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26 April 2022

Contribution for the public consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines

Dear Horizontal Team,

Please find below our comments on the draft Horizontal Guidelines and Block Exemption Regulations. Our approach has been to limit ourselves mostly to editorial comments, focusing on possible linguistic improvements leading to greater clarity. The few occasions where we go further are easily recognizable.

1. R&D BER

Given the wide range of collaboration patterns, it is sometimes difficult to identify whether the R&D BER or the TT BER is applicable to a particular agreement.

According to Article 2 (3)(a), the DR&D BER also applies to R&D agreements which include provisions on technology transfer unless the latter constitute the "primary object" of the agreement. This language is not new, but in practice the judgement call whether the technology transfer is or is not the primary object of an agreement can be difficult to make. A clarification in the DR&D BER or the DHGL would be even more welcome as the TT BER clearly establishes in Article 9 that the TTBER does not apply where an agreement falls within the scope of the R&D BER.

In ideal-typical cases, the delimitation poses no problem. An agreement between two companies to engage in research and development without a clear idea of the resulting product clearly is an R&D agreement, even if subsequently the parties license the technology to each other. Similarly, an agreement where a manufacturer of Product A licenses his well-functioning technology to a licensee who needs the license to further develop and produce Product B, is clearly a technology transfer agreement.

On the other hand, there are agreements where the qualification is less easy. In the pharmaceutical industry, there are increasing number of collaborations between large corporate organizations and small companies specialized in drug development, where the large player licenses a patented technology that both parties still need to develop in joint collaboration, and where the licensing depends on the results of further R&D. For such cases the criterion of "primary object" does not provide clear guidance.

§ 7 of the DHGL provides the "center of gravity" concept, according to which an agreement would qualify for treatment under the R&D rules rather than the joint production rules where the joint production is dependent on the results of the joint R&D. While this is a certainly a useful concept, § 8 of the DHGL expressly states that the "center of gravity concept" referred to in the DHGL only applies to the relationship between the different chapters of the DHGL, and not to the relationship between different block exemption regulations. Additional guidance would be helpful.

2. <u>Horizontal Guidelines</u>

a) Line comments

aa) Analytical framework

§ 13 appears to clarify an issue that always remained unresolved, provided that the paragraph is supposed to be valid for both the *ex post* imputation of liability and the *ex-ante* structuring of joint ventures. However, this is not clear from the text. Even if correct, practical uncertainties remain.

§§ 12 and 13 deal with the **concept of single economic entity**. § 12 recalls that fully owned subsidiaries are *presumed* to form a single economic unit with the parent for the purpose of applying Article 101 (1) (footnote 6). The first sentence of § 13 states that "for the purpose of establishing liability for an infringement of Article 101 (1)", case law has established that parent companies and their joint ventures form a single economic unit (single undertaking), provided it is demonstrated that the parent companies exercise decisive influence over their joint venture. The cases referred to in footnote 7 deal with the ex post imputation of liability.[1]

The second sentence of § 13 is ambiguous. As it starts with a "hence", it suggests that its intention is to limit the reach of the second sentence to *ex post* scenarios. However, linguistically, and grammatically the second sentence also includes *ex ante* scenarios where parties structure a joint venture so as to avoid an infringement of Article 101 (1), for example where the parent dictates the joint venture resale prices and asks for customer data. If the broader understanding is intended, § 13 would clarify an issue that has long remained unclear, i.e. whether parents can rely on the single economic entity concept when engaging in conduct with the joint venture that would infringe competition law if engaged in by fully independent companies. To the best of our knowledge, this is the first clear statement, although not yet confirmed by case law, that the single economic entity principle works "two-ways". If our understanding is correct, this is an extremely welcomed clarification.

Even under the broader reading, a residual weakness resides in the necessity to "demonstrate that the parties exercise decisive influence over the joint venture". In the decisions imputing liability to parent companies *ex post*, the Commission established the exercise of decisive influence, and it did so based on certain criteria. Where companies structure a planned joint venture, they would have to carry out the "exercise of decisive influence"-test themselves, and they may struggle establishing with legal certainty that they will meet the test on a forward-looking basis.

Further, there is a question as to the nature of the test. When applied *ex post* for the purpose of imputing liability, the Commission tends to rely on factual evidence such as voting patterns, the employment history of joint venture personnel, and their concrete involvement in matters of both the parent and the joint venture. These factors may be difficult to apply on an *ex ante* basis, as the issue is not the *capability* of exercising decisive influence but the *actual* exercise of such decisive influence.

