Comment

of the German Insurance Association (GDV)

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

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Executive summary

The German insurance industry welcomes the opportunity to comment on the draft of the revised Horizontal Guidelines and the Block Exemption Regulation for Specialisation and for Research and Development. We consider the drafts to be successful overall and an improvement compared to the previous versions. Above all, we welcome the Commission's efforts to make the Horizontal Guidelines easier to understand and to include more concrete examples.

In the following submission, we list some aspects where, in our view, there is room for improvement. We limit ourselves to those areas that are of particular importance for the insurance industry.

1 Horizontal Guidelines

We generally welcome the amendments to the Horizontal Guidelines. The detailed new segment on sustainability and a multitude of new aspects covered are helpful for self assessment, especially in the chapter on information exchange, e.g. on data sharing, signalling, hub and spoke agreements and others.

As a general remark, we would however consider it helpful if the Guidelines would contain clearer indications which types of behaviour do not as a rule give raise to competition concerns. The “soft safe harbour” contained in the Sustainability chapter is a welcome step in that direction.

1.1 Information exchange

Data sharing

We note that provisions on data sharing and access to data appear to be addressed in two different places, para. 420-422 and para. 440-442. We would suggest to rather address the topic of data sharing in one section for ease of reference.

Furthermore, we have the following comments on the relevant sections:

In our view, one of the most important aspects is the question which parties can be at risk of foreclosure. It is our understanding that paras. 421 and 441 set out the circumstances under which foreclosure for companies active on the same market may occur, and para. 422 deals with potential foreclosure of third parties in a related market. However, the penultimate sentence of para. 421 appears to indicate a wider understanding (“This can for instance be the case in data sharing initiatives, where the data shared is of strategic importance, represents a large part of the market and third parties’ access is prevented”). This could be viewed as a right for any interested third party (not merely competitors) to access such data sharing initiatives. In GDV’s view, such a broad interpretation would not be justified. We therefore suggest to clearly limit the right to access to data sharing initiatives under competition law to competitors.

We would also appreciate more clarity on the conditions under which a risk of foreclosure might exist.

First, according to the current version of the Horizontal Guidelines, a risk of market foreclosure may exist if the information concerned is “very strategic for competition” and covers a significant part of the relevant market. According to the new version, it would be sufficient if the information is

merely “of strategic importance”. We find it plausible that withholding "very strategic" data might lead to foreclosure since a lack of certain data can indeed make it significantly more difficult to operate on a market. However, if this requirement is softened, there is a risk of establishing a claim to access to many types of data through the back door.

Second, it is not entirely clear to us how the terms “commercially sensitive information” and “information/data of strategic importance” (para 421) as well as “strategic for competition” (para. 441) and “valuable asset to compete in the market” (para. 442) relate to each other. On the one hand, data/information of strategic importance could be understood as a qualification of commercially sensitive information as defined in para. 423. On the other side, data/information of strategic importance could also be interpreted as having a broader meaning than commercially sensitive information. We therefore suggest to further clarify the term data/information of strategic importance.

Third and most importantly, adopting a wide understanding of the type of data to which access must be granted would entail a risk of free-riding on the (often significant) efforts of the participants in a data pool to gather, process and aggregate the information collected into meaningful data. Therefore, access to such data should only be granted under reasonable terms and the commitment by the entity seeking access to submit the corresponding data into the pool.

Pricing algorithms

As a general observation, GDV welcomes the mentioning of (price) algorithms in various places in the draft Horizontal Guidelines, albeit scattered in various sections (e.g. paras. 419, 432, 433, 436/footnote 238). GDV considers that the usability of the draft Guidelines and thus the legal certainty for the users could be further increased by adding a dedicated section for such algorithms. In such a section, the Commission could further elaborate on how it intends to deal with algorithms under a competition law perspective. In recent years, national competition authorities such as the German Bundeskartellamt and the French Autorité de la concurrence have issued publications on algorithms[1] and in GDV’s view it would be helpful if also the Commission released further guidance on this topic.

[1] Joint study on "algorithms and competition" of the French Autorité de la concurrence and the German Bundeskartellamt available under the link https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Algorithms_and_Competition_Working-Paper.html.

