in the relevant purchasing market (see paras. 333 and 334).

As a final, high-level remark, the AAI encourages the Commission to provide more guidance on how to assess the existence (or lack thereof) of **pass-on** to consumers of any cost-reducing purchasing efficiencies or qualitative efficiencies in the form of the introduction of new or improved products on the market should be assessed. Receiving more guidance from the Commission in this area would be particularly important when it comes to cases where the joint purchasing agreement (or the theory of harm in case the agreement has already been implemented) may have an effect on suppliers' incentives to innovate and introduce new or improved products on the market. In other words, this means that where dynamic efficiencies come into play and, as such, the assessment should take into account a longer, and therefore more uncertain, time horizon.

In terms of more specific comments on purchasing agreements, the AAI would like to note the following:

On the restrictive effects on competition.

- **Page 71, para. 324** – the Draft Guidelines state that '*In general, however, joint purchasing arrangements are less likely to give rise to competition concerns when the parties do not have market power on the selling market or markets*'.

  The AAI recommends that the Commission qualify the level of market power on the selling market(s) under which joint purchasing arrangements are less likely to give rise to competition concerns.

- **Page 72, para. 325** – the Draft Guidelines state that 'exclusive purchasing obligations, whereby the members of a joint purchasing arrangement are obliged to purchase all or most of their requirements through the arrangement, may have negative effects on competition and require an assessment in the light of the overall effects of the joint purchasing arrangement'.

  By way of an example, the Commission could refer to the notion of economies of scale / scope on the supply-side to justify exclusivity (or quasi-exclusivity) in the context of a joint purchasing agreement.

On relevant markets.

- **Page 72, para. 327** – the Draft Guidelines state that 'the suppliers' alternatives are decisive in identifying the competitive constraints on purchasers. Those alternatives could be analysed, for instance, by examining the suppliers' reaction to a small but non-transitory price decrease'.

  The AAI encourages the Commission to consider the risk of potentially overstating the degree of competitive pressure when supply-side substitution is assessed, as in reality there may be factors that hold suppliers back from switching production away from the focal product. These include for example the nature of the customer relationship and/or long-term contracts.

  Furthermore, one should be wary of the risk of the so-called cellophane fallacy, especially in cases where the joint purchasing agreement is created so as its members have increased bargaining power vis-à-vis a monopolist (or a quasi-monopolist) active on the supply side.

  Finally, the AAI encourages the Commission to acknowledge the limitations in measuring supply-side substitutability via a small but significant decrease in price ('SSDP') as that would require assumptions on the cost function of the hypothetical monopolist, which may not be reflective of the actual cost function of the suppliers interested by the joint purchasing agreement.

  To conclude, the AAI encourages the Commission to underline that the outcome of the definition of the relevant purchasing market(s) should be treated with caution.

On the assessment of market power and pass-on to consumers.

- **Page 73, para. 332** – the Draft Guidelines state that '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 – in particular when dealing with small suppliers.'

  While it is not possible to rule out the possibility for such a purchasing agreement to be necessary, the AAI thinks it makes less economic sense for large purchasers to enter into a pro-competitive purchasing agreement to deal with small suppliers. In fact, large purchasers should already possess enough bargaining power to obtain more favourable terms and conditions from a small supplier, such as lower prices, more

variety, better products or services for consumers, or to prevent shortages or address disruptions in the production process.

- **Page 73, para. 335** – the Draft Guidelines state that 'If the parties to a joint purchasing arrangement are actual or potential downstream competitors, their incentives for price competition on the downstream selling market or markets may be considerably reduced when they purchase a significant part of their products together.'

  In theory, under textbook conditions of perfect competition, two firms that experience a cost reduction obtained via a joint purchasing agreement would have an incentive to pass it on in full: each party would anticipate that if it passes on none/only part of the benefits, the other party would pass-on some/a higher share of the benefits thereby attracting more demand; this would lead the other party to respond, until ultimately both parties pass-on all the benefits. While the conditions for perfect competition are hardly observed in reality, the AAI encourages the Commission to expand the sentence above to clarify that under less extreme forms of competition, the parties would still have an incentive to pass-on a significant part of the benefits of the joint purchasing arrangement.

  The Commission also states that 'First, if the parties [to a joint purchasing agreement] together hold a significant degree of market power on the selling market or markets (which does not necessarily amount to dominance), the lower purchase prices achieved by the joint purchasing arrangement may be less likely to be passed on to consumers.' This is consistent with what the Draft Guidelines state on **para. 347**: '[…] the members of a joint purchasing arrangement that together hold significant market power on the selling market or markets, may be less inclined to pass on variable cost reductions to consumers'.

  While the AAI appreciates that the Commission is not definitive on the likelihood of pass-on, the AAI believes it would be important to provide examples of cases where this is not the case. There are indeed circumstances in which pass-on is likely to take place. This would depend on a number of factors. For example, one aspect that should be taken into account is the cost structure of the companies competing in the selling market before and after they sign the joint purchasing agreement: if before the agreement is signed its future members face a more efficient rival which is not meant to be part of the agreement, when the agreement is signed its members will have an incentive to pass-on the benefits by charging lower prices to their consumers to pose a stronger competitive constraint on their rival.

Economic theory suggests that even a monopolist facing a linear demand and constant marginal costs passes on 50% of a cost reduction. While this result seems counterintuitive, it has to do with the notion of profit maximisation: a cost change would trigger a change in the profit-maximising price. Results that are in between perfect competition (where as discussed the pass-on rate would be 100%) and monopoly (where pass-on rate would be 50%) are typically observed in oligopolistic markets. This is also in line with what the Draft Guidelines themselves state on para. 347: 'Normally, companies have an incentive to pass-on at least part of a reduction in variable costs to their own customers'.

On the likelihood of a collusive outcome.

- **Page 74, para. 338** – the Draft Guidelines state that 'a collusive outcome is also more likely if the joint purchasing arrangement includes a significant number of undertakings in the selling market […]'.

  Economic theory suggests that collusion is harder to sustain when it involves a growing number of competitors, as these would find it difficult to monitor adherence to a collusive strategy by their rivals. As such, the AAI encourages the Commission to refer to the degree of market power of the members of the joint purchasing agreement rather than the number of parties that join it as a factor that could facilitate a collusive outcome: all else being equal, the higher the degree of market power of the members of the collusive strategy, the more stable collusion would become.

5. COMMERCIALISATION AGREEMENTS

According to the AAI, the Commission should ensure a **better coordination** between the horizontal guidelines and the draft Vertical Block Exemption Regulation/Draft Vertical Guidelines in case of dual distribution cases.

The inclusion of the **sustainability-related efficiencies** in the evaluation of commercialisation agreements under Article 101(3) TFEU should be linked to Chapter 9 of the Draft Guidelines.

The new section on **bidding consortia** includes useful indications on how to assess consortia agreements between parties that would be able to participate individually in tenders. However, according to the AAI, it would be helpful to provide **additional guidance** on the criteria used to assess the company's ability to submit an individual bid.

