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European Commission's Consultation on the draft revised rules on horizontal cooperation agreements

Assonime response

Assonime welcomes the opportunity to provide comments on the draft revised Block Exemption Regulations concerning R&D and Specialization Agreements (HBERs) and the draft revised Horizontal Guidelines on Cooperation Agreements (HGL). We enclose our comments, including the ones on the revised HBERs, with reference to the different chapters of the HGL.

1. Introduction

Purpose and structure of the Guidelines (§§1-9)

- As properly highlighted in the draft HGL (§1), the purpose of the Guidelines should be to provide legal certainty on the application of Article 101 TFEU to cooperation agreements between undertakings, which is of the utmost importance for an effective operation of a competitive market. We also welcome the commitment to clarify how cooperation agreements can contribute to the green and digital transitions and to attaining the goals of the EU industrial strategy and fostering the resilience of the internal market.
- As a general remark, we observe that the draft new text of the Guidelines is quite long and rich of examples and references. With respect to the aim of making the legal framework more user-friendly, some sections of the revised HGL, particularly the ones on information exchange, need some further work in order to point out the main features of the analytical framework, which are not sufficiently identified by means of examples.

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Scope of application of Article 101 (§§ 10-17)

- We respectfully submit that the definition of 'association of undertakings' provided for in §11 of the draft HGL, although drawn from the case-law, may be misleading and should not be included in the Guidelines. Companies may understand that an association of undertakings which is not meant to coordinate the economic conduct of its members on the market does not fall within the scope of application of Article 101.
- §§12-14 address an important issue raised in the revision process, i.e. how Article 101 constrains the relations between parent companies and their joint venture. The draft text usefully focuses on the case where the parent companies exercise a decisive influence over the joint venture and, therefore, they form a single economic entity. In such cases, Article 101(1) should not apply to agreements between the parents and the joint venture concerning their activity on the relevant market where the joint venture is active. This is important also to set boundaries on the scope of legitimate information exchange between the parent companies, which should act as informed shareholders, and the joint venture.
- § 17: in light of the case-law of the Court of Justice the notion of potential competitor, which is used to ascertain whether an agreement is 'horizontal' (between actual or potential competitors) has been significantly broadened. It would be important to stress that the elements indicated in the box should not be given the same weight; for instance, the last one

(conclusion of an agreement between companies operating at the same level in the production chain, some of which had no presence in the market) should not be considered in isolation, but together with other elements in order to determine whether the companies can be considered potential competitors.

Article 101(1) versus Article 101(3)

- §18-19: while the description of Article 101(1) is clear (anticompetitive object or effects), the focus on procompetitive benefits in the explanation of the role of Article 101(3) may create uncertainties which can be avoided.
  On the one hand, the first condition of Article 101(3) refers more generally to improvements in production or distribution etc., which may be efficiency-enhancing but are not necessarily pro-competitive (for this reason, the other conditions put further constraints to preserve competition). On the other hand, in the recent case-law of the Court of Justice there are clear indications that some pro-competitive aspects of an agreement can be considered in the application of Article 101(1). We refer, in particular, to the Court of Justice's judgment in *Generics* (C-307/18, §§ 103-110) (see also the opinion of AG Kokott, §§151-179, as well as the opinion of AG Bobek in *Budapest Bank*, C-228/18).

  We suggest amending § 19 as follows:

  "The second step, under Article 101(3), which only becomes relevant when an agreement is found to be restrictive of competition within the meaning of Article 101(1), is to determine the ~~procompetitive~~ benefits produced by that

agreement and to assess whether those ~~procompetitive~~ positive effects outweigh the restrictive effects on competition. ~~The balancing of restrictive and procompetitive effects is conducted exclusively within the framework led down by Article 101(3).~~ If the ~~procompetitive~~ benefits do not outweigh a restriction of competition, Article 101(2) stipulates that the agreement shall be automatically void".

