



ARD-Liaison Office Brussels

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**ARD statement on the draft revised guidelines on the applicability of
Article 101 TFEU to horizontal co-operation agreements**

ARD thanks the European Commission for the opportunity to comment on the draft revised Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements (Horizontal Guidelines).

The ARD is a joint organisation of nine independent, non-governmental state broadcasting corporations that offer a wide range of programmes on television, radio and the Internet.

The tenth member of the ARD is the foreign broadcaster Deutsche Welle (DW). Together with ZDF, ARD operates Deutschlandradio, the children's channel KiKA and the documentary channel PHOENIX, the online content network FUNK as well as the German-language television culture programme 3sat and the European culture programme ARTE with other partners. ARD and its partners produce a non-commercial programme offering that is characteristic of the German media landscape: at regional, state and national level.

In accordance with their mandate under the State Media Treaty (Medienstaatsvertrag, MStV), the regional public service broadcasters of ARD cooperate, if necessary with ZDF, among other things within the framework of joint purchasing arrangements, especially in the procurement of goods, but also in the area of services for their own operations. These are agreements on horizontal cooperation. The ARD broadcasting organisations therefore regularly apply the Horizontal Guidelines within the framework of risk management under anti-trust law, in particular the concretisations on the exchange of information, purchasing agreements and marketing agreements. They represent an essential orientation aid.

Accordingly, ARD welcomes the further specifications and additions in the revised Horizontal Guidelines, especially for the section on purchasing agreements. ARD further welcomes the addition of examples from the area of digital markets and platforms to the guidelines as well as the explanations on the conditions under which an exchange of information within the framework of data pool agreements is possible.

In order to achieve efficiency gains through joint purchasing, the demand to revise the current market threshold of the Horizontal Guidelines (at para. 329) for the exemption under Article 103 (3) TFEU should be maintained. Because significant efficiency gains are regularly associated with purchasing agreements (cf. para. 344), a greater distance from the general regulation of market shares in the *de minimis notice* (10% for competitors, without efficiency gains playing a role) would be advisable.

The ARD welcomes the statement of the European Broadcasting Union (EBU) on the revised Horizontal Guidelines and supports the suggestions for improvement made there. In particular, the demand to take into account other public interest concerns in addition to the sustainability concept (9th section) in the context of the evaluation of horizontal cooperations is to be classified as particularly urgent from ARD's point of view.

The consideration of non-competitive objectives, such as media diversity and cultural diversity, would lead to considerable facilitation in practice, because it could enable cost-saving cooperation in the administrative area, with the aim of being able to maintain plurality and competition of opinion.

In this context, from ARD's point of view, further public interest concerns, as well as sustainability considerations, are relevant in the examination of Article 101 (3) TFEU and, under certain conditions, should be taken into account as qualitative and quantitative efficiency gains.

Notwithstanding this, for providers of services of general economic interest (SGEI) - including public service broadcasting - there is the particularity that the mechanism of the price reduction incentive (para. 347) is not directly applicable due to the lack of a downstream (sales) market in the classical sense, on which price reductions can be passed on directly. Cooperations that would bring about considerable efficiency gains could therefore be omitted for reasons of prudence under antitrust law, because there are doubts as to whether the conditions for an exemption under Article 101 (3) TFEU are met.

The EBU demand for the introduction of a corresponding clarification for SGEIs in the assessment of efficiency gains is therefore to be fully supported. Pursuant to Section 26 (4) MStV, the public service broadcasters in Germany are entrusted with the provision of SGEIs within the meaning of Article 106 (2) TFEU, insofar as they cooperate in the production and dissemination of offerings in accordance with their mandate. The ARD therefore also pleads for a clarification in the Horizontal Guidelines, since the reduction of the financial requirement for the fulfilment of an SGEI has an effect on the amount of the public charge established for financing and owed by the users (reduction, stabilisation, reduced increase of the charge), so that in this respect the consumers also participate in the efficiency gains.

This circumstance is particularly well illustrated by the example of public service broadcasting in Germany: reductions in expenditure achieved as a result of cooperation between the public service broadcasters are taken into account when the Commission for the Determination of Financial Requirements (KEF) determines the financial requirements, and as a result the broadcasting contribution can be stabilised.

The reference to a corresponding example in the Horizontal Guidelines would, from the point of view of ARD, represent a significant facilitation in practice for cooperation in the area of SGEI and especially in the broadcasting area.