In terms of more specific comments on commercialisation agreements, the AAI would like to note the following:

- **Interplay and coordination between draft vertical block exemption regulation ('VBER')/draft vertical guidelines**

  Page 80, para. 356 – the Draft Guidelines state that '[a]*n important category of those more limited agreements is distribution agreements.* ***The VBER and the Vertical Guidelines generally cover distribution agreements unless the parties to the agreement are actual or potential competitors****. If competitors agree to distribute their substitute products (in particular if they do so on different geographic markets) there is a risk in certain cases that the agreements have as their object or effect the partitioning of markets between the parties or that they lead to a collusive outcome. This can be true both for* ***reciprocal and non-reciprocal agreements between competitors, which thus have to be assessed, first, according to the principles set out in this Chapter****. If that assessment leads to the conclusion that cooperation between competitors in the area of distribution would in principle be acceptable,* ***a further assessment will be necessary to examine the vertical restraints included in such agreements****. That* ***second step*** *of the assessment should be based on the principles set out in the Vertical Guidelines'.*[6]

  The AAI considers that it would be useful to add a box under para. 356 or provide examples on para. 398-405, on page 87-92, to provide additional guidance on how the above-mentioned two-step process applies in practice. For instance, the Commission may add one or more examples regarding a joint commercialisation agreement concerning the launch of a new product. The analysis of the example should identify the aspects that have to be assessed under the (horizontal) guidelines and those that fall under the VBER/vertical guidelines (e.g., (i) the agreement is necessary for the promotion of the common brand subject to the commercialisation agreement, and (ii) the recommended discounts to be applied by distributors of the new products are limited to a short period of time, are necessary to launch the new products, cannot be considered as a form of RPMs, and are therefore in line with the VBER/vertical guidelines).

- **Dual distribution relationships.**

[6] The above-mentioned two-step approach was already provided in the 2011 horizontal guidelines (para. 225-228).

Para. 357, page 80, specifies that the only exception to the two-step process indicated on para. 356 is in dual distribution cases '*to which these Guidelines do not apply*'.

The AAI would suggest clarifying this statement indicating that the (Horizontal) Guidelines do not apply to dual distribution relationships except for exchanges of information between a supplier and a buyer in a dual distribution scenario that, pursuant to Article 2(5) of the VBER, do not benefit from the exemption provided by Article 2(1) of the VBER.[7]

Accordingly, with regard to dual distribution cases, as further explained in Section 6 below, where there are reciprocal references between the Draft (Horizontal) Guidelines and the VBER/Vertical Guidelines, the AAI would suggest harmonising the two documents. For example:

- on Chapter 6 of the (Horizontal) Guidelines, the Commission could add a specific section regarding information exchange within dual distribution relationships, outside the scope of the vertical block exemption;
- on Chapter 5 of the (Horizontal) Guidelines, at the end of para. 357, the Commission could add a cross-reference to such additional section of Chapter 6 dealing with information exchange within dual distribution relationships, outside the scope of the vertical block exemption.

- **Purchasing agreements sustainability-related efficiencies.**

Page 84, para. 380 – the Draft Guidelines refer to sustainability-related efficiencies in the evaluation of commercialisation agreements under Article 101(3) TFEU. This is in line with the Commission's attention to the sustainability goal. The Draft Guidelines specify that '[j]*oint distribution can in particular be relevant for attaining environmental objectives*' (page 84, para. 380). However, the Draft Guidelines state that, in order to be considered as a significant efficiency gain pursuant to Article 101(3) TFEU, **environmental objectives must be '*certain, quantifiable and documented*'**.

[7] See para. 15 of the proposed guidance relating to information exchange in the context of dual distribution, intended to be added to the Vertical Guidelines, available at https://ec.europa.eu/competition-policy/system/files/2022-02/guidance_information_exchange_VBER_dual_distribution_2022_0.pdf (which were subject to additional public consultation from 04.02.2022 to 18.02.2022 – see https://ec.europa.eu/competition-policy/public-consultations/2021-vber_en).

In this respect, the AAI would recommend including in the Draft Guidelines:

- a cross-reference to the relevant paragraphs of Chapter 9 of Draft Guidelines dedicated to the sustainable agreements;
- a more detailed description of the **standards of evidence that should be provided for by undertakings in order to claim the existence of environmental objectives pursued by means of commercialization agreements for the purpose of the assessment under Article 101(3) TFEU**;
- one or more examples of commercialization agreements, which pursue environmental objectives.

The above additions would be useful to increase legal certainty, thus encouraging undertakings to enter into commercialisation agreements having environmental objectives, in line with the priorities established in the European Green Deal.[8]

- **Bidding consortia**

Page 85 – para. 386 *et seq*. – the Draft Guidelines includes a brand-new section on joint-bidding ('*situation where two or more parties cooperate to submit a joint bid in a public or private procurements competition*').

The AAI considers that the Draft Guidelines provide increased clarity as concerns the legality of joint-bidding. **This clarification should allow companies to assess potential future business opportunities and related potential antitrust risks**. In particular, the AAI would like to highlight the following key aspects:

(i) **Para. 387-388** – The Draft Guidelines aim at providing additional clarity on the **differences between bid-rigging** (i.e., a hard-core restriction – '*agreement between potential participants to coordinate their apparent individual decisions with respect to the participation in the tender process*') **and lawful joint bidding**.[9] The Draft

[8] https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en

[9] In particular, the Draft Guidelines define the bid-rigging cases as follows: '*illegal agreements between economic operators, with the aim of distorting competition in award procedures. […] one of the most serious form of restrictions by object and may assume various forms, such as fixing the content of their tenders beforehand (especially the price) in order to influence the outcome of the procedure, refraining from submitting a tender, allocating the market based on geography, contracting authority or the subject of the procurement or setting up rotation schemes for a number of procedures. The aim of all these practices is to enable a*

Guidelines also focus on the specific **cases of subcontracting**, where such distinction may be not straightforward.[10] The Draft Guidelines specify that, in such cases, '***there is not a general presumption*** *that subcontracting by the successful tenderer to another tenderer in the same procedure constitutes collusion among the economic operators concerned and* ***the parties concerned may demonstrate the opposite***'.

The AAI recommends the inclusion in the Draft Guidelines of a more specific description of the **standard** to assess when sub-contracting agreements constitute lawful joint-bidding agreements and do not restrict competition (e.g., evidence of the causal link between the sub-contracting agreements and the collusive plan/infringement and economic return from the subcontract as a *quid pro quo* for opting out of the bidding process).