It would therefore be helpful to clarify through <u>appropriate wording</u> whether and to what extent the Commission intends to view all parents-joint venture triangles that meet the "exercise of decisive influence test" as a single economic entity for the *ex-ante* purpose of not infringing Article 101 (1). It would also be welcome if the final

[1] Footnote 7 refers to two cases. *EI du Pont de Nemours* literally supports the first sentence of §13, this case is about the ex post imputation of liability to a parent. The second case referred to, *LG Electronics and Philips* only indirectly supports the first sentence of § 13. In that case, the issue was not the imputation of liability to a parent but the question whether the Commission was entitled to take into account certain intragroup sales between the infringing joint venture and the parents for the purpose of calculating the fine. Admittedly, this was also an *ex post* assessment, but of a different kind.

guidelines included an additional sentence or two on what it would take to meet the "exercise of decisive influence"-test.

In conclusion, we welcome the attempt to bring clarity in this very difficult topic, but we wonder whether more detailed explanations are necessary to achieve that objective.

bb) R&D Agreements

§§ 87 and 88 describe different scenarios in which **joint R&D** arrangements are likely or unlikely to have potentially anticompetitive effects. §§ 188 ff. describe the **possible efficiencies** that could outweigh a restriction of competition. The complementarity of skills and assets is a red thread throughout §§ 188-194, and the reduction of cost is mentioned briefly in § 188. What is missing in this section is an express reference to cases where independently research companies switch to cooperation because of unforeseen technical, financial, or political hurdles. For example, § 189 could add a third sentence at specifying that the restriction "may be deemed indispensable where the parties demonstrate that the cooperation is objectively necessary to advance the R&D and/or to overcome unforeseen technical, financial, political or other objective obstacles".

cc) Production Agreements

As to production agreements, § 204 may clarify that the **definition of "production"** is limited to the making (manufacturing) of physical products and excludes pure **services**. This appears to be an underlying policy choice, although service providers may also wish to collaborate to jointly produce services "products" such as so-called "financial products" or certain legal services products. No guidance is provided for the assessment of horizontal collaboration between service providers, whilst services are expressly covered by the DV BER. There is no upfront **definition of competitors** in relation to production agreements. This guidance is currently provided in § 272, which deals with the definition of competing undertakings under the DS BER only.

§ 206 defines **horizontal subcontracting** as agreements between undertakings "operating in the same product market irrespective of whether they are actual or potential competitors". There are two other types of subcontracting. Footnote 154 defines vertical subcontracting as subcontracting between companies "operating at different levels of the market", which is not the same delimitation criterion. Moreover, the 1978 Subcontracting Notice does not address the differentiation between horizontal and vertical subcontracting. We understand that, in practice, the rules on horizontal subcontracting take precedence. They therefore apply to any subcontracting agreement where both parties "operate in the same product market", even if the subcontractor is not a competitor or potential entrant in the same product and geographic market.

Assuming a definition along the lines of § 272 is included in or before § 206, § 206 could still provide additional guidance on the criterion "operating in the same product market". This would clearly apply to subcontracting agreements between integrated manufacturers operating in different geographic markets, even where they are not potential entrants into each other´s geographic market (cf. § 238). The criterion would clearly not apply to subcontracting agreements between companies operating at "different levels of trade" (e.g., the supermarket chain and the white label pasta manufacturer).

There are intermediate cases where the meaning is less clear. Subcontractors may already manufacture the product covered by the agreement as a simple contract manufacturer without any marketing and distribution activities, and no realistic possibility of entry. Do they "operate in the same product market" as the integrated manufacturer or do they operate as a company active at a "different level of trade", in particular where IPR come into play (pharmaceutic CMO)? This ambiguity is even stronger where the subcontractor has historically been active on a neighboring product market (cf. § 238). Some additional guidance would be helpful.

§ 240 states that "in some industries where production is the main economic activity", even a "**pure production agreement**" can itself limit competition. It would be helpful to clarify how to identify an industry where production is the main economic activity, by providing an example such as "e.g., the industrial production of homogenous commodity products like steel or chemicals". Similarly, it would be helpful to specify what a "pure production agreement" means, by giving an example such as "e.g., an agreement for the production of products that contains no restrictive clauses whatsoever" or "e.g., a naked production agreement including subcontracting agreements that excludes distribution".