Market coverage

The draft states in para. 454 that for an information exchange to be likely to have restrictive effects on competition, the undertakings involved in the exchange have to cover a sufficiently large part of the relevant market. In this respect, joint compilations, tables and studies within the meaning of the former Insurance BER 267/2010 constitutes an exception, as their reliability becomes greater as the amount of statistics on which they are based is increased. Given this specificity of the insurance sector, the Commission has not deemed it appropriate to subject any exemption for such joint compilations, tables and studies to market share thresholds (Recital 12 of the Insurance BER). The Commission has also stated that the Horizontal Guidelines protect the existence of this type of cooperation in the insurance sector and that its principles mirror those in the Insurance BER and exempt the exchange of information between insurers.2 We therefore assume that a high market coverage within information exchanges under the former Insurance BER would continue to be viewed as unproblematic under the new Horizontal Guidelines. Nonetheless, we would be grateful for a clarification. This could for instance be achieved by amending footnote 257 by stating that, regarding the information exchange required for the compilation of joint compilations, tables and studies within the meaning of the former Insurance BER, even a high market coverage would not be indicative of restrictive effects on competition.

Regulatory initiatives

In the context of information exchange stemming from regulatory initiatives (para. 411), a clarification would be helpful that any collection and/or disclosure of commercially sensitive information carried out by a public authority and/or government body cannot amount to a violation of Art. 101(1) TFEU by the undertakings from which the relevant information was collected.

Commercial strategy

In the text field in para. 424, it is unclear to us how the terms “commercial strategy” (example 3) and “business strategy” (example 6) relate to each other. We suggest to clarify this.

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2 Report from the Commission to the European Parliament and the Council on the functioning of Commission Regulation (EU) No 267/2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector, COM(2016) 153 final, para. 31.

Public information

Para. 427: In the text field, we believe that the wording of the 3rd sentence ("*While competitors may refer to the rising costs of supply […], they cannot jointly evaluate the rising costs if this reduces uncertainty regarding an individual competitor's future or recent actions on the market*") should be clarified. We suggest to include a wording that makes clear that competitors cannot evaluate the response to the rising costs if this reduces uncertainty on the market.

Aggregated/individualised information and data

Para. 429: We note that in the draft Guidelines the wording of the 3rd sentence of this paragraph has changed as compared to the current version of the Guidelines. In the draft Guidelines, the sentence reads: "*More generally, unless it takes place between a relatively small number of undertakings with a sufficiently large market share, the exchange of aggregated information is unlikely to give rise to a restriction of competition*". This wording is considerably broader than in the current version of the Guidelines, where an exchange of aggregated information was merely deemed anticompetitive if it takes place in a "*tight oligopoly*" (margin no. 89 of the current Guidelines).

In our view, the new wording will lead to significantly increased legal uncertainty since the specific meaning of "*relatively small number of undertakings*" and "*sufficiently large market shares*" is unclear. Against this background, we see a significant risk that undertakings may refrain from the collection and publication of aggregated market information altogether, since the risk of an infringement of Art. 101(1) TFEU could become incalculable. This would run counter to the efficiencies of an exchange of aggregated data which is highlighted by the Commission itself the first sentence of this paragraph. We would therefore suggest to keep the reference to a "*tight oligopoly*" in this context.

Unilateral disclosures

Para. 434: We welcome the fact that clarification on the practice of "signalling" is now also to be included in the Horizontal Guidelines. In order to improve legal certainty in this area, we would welcome it if it were made clear that a public statement concerning an intended concrete measure already decided by the undertaking's management is unobjectionable under competition law as long as it does not contain any signs for an intention of collusion. Such announcements promote efficiency for consumers, as they can adjust their planning accordingly. In this context, a clarification would also be desirable to the effect that in the critical case of non-implementation of an announcement, only the signaller has to expect investigations by the cartel authorities, not the competitors.

2 Sustainability agreements

Regarding sustainability agreements, we see the need for an additional safe harbour specifically aimed at sustainability agreements having the goal to fight global warming (2.1). Furthermore we have some comments on specific aspects of the chapter (2.2.).

2.1 Need for a *safe harbour* for certain sustainability agreements aimed at combating global warming

We appreciate that the draft revised Horizontal Guidelines address a variety of different sustainability goals. However, in our view, they do not sufficiently address the most important types of sustainability agreements: those directed at combating global warming by reducing green house gas (GHG) emissions and having as their objective safeguarding a liveable future for humankind on our planet. We provide more details on the scientific background of this point in an **annex** attached to this paper.

