

THE NEW EU AND UK COMPETITION REGIMES FOR HORIZONTAL COOPERATION AGREEMENTS

The European Commission (the **Commission**) has issued its final amended texts of its Horizontal Guidelines (the **Guidelines**) and the Block Exemption Regulations relating to Research & Development (the **R&D BER**) and Specialisation (the **SBER**), which deal with the application of the EU prohibition on anticompetitive agreements to arrangements between actual or potential competitors. These revised texts will introduce a number of changes and clarifications to the EU regime for horizontal agreements when they enter into force on 1 July 2023.

Following the UK's departure from the EU, the UK Government has issued its own block exemptions and has published its own draft Guidance on Horizontal Agreements earlier this year, which differs from its EU equivalent rules in certain material respects.

THE NEW EU HORIZONTAL BLOCK EXEMPTIONS AND GUIDELINES

The Commission's rulebook about "horizontal" cooperation – *i.e.*, arrangements between actual or potential competitors – consists of the R&D and Specialisation BERs and its related Guidelines. The BERs provide a safe harbour exemption from the application of the EU prohibition on anticompetitive agreements – Article 101 of the Treaty on the Functioning of the EU (**TFEU**) - for those R&D and specialisation cooperation agreements that meet certain market share thresholds and do not contain any "hardcore" restrictions of competition law. The Guidelines set out the Commission's guidance on how to apply the BERs, as well as how to assess different types of horizontal arrangements for compliance, such as joint purchasing, commercialisation, standardisation and (in a new section to the Guidelines) sustainability agreements. This includes guidance on the types of horizontal arrangements that the Commission considers to have the object of restricting competition: such "by object" restrictions are considered to be hardcore infringements of competition law that are prohibited irrespective of their

Key issues

- What is the purpose of the EU guidelines relating to cooperation agreements between competitors?
- What prompted the Commission to amend the EU regime affecting horizontal agreements?
- What are the key changes in the Commission's revised Guidelines?
- How do the UK's horizontal block exemptions and (draft) guidance differ from the EU regime?

effects, unless they satisfy the strict criteria for exemption in Article 101(3) TFEU.

The new Guidelines have been substantially rewritten to cover changes in the case law since 2010, to provide additional guidance in various areas and to provide for a clearer structure. They make increased use of "soft safe harbours" for various types of arrangement, which give parties to such arrangements a degree of comfort that they are unlikely to face enforcement action but falling short of the legal certainty of a block exemption.

One key point that is relevant to all types of horizontal agreements is the (long overdue) clarification that the Commission will "in general" treat agreements between a parent company and a joint venture over which it exercises decisive influence as being intra-group, and therefore falling outside the scope of the Article 101 prohibition, provided the agreement relates to conduct in the markets in which the JV is active and in periods during which the parent has decisive influence over the JV. This will substantially reduce the need for information barriers and compliance policies in respect of arrangements and information flows between parent companies and their JVs. The need will not, however, be eliminated, as arrangements between the parents of a JV (including information flows between them via a JV) are still caught.

Joint Research and Development

The main substantive changes to the new R&D BER are as follows:

- the BER now provides that market shares may be calculated based on an average of the three preceding calendar years if data for the preceding calendar year is not representative. It also standardises the grace period that applies if the parties' market shares increase above the threshold for exemption (*i.e.*, above 25%), so that it is now two years in all cases;
- new articles refer to the powers of the Commission and the National Competition Authorities of EU Member States (**NCAs**) to withdraw the benefit of the block exemption in individual cases, including typical situations in which it may be considered appropriate to withdraw the benefit of the exemption.

