Public consultation regarding the draft Horizontal Block Exemption Regulations and the Horizontal Guidelines

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26 April 2022

I. INTRODUCTION

We are grateful for the opportunity offered to formulate observations on the draft Horizontal Block Exemption Regulations ("draft HBERs") and the draft Horizontal Guidelines ("draft HGL"). The authors of this submission are members of the Bar of Brussels (Belgium) and active in the field of competition law. They are intensely engaged in advisory work related to the object of the draft HBERs and the draft HGL.

In our advisory work, information exchanges (outside the context of any particular type of cooperation agreement) occupy an ever-increasing role. While the 2011 Horizontal Guidelines are of assistance in this respect, they have not always proven easy to apply in practice. The specified nature of the 'by object' box is obviously helpful, but in many instances it remains challenging to arrive at sufficiently robust conclusions in the context of an effects assessment. Hence, additional guidance and legal certainty is valuable and will promote compliance with the EU competition rules.

As we assume that the other aspects of the drafts will be covered by other practitioners and/or stakeholders, we will focus our input on section 6 of the draft HGL, related to information exchange. The reason for this selection is that the overall level of guidance and legal certainty offered in this section 6 risks not representing, from a practitioner's perspective, the envisaged step forward.

The submission is confined to a limited number of technical points which may deserve further reflection and possibly even a change in approach. We respectfully suggest that the overarching question should always be: what exactly do we expect undertakings to comply with in the information exchange area and is the guidance offered as precisely and specific as possible to guide them and their advisors to that objective?

We propose to focus on the following topics:

- The general section dealing with the "by object" box;
- The definition of the "by object" box in the context of information exchange;
- Safe harbours to be provided for information exchanges;
- Clean teams.

The approach adopted with respect to the observations is purely technical. The major aim of the observations is for the future regime to be an efficient tool to ensure compliance with EU competition law, while at the same time not discouraging pro-competitive (or neutral) horizontal information exchanges. To achieve this goal, the guidance needs to be sufficient and sufficiently clear, and at the same time not overly restrictive. As with the Vertical Guidelines and the Vertical Block Exemption Regulation, clarity and legal certainty are key parameters for the success of the future regime.

II. OBSERVATIONS

A. Restrictions of competition by object

a. General

The draft HGL (paras 28-35) contain a general description of the concept of restrictions of competition by object. As the main aim of the draft HGL (see, para 1) is to provide legal certainty to undertakings in their assessment of horizontal cooperation agreements, while ensuring effective protection of competition, this general section may not match entirely with the stated objective of the draft HGL.

The general section seems to open the 'by object' box to an extent that is not entirely in line with past practice and presents issues of compatibility with the case law of the Court. This observation applies in particular to para 31 which provides: "*The concept of restriction of competition 'by object' can be applied to practices for which, after an individual and detailed examination, it is demonstrated that they present a sufficient degree of harm to competition*".

A double concern may be raised with this particular contention:

- It fails to do justice to the requirements of restrictive interpretation and reliance on prior experience that are embedded in the Court's case law. The reference to the Court's judgment in *Sun v Commission*, C-586/16P, para 86, does not justify the isolated use of the quoted language. The relevant para 86 must be read in conjunction with the judgment of the Tribunal (T-460/13) and in particular para 272 of that judgment to which the Court makes explicit reference in para 86. Para 272 does justice to the requirement of prior experience and places the relevant individual agreements in the categories of by object restrictions with which sufficient prior experience exists. The language quoted in para 31 of the draft HGL should therefore be placed in context and, to avoid that legal certainty is hampered, reference should be made to both the requirements of restrictive interpretation and prior experience.

- The general section contained in the draft HGL (para 28-35) seems difficult to reconcile with the approach taken in the draft Vertical Guidelines (containing a clear link between the hardcore restrictions and the qualification as 'by object' restrictions) and, more importantly, the 2014 Commission Staff Working Document. The 2014 Commission Staff Working Document contains a catalogue of the 'by object' restrictions and creates similarly a clear link with the hardcore restrictions included in the various block exemption regulations and the guidance documents issued by the Commission in the past. The 2014 Commission Staff Working Document provides explicitly that "*DG Competition intends to regularly update the examples listed below in the light of such further developments [in the caselaw of the Court and the Commission's decisional practice] that may expand or limit the list of restrictions "by object"*". It is striking that the draft HGL (para 28-35) do not contain any reference to the 2014 Commission Staff Working Document and, furthermore, do not provide any assurance that the 'by object' box inventory in the 2014 Commission Staff Working Document (that obviously may be subject to change in the future) is still valid.