§§ 250, 251 state that an agreement is "**more likely**" to meet the exemption criteria if limited to the exchange necessary for the *production* of the contract products and "**less likely**" if it relates to prices and sales. If this is intended to reveal an implicit bias against joint production agreements including joint distribution in cases falling outside the DS BER, the language should make that clear, e.g. by stating in § 251: "… for example information related to prices and sales, including in the case of joint distribution agreements". We understand that "less likely" is meant to be softer than "unlikely".

§ 266 (b)(ii) lists three conditions that a "**third party distributor**" must meet. The first and third condition clearly delimit scenarios that either meet the criterion or not. The second condition appears to be grammatically all-inclusive unless it intends to delimit exclusive and non-exclusive distribution from selective distribution. If this is not the intended meaning, the second condition is not a true condition, and the paragraph could be rephrased, e.g., as "(b) Distribution is undertaken by an exclusive or non-exclusive third-party distributor that meets two cumulative conditions: [i) jointly appointed and ii) not a competitor ….]".

As indicated above, there is a noticeable **absence of proximity** (in terms of numbering) between the definition of a subcontractor in § 206, the potential entrant in § 238 and the definition of a potential competitor under the DS BER in § 272.

dd) Purchasing Agreements

§ 328 could include a reference to the fact that the **geographic scope** of purchasing markets is typically wider than that of selling markets, as reflected in Example 5 (§353).

§ 329 operates with a **market share threshold** of 15%. Having explained that joint purchasing agreements usually aim at creating buying power vis-à-vis large suppliers (§ 313) and less likely to create anticompetitive effects in the absence of market power (§ 324), one would have expected a threshold of 25% or at least 20%, all the more as the geographic scope of the purchasing market is typically wider than on the selling market. **Example 3** in § 351 refers to a minimum purchase volume accounting for "50% of each retailer´s total cost". Would it be clearer to replace the word "cost" by "requirements"? Same question for **Example 4** (§352). It the reference to "cost" is intended to reflect the commonality of costs, an alternative wording could achieve more clarity.

ee) Commercialization Agreements

In relation to public tenders, § 393 states that undertakings that can only bid for **individual lots** (if allowed) and not for the whole of the contract must be considered competitors, and that efficiencies of a joint bid for the whole contract can only be considered under Article 101 (3). That seems to place an unfortunate burden of proof on smaller bidders that must compete with large bidders.

§ 394 reflects a similar inbuilt **bias against smaller bidders**. They must be considered competitors "if it is not possible to exclude" that they could bid individually. This is not a neutral benchmark.

Example 1 in § 398 mentions that the large city is "close to the border of another Member State". It is not clear whether this criterion plays any operative role in the subsequent analysis, unless it intends to emphasize the applicability of EU as opposed to national competition law.

The same applies to **Example 4** (§ 401), where the bookstores operate close to a border. Moreover, the geographic reach of bookstores is still limited by linguistic aspects.

It would be useful if **Example 7** (§ 404) would consider the potential role (if any) of partially overlapping content. For example, in a scenario where the subscription price to a service is € 15, but the consumer needs two subscriptions to access his preferred movies, he would be better off to pay € 20 to a combined provider.

ff) Information Exchange

§ 411 states that competition law applies even where regulation **obliges** undertakings to share information and data. An additional sentence should clarify that this only applies where and to the extent that the undertakings have room for maneuver in the way in which they comply with mandatory regulation.

§ 413 recalls that a **concerted practice** requires not only a contact but also subsequent market conduct and a relationship of cause and effect between the two. The last sentence of the same paragraph recalls that companies are *presumed* to take account of the information received. The case law justified to qualify the presumption as rebuttable, and undertakings may provide proof to the contrary.[2]

Footnote 222 in § 426 should clarify that information previously communicated (not the public) remains **genuinely public** as long as it can be recovered either on the same website or through a simple web search, i.e. without major effort or cost.

§428 reads as follows: "The commercially sensitive nature of information depends also on the usefulness it has to competitors." Yet, in our view, this section could lead to certain misunderstandings. Information being useful should not necessarily mean that it is also restrictive of competition. After all, the undertakings would naturally only want to share information that is somehow useful to them, otherwise the information exchange would be a meaningless exercise. A clarification could be helpful, such as for example the following wording: "usefulness in terms of revealing future behavior of competitors".

According to § 431, information can be considered as **historic** if it is "several times older than the average length of the pricing cycles or the contracts in the industry". This is quite a high standard, and it is not clear what exactly "several times" implies. On the other hand, information over the last year can still be "current" if it "serves to artificially increase the transparency" between competitors, for example in case of consumer preferences that form the basis for strategic decisions. The language should clarify that there is no assumption that undertakings exchange such consumer trends data for the purpose to artificially increase transparency. Rather in the given example, they exchange such data to optimize their respective individual brands, which is exactly the opposite of a collusive outcome.

