EuroCommerce for retail & wholesale

Position paper
26 April 2022

Horizontal Block Exemption Regulations and Guidelines – EuroCommerce views on the Commission proposed drafts

EuroCommerce welcomes the opportunity offered by the European Commission to comment on the draft R&D Block Exemption Regulation and Specialisation Block Exemption Regulation (referred together as the Horizontal Block Exemption Regulations or 'HBERs') and the Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements (also known as the Horizontal Guidelines or 'HGL'), published on 1 March 2022.

EuroCommerce represents the retail and wholesale sector in Europe. Retailers and wholesalers are involved in several types of horizontal cooperation agreements covered by the existing HGL and therefore the new Guidelines shall be a key instrument to ensure legal certainty and compliance with competition rules.

EuroCommerce would like to make a number of comments on:

- the revised Guidelines, namely on the issues of purchasing agreements, joint commercialisation, information exchange and sustainability cooperation;
- on the R&D Block Exemption Regulation, which concerns those retailers who run their own research and development sites and production facilities in relation to their private label; and
- the Specialisation Block Exemption Regulation, namely on the issue of joint production.

Key messages

- EuroCommerce welcomes the legal certainty the revision of the Horizontal Block Exemption Regulations and Guidelines brings but notes there remains room for misinterpretation.
- EuroCommerce welcomes the Commission's recognition that buying agreements can be organised in different ways for the benefit of consumers. The Guidelines should highlight the many benefits of buying cooperation and clarify that anticompetitive effects are limited to specific situations, ensuring that joint purchasing agreements are always be assessed through an effects analysis. It is important the Commission provides further examples to cover the different types of purchasing agreements, the nature of efficiency gains and where pass-on may be more likely.
- The revised Guidelines on information exchange contain important clarifications and should ensure consistency with other legislative proposals and provide guidance on new developments (such as algorithms) and provide examples that cover common practices (such as joint commercialisation).
- EuroCommerce welcomes the new chapter on sustainability cooperation which will help business cooperate safely to the benefits of sustainability. It is important that the Commission provides further examples and guidance to provide further clarity.

1. Horizontal Guidelines – general issues

1.1. EuroCommerce welcomes the proposed amendments and the restructuring of Section I of the Guidelines ('Introduction'), including the introduction of references to recent case law on e.g. the definition of 'undertaking' and of 'actual and potential competitors.'

1.2. In relation to the definition of 'potential competitors', the Guidelines state that an undertaking will be considered a potential competitor if it will take the necessary steps to enter a specific market '*within a short period of time*'.

1.3. The concept of a '*short period of time*' defined in footnote 12 varies depending *inter alia* on whether the undertaking in question is party to a horizontal cooperation agreement. This introduces a distinction in the meaning of the concept for those that are party to a horizontal cooperation agreement and those that are a third party. The result being that if a cooperation agreement exists, the Commission would normally consider a longer period to amount to a '*short period of time*'. We would ask the Commission to reconsider this approach: in line with the CJEU decision in *Lundbeck*,[1] the Commission should make an overall assessment considering all the criteria listed in paragraph 17 of the Guidelines without *a priori* factoring in a "*longer period of time*" merely on the basis of the existence of an agreement between the undertakings concerned.

1.4. Cooperation agreements are diverse in terms of membership, geographical scope and activities; a general rule that a longer period should be assumed for a party to a cooperation agreement does not take into consideration the specificities of the various types of collaboration.

The centre of gravity

1.5. EuroCommerce appreciates the proposed Commission approach that the analysis of agreements combining different types of cooperation should be carried out on the basis of the centre of gravity (i.e. based on the starting point of the cooperation and the degree of integration of the different functions).

Conclusions

EuroCommerce would suggest the following changes to the draft rules:

- Reconsider footnote 12 and the definition of 'short period of time' in the presence of a cooperation agreement.

2. Purchasing agreements

2.1. Purchasing agreements exist in many sectors and their role in supporting competitiveness is well-established. In fact, over the last two years we have seen the European Commission itself engage in the joint purchasing of vaccines against COVID-19 and the creation of an EU Energy Purchase Platform for gas, LNG and hydrogen in the aftermath of the Russian invasion of Ukraine on behalf of member states.