We believe that the importance of this mission merits explicit consideration in the horizontal guidelines of these types of agreements, for the following reasons:

- There is a very significant need for private initiatives to combat climate change, since current governmental pledges fall short of achieving the 1.5°C goal stated by the Intergovernmental Panel on Climate Change (IPCC) and the Paris Agreement. For more details on this, again, we refer to the **annex**.

- Private emission reduction initiatives can only be effectively reaching the 1.5°C goal in line with the scientific based reduction path if undertakings are cooperating as opposed to each undertaking taking actions individually. Also, first mover disadvantages will be eliminated by this.
- For this purpose it is crucial that undertakings apply a consistent methodology to allocate emissions to products or services offered by the sector at hand (example: shall the emissions of a combustion engine car be attributed to the manufacturer of the motor, the automotive OEM (if different from the motor manufacturer) or to the supplier of fuel?). Often, such initiatives require knowledge from specialized third party expert institutions with whom the relevant methodology is developed. In the insurance and reinsurance sector in particular, developing GHG reduction initiatives are particularly complex, as insurers and reinsurers may (and often do) (re-)insure businesses from all economic sectors, making it generally necessary to familiarize themselves with the emission reduction pathways identified by science for each of these sectors.
- Liveable future for humankind on our planet is connected to and backed by a multitude of fundamental rights and freedoms enshrined amongst other in the EU Charter of Fundamental Rights (CFR), such as the right to life (article 2 CFR), the right to liberty (article 6 CFR), the freedom to conduct a business (article 16 CFR) and the right to property (article 17 CFR). Furthermore, as the Commission has itself stated, the application of Competition law needs to be in accordance with its Green Deal policies.[3]

Given the paramount aim to collectively combat global warming, in our view, Articles 101 and 102 TFEU must be duly interpreted in a way to reflect both this paramount aim and the above fundamental rights.

For these overarching principles, such agreements are permissible under EU law. However, for the sake of clarity, we propose a specific *safe harbour* for sustainability agreements which pursue combating global warming by agreeing to jointly achieve a reduction of greenhouse gas (GHG) emissions. This is all the more necessary because the draft horizontal guidelines conceptually are only dealing with sustainability standardisation agreements as opposed to sustainability agreements (see also individual comments on paras. 555 et seq. below).

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[3] For instance, Competition Policy in Support of Europe's Green Ambition in Competition Policy Brief 2021-1, p. 1 states that the EU's efforts to become climate neutral and environmentally sustainable must be supported and complemented by competition policy.

In our view, this *safe harbour* should be conditional upon the following criteria:

1. The sustainability agreement has as its main objective the reduction of GHG emissions and thus aims at limiting global warming.
2. The relevant initiative cannot be expected to be similarly effective in terms of reduction of GHG emissions if it was carried out by each undertaking individually. Effectiveness, *inter alia*, follows from targeting scientifically elaborated reduction curves.
3. The substance of the relevant initiative may not collectively go beyond what is necessary to achieve the 1.5°C goal.
4. The relevant agreement only prescribes reduction targets and pathways, not individual measures members eventually take to meet these targets.

For more details on this, please refer to the **annex** to this submission.

2.2 Individual comments

Please find some further comments on individual aspects of the sustainability section below.

Paragraph 560: According to this paragraph the parties will have to bring forward all facts and evidence demonstrating that the agreement genuinely pursues such objective and is not used to disguise a by object restriction of competition. The question in this context is what standard of proof is being applied here? The wording suggests that if one evidence is missing the requirement is not fulfilled. Furthermore, when are sustainability objectives genuine?

Paragraphs 555 et seqq.: Structurally, Section 9.3 of the Guidelines refer to “sustainability agreements” – the Guidelines themselves then refer in Section 9.3.2 to “sustainability standardisation agreements”. In this context the question arises whether the scope of Section 9.3 might be too narrow. The Guidelines should provide clearer guidance on the application of Article 101 (1) to sustainability agreements as such and not only standardisation agreements (which in turn deal with products/labels, but not so much for services). For providers of re/insurance, this guidance is even more important.

Paragraph 566: We do not fully agree with the assessment that the questions of interoperability and compatibility between technologies are generally irrelevant for sustainability standards. There may well be situations

where a sustainability standard is set by an industry to enable a standardized, state of the art assessment of sustainability progress in the complex technical business of their vertically related industry customers. This can be understood as securing a uniform, impartial assessment process between these two industries, thus the interoperability and compatibility between these two industries. We would suggest to include this aspect in the wording of the paragraph.