In a welcome move, the Commission has abandoned certain proposals that were included in a 2022 draft of the R&D BER that was issued for consultation. Those proposals would have excluded from the benefit of the BER agreements to carry out joint R&D to create a product or technology that would create a completely new market (*e.g.*, a vaccine for a virus for which no vaccine existed previously), where the parties could have carried out the R&D independently and could not verify the presence of three or more competing R&D efforts by other businesses. The requirement for evidence of early-stage R&D efforts of competitors was heavily criticised by respondents to the consultation as unworkable. The final BER continues to cover such arrangements in the same way as the previous version (with no market share threshold) and recognises that such arrangements only give rise to competition concerns in "exceptional circumstances". Where such issues do arise in an individual case, the Commission or an NCA can exercise their powers to withdraw the benefit of the BER.

Specialisation and Joint Production

The SBER covers certain agreements whereby actual or potential rivals that fall below a combined 20% market share threshold agree to focus their efforts

on the production and supply of particular goods or services and, to that end, to withdraw (either unilaterally or multilaterally) from an existing market. It also covers agreements whereby such rivals agree to jointly produce certain products or services.

The main change to the SBER is to expand the definition of "unilateral specialisation agreements" to cover agreements that include more than two parties. In common with the changes to the R&D BER, the changes to the SBER also simplify the grace period that applies when the parties exceed the market share thresholds after having entered the agreement, allow for market shares to be calculated on the basis of a three-year average in appropriate circumstances, and introduce articles referring to the powers of the Commission and NCAs to withdraw the benefit of the block exemption in individual cases.

As well as containing new guidance on how to apply the SBER, the Guidelines now make it clear that it covers all types of horizontal subcontracting agreements, not just those that aim to expand production. There is also a new section with detailed guidance on mobile telecommunications network sharing agreements, as a specific illustration of joint production agreements where services are involved.

Joint Purchasing

Where competitors decide to enter into a joint purchasing arrangement, the revised Guidelines clarify that they must also undertake a competition law assessment if they merely carry out joint negotiations of the terms and conditions of a purchase with a supplier, without jointly concluding a purchase agreement with the supplier.

The Commission's revised Guidelines also include new guidance about how to distinguish between a legitimate joint purchasing arrangement between rivals and an illegal "buyer cartel" that is considered to have the restriction of competition as its object, even if it affects purchase prices in much the same way. The key difference, it seems, is primarily one of structuring and presentation: joint purchasing involves collective negotiation with the supplier for the whole group, whereas a buyer cartel consists of individual negotiations with the supplier, with the cartel members secretly coordinating those negotiations. Joint purchasing may still have anticompetitive effects and therefore be prohibited (*e.g.*, if there is insufficient competition between the parties in the downstream supply market), but, unlike a buyer cartel, it will not be treated as a by-object infringement and therefore prohibited irrespective of its effects.

The Guidelines also clarify that the use and implementation of temporary threats as a collective negotiation tactic (*e.g.*, threats to collectively stop orders from a supplier), is generally permissible for joint purchasing alliances, if substitutes for those products continue to be available to customers.

Joint Commercialisation

In relation to agreements between competitors to jointly sell, distribute or promote their products, the Guidelines re-emphasise that output limitations – whereby competitors agree the quantity of the products to be placed on the market – give rise to a serious competition concern. A notable addition from the Commission is a standalone section on the analysis of joint bidding practices in tenders, including where several parties engage in "bid rigging"

designed to distort competition in the tender procedure and thus constituting a by-object infringement. The section provides helpful clarity for companies on how to assess the legality of their joint bidding agreements, in particular where each party to the arrangement would be capable of competing in a tender procedure individually.

Information Exchange

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

The Guidelines also expand the category of exchanges of CSI between actual or potential competitors that will be considered to be a particularly harmful "by-object" infringement. Under the previous guidelines, the category was limited to disclosures of future intentions regarding prices or output volumes. In line with subsequent case law of the EU courts, the revised Guidelines now make it clear that any exchange of CSI will be considered to be a by-object restriction, if it "is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market". Consequently, depending on the circumstances, exchanges of information on current pricing, capacity or output, demand forecasts and characteristics of future products could all be treated as by-object infringements, to the extent that they reveal indications about a party's likely future market conduct. That said, there have not, to date, been any cases in which the Commission or the EU Courts have found that disclosures of *current* pricing or output data, in isolation, have been found to amount to a by-object infringement.