2.2. The section on purchasing agreements of the HGL provides the legal framework for the functioning of European retail and wholesale alliances. There is no economic justification for a

[1] Case C-591/16 P *Lundbeck v Commission* [2021].

differing, sector-specific approach to purchasing agreements in retail and wholesale in the market for fast-moving consumer goods ('FMCG').

2.3. We would like to offer a number of comments on the proposed revisions to this section.

2.4. While we appreciate the extensive guidance given on different types of joint purchasing in paragraph 312 of the Guidelines, we would welcome a statement that joint purchasing can be organised in many different ways, including the specific forms described by way of example in paragraph 312 of the draft.

2.5. As a general comment, while we welcome the recognition in paragraph 313 that joint purchasing agreements usually aim at creating a degree of buying power vis-à-vis large suppliers, there is room for possible misinterpretation. EuroCommerce would invite the Commission to remove the reference to '*large*' suppliers, to avoid the impression that joint purchase agreements may only be concluded to deal with this type of supplier. Further, EuroCommerce also invites the Commission to consider removing the reference to '*that individual members of the joint purchasing arrangement would not attain if they acted separately instead of jointly*' as it implies a threshold for a member to participate in a joint purchasing agreement that is not necessary and could inadvertently imply that only members of a certain size can participate. This would ensure that paragraph 313 illustrates when such agreements are used, rather than define criteria for who could be a member of a joint purchasing agreement.

Joint negotiations

2.6. We welcome the recognition by the Commission that joint purchasing agreements can also be limited to jointly negotiating '*the purchase price, certain elements of the price, or other terms and conditions, while leaving the actual purchases, pursuant to the jointly negotiated price and terms and conditions, to its individual members*'.[2]

2.7. From a competition law and economic perspective there is no relevant difference between joint purchasing and joint negotiation of additional rebates or discounts for certain services. Both mechanisms amount to means of purchasing together, with no distinction between negotiations over the full net price or negotiations over parts of the price and terms and conditions. This is also reflected in the practice of competition authorities in the EU who have assessed, independently from their actual legal nature, joint negotiation agreements as joint purchasing ones, since joint purchasing typically constitutes the 'centre of gravity' of alliances.

2.8. Often retail and wholesale alliances jointly negotiate parts of the price (e.g. rebates) which constitute elements of the net purchasing price. Additionally, they may negotiate the provision of 'on-top services'. The provision of 'on-top services' is dependent on the procurement of branded products by individual members: members who do not source the relevant products will also not provide services to the supplier. It is important that the Commission recognises the pro-competitive effects of joint negotiations under the Guidelines as they are an effective method for undertakings to seek synergies in sourcing to the benefit of consumers with minimal risks to competition.

[2] HGLs, paragraph 316.

2.9. Consequently, we also welcome the inclusion of Example 2[3] which demonstrates that an alliance negotiating rebates with a large supplier in exchange for promotional services is a joint purchasing agreement.

2.10. Further examples that could also demonstrate other types of agreements that generate efficient gains, related to specific terms and conditions, payments for specific services or which relate to limited products in a member's portfolio, facilitation of negotiations and reduction of costs, including for SMEs, would also be welcome. Similarly, further examples could demonstrate that moderate market concentration could also lead to efficiency in supply chains, for example, by encouraging a more robust supplier base.[4]

Buyer cartels

2.11. EuroCommerce welcomes the guidance provided by the Guidelines on buyer cartels which are restrictions of competition by object, contrary to joint purchasing agreements which always require an effects analysis.[5]

2.12. We also welcome the criteria listed in in paragraph 319 of the Guidelines to assist undertakings in assessing whether the agreement to which they are party together with other purchasers, does not amount to a buyer cartel. The factors identified by the Commission in paragraph 319(a)-(b) again demonstrate that no alliance would amount to a buyer cartel, because alliances are often based on a central secretariat with an individual legal and commercial identity separate from its members and based on written agreements.

2.13. While the Guidelines note that the elements identified to distinguish legitimate cooperation from buyer cartels are a non-exhaustive list, the text could go further to clarify that the criteria identified at paragraph 319 do not constitute cumulative and mandatory requirements that need to be fulfilled by members of a joint purchasing agreements. This would further explain they are merely an indicative list of factors.