Given the importance of the differentiation between restrictions by object and by effect for various reasons (applicability of *de minimis Notice,* assessment of appreciability post-Expedia, burden of proof, etc.) it would be unfortunate if the inclusion of a general section in the draft HGL (such as that included in paras 28-35) creates legal uncertainty as to what belongs, at the time of the adoption of the new Horizontal Guidelines, in the 'by object' box. In order to secure an adequate level of legal certainty in this respect, the Commission may wish to consider to (i) either eliminate the general section or, alternatively, to complete it with an explicit reference to the requirements of restrictive interpretation and prior experience, (ii) include a clear reference to the 2014 Commission Staff Working Document similar to footnote 70 in the draft Vertical Guidelines and (iii) confirm that the 'by object' restrictions are, at the time of adoption of the new Horizontal Guidelines, those that are listed in the 2014 Commission Staff Working Document (to be updated, if there would be a need to do so).

b. <u>Related to information exchange</u>

Sections 6.2.3.1. (para 424) and 6.2.6 (paras 448-449) of the draft HGL address the cases in which information exchanges qualify as restrictions by object. These paragraphs deviate considerably from the approach taken in the 2011 Horizontal Guidelines.

It may be good to recall that, presumably for reasons of legal certainty, the 2011 Horizontal Guidelines contained a clearly defined 'by object' box. While drafts of the 2011 text referred also to current information, these references were removed in the final text. The examples included in para 424 reintroduce current information in the 'by object' box. Hence, the legal certainty achieved by the 2011 Horizontal Guidelines by operating a clear distinction between future (on the one hand) and current and historic information (on the other hand) seems to be abandoned. Furthermore, the subject matter of the information exchange covered by the 'by object' box seems to go further than was the case in the 2011 Horizontal Guidelines (see paras 73-74 and the related footnotes of the 2011 Horizontal Guidelines).

It may furthermore be good to recall that the definition of the 'by object' box contained in the 2011 Horizontal Guidelines was largely inspired by enforcement efficiencies and not by any economic conviction that each exchange of future price or volume information by definition appreciably restricts competition.[1] If we recall correctly, the decision on the definition of the 'by object' box taken at the time relied on a weighing of the disadvantages for businesses in being discouraged from exchanging the relevant types of information and the additional hurdle for the enforcers (burden and standard of proof) if the relevant information had to be assessed as to its effects.

We have the impression that the economic logic and reasoning underpinning the choices made in 2011 have been set aside when drafting the new Horizontal Guidelines. This results in substantially increased legal uncertainty. The lid of the 'by object' box has been opened and the examples given suggest that there is ample (new) room for a debate on whether a given information exchange qualifies as a restriction by object or by its effects, blurring the line between the two categories. Due to the unpredictability it entails, the approach in the new draft HGL runs the risk of producing suboptimal results from a competition policy perspective. As a former Chief Economist already insisted in 2010, rules that insufficiently clearly formulate the circumstances under which a given information exchange is prohibited, do not create the necessary ex-ante incentive effect, since they do not allow companies to discern the exchanges of information that are anticompetitive and thus to be avoided from the ones that are efficiency enhancing[2].

The approach taken in the draft HGL on the definition of the 'by object' box reduces the overall usefulness of the relevant guidelines in this respect. From the perspective of achieving compliance with competition law and promoting reliable advisory work in this area, the draft HGL in its present form represent an undeniable step backwards. Relying on the requirements of restrictive interpretation and prior experience, it should be possible to present a sufficiently clear set of information exchange practices that DG Competition wishes to see land in the 'by object' box at the time of the adoption of the new Horizontal Guidelines. Such a set would obviously not be cast in stone and may evolve over time in line with newly acquired experience. The 2014 Commission Staff Working document presents a helpful framework for updating the relevant set if the decisional practice of the Court or the Commission makes it necessary to do so.

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[1] See for instance Kai Uwe-Kühn, "Designing Competition Policy towards Information Exchanges – Looking Beyond the Possibility Results" in OECD Policy Roundtable on Information Exchanges between Competitors under Competition Law (2010), e.g. p. 430: "*Neither parallel prices nor information exchanges make collusive behavior more likely by themselves and just cumulating the two has no impact on that conclusion."*

[2] Kai Uwe-Kühn, "Designing Competition Policy towards Information Exchanges – Looking Beyond the Possibility Results" in OECD Policy Roundtable on Information Exchanges between Competitors under Competition Law (2010), e.g. p. 420: "*If the competition authority itself cannot specify what characteristic of the market would make the information exchange agreement anticompetitive, the firm does not have the information that would allow it to avoid the information exchange in case that it is anticompetitive*." Also p. 425: "*First, any type of information exchange for which we cannot specify circumstances under which the information exchange would be prohibited should not come under scrutiny. The reason is that it is highly inefficient to review cases when the policy cannot have an incentive effect on ex-ante behavior*."

B. Safe harbours for information exchanges

Section 6.2.7. of the draft HGL covers the restrictive effects on competition related to information exchanges. If the 'by object' box is clearly defined (see point A), any other exchange of commercially sensitive information that "*is likely to influence the commercial strategy of competitors"*[3] will need to be assessed by the party or parties involved to ascertain whether the exchange does not have restrictive effects on competition.