Paragraph 567: Again, in complex technical environments, the sustainability standard may well also extend to the technical description on how to properly and impartially assess the sustainability progress of the subjected vertically related industry customer.

Paragraph 572: Regarding the sixth condition, we would suggest adding some guidance on when an increase in price or a reduction in the choice of products can be considered "significant". Taking into account footnote 325, it is our understanding that a significant increase in price or a significant reduction in the choice of products can most likely not be anticipated where the increase or the reduction merely reflect an increase in the quality of products.

Paragraph 579: Pursuant to this paragraph, efficiencies need to be objective, concrete and verifiable. In the context of sustainability agreements, the efficiencies may not be concrete immediately but will materialise over time. The Guidelines should clarify this point in particular, where competitors enter into sustainability agreements based on objective scientific knowledge/views at the point in time such agreements are entered into. The concept of relying on reports is also referred to in paragraph 607 of the Guidelines.

Paragraph 581: Again, in the context of sustainability not all effects are known at the point in time an agreement is entered into. This implies that restrictions may not be known at such time. Therefore, the Guidelines should clarify this point as well, also to avoid a situation where competitors are acting in good faith but might then breach competition rules as a result of a restriction that may materialise later on. See also paragraph 583, where the Guidelines recognise that it may not be clear from the outset what the restrictions an agreement may entail.

Paragraph 583: The view expressed in this paragraph appears to be too narrow and potentially wrong. It assumes that in case EU or national law requires undertakings to comply with concrete sustainability goals, cooperation agreements and the restrictions they may entail cannot be deemed indispensable for the goal to be achieved. This view does not recognise the question of how a goal is to be achieved. It may be the case that the

law requires compliance with certain goals, but is silent on how the undertakings can achieve this. This could well be in a form of cooperation that is not only cost efficient, but efficient by other means (e. g. achievement of the goals within a shorter timeframe). And it is also not clear how this paragraph would interplay with the so called "state compulsion defence".

Paragraph 585: This paragraph is again very product and label focused – guidance for services should also be reflected here.

Paragraph 599: Pursuant to this paragraph, parties need to provide cogent evidence demonstrating the actual preferences of consumers – the question is whether the Guidelines introduce a stricter burden of proof. It should be sufficient from a burden of proof perspective that the parties simply provide evidence.

Paragraphs 601 et seqq.: The examples provided in this part of the Guidelines are product focused and it would be preferable that the Guidelines also provide guidance in the context of services.

Paragraph 606: Pursuant to (a) the parties should be able to clearly describe the claimed benefits and provide evidence that they have already occurred or are likely to occur. The question in this context is what is meant by “likely”. Would this imply a short-term benefit? In the sustainability context – as mentioned above – benefits may not be clear from the outset and they could materialize in the mid- to long-term. If this is the case, would such benefits also be caught by (a)? Furthermore, in (b) it seems doubtful whether the beneficiaries can be clearly defined – at least under certain circumstances there should be a possibility to rely on the benefit for the society as a whole without having to define further or demonstrate what part accrues to the consumers of the product in the relevant market. In this context it should be noted that under (d) the required allocation may also not always be possible (as is also recognized in paragraph 608).

3 Specialisation BER

We welcome the change that unilateral specialisation will also fall under the Specialisation BER if more than two parties participate.

In the public consultation on the revision of the horizontal BERs, the Commission had already once put up for discussion the definition of the term "joint” in the context of distribution in the Specialisation BER. Following the R&D BER, the term was supposed to be expanded to clarify that it also covers the scenario in which the parties agree that the distribution will

be carried out by only one party. Since this proposal has apparently not been included in the draft of the new Specialization BER, we would like to reiterate the wish for a corresponding clarification.

From a competitive perspective it is irrelevant whether distribution is carried out by a joint team, organisation or undertaking or, in accordance with an agreement within the consortium, by only one party. The competitive effect is essentially the same. A solution involving only one party is also likely to be cheaper and therefore more efficient than a joint effort. Therefore, there is no reason in our view to exclude this form of joint distribution from the scope of the Specialisation BER. We suggest aligning the Specialisation BER with the clear wording of the R&D BER (Art. 1 No 12 c) and No 14) R&D BER), e. g. by adding one additional option to the definition of “joint” in Art. 1 1 (l) “(3) allocated between the parties by way of specialisation”. Para. 266 of the Horizontal Guidelines could be amended accordingly.

At the least, a clarification of the term “joint team” in the Horizontal Guidelines would be very welcome.

Brussels, 26 April 2022