2.14. In addition, further clarity may be brought to the Guidelines by listing the basic criteria that the Commission considers indicates a buyer cartel, to enable a clearer assessment of the distinction. For instance, these could include joint negotiations (collective bargaining) leading to efficiency gains as opposed to individual and separate negotiations where cartel members create a blurred picture of the actually prevailing market conditions, thereby distorting competition.

2.15. Similarly, the Commission could also set out **how** it may take account of the parties' market power when examining behaviour in those cases falling in a grey area between legitimate joint purchasing and buyer cartel conduct - for example, suggesting how it could consider low combined market shares as indicative of a joint purchasing agreement, rather than a buyer cartel in its assessment. This corresponds to the economic rationale that in the absence of any purchasing power of the members of such an arrangement, cartel conduct would not result in any economic benefits for its members, whereas joint purchasing usually does generate efficiencies, also for small buyers.

[3] HGLs, paragraph 350.
[4] Joint Research Centre *Retail alliances in the agricultural and food supply chain* (2020), page 37.
[5] *Horizontal Guidelines on purchasing agreements : delineation between by object and by effect restriction – Final Report*, available at https://ec.europa.eu/competition-policy/system/files/2022-03/kd0722013enn_purchasing_agreements.pdf, paragraph 528; HGLs, paragraph 316.

Pro-competitive effects

2.16. Joint purchasing can have significant pro-competitive effects for the members of the alliance, for competitors that are not purchasing jointly with the members of the alliances as well as for consumers; it can also have pro-competitive effects for suppliers upstream.[6]

2.17. We welcome the Commission's addition to the Guidelines that joint purchasing can lead to '*more variety*' of products for consumers[7]: alliances can provide consumers with access to new products and a wider product choice, including for items that might otherwise not be available at all or only in other regions or Member States.

2.18. Suppliers can especially benefit from joint purchasing where it helps SME retailers establish efficient structures that allow them to offer their customers products at competitive prices and at the same time offer their suppliers an administrative environment and services as efficiently as larger competitors can. To ensure equal treatment of SME purchasers, their joint buying activities should not be judged more strictly than the unilateral conduct of large purchasers.

2.19. Joint purchasing can mitigate restrictions which manufacturers impose on retailers and wholesalers through territorial supply constraints.[8] While these are vertical restrictions, and we welcome the steps taken in the draft Guidelines on Vertical Restraints at paragraph 189, the freedom to source products, particularly FMCG, relies on retailers being able to negotiate effectively and use hard bargaining and enables retailers to provide a wider range of products at lower prices.

2.20. Moreover, joint purchasing can reduce purchase prices not only for the parties to the joint purchasing agreement, but also for their competitors (including SMEs) that do not purchase together with them and for consumers.[9] In addition, joint purchasing can foster innovation by suppliers and manufacturers, because innovative new products face less pricing pressure.[10]

2.21. The Commission in paragraph 337 already acknowledges the fact that it is beneficial for the assessment of the effects of joint purchasing if the buyers are not active on the same selling markets. We invite the Commission to make(particularly in the second sentence) a more general and clear statement to note that overall joint purchasing agreements have pro-competitive effects as long as the parties to the cooperation continue to compete outside the buying arrangement. This could be achieved by using language more similar to that in paragraph 324, which is clearer. We also invite the Commission to consider providing further clarification on how it shall assess the negative market outcomes.[11]

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[6] Joint Research Centre *Retail alliances in the agricultural and food supply chain* (2020), pages 38 and 39.
[7] HGLs, paragraph 313.
[8] Territorial supply constraints make it impossible for buyers to source on a European basis, and manufacturers insist that, under threat of suspending supplies, retailers buy from their designated distributor for that territory and even prohibit retailers from transferring stock from stores in one country to branches in another. The Commission study showed that these practices are widespread and cost Europe's consumers at least €14 billion. For further information see: European Commission *Study on territorial supply constraints in the EU retail sector: Final report* (2020).
[9] Molina, H. *Buyer Alliances in Vertically Related Markets* (2019), page 14.
[10] Joint Research Centre *Retail alliances in the agricultural and food supply chain* (2020), pages 30, 35.
[11] Joint Research Centre *Retail alliances in the agricultural and food supply chain* (2020), pages 37 and 39.

Anti-competitive effects

2.22. The revised section on buying agreements addresses potential pro- and anti-competitive effects of joint purchasing agreements on parties to the cooperation, competitors outside the agreement, suppliers and consumers.