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

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

In such instances, the Guidelines state that it is (somewhat counter-intuitively) not only the disclosing business that is considered to commit an infringement,

but also rivals that become aware of the disclosures and do not act to "distance" themselves from it, e.g., by responding with a clear statement to the discloser that they do not wish to receive such information, or by reporting the disclosure to competition authorities.

Standardisation Agreements / Standard Terms

The Guidelines clarify that businesses who monetise their intellectual property rights (**IPRs**) through methods other than royalties, or through royalty-free licensing are still subject to the rules on the standard development process, and that commitments to offer fair, reasonable and non-discriminatory (**FRAND**) terms can also cover royalty-free licensing.

Those rules still provide that, in general, all competitors should be able to participate in the development of a standard, but now clarify that in some circumstances it may be permissible to restrict such participation. For example, where there is competition between several standards and standard development organisations (**SDOs**); where without the restriction, it would not have been possible or likely for the standard to be adopted; and if the restriction is time-limited and aimed at speeding up the standard-setting process. The Guidelines further state that collective representative procedures can lessen or even remove the potential negative effects of restrictive participation.

The Guidelines now emphasise the importance to market efficiency of making available necessary information to participants in standardisation development processes and participants in the market to which the standard applies, so that they can make informed choices about the technology to be included in a standard. To that end, the Guidelines set out specific disclosures that participants in the standard development process are required to make, including disclosures necessary for the implementation of the standard (e.g., patent or patent application numbers). "Blanket" disclosure (where the participant simply declares that it is likely to have IPR claims over a particular technology) should only be allowed where such specific information is not yet publicly available. In that case, participants should be encouraged to update their disclosures before the standard is adopted.

The Guidelines also set out circumstances in which disclosures mandated by participants in standard development agreements will, in principle, be considered to fall outside the prohibition on anticompetitive agreements. These include:

- disclosures of information regarding the characteristics and value-added by each IPR belonging to a standard; and
- requirements that participating IPR holders make ex-ante disclosures of their most restrictive licensing terms, including the maximum cumulated royalty rate for standard essential IPR.

Minimal changes have been made to the guidance for standard contract terms, mainly for the purpose of clarification.

Sustainability Agreements

As the Commission is committed to the European Green Deal and the United Nations' sustainable development goals, the Guidelines include a completely new chapter on cooperation agreements with sustainability objectives. Such objectives include, among other things, addressing climate change, reducing

pollution, limiting the use of natural resources, upholding human rights, ensuring a living income, fostering resilient infrastructure and innovation, reducing food waste, facilitating a shift to healthy and nutritious food, and ensuring animal welfare.

The Guidelines provide illustrative, non-exhaustive examples of sustainability agreements that are likely to fall outside the scope of the prohibition on anticompetitive agreements of Article 101(1) TFEU, such as:

- agreements that aim solely to ensure compliance with international treaties, agreements or conventions or respective national laws that are not fully implemented or enforced by a signatory State;
- agreements that solely concern the internal corporate conduct of undertakings (e.g., ban of plastic cutlery);
- agreements to set up a database of general information on suppliers with (un)sustainable value chains/production processes/distribution practices; or
- agreements relating to industry-wide awareness campaigns, e.g. regarding the environmental impact of certain products.

The Guidelines in particular focus on sustainability standardisation agreements, which are used to specify requirements that producers, processors, distributors, retailers or service providers in a supply chain have to meet in relation to a wide range of sustainability metrics, such as the environmental impacts of production. In this respect, the Guidelines provide a "soft safe harbour", according to which such agreements fall outside the prohibition on anticompetitive agreements if all of the following conditions are met:

- The procedure for developing the sustainability standard is transparent and all interested businesses can participate. Similarly, all businesses should have non-discriminatory access to the outcome of the standardisation, e.g., the ability to obtain an agreed standard label.
- The sustainability standard does not impose an obligation to comply if businesses do not wish to participate, and those that do participate must be free to adopt a higher sustainability standard for themselves.
- The parties to the sustainability standard do not exchange CSI that is not necessary for the standardisation; and
- At least one of the following conditions must be satisfied: (i) the standard does not lead to a significant increase in price or a significant reduction in the choice of products available on the market; or (ii) the businesses participating in the standard have a combined market share of 20% or less on any relevant market affected by the standard.