[2] Case C-199/92, *Hüls v. Commission*, Judgment of 8 July 1999, para. 162; Case C-49/92, *Commission v. Anic*, Judgment of 8 July 1999, para. 121; Case T-180/15 – *Icap v Commission*, Judgment of 10 November 2017, para. 57.

The text in the box in § 432 states that "introducing a pricing rule in a **shared algorithmic tool** … is also likely to be caught by Article 101 (1)…". § 433 speaks of receiving sensitive information from a competitor "as input in an algorithmic tool". This language should be further refined to ensure that the fundamental distinction between unilateral and collusive conduct is not blurred. If "shared algorithm" means that if Company A happens (unknowingly) to use a price monitoring algorithm sourced from a software developer X that also made available to competitor B, there should be no finding of collusion. In reality, it may not even be possible for A to obtain information from X as to whom else X sold the algorithm, or assurances that the algorithm sold to B is somewhat different.

§ 436 applies **hub-and-spoke analysis** to shared optimization algorithms (also § 437). The fundamental problem with the case law on hub-and-spoke cartels is the concept of "reasonably foreseeable". While the facts at hand in the case law shows clear evidence of collusive contacts, the concept of "reasonable foreseeability" is dangerously elastic. What is not "reasonably foreseeable" in times of worldwide pandemics and brutal war or to watchers of series à la "Bureau des légendes" or "Ozark"? Therefore, the language should clarify that clear evidence of collusive conduct shall be required for finding an infringement.

§ 437 explains the legal test of liability for an undertaking that exchanges commercially sensitive information with its competitors via third party. Accordingly, an undertaking may be held liable, if there is awareness and intent, which would be the case when (i) the undertaking tacitly or expressly agrees with the third party or (ii) the undertaking intends to disclose information via the third party or (iii) it is reasonably foreseen that third party would share the information with competitors and the undertaking was prepared to take the risk. Then, §438 explains the legal test for third parties that transmit commercially sensitive information, which is basically the same test under § 437: intent and awareness, or the third party could have reasonably foreseen and prepared to take the risk. One could question here whether it is reasonable to impose the same threshold of liability to (i) undertakings vis-à-vis their relationships with their competitors and (ii) third parties vis-à-vis their relations in a vertical context. For example, does this mean that the third party (let's say a platform) has the responsibility to actively keep track of all the users and their status as being each other`s actual/potential competitors? It is understandable that such burden is imposed on undertakings, who are in a better position to know their competitors; so that the test for "reasonably foreseen" seems fair. However, the liability threshold should be only limited to scenarios where there is intent and awareness for third parties, as it might be too burdensome for third parties to know the competitive relationship between different undertakings.

gg) Sustainability Agreements

§ 546 links the legitimacy of sustainability agreements to the concept of "**market failure**", whether addressed by regulation or not. This is somewhat narrow is the window. Given the current state of climate change, all hands-on deck is needed, and any efforts to green the planet short of greenwashing should be welcome even if they cannot be directly linked to an identifiable market failure.

For the same reason, the language in § 579 sets the bar too high. In many instances, there will be tools to demonstrate and quantify green efficiencies, but it would be regrettable if sustainability agreements that are not obviously greenwashing fall short of the test simply because the data are not available. In the case of doubt, the "Give Peace a Chance" principle should apply. That also applies *mutatis mutandis* to the consumer preferences mentioned in §§ 599 and 600.

The concept of **collective benefits** developed in §§ 601 ff. should take sufficient account of the connectedness of climatic changes. If the rain forest burns down, people in Belgium will suffer the consequences. The Sahara is arid because of climatic processes in the Himalayas that induce certain winds. Therefore, in the case of doubt and given the scarcity of data (§ 608), credibly claimed collective benefits should be accepted to be likely. Linking them to market coverage (§ 605) seems counterintuitive. It is not because only two out of ten start a good thing that it may not lead to follow-on conduct.

b) Overall comment

The work that has gone into the DHGL is impressive and so is the result. The DHGL achieve almost everything that such an instrument of abstract guidance can possibly achieve. In our view, the current state of dynamic innovation and (dramatic) evolution requires, in addition to guidelines, more practical mechanisms allowing informal guidance. We are aware of the steps taken in that direction but nevertheless wish to re-submit our stand-alone document from October 2021, because we think that it is still a valid thinking paper.

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We remain available for any further questions or requests for clarifications that you may have.

Best Wishes

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