2.23. In relation to **anticompetitive effects to parties to the joint purchasing**, the HGL provide guidance on intra-agreement contractual restrictions,[12] specifically highlighting the risks posed by **exclusive purchasing obligations**. In relation to these, the Guidelines should clarify that such obligations might be ancillary to a joint purchasing agreement (and therefore not restrict competition) because the economies of scale achievable through the cooperation agreement could be negatively impacted if the parties to the buying arrangement can select from the assortment jointly purchased.

2.24. In relation to **risks to competition upstream**, the Commission recognises that these may arise if the joint purchasers have a significant degree of buying power on the purchasing market.[13] We would invite the Commission to specify that anti-competitive effects upstream may arise **only** if the parties have a significant degree of market power. This is because economic theory suggests that pricing pressure on existing assortments exerted by joint purchasing may motivate sellers to innovate, because innovative and new products face less pricing pressure (also from consumers).[14] Furthermore, a moderate level of market concentration also benefits suppliers: they conduct business with a well-managed number of customers that are interested in building reliable supply relationships with effective suppliers rather than adversely affecting their supplier base in a manner that may lead to the gain of additional revenues in the short term.[15]

2.25. A further factor increasing risks upstream is if the joint purchasing occurs vis-à-vis small suppliers: we would invite the Commission to reflect on this assumption. Joint purchasing can bring about volume effects for smaller suppliers which has pro-competitive effects and promote investments and innovation.[16] We believe an acknowledgement of this element should be included in the Guidelines.

2.26. We welcome the clarification that risks to upstream suppliers (if any) may be limited if such suppliers have countervailing seller power given by the fact that e.g. they sell must-have products. This is a key clarification which must be in the final version of the Guidelines. As noted above, in relation to retail and wholesale alliances, who mainly deal with must-have brands suppliers in FMCG, innovation and product variety in the consumer goods segment have increased and new products are launched every year.

2.27. The Guidelines also recognise **risks that joint purchasing agreements can bring for competitors not party to the arrangement**; we agree with the Commission that such risks must always be assessed through an effects analysis.[17] The JRC Report on Retail alliances found no empirical evidence about the presence of the waterbed and spiral effects to the detriment of other retailers and wholesalers and hence alliances have no effect on other retailers and wholesalers[18]

[12] HGLs, paragraph 325.
[13] HGLs, paragraph 331; Competition Commission, *The supply of groceries in the UK market investigation* 30.4.2008, paragraphs 9.5, 9.44, 9.83; Joint Research Centre Retail alliances in the agricultural and food supply chain (2020), page 37.
[14] Joint Research Centre *Retail alliances in the agricultural and food supply chain* (2020), page 30.
[15] Joint Research Centre Retail alliances in the agricultural and food supply chain (2020), page 37.
[16] Joint Research Centre Retail alliances in the agricultural and food supply chain (2020), pages 30, 35.
[17] HGLs, paragraph 334.
[18] Joint Research Centre *Retail alliances in the agricultural and food supply chain* (2020), page 32.

or in fact, as some studies suggest, can have positive effects on other retailers not part of the agreement.[19]

2.28. The Commission finds that joint purchasing agreements are less likely to restrict competition if **members are not competitors** on the same market. We agree with this statement.

2.29. The Commission, however, seems concerned of the risk that a joint purchasing arrangement could discourage investments or innovations by suppliers,[20] emphasising that even when the joint purchasers are not active on the same retail markets, buying cooperation may still lead to restrictive effects if the buyers have 'a significant position' on the purchasing markets (i.e. by harming investment incentives of suppliers).[21]

2.30. In the FMCG sector in general and more specifically in the case of retail and wholesale alliances, we would like to suggest this is an overcautious approach and the risks to upstream investment incentives are overstated. The Commission should consider that these risks rarely materialise. Alliances in the retail and wholesale sector usually negotiate with strong multinational corporations which bring considerable countervailing selling power to the table and the discounts and rebates which are jointly negotiated are insignificant compared with the overall turnover of said suppliers.[22] Profit margins of suppliers have increased over the past decade, leaving them sufficient resources to allocate to innovation if they desire. There is no evidence that the emergence of European retail and wholesale alliances in this period has had any impact on their R&D budgets. We would therefore ask the Commission to amend the Guidelines to reflect the fact that negative effects on innovation rarely occur.