Arrangements falling outside the above safe harbour (and any applicable block exemptions) must be assessed for their effects, but may still benefit from the exemption provided by Article 101(3) TFEU if they give rise to customer benefits that outweigh their anticompetitive effects. In this regard, the Guidelines provide additional context and details on how to assess sustainability agreements under the four conditions of Article 101(3) TFEU:

- *Efficiency gains*: The Guidelines provide examples of sufficient sustainability benefits, such as better-quality products, less pollution,

cleaner production or distribution technologies. Efficiency gains should be substantiated as objective, concrete and verifiable.

- *Indispensability*: The obligation imposed by sustainability agreements should not go beyond what is necessary to achieve the aim of the agreement. In this respect, cooperation agreements will not be indispensable if EU or national laws or regulations impose obligations on the parties that sufficiently address the sustainability objective of the agreement.
- *Pass on to consumers*: Benefits from the sustainability agreement should outweigh the harm, so that the overall effect on consumers of the products in question is at least neutral. The Guidelines refer to three specific forms of benefits: (i) individual use value benefits directly improving a consumer's experience, (ii) individual non-use value benefits resulting from the consumers' altruistic choice to appreciate the impact of their sustainable consumption (e.g., by paying a higher price for sustainable wood furniture) and (iii) collective benefits (a somewhat uncertain category which will require additional guidance from the Commission over time). In contrast to guidelines issued by the UK (see below) and Dutch competition authorities, the Commission has declined to accept that "out of market" benefits, *i.e.*, those that are enjoyed by the wider public who are not consumers of the products in question, can ever be taken into account when considering this balancing exercise.
- *No elimination of competition*: The sustainability agreement should not allow elimination of competition in respect of a substantial part of the products in question. According to the Guidelines, this will not be the case if the parties to the agreement continue to compete on at least one key aspect of competition, such as price, quality, variety - even if a sustainability agreement covers an entire industry.

Although the new sustainability chapter in the Guidelines provides much needed comfort for undertakings seeking to improve their industry's sustainability, there are still unclear and ambiguous references, which despite several comments during the consultation period have not been resolved. Being aware of this, the Commission plans to provide additional guidance in relation to novel questions regarding sustainability agreements through its Informal Guidance Notice on a case-by-case basis. In addition, undertakings may also enter informal discussions with their NCAs.

THE NEW UK HORIZONTAL BLOCK EXEMPTIONS AND DRAFT GUIDELINES

Having left the EU, the UK now has its own R&D and Specialisation Block Exemptions which, for the most part, are identical or very similar to their EU counterparts. The only significant differences are that:

- The UK block exemptions became applicable, and have transitional periods that run from, 6 months earlier than the EU ones (1 January 2023 vs 1 July 2023), and expire 6 months later (31 December 2035 vs 30 June 2035).
- As noted above (see "Joint Research and Development"), the EU R&D BER covers R&D between parties that are only competitors in innovation (and not on the product and technology / licensing markets), subject to the

possibility of withdrawal of the BER in individual cases, e.g. if the parties are the only ones able or likely to carry out the relevant R&D.

- In contrast, the UK R&D BER covers such joint R&D only to the extent that the parties can satisfy themselves that there are at least three other competing and comparable R&D efforts. The EU had considered implementing such an exclusion, but ultimately decided against it for the reasons noted above.