The draft HGL currently provide rather limited concrete guidance with respect to such a self-assessment. The draft HGL indeed indicates that "*the likely effects of an information exchange on competition must be analysed on a case-by-case basis as the results of the assessment depend on a combination of various case specific factors*". It seems to do no more than indicating which general parameters are relevant for this assessment, without providing more concrete guidance. From the perspective of a practitioner, the hope was that the new Horizontal Guidelines would go substantially beyond the inventory of general parameters that was already contained in the 2011 Horizontal Guidelines.

The following present a handful of examples of points where the guidance in the draft text is currently still very limited and where the new Horizontal Guidelines may present an opportunity for more concrete guidance, that would benefit undertakings and their advisors in the form of more legal certainty:

- When indicating that the exchange needs to cover a sufficiently large part of the relevant market for it to have restrictive effects, the guidance offered in this respect is that "*[w]hat constitutes 'a sufficiently large part of the market' cannot be defined in the abstract and will depend on the specific facts of each case and the type of information exchanged".* It would be valuable, considering the more than a decade of experience with the 2011 Horizontal Guidelines, to receive more tangible evidence than a reference to a case-by-case assessment.

- Reference can be made to the guidance given in para 457 with respect to the efficiency gains that need to be proven under Article 101(3) TFEU. The draft HGL indicate that "[*i]nformation that is genuinely public can thus benefit consumers by helping them to make a more informed choice*". Rather than being helpful, this observation is somewhat confusing. The point cannot be whether genuinely public information, of which it is assumed that the exchange cannot be considered to restrict competition (see para 425), would lead to efficiency gains. Guidance on efficiencies is relevant when commercially sensitive (and thus non-public) information is involved. Bringing up genuinely public information in the context of Article 101 (3) TFEU casts doubts on the reliability of guidance offered in other sections of the draft HGL.

- The need for guidance is also not exactly resolved by the examples that are presented. The hypotheses underpinning these examples are based on a combination of assumptions, rendering it very difficult to extrapolate from them any concrete guidance. These are fairly 'safe' examples from an enforcer's perspective, as they will always be distinguishable from real cases that present themselves.

  In this context, reference can be made to example 2 (p. 110-111) which deals with benchmarking. Businesses are in clear need of more guidance on how benchmarking exercises can be conducted in compliance with EU competition law. Benchmarking is also a recurring theme at competition law conferences, which suggests that there is a genuine need for guidance. Example 2 is not particularly helpful as it is based on rather extreme facts that lead to an obvious outcome. As such, the example does not offer much additional guidance.

[3] Para 423 draft HGL

It would be helpful to provide additional examples based on more realistic scenarios and, also, to offer more concrete guidance on the techniques that can be used to increase the likelihood of compliance. One such example could be a one-time bilateral information exchange at a particular point in time to assess the relevant purchase cost of one particular component or ingredient for which there is not much transparency in respect of its pricing. Hence, it is a single and one-time exercise involving only two players in respect of one particular purchase item. This is an example of a scenario on which we have received multiple questions over the years. It is unfortunate that the draft HGL do not provide more guidance on these types of questions than was available until now.

In addition to clearer guidance, it would be helpful, and in our opinion feasible, that a number of clear safe harbours are included in the guidelines. At this moment, parties will not be able to rely on the guidelines with sufficient comfort, as the language leaves considerable room for interpretation. By way of example:

- Para 425: "*The fact that information is genuinely public **may decrease** the likelihood of a collusive outcome*";
- Para 428: "*The exchange of genuinely aggregated information where the recognition of individualized company level information is sufficiently difficult or uncertain, **is much less likely** to lead to a restriction of competition than exchanges of company level information*";
- Para 430: "*The exchange of historic information **is unlikely** to lead to a collusive outcome*";

While we fully understand that such qualifying language is justified and possibly even necessary when setting the scene, the draft HGL can then (to achieve the objective stated in para 1) take matters one step further and convert these general observations into workable and therefore sufficiently measurable guidelines or safe harbours. This would clearly make it easier to understand when competition law risks to be breached, but will also ensure that parties do not shy away from pro-competitive or competition-neutral exchanges.

C. Clean teams

Section 6.2.4.4 deals with "*measures put in place to limit and/or control how data is used*". This topic is of considerable practical relevance. It is useful and helpful that in this context the issue of clean teams is raised. However, the description included in para 440 does not entirely match with the more difficult questions arising in business reality.

During an initial exploratory phase of a contemplated cooperation project, it may be possible to involve participants removed from the business. However, once such initial phase has passed and the project needs to be defined with greater precision, it is in most cases necessary to involve people more closely related to the day-to-day operations as their expertise is needed. A good example are the preparatory steps that may lead to a joint purchasing arrangement. It is unrealistic to assume that such steps can be handled with success by involving only people that are removed from the commercial operations.

We welcome the inclusion of a reference to clean teams in the draft HGL, but would find it valuable that this section of the draft HGL is substantially expanded and addresses the various scenarios that are of immediate importance considering actual business reality. The guidance included in para 440 merely reflects a position of which nobody doubted that it is compliant with competition law and hence currently does not address the more difficult questions that arise in practice.