Pass-on of lower prices

2.31. The revised HGL state that pass-on to consumers[23] of lower prices is less likely if:

(a) the members of the joint purchasing agreement have significant market power on the selling market;

(b) the arrangement is based on pure reductions of fixed costs (such as lump-sum payments by suppliers) as they do not provide incentives to expand output.

2.32. In relation to criterion a) above, we believe the Guidelines should clarify that pass-on to consumers of lower prices is less likely if the members of the joint purchasing agreement have significant **joint** market power on the selling market. The market power of the competitors of the members of the joint purchasing agreement should also be considered, as pass-on to consumers of lower prices is more likely in a competitive market.

2.33. On issue b), we would invite the Commission to reconsider this statement. Any fees are generally invoiced as a percentage of sales and not as lump sum payments. It should also be considered that members to a purchasing agreement typically receive instalments and include any lump sum payments, end-of-year reimbursements and non-product related discounts in their pricing models and calculations based on the forecasts which are provided by suppliers and jointly adopted in the course of discussions leading to the agreements.

[19] Molina, H. *Buyer Alliances in Vertically Related Markets* (2019), page 14.
[20] This is already being laid out in HGLs, paragraphs 331 et sq.
[21] HGLs, paragraph 337.
[22] See EuroCommerce submission to the public consultation dated 5 October 2021.
[23] HGLs, paragraphs 335, 347.

2.34. In fact, economic studies on joint purchasing do not make a distinction on pass-on of lower prices between buying agreements involving lump sum payments with other price-related payments.[24] If anything, a more relevant distinction to be drawn would be around whether the payment is product-related or to other services.

2.35. We also invite the Commission to consider guidance of what is permissible, including positive examples of where pass-on is more likely, rather than focussing on potential risks.

Negotiations between joint purchasers and suppliers

2.36. The Guidelines indicate that threats to abandon negotiations or to temporarily stop purchasing by a joint purchasing arrangement are '*typically part of a bargaining process*'[25] and that strong suppliers may use similar threats to stop negotiating – these are negotiating tactics which '*do not usually amount to a restriction of competition by object*'.

2.37. EuroCommerce welcomes this statement. We have long argued in favour of this approach, which has also been endorsed by competition authorities in Europe such as the Commission and the German Bundeskartellamt. As a matter of principle, hard bargaining should be allowed and is an expression of the freedom to contract. Joint purchasing also entails jointly deciding not to purchase a specific product if the commercial relationship is not agreeable for both sides of the negotiation table.

2.38. We also welcome this approach being reflected in the example provided at paragraph 350.

2.39. We would invite the Commission to clarify that this approach does not only apply to threats to abandon negotiations but also in general to any coordinated approach taken by the joint buyers during negotiations: as confirmed by the Whish study, these bargaining tactics are the '*manifestation of collective bargaining, and not something that infringes competition law in and of itself*.'[26]

2.40. The HGL also cover the interplay between sustainability and joint purchasing: an agreement between the members of a buying arrangement to no longer purchase products from certain suppliers because such products are unsustainable '*does not in principle have the object to exclude suppliers producing unsustainable products from the purchasing market*.'

2.41. We would agree with this assessment and reiterate the point made above that joint purchasing also entails jointly deciding not to purchase a specific product if the commercial relationship is not agreeable for both sides of the negotiation table.

Conclusions

EuroCommerce would suggest the following changes to the draft rules:

- Eliminate references to large suppliers at paragraph 313;
- Provide further examples of joint purchasing agreements involving the negotiations of certain terms and conditions;

[24] Molina, H. *Buyer Alliances in Vertically Related Markets* (2019), page 22.
[25] HGLs, paragraph 343.
[26] *Horizontal Guidelines on purchasing agreements : delineation between by object and by effect restriction – Final Report*, available at https://ec.europa.eu/competition-policy/system/files/2022-03/kd0722013enn_purchasing_agreements.pdf, paragraph 244.