Unlike the EU, the UK has not yet finalised its horizontal guidance. However, draft guidance that was published for consultation in January and February 2023 indicates that there will be some material differences between the EU and UK guidelines. The most notable of these relate to sustainability agreements, where the CMA goes further than the Commission in a number of respects. In particular, the CMA has aligned itself with the approach taken in the Netherlands and Austria by accepting that, for agreements that contribute to reducing greenhouse gas emissions, "out of market" benefits to society as a whole may be taken into account when assessing whether an agreement qualifies for exemption.

There are also material differences in the guidance on standard-essential IPR and FRAND licensing requirements. In part, these reflect the judgment of the UK Supreme Court in *Unwired Planet v. Huawei*, but the UK guidance also explains that owners of standard-essential IPR might not always be required to license those IPR to *all* third parties on FRAND terms (in contrast to the position taken in the Commission's Guidelines). Instead, the UK guidance indicates that IPR policies that do not provide for FRAND licensing to third parties at all levels of the supply chain may not be anticompetitive if third parties still have "de facto" access to the standard (e.g. if "have made" rights for upstream component suppliers are adequate in the relevant industry context), or may be exempt from the prohibition if such restrictions on access are necessary to bring about efficiencies in terms of the successful development and/or adoption by users of the standard in question.

AUTHORS



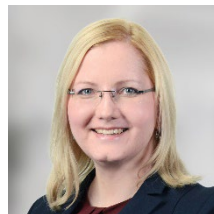
Dimitri Slobodenjuk
Partner, Düsseldorf

T +49 211 4355 5315
E dimitri.slobodenjuk
@cliffordchance.com



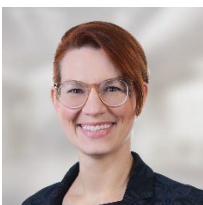
Victoria Baltrusch
Knowledge Lawyer,
Paris

