EBU

OPERATING EUROVISION AND EURORADIO

EBU'S COMMENTS ON THE EUROPEAN COMMISSION'S DRAFT REVISED HORIZONTAL BLOCK EXEMPTION REGULATIONS AND HORIZONTAL GUIDELINES DATED MARCH 1ST 2022 (26/04/22)

ABOUT THE EBU

The European Broadcasting Union is the world's leading alliance of public service media (**PSM**). The EBU has 115 member organizations in 56 countries who operate nearly 2,000 television, radio and online channels and services and reach an audience of more than one billion people in 160 languages. PSM organizations are entrusted with the performance of a service of general economic interest, which consists of the provision of high-quality content that fulfils the social, cultural and democratic needs of the society they serve.

The EBU and its Members welcome the opportunity to provide comments on the Commission's revised Horizontal Block Exemption Regulations and Horizontal Guidelines**.** PSM organizations vary significantly from one country to another and have therefore relied on the Horizontal Block Exemption Regulations and the Horizontal Guidelines to varying degrees. The following paper brings to the Commission's attention certain issues that are *common* to EBU Members.

We welcome the fact that the revised Horizontal Guidelines have been renewed and updated with meaningful examples pertaining to digital markets. That said, we identified certain areas notably mentioned in our initial reply to the Commission's consultation submitted in February 2020 (see here), where the revised draft could be improved. This implies to:

- clarify certain issues related to **information exchange in general** and **data sharing** in particular; and
- provide guidance on the **role of public interest considerations beyond sustainability, quantitative and qualitative efficiencies** in assessing whether an agreement may benefit from an exemption under Article 101(3) TFEU.

1. Article 101(1) TFUE: Information Exchange and Data Sharing

At this outset, we take the view that the draft provides a comprehensive assessment of data-sharing arrangements under article 101(1) TFEU. The EBU welcomes the additional guidance provided by the Commission on concepts which are relevant for self-assessment under Article 101(1) TFEU (e.g. the age of information, unilateral disclosure, and indirect information exchanges) but also acknowledged that the sharing of certain 'technology data' albeit strategic can be shared under specific terms (e.g. at para. 441). Meanwhile, we also take the view that the draft could benefit from:

- clarification regarding certain definitions and the interplay with mandatory or voluntary EU digital regulatory frameworks setting data sharing obligations (a); and
- the provision of a safe harbor for certain data sharing pooling agreements (b)**.**

a. Information Exchange and relationship with other EU digital regulatory frameworks

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Since the initiation of the reform of the Horizontal Guidelines, various instruments providing for transparency/information sharing obligations with platforms have entered into force (e.g., the **P2B Regulation**[1] which requires *i.a.*, online intermediation service providers and search engines to disclose the main parameters determining ranking) or are about to be adopted (e.g., the draft **Digital Markets Act** mandating *i.a,* gatekeepers to give business users access to' their own data or the proposed **Data Act** which could allow third parties to receive data generated by IoT devices on behalf of end-users).

While the draft guidelines focus on the competitive significance of data pools and potential foreclosure of competition by companies who do not have access to such data, it does not refer to the **sharing of data pursuant to mandatory or voluntary EU digital regulatory frameworks**.

For instance, the collection and sharing of valuable data for use by platforms which are generally vertically (and/or diagonally) integrated and compete with business users in downstream and/or upstream markets is a core objective of the above-mentioned initiatives and is fundamental to remedy the information asymmetries which inhibit competition in digital markets. Platforms could however be minded to argue that the data requested (*e.g.*, disclosure of the main parameters determining ranking in the context of the P2B Regulation or the access by advertisers to the gatekeeper's performance measuring tools/data in the context of the DMA) contains competitively sensitive information.[2] We would therefore recommend clarifying (potentially at para. 423 *et. seq*.) that the **provisions enshrined in EU digital regulatory framework providing for access to data (beyond business users' own data) are unlikely to qualify as commercially sensitive** (either it can be presumed that transparency is needed to protect competition in a given context or because such information is accessible to all undertakings active in the relevant market in a non-discriminatory manner).

In the same vein, we would welcome a clarification that **access to business users' own data** (*i.e*., an arrangement whereby platform A grants business user B access to data that was generated as a result of the use of A by B) **should not be regarded as an information exchange** within the meaning of the Guidelines (*e.g*., at para. 440). In this case, the data is the business user's data and such arrangements must fall outside the scope of Article 101(1) TFEU.

b. Data sharing: Safe harbor for certain data sharing pooling agreements

We welcome the fact that the new draft Horizontal Cooperation Guidelines now provide guidance on how data can be shared and used in particular in the framework of **data pooling agreements**. That said, the revised draft Guidelines do not consider the situation where additional measures are necessary to level the playing field between the participants to such data sharing/pooling agreement (e.g., one may wonder whether the access to the pool should not be proportionate to the participants' market power).