- Clarify that the criteria identified at paragraph 319 are non-cumulative and non-exhaustive;
- Include a clear statement that overall joint purchasing agreements have pro-competitive effects as long as the parties to the cooperation continue to compete outside the arrangement;
- Recognise at paragraph 325 that exclusive purchasing obligations may amount to ancillary restraints and hence not infringe Article 101(1) TFEU;
- Include a general statement that risks to competition upstream (and specifically to innovation) arising out of joint purchasing rarely occur, and **only** if the parties have a significant degree of market power;
- Reflect that joint purchasing can have pro-competitive effects even when implemented vis-à-vis smaller suppliers;
- Reconsider the approach on lump-sum payments at paragraph 347;
- Consider the inclusion of examples where pass-on is more likely;
- Recognise at paragraph 350 that any coordinated approach taken by joint buyers during negotiations is a manifestation of collective bargaining and does not usually amount to a restriction of competition.

3. Joint commercialisation

3.1. EuroCommerce welcomes the further clarification provided by the Guidelines on the issue of joint commercialisation and the examples provided that fall into the safe harbour.[27]

3.2. These provisions are essential for retail chains which are not run by a single owner in the form of a capital company, but where the stores are owned by individuals, such as franchisees, in ensuring that they can commonly market products. These are often used to advertise offers, for example, in a weekly paper where savings or discounts are offered across the chain on the same product to effectively reach consumers.

3.3. We would like to invite the Commission to consider whether a further example could be included to cover this type of arrangement and to consider raising the market share threshold above 15% in such situations, to provide legal certainty for such chains that engage in these activities that do not cause consumer harm.

Conclusions

EuroCommerce would suggest the following changes to the draft rules:

- Include further examples to cover the activities of retail chains' joint commercialisation activities in part 5.5;
- Consider raising the 15% market share threshold.

[27] HGLs, paragraphs 398 to 402.

4. Information exchange

4.1. EuroCommerce welcomes the further clarifications provided by the Guidelines on the issue of information exchange and data sharing.

4.2. These provisions are essential for legal certainty and provide effective guidance to make sure that information exchange among companies – including among European retailers and wholesalers – is structured to effectively safeguard compliance with competition law.

4.3. We would like to provide a number of comments on some of the proposed amendments.

Definition of information and examples

4.4. We welcome the clarification provided in relation to the definition of information (covering inter alia raw data and pre-processed data).[28] In relation to raw data, the Guidelines note that 'raw data may be less commercially sensitive than aggregated data': we would ask the Commission to specify that raw data can be less sensitive only if it does not contain any information reducing one competitor's uncertainty about the current or future market behaviour of another competitor or several other competitors.

4.5. We appreciate the list of examples provided by the Commission of commercially sensitive information (such as pricing, pricing intention, current and future production capacity or intended commercial strategy).[29]

4.6. In relation to exchanges of future product characteristic relevant for consumers, the Guidelines could recognise these are particularly sensitive between competing manufacturers in industries where innovation plays a critical role. However, this may not be the case for all sectors.

4.7. Additionally, there is still uncertainty in relation to the approach concerning dual distribution scenarios under the Vertical Block Exemption Regulation ('VBER') entering into force in May 2022.[30]

4.8. Were the Guidelines to apply to some dual distribution scenarios excluded from the application of the VBER, we would note that it may be necessary for a supplier and a buyer to discuss product characteristics relevant for consumers (e.g. whether the consumers will prefer plastic or cardboard packages for the product they purchase). We would invite the Commission to clarify this point and provide an example as suggested above.

4.9. Aggregated customer preferences and information relating to information on new goods are listed as information necessary to improve the production or distribution of the contract goods in the draft Vertical Guidelines, but it is unclear how future product characteristics would be assessed in a dual distribution relationship if the HGL were to play a role in its assessment.

Algorithms

4.10. The Guidelines provide further guidance on the issue of algorithms. The Guidelines explain that data can be exchanged via algorithms,[31] including unilaterally.[32]

[28] HGLs, paragraph 407.
[29] HGLs, paragraph 424.
[30] For further information, see EuroCommerce's response to the consultation on dual distribution dated 18 February 2022.
[31] HGLs, paragraph 408.
[32] HGLs, paragraph 432.

4.11. The Guidelines provide guidance on collusion by algorithms and what conditions need to be present for this to occur,[33] e.g. structural market conditions such as a high frequency of interactions, limited buyer power, the presence of homogenous products or services, and who has access to the algorithmic tool.

4.12. We would appreciate further guidance on algorithmic collusion and how business can successfully prevent it from happening or demonstrate they have taken reasonable steps to prevent it from happening. For example, the Commission could provide guidance on how to ensure that the use of algorithms, where there is no intention to collude, does not expose those sharing to accusations of algorithmic collusion.