(ii) **Para. 391 -393** – The Draft Guidelines confirms that '[a] *joint bidding consortium agreement* […] ***does not restrict competition if it allows the undertakings involved to participate in projects that they would not be able to undertake individually***' (i.e., they can complete a tendered contract on their own).[11] This means that (a) companies should bid individually if they have the ability to do so, and that (b) if they are not potential competitors, '*there is no restriction of competition within the meaning of Article 101(1) TFEU*'. The Draft Guidelines also states

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predetermined tenderer to secure a contract while creating the impression that the procedure is genuinely competitive. From a competition point of view bid rigging is a form of cartel that consists in the manipulation of a tender procedure for the award of a contract'. This definition reflects the recent EU and national case law (e.g., EU Court of justice, judgment of January 14, 2021, case C-450/19, *Kilpailu- ja kuluttajavirasto*); as well as European Commission Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground, 15 march 2021

[10] The Italian Competition Authority ('ICA') investigated cases in which joint-bidding and (cross) subcontracting agreements were allegedly used simultaneously in the same purported collusive scheme (see ICA decision no. 27646 of April 17, 2019, case *I808 - GARA CONSIP FM4 - ACCORDI TRA I PRINCIPALI OPERATORI DEL FACILITY MANAGEMENT*; and ICA decision no. 27993 of November 12, 2019, case *I821 - AFFIDAMENTI VARI DI SERVIZI DI VIGILANZA PRIVATA)*.

[11] This is also in line with the content of European Commission Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground, 15 march 2021, according to which: '*it should be borne in mind that companies often consider strategic partnerships or cooperation* ***as a key aspect of their growth strategy****. Economic operators have the* ***right to make legitimate business choices on the activities they will undertake*** *and contracting authorities* ***should not per se limit this right but should instead assess the risks of collusion on a case-by-case basis***'.

that determining a company's ability to submit an individual bid (i.e., parties are competitors) will require an **in-depth, realistic and case-by-case assessment** given that '*the mere theoretical possibility of carrying out the contractual activity alone does not automatically make parties competitors*'.

In this respect, the AAI would suggest the following additions to the relevant sections of the Draft Guidelines setting out the standards to carry out such an assessment on the basis of '*the **requirements** included in the **tender rules***';[12] as well as '*the specific circumstances of the case, such as **the size and abilities of the undertaking, and its present and future capacity assessed in light of the evolution of the contractual requirements***':

a. clarifying the notion of '**potential competitors**' specifying, for instance, that it should be **likely and realistic for them to expand their capacity** to be able to bid for the contract individually;

b. specifying that the overall **assessment of capacity may include whether undertakings have the required economic resources, machinery, staff, technology, know-how, etc**.;

c. providing additional **guidance on the standard** for the above assessment.

(iii) **Paras. 395-397** – Once it is confirmed that undertakings who entered into a joint bidding agreement are indeed competitors, the Draft Guidelines require an **assessment under Article 101(3) TFEU** to determine whether the joint bid leads to better prices or better quality and whether such efficiencies are passed on to customers. In this respect, the Draft Guidelines states that '*the criteria of Article 101(3) can be fulfilled if the joint participation to the tender allows the parties to **submit an offer that is more competitive than the offers they would have submitted alone in terms of prices and/or quality and the benefits in favour of the consumers and the contracting entity outweigh the restrictions to competition***'. The Draft Guidelines lists the

[12] With regard to the requirements included in the tender rules, the Draft Guidelines specify that '[i]*n cases of calls for tenders where it is possible to submit bids on parts of the contract (lots), undertakings that have the capacity to bid on one or more lots – but assumedly not for the whole tender – have to be considered competitors. In similar situations the collaboration is often justified by the fact that the cooperation in the consortium agreement would allow the parties to bid for the complete contract and this would give the possibility to offer a combined rebate for the complete contract'*.

elements that should be taken into account to carry out this assessment: '*the parties' position in the relevant market, the number and the market position of the other participants to the tender, the content of the consortium agreement, the products or services involved and the market conditions*'.

In this respect, the AAI recommends including a box providing practical guidance on the circumstances in which joint bidding by actual or potential competitors may on occasion be deemed acceptable under competition rules, in particular, **what elements pertaining to '*the content of the consortium agreement*' or '*the products or services involved and the market conditions*' may be deemed relevant for the assessment of a joint bidding agreement under Article 101(3) TFEU**.

6. INFORMATION EXCHANGE

In line with the existing 2011 Horizontal Guidelines, the Draft continues to highlight a wide range of both positive and negative effects resulting from information exchange. The general framework remains largely unchanged: effects on competition must be analysed on a case-by-case basis and depend on a combination of various case-specific factors (e.g., type of information, timing of information, level of aggregation). The AAI is in favour of a **case-specific assessment** and, as such, the AAI encourages the Commission to confirm that approach when finalising the guidelines.

The AAI has focused its analysis on the following key points, which, in our view, should be integrated/modified as suggested below. These are (i) the interplay and coordination between the Draft Guidelines and the EU Merger Regulation, (ii) algorithms, and (iii) the interplay with the VBER.

As for **the interplay and coordination between the Draft Guidelines and the EU Merger Regulation**, the AAI considers appropriate to include precise and practical indications on the conditions when an exchange of information - carried out in the context of M&A transactions - may be considered as an autonomous violation of Article 101 TFEU.

The AAI recommends to provide more detailed guidance on the new challenges introduced by **the use of algorithms** and include considerations on the exchange of information about consumers' preferences under an economic perspective.

The **coordination theory of harm**, and in particular the risk that the exchange of information may increase transparency and allow firms to

tacitly coordinate, remains the main focus in the Guidelines. At the same time, the Commission recognises that **data sharing** has gained importance in recent years and has become essential to inform decision-making through the use of big data analytics and machine learning techniques.

The Draft Guidelines indeed provide additional guidance on the **different types of information exchanges,** including different types of data sharing, but do not explore the increasing importance of technology in facilitating the availability and sharing of information, and the impact thereof, in detail. These trends have wide-ranging implications for how firms compete in today's markets, many of which are also positive for consumers (e.g., reduced search costs and improved ability to assess quality), and in turn require a balanced approach. As such, the AAI recommends the Commission to acknowledge the positive aspects that, in principle, information exchange can bring about in the digital era.

For example, the Draft Guidelines note that the use of **algorithms** by competitors may increase the risk of a collusive outcome in the market. While algorithms may - inadvertently or otherwise - lead to anticompetitive market outcomes, there are also pro-competitive and efficiency-enhancing effects alongside the potential risks. These include cost reductions, optimal price discovery, and reduced barriers to entry.

In this respect, consider online retailers that sell hundreds or even thousands of different products in a fluctuating market with changing costs and inventories. It can be difficult for a multi-product firm of that kind to identify the 'right' price for all of its products. The use of automated decision rules or optimisation algorithms can lead to significant **efficiency gains**. These cost savings can then, in whole or in part, be passed on to consumers through lower prices. Algorithms may also help firms to enter (and become effective competitors in) new markets previously reserved for knowledgeable and experienced players and help level the playing field.

Overall, technology has the effect of making **information** that is already public more **easily accessible.** As with the assessment of any form of conduct in a competition context, the relevant question is how much extra information the conduct makes available relative to the baseline. This means that some types of information exchange that may previously have had a negative effect on competition may no longer do so where this information is already easily accessible in the public domain. Such cases would need a careful consideration of the right counterfactual for assessing the effects of the information exchange. As such, the AAI suggests that the Commission considers and explores this aspect in the final version of the Guidelines.