In this context, we would encourage the Commission to include in the draft revised Guidelines a 'safe harbor' whereby the agreement would be deemed compatible with EU competition law and parties to the agreement would not need to share data with platforms. The Commission could take inspiration from provisions enshrined in some of its most recent legislative

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1 Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L 186,

2 Such clarification would be welcomed since that the Trade Secrets Directive applies without prejudice to the application of article 101 TFEU. See Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, para. 38.

proposals (*e.g.*, the Article 5(2) of the Data Act proposal whereby gatekeepers in the meaning of the DMA cannot benefit from data sharing obligation).

2. Exemption under 101(3) TFEU: the role of public interest considerations and qualitative/quantitative efficiencies in the assessment of horizontal cooperation agreements

The EBU welcomes the introduction by the Commission of a public policy objective, namely sustainability, in the Horizontal Guidelines. This is a significant leap forward in the integration of such objectives in the assessment of pro-competitive effects under Article 101(3) TFEU (and Art. 101(1) assessments). Yet, this improvement is limited in scope (the draft Guidelines refer exclusively to 'sustainability agreements' as a category of its own) and does not refer to other Union's policies and how other public policy objectives (including media pluralism) should be factored in the assessment under Article 101 TFEU.[3] In this respect, the new draft merely refers paras. 40/41 of the current draft to the 2004 Guidelines on Article 101(3) TFEU[4]. Providing for such guidance in the course of the present reform would be **timely and necessary**.

First, it would be timely because to our knowledge, no revision of these guidelines is foreseen in a near future. *Second*, it would be necessary because the grounds for an exemption under Article 101(3) TFEU rely currently (based on recent case law and secondary law) mostly on economic efficiency and the protection of price competition, setting aside issues concerning other public interest objectives. However, **several provisions within the Treaty on the Functioning of the European Union establish that non-economic considerations beyond environmental protection** (relating to, *i.a*, consumer protection, education, social cohesion and, of particular relevance for PSM, cultural diversity) **must be 'integrated', 'ensured' or 'taken into consideration' in the definition of other Union policies, including competition enforcement**.[5]

We thus invite the Commission to:

- **broaden the scope of section 9 of the draft Horizontal Guidelines** (at para. 541-550) to clarify that sustainability is only one of the policy objectives that may be taken into consideration by the Commission and to expressly refer to other policy objectives such as consumer protection, education, social cohesion and foremost **cultural diversity**; and
- include relevant examples/indicators to assess the contribution of commercialisation or production agreements against public policy objectives other than sustainability (*e.g.* a PSM joint production involving European works to promote cultural diversity).

On another note, quality improvements and other efficiencies of a qualitative nature are particularly relevant to digital (media) markets where competition is mainly driven by non-price parameters. However, the current draft of the Horizontal Guidelines only provides examples of qualitative efficiencies with respect to sustainability agreements and therefore fails to explain more broadly how qualitative efficiencies (*i.a.* in digital markets) would determine the Commission's assessment. We invite the Commission to provide meaningful examples

[3] European Commission's draft Horizontal Guidelines, March 1st, 2022, paras. 541-550.

[4] Commission Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97.

[5] See e.g., Articles 11, 12, 147(2), 175, and 167(4) TFUE.

analysing for instance in the media sector the quality of content offered (*e.g.*, the acquisition of attractive content from independent production houses), fostering **innovation,** the promotion of **cultural diversity** and the **economic context** (in particular the market power of global digital players).

In the same vein, we would encourage the Commission to introduce a carve out for services of general economic interests (**SGEIs**) when it comes to the assessment of efficiency gains and in particular to the "pass-on to consumers" criteria. While the draft provides that quantitative and qualitative efficiencies need to be passed on (para. 346), the examples and guidance laid down in the text (*i.a.*, at paras. 590-609) are exclusively applied to sustainability agreements. The draft would benefit from a clarification of how collective and individual use/non-use benefit can be assessed in section 1 of the draft. This is particularly important for services of general economic interest since the reduction of the financial needs for the performance of such services, which affects the amount of a household fee or public charge owed by the users to finance the SGEIs (reduction, stabilization, reduced increase of the charge), is an efficiency gain which is difficult to quantify. For many SGEIs, including PSMs, there is no downstream market where price reductions may be passed on.[6] It might therefore make sense to apply the reasoning developed at paras. 590-593 to SGEIs.

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[6] The license fee/household charges (or other public funds) are not determined according to market-economy criteria and paid by the contributors against a specific service defined in detail and thus determined in terms of its actual costs, but rather for the abstract possibility of using the services of the PSM over a given period of time.

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