Information exchange required by law

4.13. The Guidelines indicate that Article 101 applies to information exchange between competitors even if such exchange is obliged or encouraged under national or EU law.[34]

4.14. We would invite the Commission to reconsider its approach, given the framework being established in the proposed Data Act. This is necessary for business to have legal certainty and to achieve the right balance in such information requests.

4.15. If businesses are obliged to participate in an exchange of information by law, this forces them to establish a flow of information that is usually located between different undertakings, i.e. different organisations, and different parts of an organisation.

4.16. This is driven by governments and regulatory authorities, rather than a desire within the undertaking to exchange information in this way. In addition, these types of wide requests can force businesses to include information in their internal structures which they do not want to have. Where information is exchanged, internal controls and firewalls need to be established to keep such information exchange in line with competition rules and requirements. Where the legal obligation to exchange, the respective information is not limited to what is necessary, it can create a disproportionate burden for businesses and potential liability driven by the government requirement to share data. If legislation or administrative practices do not take these practical consequences into account or do not create adequate safeguards, particularly for the most sensitive procedures, it will fall to businesses to take the risk and compensate for the deficiencies or lack of consideration of this aspect.

Information exchange as part on an acquisition process

4.17. The Guidelines explain that information exchange may also take place in the context of an acquisition process[35] and that any conduct restricting competition that is not directly related to and necessary for the implementation of the acquisition of control is subject to Article 101.

4.18. We would invite the Commission to include guidance taken from the *Altice*[36] and the *Facebook/Whatsapp* decisions[37] to explain and specify what information exchange may be necessary at what stage of the acquisition process.

[33] HGLs, paragraph 418.
[34] HGLs, paragraphs 411, 432 and 435.
[35] HGLs, paragraph 410.
[36] T-425/18 *Altice Europe NV v European Commission* [2021].
[37] Commission Decision Case COMP/M.7217 – *Facebook/Whatsapp*.

Ancillary information exchange

4.19. Section 6 also considers those situations when information exchange is part of another type of horizontal agreement, specifying that if the information exchange does not go beyond what necessary for the legitimate cooperation, it is more likely to meet the criteria of Article 101(3) even if it does restrict competition.[38]

4.20. We welcome this statement but invite the Commission to consider clarifying that what does not exceed what necessary may be implied when the agreement is purely ancillary.

Presumption

4.21. The Guidelines reflect EU case law concerning the presumption that an undertaking which receives unlawful commercially sensitive information from competitors will take that information into account when determining its conduct on the market.

4.22. In relation to this point, to provide businesses with further legal certainty about what to do when at the receiving end of an unlawful exchange, we ask the Commission to consider reflecting recent case law on signalling in the Guidelines and how business can distance themselves from the exchange appropriately.[39]

Data pools

4.23. In our previous contribution to the review of the horizontal rules, EuroCommerce sought additional guidance on the issue of data pools; we hence appreciate the additional guidance that the Commission has provided at paragraph 441 on how to set up a data pool safely without infringing antitrust rules.

Conclusions

EuroCommerce would suggest the following changes to the draft rules:

- Ensure consistency between the HGL and other legislative instruments (e.g. with the vertical rules in relation to dual distribution and with the proposed Data Act);
- Provide further guidance on the issue of algorithms;
- Provide further guidance on the application of Article 101(1) TFEU to information exchanges part of acquisition processes;
- Reflect recent case law on how undertakings can publicly distance themselves after receiving unlawful commercial information.

[38] HGLs, paragraph 409.
[39] See for instance C-373/14 P *Toshiba v Commission* [2016].

5. Sustainability agreements

5.1. Throughout the consultations on competition policy, the EU Green Deal and the HBER, EuroCommerce stressed the need for further clarity in the Guidelines on cooperation between competitors for the purposes of sustainability. We therefore welcome the new section of the Guidelines on sustainability cooperation.

Competition as a drive for innovation to the benefit of sustainability

5.2. We agree with the Commission's general stance that competition, innovation and a well-functioning single market are key elements in building a sustainable economy and invite the Commission and national competition authorities to be vigilant about the risk of greenwashing.[40]

Sustainability goals as part of other types of cooperation

5.3. We appreciate the Commission's recognition that other cooperation agreements can address sustainability goals: joint purchasing agreements can for instance contribute to efficiencies in logistics and packaging and can act as a vehicle for setting environmental standards in the chain.