With regard to the **interplay between draft VBER/draft vertical guidelines and draft (horizontal) guidelines in relation to dual distribution cases**, according to the AAI, the Commission should ensure a better coordination between these two documents in order to guarantee an easier self-assessment for businesses and a more harmonized application of competition law.

As a general suggestion, the AAI recommends to include in the Draft Guidelines:

- more updated examples of information exchanges that can be qualified **as by-object restrictions**.
- precise and practical indications on the conditions when an exchange of information - carried out **in the context of M&A transactions** - may be considered as an autonomous violation of Article 101 TFEU.
- **more detailed guidance** on the new challenges introduced by the use of **algorithms** and include considerations on the exchange of information about consumers' preferences under an economic perspective.
- more updated **examples** of information exchanges that can be qualified as a 'by-object' restrictions.

With regard to the **interplay** between **draft VBER/draft Vertical Guidelines and draft (Horizontal) Guidelines** in relation to dual distribution cases, according to the AAI, the Commission should ensure a better harmonisation between these two documents to ensure an easier self-assessment for businesses and a more harmonized application of competition law.

In terms of more specific comments on information exchange, the AAI would like to note the following:

- **<u>Interplay with EU Merger Regulation</u>**

  Page 93, para. 410 – the Draft Guidelines refers to the information exchange as part of an **acquisition process**:[13] '[i]*n such cases,*

[13] In this respect, see also page 20, para. 51: '[t]*hese Guidelines apply to the most common types of horizontal cooperation agreements irrespective of the level of integration they entail with the exception of operations constituting a concentration within the meaning of Article 3 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (hereinafter referred to as the 'Merger Regulation') as would be the case, for example, with joint ventures performing on a lasting basis all the functions of an autonomous economic entity ('full-function joint ventures')*'.

depending on the circumstances, the exchange may be subject to the rules of the Merger Regulation. Any conduct restricting competition that is not directly related to and necessary for the implementation of the acquisition of control remains subject to Article 101 of the Treaty'. In this respect, page 104, para. 440 – the Draft Guidelines refer to the **measures put in place to limit and control how data is used**, in order to '*prevent that commercially sensitive information can influence a competitor's behaviour*'. In this context, the Draft Guidelines include a new section on '*clean teams*' and '[t]*echnical and practical measures* [that] *can ensure that a participant* [to a data pool] *is unable to obtain commercially sensitive information from other participants*' (6.2.4.4.).

However, according to the AAI, the Draft Guidelines do not provide effective guidance **to assess when information exchange may give rise to antitrust concerns under Article 101 TFEU in the context of M&A activity.**

The *Altice* case (mentioned in footnote 196 of the Draft Guidelines)[14] does not provide clear guidance on whether information exchange can constitute a standalone gun-jumping violation under Article 101 TFEU.

In light of the above, the AAI would suggest supplementing the text of para. 440 of the guidelines including **precise and practical indications on the conditions when an exchange of information - carried out in the context of M&A transactions - may be considered as an autonomous violation of Article 101 TFEU**.

In addition, the AAI suggests clarifying the reference to '*involved in the day-to-day commercial operations*' with regard to definition of clean team included in the text box of para. 440. In particular, according to the AAI, it would be useful to provide more detailed indications and/or examples of the specific internal functions and levels of seniority, which should be prevented from being included in a clean team.

[14] General Court judgment of September 22, 2021, case T-425/18, *Altice Europe v Commission*. the European Commission and the General Court found *inter alia* that instances of exchanging sensitive information, carried out before the filing of the transaction with the European Commission, '*contributed to demonstrating the exercise of decisive influence*' on the target daily activity. Although it is recognized that, in the pre-signing phase, information exchange is a normal part of the acquisition process since it is relevant for business valuation, the General Court challenged Altice for (i) having continued information exchange on sensitive commercial and competitive topics after the signing; and (ii) being aware of the unlawfulness of such conduct. For this reason, the General Court concluded that the exchange of information helped to indicate or contribute to a change of control in the target.

- **Algorithms**

Page 96, para. 418 – the Draft Guidelines refers to algorithm collusion as a **method to increase the internal stability** of an anti-competitive agreement or concerted practice, aimed to '*increase market transparency, to detect price deviations in real time and to make punishment mechanisms more effective*'. Page 101, para. 432 – the Draft Guidelines refers to **unilateral disclosure through algorithmic tool** as '*A situation where only one undertaking discloses 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 websites, (chat) messages, emails, phone calls, input in a* ***shared algorithmic tool****, meetings etc. It is then irrelevant whether only one undertaking unilaterally informs its competitors of its intended market behaviour, or whether all participating undertakings inform each other of the respective deliberations and intentions. When one undertaking alone reveals to its competitors 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*'.

The AAI notes that monitoring competitor's behaviors in digital markets has become simple, rapid and economical, regardless of the geographical size of the relevant market and the number of market players. Such monitoring allows for **quick and intelligent adaptation to market conditions**. This is a rational and inevitable behavior for every operator and, as such, legitimate. The use of new technological tools such as pricing algorithms reduces transaction costs for firms as they increase efficiency by, for instance, repricing thousands of products in real-time for consumers to see. In this context, the AAI recommends amending the Draft Guidelines to distinguish the cases where it would be possible to attribute to companies any antitrust infringement arising from the **parallel use of individual algorithms**.

The elements identified by the Draft Guidelines, such as the level of awareness of the suppliers or recipients of the information regarding the exchanges, the existence of a tacit agreement or the reasonable foreseeability of such exchange, might prove rather unclear in practice.

In **footnote 206** the Commission distinguishes between '**algorithmic collusion**' and the so-called '**collusion by code**'. The Commission notes that 'collusion by code' is typically a cartel and, therefore, it is considered a restriction of competition by object, irrespective of the market conditions and of the information exchanged. The Draft Guidelines

however do not spell out what 'collusion by code' looks like. For example, if two competitors unilaterally adopt a reward-punishment algorithm that keeps prices high if the other competitor does, and sets competitive prices otherwise, it is not clear from the Draft Guidelines if this would be enough for this practice to fall into the 'collusion by code' category and be treated as an infringement by object.

In order to increase legal certainty, the AAI suggests to:

- add (on **pages 109-112**) one or more examples/case scenarios related to a tacit collusion or concerted practice carried out through the use of algorithmic tools or other innovative data-sharing initiatives;
- specify the **potential types of evidence** that might be used to establish a breach of competition law, with regard to the role of the algorithm and its context (e.g., objective of the algorithm, its implementation and changes over time, input data used by the algorithm, output and decision-making process connected with the algorithm);[15]
- provide more clarity around what falls in the 'collusion by code' category and what does not.

