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**CONTRIBUTION TO THE PUBLIC CONSULTATION ON THE DRAFT REVISED RULES
ON HORIZONTAL COOPERATION AGREEMENTS BETWEEN COMPANIES
- COMMENTS TO THE NEW DRAFT HORIZONTAL GUIDELINES -**

26 April 2022

Eurelec Trading ("**EURELEC**") is a joint venture headquartered in Brussels, Belgium, set up by the two retail groups REWE (Germany) and E.Leclerc (France) in 2016 to jointly negotiate purchase prices and purchase price conditions across Europe.

EURELEC welcomes the opportunity to be able to comment on the new draft "Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements" ("**Draft HGs**"), published by the European Commission ("**Commission**") on 1 March 2022.¹

1. General comments

The Draft HGs, for over ten years now, provide an important reference framework for companies wishing to assess their cooperation agreements under Article 101 TFEU.

In the following, EURELEC we will focus its comments on the section dealing with joint purchasing agreements, which is section 4 of the Draft HGs.

By way of general comment – EURELEC is of the view that the revised section on joint purchasing agreements in the Draft HGs presents a clear improvement for companies and their advisers from the perspective of legal certainty and compared to the existing guidelines. Some of the sections, in particular on the distinction between buyer cartels and a genuine purchasing cooperation as well as on pass-on under Article 101(3) TFEU, now read much clearer.

2. Substantive comments

2.1. Section 4.1. - "Introduction" and section 4.4. - "Example 2"

EURELEC welcomes the fact that the Commission now specifically refers to retail alliances as a form of joint purchasing cooperation.

It further welcomes the fact that the Commission makes clear that joint purchasing agreements can also be limited to jointly negotiating "*the purchase price, certain elements of the price, or*

¹ EURELEC has already contributed to the public consultation that took place last year and has also participated in the workshop on joint purchasing agreements organised by DG COMP on 25 October 2021.

other terms and conditions, while leaving the actual purchases, pursuant to the jointly negotiated price and terms and conditions, to its individual members".

Indeed, whether negotiating actual purchase prices and purchase price conditions or whether jointly negotiating additional rebates / discounts or certain on top services (against a service fee), does not make a difference in the case of retail alliances as the core of the activity remains the same, which is the joint purchasing of products.

2.2. Section 4.2.2 - "Restrictions of competition by object"

EURELEC welcomes the fact that the draft HGs now provide for a better distinction between genuine joint purchasing agreements and (illegal) buyer cartels. Indeed, a criticism that the current guidelines faced was that the distinction between the two was not clear. This has caused in practice legal uncertainty for companies and their legal advisers in Europe.

EURELEC agrees that focusing on the collective spirit / set-up of an arrangement in question (in terms of negotiation and conclusion of an agreement) is an appropriate benchmark for distinguishing genuine from non-genuine forms of cooperation in purchasing.

2.3. Section 4.2.3.2. - "Market power"

Market share thresholds - paragraph [329]

EURELEC is disappointed to see that the Commission leaves the market share thresholds for the safe harbour unchanged.

So - as before - if the parties' market shares do not exceed 15% on the relevant purchasing as well as selling market, it is unlikely that the arrangement gives rise to any competition concerns. If the threshold on both (or one) of the markets is exceeded a more detailed analysis is required to see whether it may result in any restrictive effects.

Eurelec is of the view that at least the threshold on the relevant purchasing market should be increased to 30% in order to be consistent with the guidelines on vertical agreements that state there is no foreclosure risk on the purchasing market(s) below **30%**.

"Second safe harbour" - paragraph [337]

EURELEC takes note of the fact that the Commission has "re-modelled" that paragraph compared to the version in the current guidelines, which can be found in paragraph [212].

The revised wording makes clear that the fact that parties to a joint purchasing agreement are not competing downstream is not a potential "free pass" for the entire joint purchasing arrangement but only in as far as negative effects on the selling markets are concerned. Also, the wording has been toned down in that it now says "...*the joint purchasing agreements is less likely to have restrictive effects...*" instead of "unlikely". In the last sentence of paragraph [337] the Commission states that this is irrespective of any eventual negative effects on the upstream purchasing market.

In EURELEC's view it should be clarified that restrictive effects in the upstream market are less likely (better: "unlikely") in case of countervailing seller power. This would also bring that section in line with paragraph [332] of the Draft HGs. EURELEC, which is negotiating with multinational FMCG suppliers only, has no evidence that these strong suppliers suffer from decreased investment incentives. On the contrary, business data of publicly listed FMCG suppliers shows that their profits generally are significant.

2.4. Section 4.2.3.3. - "Collusive outcome"

Bargaining threats in context of negotiations – paragraph [343]

EURELEC welcomes the fact that the Commission now refers to the issue of threats in the bargaining process in the Draft HGs. In particular, EURELEC agrees with the Commission's statement in the paragraph that these are typically part of the bargaining process and may

similarly be applied by suppliers in negotiations (temporary stops in orders of certain products on the part of joint purchasers, delivery stops on the part of suppliers).

The Commission is likewise correct in stating that the potential restrictive effects of such measures are not to be assessed in isolation but moreover as part of the effects of overall joint purchasing arrangement on the market (so not only *vis-à-vis* suppliers but also *vis-à-vis* the end consumer).

2.5. Section 4.3.3. - "Pass-on to consumers"

EURELEC welcomes the fact that the Commission has updated and expanded that section in the Draft HGs. It increases certainty on the elements the Commission will consider when assessing whether restrictive effects of a joint purchasing agreement are likely or not.