Agreements outside Article 101(1) and the soft safe harbour

5.4. We also welcome the specific examples identified by the Commission on agreements falling outside the scope of Article 101(1) as well as the newly introduced 'soft safe harbour' for standardisation agreements. It is becoming more common for competitors to develop and jointly use standards, logos, guidelines and private certifications attesting companies' engagement with sustainable practice, the use of specific products and other sustainability elements.

5.5. In relation to the sixth limb of the soft safe harbour test, we would welcome further guidance on the meaning of the 'significant increase in price' and whether this should be assessed on a case-by-case basis.

Sustainability as part of the assessment under Article 101(3)

5.6. The Guidelines also provide guidance on how to consider sustainability benefits as part of an analysis under Article 101(3) to establish whether an agreement restrictive of competition brings about sufficient benefits to consumers, including 'out-of-market' benefits.

5.7. The Guidelines indicate that consumers receive a fair share of the benefits arising out an agreement restrictive of competition when the benefits outweigh the harm, so that the effects on the market are at least neutral.[41]

5.8. We would agree with the approach of the Dutch Competition Authority that full compensation of consumers within the relevant market be not required; instead, an appreciable objective advantage should be sufficient.

5.9. All the given examples provide guidance on agreements involving consumer products. We would welcome further examples of an agreement related to a product for business-to-business use or a component to be included in a business-to-business product.

[40] HGLs, paragraph 544.
[41] HGLs, paragraph 588.

Conclusions

EuroCommerce would suggest the following changes to the draft rules:

- Provide further guidance on the issue of 'significant increase in price' in relation to the 'soft safe harbour';
- Reconsider the approach to the 'fair share' criterion under Article 101(3) TFEU.

6. R&D Block Exemption Regulation

6.1. EuroCommerce welcomes the additional clarity brought by the R&D Block Exemption Regulation ('the R&D Regulation') to encourage undertakings in their research and technological development activities.

6.2. The revised R&D Regulation excludes from its safe harbour research and development agreements where there would remain less than three competing research and development efforts.[42] We would invite the Commission to consider the practical effect of such restriction on actions taken to develop new products that may rely on a specific technology (e.g. to develop plant-based alternatives) and consider further flexibility to ensure this restriction does not deter such investment due to the case-by-case assessment.

6.3. Therefore, we propose the R&D Regulation does not include this change. To date, agreements can be exempted under the R&D Regulation if they are concluded among non-competitors irrespective of the market shares. Such cooperation between non-competitors cannot lead to a reduction of competition. In comparison, if an R&D cooperation agreement is concluded among competitors, the cooperation may lead to a reduction of competing R&D poles. When the market share threshold is applied to this situation, the result is that non-competing R&D poles that are limited to three participants will necessarily be smaller than the other remaining R&D pole. Therefore, by imposing a limitation on the number, it is likely that the remaining R&D pole will become and stay dominant or be the only pole fit enough to survive.

7. Specialisation Block Exemption Regulation

7.1. EuroCommerce welcomes the additional clarity brought by the Specialisation Block Exemption Regulation ('the Specialisation Regulation') to joint production agreements and its further facilitation of cooperation, particularly to arrangements with more than two parties.

7.2. We would welcome further clarification in the recitals on the definition of 'potential competitor'[43] in particular to explain further what 'realistic grounds' means. We suggest keeping the requirement included in Art. 1(1)(n) of the current Specialisation Regulation that potential competition requires that the market entry must be reasonably expectable 'in case of a small but permanent increase in relative prices.'

7.3. The draft does not include that additional requirement and reduces legal certainty. Although we note that the current version provides more certainty for businesses, as 'the small but permanent increase in relative prices' (i.e. 5%-10%) is the key element of the SSNIP test which the

[42] Draft R&D Regulation, Recital 17.
[43] Draft R&D Regulation, Article 1(i)(2).

Commission uses when defining the relevant product market.[44] We would also welcome the introduction of a definition of 'jointly' in the context of production to include any kind of combination and allocation of the parties production resources, appropriate and efficient according to their judgement to further explain its use and to ensure consistency with the HGL, namely by incorporating the equivalent examples in paragraph 204 of the Guidelines.

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[44] Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), paragraph. 17.