Restrictions by object (§§ 28-35)

- While stating that the notion of restriction by object applies to types of cooperation which by their very nature are harmful to the proper functioning of competition, the draft revised HGL should recall more clearly the extremely important principles of the recent case-law of the Court of Justice on this topic.
  Since the draft HGL include numerous examples, drawn from the case-law, of agreements which have been regarded as having an anti-competitive object, in order to provide a helpful analytical framework enabling undertakings to understand how Article 101 is applied, we strongly suggest providing a complete and more systematic overview of the principles of the case-law on restrictions by object, in particular with reference to the Court of Justice's judgments in *Cartes Bancaires* and in *Generics*.

  To this aim, we suggest shifting the current § 30 after § 33 (as a new § 33 -bis) and to substitute § 31 with the following:

  "It is clear from the case-law of the Court of Justice that the concept of restriction of competition by object must be interpreted restrictively and can be applied only to practices for which, after an individual and detailed examination, it is

demonstrated that they reveal a sufficient degree of harm to competition for the view to be taken that it is not necessary to assess their effects (*Generics*, § 67; *Cartes Bancaires*, § 58). The assessment of whether an agreement is restrictive by object should be based on sufficiently reliable and robust experience of the negative impact of this type of coordination on the market (*Budapest Bank*, §76; *Cartes Bancaires*, § 51)".

Assessment under Article 101(3)

§ 40: for the reasons outlined above, in the light of the recent case-law we suggest avoiding reference to 'pro-competitive effects' when illustrating the application of Article 101(3). The HGL might refer to positive effects, benefit, efficiency-enhancing effects or more literally to the effects mentioned in the first condition of Article 101(3) [1].

2. Research and Development Agreements

The draft revised R&D BER and the revised chapter of the HGL on R&D agreements contain several welcome clarifications and provide enhanced flexibility with respect to the grace period.

§ 138: importantly the HGL clarify that for certain markets (e.g. some bidding markets) looking at data relating to the preceding year would be inadequate and it may be necessary to calculate market shares on the basis of an average of the parties' market shares of the last three preceding calendar years. Since in some markets there may be true uncertainty on whether this is the case, it would be very important if the Commission was willing to provide individual guidance to

[1] For instance, in the chapter on sustainability agreements, the benefits resulting from the agreement are properly referred to as 'efficiency gains' (§ 577).

undertakings on the correct way to calculate market shares for the application of the block exemption.

Art. 6(3) R&D BER: the draft new R&D BER introduces a new threshold for agreements between undertakings competing in innovation, i.e. R&D agreements for new products and/or technologies that create their own new market and R&D poles directed primarily towards a specific aim or objective. Such agreements are covered by the block exemption provided that there are three or more competing R&D efforts in addition to and comparable with those of the parties to the agreement. Although we understand the effort to safeguard competition in innovation, the requirement of at least three additional R&D initiatives may not be easily met for many very specific R&D initiatives. In such cases, the inapplicability of the BER would entail a case-by-case application of Article 101. Clearly, this does not entail a presumption of illegality, but we wonder whether the benefits for competition exceed the cost of making the legal framework more complex.

3. Production agreements

Specialization BER, Art. 1 (a) (1): we welcome the proposal to make the notion of 'unilateral specialization agreements' more flexible, so as to cover also agreements entered into by more than two parties.

§232 HGL: we also welcome the proposal to broaden the HGL safe harbour in order to cover all horizontal subcontracting agreements falling outside the scope of application of the BER, provided that the combined market share does not exceed 20%

Mobile infrastructure sharing agreements (§§ 296-307)

The draft HGL make a commendable effort to provide guidance on the application of Article 101 to mobile infrastructure sharing

agreements. Similarly to other sharing agreements in the digital sector, these initiatives may be efficiency-enhancing and are at least in part encouraged by the sectoral regulation and policy measures. If the goal of the Guidelines is to enhance legal certainty in order not to discourage sharing initiatives which do not significantly restrict competition, probably some further efforts should be devoted to clarifying the analytical framework. In particular, it should be further stressed that the anticompetitive impact will always be assessed with reference to the counterfactual scenario, in the absence of the agreement.

4. Information Exchange

The revised chapter of the HGL has the ambition to provide a general analytical framework for the application of Article 101 to any exchange of information, ranging from the exchange of commercially sensitive information to data sharing and data pooling. It should be stressed that, although in the application of competition law we are used to focus on the exchange of commercially sensitive information, within the broader context of the digital transformation of the European economy and society the sharing of data concerns extremely heterogeneous data, including data relating to physical phenomena such as weather, temperature, moisture, pollution, C02 emissions or data on mobility and traffic congestion, logistics, intelligent transport systems, etc.