- **Nature of information exchanged, characteristics of the exchange and market characteristics**

Sections 6.2.3, 6.2.4 and 6.2.5. describe the key elements to be taken into account in the analysis of information exchanges under Article 101(1) TFEU. These elements are similar to those set out in the 2011 Horizontal Guidelines, but the Draft Guidelines provides for more practical examples to guide undertakings in their self-assessment.[16] The main novelties concern the new sections on the (technical) measures that can be implemented by undertakings in order to restrict the access to confidential information and/or to control how information is used (e.g., clean teams – 6.2.4.4.) and the non-discriminated accessibility of

[15] See the joint study on 'algorithms and competition' of the French *Autorité de la concurrence* and the German *Bundeskartellamt*, 6.11.2019, available here

[16] See for instance Pages 97-98, para. 423-424, providing for additional descriptions/examples of commercially sensitive information (taking into account also the recent EU case law); Pages 98-99, para. 425-427, providing for new and concrete examples relating to public or non-public information; Pages 100-101, para. 428-429, providing for new criteria to assess aggregated/individualized data; Pages 100-101, para. 430-431 provides for examples relating to the age of data.

the exchange in case of data-sharing initiatives, as a new requirement to assess information exchange (6.2.4.5.).

The AAI notes the following:

- The technological and digital evolution has empowered firms with the possibility to gather a vast set of **information about the preferences and characteristics of their own consumers**. According to the AAI, the exchange of this private information between competing firms should be taken into account in the Draft Guidelines for its effects on competition. As long as private information about consumers' preferences allows each firm to price discriminate, economic theory shows that the exchange of such information between the firms alters neither the collusive nor the punishment profits, whereas it increases the deviation profits. This suggests that **collusion is less likely to emerge when the firms exchange their private information about consumers' preferences**. Therefore, the AAI suggests to **include a few paragraphs in section 6.2.3** ('*The nature of the information exchange*') describing the circumstances under which information exchanges concerning consumer preferences should be considered unlikely to give rise to competition concerns.

- As noted above, the AAI suggests clarifying the reference to '*involved in the day-to-day commercial operations*' with regard to **definition of clean team** included in the text box of para. 440 (section 6.2.4.4.). In addition, the AAI would recommend the inclusion of further guidance on the **measures to be implemented to minimize potential antitrust risks**, such as the use of data rooms, firewall, no dual roles and cooling-off period provisions, acknowledgements of confidentiality or protocols to be shared among the relevant employees containing specific instructions not to disclose, convey or make available any confidential sensitive information to non-authorized colleagues.

- The Draft Guidelines do not seem to clarify enough the standard required to alleviate the information's sensitivity. For example, in the section related to the publicity of the information (6.2.3.2.), **it** is unclear whether**, in order to fall within the scope of 'non-public' information,** an **'obtainable' information is supposed to be substantially or just more 'costly'** for undertakings that do not participate in the exchange (para. 426). The AAI would suggest **narrowing the key definitions** to **reduce the risks of**

different approaches and non-harmonized application by the national competition authorities or national courts.

- The Draft Guidelines appears **not** to consider the fact that there could be a possible **justification for any unilateral disclosure** of pricing intentions by a competitor. As a result of the presumption set forth in para. 433, the only way to avoid the risk of antitrust violations if a company receives commercially sensitive information from a competitor would appear to be responding '*with a clear statement that it does not wish to receive such information*' or report the unilateral disclosure to the relevant authorities (para. 433). In addition, para. 434 states that unilateral announcement that is genuinely public '*generally does not constitute a concerted practice*', even if this possibility is not excluded. However, the example provided in the text box would appear to leave little room for justifying a legitimate public announcement referring to future pricing intentions. For instance, according to the AAI, the text box could be specified in so far as it currently does not take into account the **difference between publishing detailed pricing information and statements in analyst conferences as to how one would deal with rising raw material prices.** In addition, the AAI would suggest giving more importance to the nature of the information subject to the announcement and the **efficiency gains** that may result from a public announcement.

- **By object restrictions/cartels**

Page 97, para. 424 of the Draft Guidelines identifies the '*information that has been considered to be **particularly commercially sensitive** and the exchange of which was qualified as a **by object restriction***'. In this context, the Draft Guidelines refers to by object restrictions mainly covering future information on pricing, production capacity, commercial and business strategy, sales, product characteristics.

Page 106, para. 448 *et seq*. – the Draft Guidelines refers to cases where the **exchange of commercially sensitive information could qualify as a by object restriction**: *'information [that] is 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. In assessing whether an exchange constitutes a restriction of competition by object, the Commission will pay particular attention to the content, its objectives and the legal and economic context in which the information exchange takes place. When determining that context, it*

is necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question'.[17]

According to the AAI, the standards provided for in **paras. 424 and 448 *et seq.*** are **broader than those provided in the 2011 Horizontal Guidelines**. The latter cover only exchange of information on future prices as a 'by-object' restrictions. The AAI therefore suggests to include one or more examples that are **consistent with the broader definition provided in the main body of the guidelines**.

- **<u>Dual distribution cases</u>**

Page 18, para. 48 – the Draft Guidelines refers to '*to the extent that vertical agreements, for example, distribution agreements, are concluded between competitors, the effects of the agreement on the market and the possible competition problems can be similar to horizontal agreements. Therefore, vertical agreements between competitors fall under these Guidelines. Should there be a need to also assess such agreements under the VBER and the Vertical Guidelines, this will be specifically stated in the relevant chapter of these Guidelines. In the absence of such a reference, only these Guidelines will be applicable to vertical agreements between competitors*'. However, the Draft Guidelines appears to **perceive dual distribution as rather vertical arrangements**. This is in line with the approach adopted in the Commission's draft VBER and its updated draft Vertical Guidelines, applicable to dual distribution cases.[18] In this respect, the VBER also

[17] According to the European Commission, this approach would be in line with the recent EU case law, such as for instance *Ifinenon Technologies* case (2020), *Dole Food* case (2015), *T-Mobile* case (2009) (see footnote 251 of the Draft Guidelines). Page 107, para. 450 of the Draft Guidelines include the following definition of when an information exchange may be considered as a cartel: '*if it is an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors*'

[18] In particular, based on the VBER, dual distribution will continue to be exempted by Article 2(4) of the new VBER, but without an additional lower market share threshold for information exchange. In the consultation on the draft VBER launched by the European Commission on July 9, 2021 stakeholders did not support the proposed narrowing of the safe harbor with a 10% threshold (set out in Articles 2(4) and 2(5) VBER), and requested more detailed guidance on the types of information that can be exchanged in a dual distribution relationship. Therefore, on February 4, 2022, the European Commission published for consultation a draft new section to be included in the draft vertical guidelines dealing with information exchange in

provides that the exchange of information between a supplier and a distributor/retailer is not covered by the VBER where the information exchange is '***not necessary to improve the production or distribution of the contract goods or services by the parties***'.[19] The draft Vertical Guidelines include a '*non-exhaustive*' list of examples that '*generally*' can[20] and cannot[21] benefit from block exemption. As for the latter, the draft Vertical Guidelines specify that an **individual assessment under Article 101 TFEU (and relative guidelines) is required** to exclude a breach of competition law. They also provide for some general precautions and measures that undertakings may put in

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dual distribution. In that occasion, the European Commission did not publish a revised version of the VBER, but stated that the draft vertical guidelines is based on the '*assumption'* that the draft VBER will include a '*provision stating that the block exemption does not apply to the exchange of information between the supplier and the buyer that is not necessary to improve the production or distribution of the contract goods or services by the parties*' (see the Commission Consultation document of February 4, 2022, 'Guidance on information exchange in the context of dual distribution', page 2).