T +33 1 4405 5134
E victoria.baltrusch
@cliffordchance.com



Anne Filzmoser
Senior Associate

T +49 211 4355 5308
E anne.filzmoser
@cliffordchance.com



Caroline Scholke
Counsel, Düsseldorf

T +49 211 4355 5311
E caroline.scholke
@cliffordchance.com



Stephanie Koay
Associate, London

T +44 20 7006 2901
E stephanie.koay
@cliffordchance.com

EU ANTITRUST CONTACTS

Aniko Adam

Counsel, London
T +44 207006 2201
E aniko.adam
@cliffordchance.com

Begoña Barrantes

Counsel, Madrid
T +34 91 590 4113
E begona.barrantes
@cliffordchance.com

Mark Besen

Partner, Düsseldorf
T +49 211 4355 5312
E marc.besen
@cliffordchance.com

Richard Blewett

Partner, Brussels
T +32 2 533 5023
E richard.blewett
@cliffordchance.com

Luciano Di Via

Partner, Rome
T +39 064229 1265
E luciano.diva
@cliffordchance.com

Michael Dietrich

Partner, Düsseldorf
T +49 211 4355 5542
E michael.dietrich
@cliffordchance.com

Jan Dobrý

Counsel, Prague
T +420 222 55 5252
E jan.dobry
@cliffordchance.com

Chandralekha Ghosh

Counsel, London
T +44 207006 8438
E chandralekha.ghosh
@cliffordchance.com

Sue Hinchliffe

Partner, London
T +44 207006 1378
E sue.hinchliffe
@cliffordchance.com

Belén Irissarry

Counsel, Madrid
T +34 685157716
E belen.irissarry
@cliffordchance.com

Nelson Jung

Partner, London
T +44 207006 6675
E nelson.jung
@cliffordchance.com

Amélie Lavenir

Counsel, Paris
T +33 1 4405 5917
E amelie.lavenir
@cliffordchance.com

Katharine Missenden

Counsel, Brussels
T +32 2 533 5913
E katharine.missenden
@cliffordchance.com

Elizabeth Morony

Partner, London
T +44 20 7006 8128
E elizabeth.morony
@cliffordchance.com

Alex Nourry

Consultant, London
T +44 207006 8001
E alex.nourry
@cliffordchance.com

Miguel Odriozola

Partner, Madrid
T +34 91 590 9460
E miguel.odriozola
@cliffordchance.com

Greg Olsen

Partner, London
T +44 207006 2327
E greg.olsen
@cliffordchance.com

Dieter Paemen

Partner, Brussels
T +32 2 533 5012
E dieter.paemen
@cliffordchance.com

Michel Petite

Of Counsel, Paris
T +33 1 4405 5244
E michel.petite
@cliffordchance.com

Milena Robotham

Partner, Brussels
T +32 2 533 5074
E milena.robatham
@cliffordchance.com

Michael Rueter

Counsel, London
T +44 207006 2855
E michael.rueter
@cliffordchance.com

Katrin Schallenberg

Partner, Paris
T 33 1 4405 2457
E katrin.schallenberg
@cliffordchance.com

Caroline Scholke

Counsel, Düsseldorf
T +49 211 4355 5311
E caroline.scholke
@cliffordchance.com

Joachim Schütze

Of Counsel,
Düsseldorf
T +49 211 4355 5547
E joachim.schutze
@cliffordchance.com

Matthew Scully

Partner, London
T +44 20 7006 1468
E matthew.scully
@cliffordchance.com

Dimitri Slobodenjuk

Partner, Düsseldorf
T +49 211 4355 5315
E dimitri.slobodenjuk
@cliffordchance.com

Jennifer Storey

Partner, London
T +44 207006 8482
E jennifer.storey
@cliffordchance.com

Torsten Syrbe

Partner, Düsseldorf
T +49 211 4355 5120
E torsten.syrbe
@cliffordchance.com

David Tayar

Partner, Paris
T +33 1 4405 5422
E david.tayar
@cliffordchance.com

Iwona Terlecka

Counsel, Warsaw
T +48 22429 9410
E iwona.terlecka
@cliffordchance.com

Luke Tolaini

Partner, London
T +44 20 7006 4666
E luke.tolaini
@cliffordchance.com

Aleksander Tombiński

Counsel, Brussels
T +32 2 533 5045
E aleksander.tombinski
@cliffordchance.com

Anastasios Tomtsis

Partner, Brussels
T +32 2 533 5933
E anastasios.tomtsis
@cliffordchance.com

Eleonora Udroi

Of Counsel,
Bucharest
T +40 756012261
E eleonora.udroi
@cliffordchance.com

Ashwin van Rooijen

Partner, Brussels
T +32 2 533 5091
E ashwin.vanrooijen
@cliffordchance.com

Thomas Vinje

Chairman Emeritus,
Washington DC
T +32 2 533 5929
E thomas.vinje
@cliffordchance.com

Stavroula Vryna

Partner, London
T +44 20 7006 4106
E stavroula.vryna
@cliffordchance.com

Samantha Ward

Partner, London
T +44 20 7006 8546
E samantha.ward
@cliffordchance.com

Emily Xueref-Poviac

Counsel, Paris
T +33 1 4405 5343
E emily.xuerefpoviac
@cliffordchance.com

Georgios Yannouchos

Counsel, Brussels
T +32 2 533 5054
E georgios.yannouchos
@cliffordchance.com

**Maximilian Zedtwitz
von Arnim**

Counsel, Düsseldorf
T +49 211 4355 5746
E maximilian.zedtwitz
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

© Clifford Chance 2023

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571 Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi o Amsterdam o Barcelona o Beijing o Brussels o Bucharest o Casablanca o Delhi o Dubai o Düsseldorf o Frankfurt o Hong Kong o Istanbul o London o Luxembourg o Madrid o Milan o Munich o Newcastle o New York o Paris o Perth o Prague o Riyadh o Rome o São Paulo o Shanghai o Singapore o Sydney o Tokyo o Warsaw o Washington, D.C.

AS&H Clifford Chance, a joint venture entered into by Clifford Chance LLP.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.