EU legislative initiatives, in particular the recent proposal for a Data Act, aim at encouraging data sharing between companies as far as non-commercially sensitive information is involved.

In our view, also to ensure a better coordination of competition policy and EU policy for the digital transformation, the chapter of the HGL on information exchange should make a neat distinction between the

first category (commercially sensitive information) and the second category of data which do not contain commercially sensitive information (relating to the strategies of the companies, their customer base etc.). The reason why this distinction is of the utmost importance is that, whereas for commercially sensitive information the main competition concerns relate to the risk of collusion, for non-commercially sensitive data the main risk for competition is that of foreclosure of a potentially important asset. The current text of the proposal, by mixing the two, inevitably creates some confusion which may unduly discourage the sharing of non-commercially sensitive data, contrary to the objectives of the EU strategy for data.
In the light of the above considerations, we suggest the following:

- §§ 406-411 may be kept as a general introduction, covering both categories of agreements
- sections 6.2 and 6.3 should be dedicated only to the assessment of the exchange of commercially sensitive information under Article 101 (1) and Article 101(3)
- a new section 6.4 should be dedicated to the assessment of the sharing of non-commercially sensitive data under Article 101, focusing on the specific competition concerns relevant for this type of data that from an economic viewpoint should be considered as an input, more than a means for collusion. In this section, the Guidelines may also indicate that, depending on the case, non-commercially sensitive data sharing may be regarded as an R&D agreement or a production agreement.

As to the guidance on commercially sensitive information, references to the case-law on information exchanges qualified as by object restrictions should always recall that the assessment of a restriction by object is not form-based and should be made in individual cases, taking into account

the nature of the information exchanged, the objectives of the exchange and the legal and economic context. The list contained in § 424 should be explained in this context.
In order to help undertakings to assess whether the exchange of commercially sensitive information restricts competition, more than providing many examples it is useful to recall that the main test should be the comparison of how the market would operate with and without the specific exchange of information (counterfactual scenario). The advantage of focusing on this analytical framework compared to the emphasis on lists and examples, is that it is at the same time more general and more precise in terms of its ability to point out true anticompetitive practices.

5. Standardization agreements

§ 470: the draft revised HGL properly refer to the symmetric risks of hold-up and hold-out when discussing potential concerns relating to the licensing of standard essential patents.
§ 483: the proposal clearly encourages detailed disclosure of standard essential patents compared to blanket disclosure. Reference to reasonable endeavours should include consideration by the SDO of the costs of detailed disclosure for participants.

6. Sustainability agreements

We welcome the new chapter of the draft revised HGL on sustainability agreements and the approach adopted by the Commission.
First of all, it is extremely important that the HGL clarify that many agreements fall outside the scope of Article 101(1), in particular when they do not affect price, quantity, quality, choice and innovation (§§ 551-554)
A second very important proposal is the establishment of a soft safe harbour for those sustainability standardization agreements that comply

with a set of cumulative conditions and therefore are considered 'unlikely to produce appreciable negative effects on competition" (§§ 572-574).

As to the application of the four conditions of Article 101(3), the Commission follows a well-balanced approach. It provides many useful examples of efficiency-enhancing effects which may be relevant for the application of the first condition of Article 101(3) (§577-579).

For the second condition, the Commission makes a notable effort to broaden the types of benefits which can be taken into account when assessing whether consumers have received a fair share of the benefits deriving from the agreement, while maintaining the requirement that the overall impact on the affected consumers should be at least neutral (§§ 588-609).

For the third condition, it stresses that the agreement may not be necessary if there is sufficient willingness to pay on the market or if the improvement is required by regulation; however, the Commission also argues that the agreement may turn out to be indispensable for reaching the sustainability goal in a more cost efficient way (§§ 580-587).

Finally, on the fourth condition, the draft HGL usefully indicate that the agreement can cover the entire industry, as long as the parties continue to compete on at least one important aspect of competition (§§ 610-614).