[19] Draft new section dealing with information exchange in dual distribution, of February 4, 2022, paragraph 10 and Communication from the Commission 'Approval of the content of a draft for a Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices', of July 9, 2021, Article 2, para. 5.

[20] The 'non-exhaustive' list of examples of information exchange that 'generally' can be considered to benefit from block exemption includes: (i) technical information and information that enables the supplier or buyer to adapt the contract goods/services to the requirements of the customer; (ii) information relating to the supply of the contract goods or services (e.g., production, inventory, stocks, sales volumes and returns); (iii) aggregated information relating to customer purchases of the contract goods or services, customer preferences and customer feedback; (iv) wholesale prices; (v) information relating to the supplier's recommended resale prices ('RRPs') or maximum resale prices, provided that such information exchange is not used to restrict the buyer's ability to determine its sale price or to enforce a fixed or minimum sale price, and there is no information exchange relating to actual future downstream sale prices; (vi) information relating to the marketing of the contract goods or services; (vii) performance-related information.

[21] The list of examples that 'generally' do not benefit from block exemption includes: (i) information relating to the actual future prices at which the supplier or buyer will sell the contract goods or services downstream (except in the context of a coordinated short-term low price campaign); (ii) customer-specific sales data, including non-aggregated information on the value and volume of sales per customer, or information that identifies particular customers, unless necessary to enable the supplier or buyer to adapt the contract goods or services to the requirements of the customer or to provide guarantees or after-sales services, or to allocate customers under an exclusive distribution agreement; (iii) the exchange of information relating to goods sold by a buyer under its own brand name with a manufacturer of competing branded goods, unless the manufacturer is also the producer of the own-brand goods.

place to reduce the risk that the information exchange is not exempted and may raise horizontal concerns.[22]

In this context, as anticipated in Section 5 above, where there are reciprocal references between the draft (Horizontal) Guidelines and the draft VBER/draft Vertical Guidelines, the AAI would suggest harmonising the two documents, **including a specific section in Chapter 6 regarding information exchange within dual distribution relationships, outside the scope of the vertical block exemption**. This additional section should:

(i) provide more **detailed elements to assess when an exchange of information is not necessary** to improve the production or distribution of the contract goods or services by the parties' under an horizontal perspective;

(ii) set out practical guidance on how information exchanges, that cannot benefit from vertical block exemption, will be **individually assessed** by the Commission under Article 101 TFEU;

(iii) include **one or more examples** at pages 109-112 regarding dual distribution situations and relative analysis.

The AAI considers these integrations particularly relevant in order to avoid any risk that national competition authorities or national courts will take different approaches on these issues, thus jeopardizing the goal of uniform and harmonized application of competition law.

7. STANDARDISATION AGREEMENTS

The AAI agrees with the **notion** that standardisation agreements typically produce **significant positive economic effects**, both on the demand and supply side. The Draft Guidelines also confirms the general principle that, even if the establishment of a standard can create or increase the market power of the intellectual property right ("IPR") holders possessing the IPR essential to the standard, there is no presumption that holding or exercising IPR essential to a standard equates to the possession or exercise of market power. As such, the AAI agrees that the question of market power can only be assessed on a

[22] For instance, (i) exchange only aggregated sales information; (ii) ensure an appropriate delay between the generation of the information and the exchange; (iii) use firewalls (e.g., to ensure that information communicated by the buyer is accessible only to the personnel responsible for the supplier's upstream activities and not to the personnel responsible for the supplier's downstream direct sales activity).

case-by-case basis, by way of undertaking an effects-based analysis.

However, there continues to be uncertainty in the description that the Commission provides of the four possible markets over which standardisation agreements may produce their effects. The AAI would encourage the Commission to provide more clarity, for example by way of offering concrete examples.

How to assess whether price for IPRs is fair and reasonable

In its explanatory note, the Commission clarifies that the Draft Guidelines propose to introduce more elements for conducting the assessment of whether a proposed licensee fee is **FRAND**. The AAI welcomes the direction of travel that the Commission is taking in this area.

In doing so, the Commission rightly **discourages** the use of a **price-cost test** to determine whether the price of an IPR is fair and reasonable. The Commission refers to the difficulty of assessing the costs attributable to the development of a particular patent (or groups of patents) and the fact that carrying out such an assessment may distort the incentives to innovate in the first place. There are however further reasons, not mentioned in the draft, as to why the price-cost test is not well-suited in the context of highly innovative industries. The Commission may want to consider mentioning these in the final version of the new Horizontal Guidelines:

- the economic value of an IPR could be high due to customers' willingness to pay for a specific feature, and this may not involve higher production costs. In other words, if a **customer** derives a **high economic value** from the product or service, then the **supplier** may be able to legitimately **charge a high price**, even if it involves high margins (in line with EU case law such as *United Brands*);

- similarly, looking solely at the cost of the technology in question to undertake the price-cost test may overlook the risky nature of the R&D process, whereby in order to diversify risk, companies choose to develop multiple technologies at the same time, hoping that at least one of them would be part of the standard; as such, the **price-cost test** would **ignore** the **costs incurred** by the **IPR holder** to develop the other technologies, leading to an underestimation of the real overall costs incurred.

The Commission rightly highlights the **relevance** of the **economic value approach** for IPRs. This is a welcome clarification and for the reasons above, makes commercial and economic sense. The AAI notes that an analysis of costs and profitability of the users of the IPR may still be useful, for example to

test whether the impact on the user of the IPR is significant enough that downstream competition is distorted.

The Commission also rightly **recognises FRAND commitment** as a tool to **strike the right balance** between (i) the creation of the IPR and (ii) its distribution or implementation. This is a useful clarification and avoids the interpretation of the term 'FRAND commitment' as a tool to only reduce royalties. In this context, the Commission's explanation of hold-up and hold-out is also useful. The Commission could **expand** on this to some extent to explain the relevance of these two concepts for the negotiation power of the IPR holder(s) and users.

The Commission notes that participants will have to assess for themselves whether the **licensing terms** and in particular the **fees** they charge **fulfil the FRAND commitment**. The Commission provides some comments on methods available to do this. For example, the Commission mentions comparisons, including with royalty/value before the standard is adopted (**ex-ante**), and also royalty after standardisation (**ex-post**).

In this context, the Commission could acknowledge that undertaking an **ex-ante** assessment of the economic value bears the risk of measurement errors, leading to distorted values. This is due to the fact that it could be difficult to assess the real contribution or value of the IPR before the standard is actually adopted. For example, the IPR holder might overestimate the real economic value by setting the expectations too high, for instance if they expect the standard to stay in place for a long period of time, while in reality the innovative process leads to a new standard sooner than expected by the IPR holder. Alternatively, the IPR holder may not fully realise all the use cases the technology will be used for. In this context, the suggestion of using **ex-post** benchmarks is useful.

On the effects-based assessment of the standard agreement

The Draft Guidelines clarify that the assessment of each standardisation agreement must take into account the likely effects of the standard on the markets concerned, with one of the factors being the **participation in the development of the standard**. On that point, the draft revised Horizontal Guidelines introduce more **flexibility** in the effects analysis by allowing, under certain circumstances, more limited participation in the development of a standard – which is welcomed.

Among the **factors** that according to the Commission one should consider there are the **market shares** of the goods, services or technologies based on the standard itself. However, as the Commission itself acknowledges, it might not always be possible to assess with any certainty at an early stage whether

the standard will in practice be adopted by a large part of the industry or whether it will only be a standard used by a marginal part of the relevant industry – reason why, as noted above, the results of the ex-ante assessment of the economic value generated from the IPR should also be interpreted with caution.

In addition, while **market shares** can provide an indication of the effects of a given standard agreement, in contexts where the introduction of the standard is likely to result in a new relevant market being created, computing market shares in an accurate and reliable manner may not be feasible. The AAI therefore recommends the Commission to acknowledge this further limitation.

Assessment under Article 101(3) TFEU

The Draft Guidelines continue to highlight that **efficiency gains** attained by **indispensable restrictions** must be **passed on to consumers** to an extent that **outweigh** the restrictive effects on competition caused by a standardisation agreement. The Commission clarifies that a relevant part of the pass-on assessment is to understand which procedures are used to guarantee that the interests of the users of standards and end consumers are protected. The Draft Guidelines provide that where standards facilitate technical interoperability and compatibility or competition between **new and already existing products, services and processes**, it can be **presumed** that the standard will benefit consumers. However, the Commission **does not provide guidance on how the pass-on should be assessed** in cases where interoperability/compatibility is not relevant or where there are no existing products, services and process available. Given the complexity of measuring pass-on to assess whether or not it offsets the restrictive effects on competition caused by the standardisation agreement, the AAI encourages the Commission to **provide more clarity** on this aspect.

In terms of more specific comments on standardisation agreements, the AAI would like to note the following:

- **<u>On the assessment under Article 101(3) TFEU</u>**

  Page 124, para. 511 - The Draft Guidelines refers to a presumption of efficiencies' passing on to consumers '*where standards facilitate technical* ***interoperability and compatibility or competition*** *between* ***new and already existing products, services and processes***'.

  While appreciating the further guidance provided by the Commission by clarifying the cases in which undertakings may benefit the exemption provided under **article 101(3) TFUE**, the AAI encourages the

Commission to **provide more clarity** on how the **pass-on** could be measured whereby these conditions are not met (i.e., whereby the standard does not facilitate technical interoperability and compatibility or competition or where there are no existing products, services and process available).

Page 124, para. 512 – The Draft Guidelines refers to '*the concept of no elimination of competition*'.

The AAI deems it appropriate adding the sentence of par. 324, 2011 Horizontal Guidelines, that states that '*when standardisation only concerns a **limited part of the product or service**, **competition is not likely to be eliminated***'[23] to provide further indications for the purpose of carrying out the correct competitive assessment.

8. STANDARD TERMS

The AAI welcomes the proposal to devote a specific section of the 2022 Horizontal Guidelines to Standard Terms.

The AAI notes that Standard Terms may cover different aspects of the same product (e.g., characteristics, technical conditions of supply, commercial conditions of supply, legal aspects, complementary goods or services), and have a different complexity compared to Standardisation Agreements. Standard Terms may find their ideal conditions of implementation - either by trade associations or directly by competitors - in markets that are equally complex, with highly diversified supply and highly fragmented or customised demand.

The AAI notes that the use of Standard Terms brings benefits to competition insofar as it **increases the level of comparability, certainty and transparency for the end customer**, but it could **create critical issues** in cases where they could become a tool to pass-on (upstream or downstream) in a concerted manner the costs and inefficiencies of the firms that adopt them, exploiting the lack of bargaining power of atomistic counterparties affected by information asymmetries and - in some cases - the fact that the competition prevailing on the market concerns variables other than price.

[23] Indeed par. 324 stated that '*however, when standardisation only concerns a limited part of the product or service, competition is not likely to be eliminated". We give in this way an indication on how to proceed when the standard-setting only concern a limited part of the product or service*'.

Although an innovative proposal has been made to devote a separate section to the Standard Terms, the current text of the draft concerning them coincides with that of the 2011 Horizontal Guidelines.

The AAI believes that this is reasonable, given that the core competitive themes of the Standard Terms are unchanged, but nevertheless notes the potential usefulness of updating the text with new practical examples that could provide better guidance to stakeholders.

The market landscape in 2011 (where the previous Guidelines were established) was very different from that which will be addressed by the future Guidelines.

Compared to 10 years ago, the current role of Digital Markets (which expand the horizon of possible cases for the Standard Terms well beyond the case of online shopping, already mentioned in 2011 and referred to in the current para. 529 of the draft) and the expected evolution of the Fintech sector (which changes the outlook of the traditional banking and insurance markets, mentioned in 2011 and referred to in the current para. 516 of the draft), for example, are highlighted.

Additional case studies (in addition to the existing ones, which are the same as those reported in the 2011 Horizontal Guidelines) could make the Draft Guidelines related to Standard Terms more appropriate.

In terms of more specific comments on the Standard Terms, the AAI would like to note the following:

- **Page 16, para. 518** – the Draft Guidelines indicates the downstream market as the only relevant market. However, if the Standard Terms apply in case of purchase, they may also have an impact on the upstream market.

- **Page 127, para. 523** – the Draft Guidelines mention price as the only relevant parameter to identify restrictions by object in the case of Standard Terms.

  The AAI notes that the current environment of Digital Markets, and in particular the emergence of zero-price markets, has put the focus on intangible goods such as data and information, and with them on new, less classical drivers upon which competition takes place (such as data acquisition and management conditions, privacy, ease of use, security, continuity of service), which may be the subject of Standard Terms.

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- **Page 129, para. 534** – the Draft Guidelines states that '*It is generally not justified to make standard terms binding and obligatory for the industry or the members of the trade association that established them. The possibility cannot, however, be ruled out that making standard terms binding may, in a specific case, be indispensable to the attainment of the efficiency gains generated by them*'.

  The AAI welcomes a case-by-case approach (which is in line with the Commission's proposal). However, a careful evaluation exercise should be carried out to weigh positive and negative effects that are likely to be pass-on to consumers, and test whether the proposed standard terms could be made less distortive by reformulating them (i.e. whether the proposed standard terms are the least distortive configuration that could be implemented).

- **Page 129**, Examples. The AAI suggests the insertion of:

  - an example referring to Standard Terms that are unlikely to have restrictive effects in online sales;

  - an example referring to Standard Terms that are unlikely to have restrictive effects in a zero-price market environment (e.g. a price comparator).

9. SUSTAINABILITY

We appreciate that the debate on sustainability has shifted from a question on 'should competition law and policy deal with the environmental ambitions set by the Commission and other government institutions?', towards the more action-focussed questions 'how should we use the 101 TFEU framework to balance out the environmental gains from a cooperation with the potential negative effects on competition?'. The draft revised Horizontal Guidelines, with its brand-new section dedicated to sustainability agreements, **moves in the right direction.**

Compared to the current Horizonal Guidelines, the draft offers more room and guidance for corporates who want to coordinate on green initiatives. In what follows we discuss a number of noteworthy points.

From an **economics perspective**, if there is demand for greener products and sufficient willingness to pay by consumers, a firm could unilaterally engage in greener production. Hence, in such a situation, one would normally consider there is no need to coordinate between competitors. Economic research has

shown that, when there is willingness to pay, coordination would lead to lower levels of sustainability than when companies compete on green.[24] The EC seems to recognise this point in para. 582 by stating that in situations where there is demand for sustainable products, the agreement is not indispensable. However, the Commission does not seem to rule out cooperation in full. Instead, it adds that the agreement may be **indispensable** for reaching the sustainability goals in a more cost-efficient way—for instance when the agreement leads to reaching a sufficient scale to cover fixed costs (see para. 585).

In paragraph 588, it is noteworthy that the text no longer refers to consumers needing to be fully compensated as part of the 101(3) TFEU assessment. Now it states that the overall effect on consumers in the relevant market is at least neutral. While this—from an economics perspective—is very similar to the previous wording, we wonder whether the Commission is aiming to show that there is more room than previously thought.

In what follows, we can see the influence of the advice written by **Professor Roman Inderst** for the Commission (for instance in paras. 594 and 596).[25] The effect of this is that the Commission now recognises the following **three types of benefits** to consumers that could follow from sustainability agreements:

- improvements that benefit the consumers individually (para. 590, '**individual use value benefits**');
- '**indirect benefits'**, resulting from the consumers' appreciation of the impact of their sustainable consumption on others" (para. 594, '**individual non-use value**');
- '**collective benefits**' on different markets, such as positive externalities that benefit everyone, if consumers who 'pay' for the benefit substantially overlap with customers who benefit, like climate change abatement (paras 601 and 606).

This can be considered as the biggest shift compared to the existing Guidelines, where only the first category above was considered. We welcome the introduction of these further categories.

The first two categories, **direct and indirect benefits** to consumers, involve

[24] Schinkel, M.P. and Treuren, L. (2021), 'Corporate social responsibility by joint agreement', Amsterdam Center for Law and Economics, working paper No. 2021-01.

[25] Inderst, R. (2022), Incorporating Sustainability into an Effects-analysis of Horizontal Agreements.

no spillovers between consumers. The benefit to a consumer is independent of whether others are consuming the product. The last category, collective benefits, does involve a spillover effect between consumers, as the benefit (or harm) follows from collective consumption of a product.

Regarding the last category, **collective benefits** (section 9.4.3.3.), while the Commission broadens the scope, it is questionable whether the Draft Guidelines provide sufficient guidance for corporates. The Commission states in paragraph 608 that they have no experience with it and cannot provide guidance yet. They do refer to public authorities' reports (para. 607). More guidance can be found by referring to the ACM analysis of the closure of the coal plants, where the reports by CE Delft are used to determine the collective value of less emissions.[26]

In terms of more specific comments on sustainability, the AAI would like to note the following.

On a general note, the AAI welcomes the **open-ended definition** of sustainability agreements (**paras. 541 ff.**), the **safe harbour** provided for sustainability standardisation agreements (**paras. 572-575**), and the overall structure of the new section.

However, the following remarks are made with regards to certain aspects on the assessment of sustainability agreements when they fall within the scope of article 101(1) TFEU and may qualify for an individual exemption pursuant to article 101(3) TFEU:

- **Page 132, para. 547** – the Draft Guidelines provides that '*Where a sustainability agreement concerns a type of cooperation described in any of the preceding chapters of these Guidelines, its assessment will be governed by the principles and considerations set out in those chapters, while taking into account the specific sustainability objective pursued'*.

  The AAI believes that, while the theoretical basis of such provision may be shared, on a more practical level it may be **difficult** for undertakings and their lawyers to **identify** the right analysis to be made in any given case. In particular, it may be difficult to provide adequate relevance to both analyses and to understand ultimately how the two interact with one another. For instance, in case of a production agreement, it may be difficult to understand, lacking any explicit reference to such aspect,

[26] https://www.acm.nl/sites/default/files/old_publication/publicaties/12033_acm-notitie-sluiting-kolencentrales.pdf

whether the specific features of the analysis provided for sustainability agreements should prevail - and to what extent - to those of production agreements (based on chapter 3 of the Draft Guidelines), in particular when it comes to analysing the four conditions for the exemption under article 101(3) TFEU.

- **Page 142, paras. 601 ff.** – the Draft Guidelines refers to '*collective benefits*'.

  According to its experience, the AAI believes that, a consistent number of agreements following the definition of 'sustainability agreements' may provide only collective benefits, especially in some sectors (e.g. refined products in the oil industry). However, based on the Draft Guidelines it may be **difficult to deem those agreements exempted based on article 101(3) TFEU**: the AAI notes that while the Draft Guidelines do not exclude such possibility (as stated in para. 609), it should be further stressed to provide more legal certainty for undertakings on such specific aspect. A more **explicit reference** may provide incentives to undertakings wishing to enter into a wide range of sustainability agreements that, while they not qualify as sustainability standardisation agreements, may in principle fall within the remit of article 101(1) TFEU while, providing consistent and relevant collective benefits (e.g. a decrease in pollution and less traffic).

  In this regard, the AAI believes that, especially in some sectors, businesses will pursue sustainability objective by integrating them in **their ordinary activities** and thus by entering into 'traditional' cooperation agreements. While avoiding the **risk** of so-called '**greenwashing'** is necessary, at the same time for a true enhancement of sustainable development those types of agreements will need to be encouraged despite the fact in some cases they **may only provide collective benefits** (and not the more specific 'individual use value benefits' and 'individual non-use value benefits' defined in the Draft Guidelines).

- **Page 143, para. 603** – the Draft Guidelines provides that '*By analogy, 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*'.

  In addition, **para. 606** provides that '*For collective benefits to be taken into account, parties should be able to:*

(a) describe clearly the claimed benefits and provide evidence that they have already occurred or are likely to occur;

(b) define clearly the beneficiaries;

(c) demonstrate that the consumers in the relevant market substantially overlap with the beneficiaries or are part of them; and

(d) demonstrate what part of the collective benefits occurring or likely to occur outside the relevant market accrue to the consumers of the product in the relevant market.'

The AAI observes that those **four cumulative conditions** risk to be **too strict** and therefore to make it extremely difficult for undertakings to consider those type benefits (which in practice may be recurrent, as explained above) relevant for the analysis under article 101(3) TFEU. In particular, it may too complex to demonstrate conditions (c) and (d) as described in paras. 602 and 603, especially lacking any relevant prior decisions and case law at this point in time. The AAI therefore suggest including **specific examples** of such scenario in para. 9.6, and to make conditions (c) and (d) alternative as opposed to cumulative.