EBU

OPERATING EUROVISION AND EURORADIO

EBU Reply to the Commission's Consultation on Horizontal Cooperation Agreements

1. Introduction

The European Broadcasting Union (EBU) welcomes the opportunity to reply to the European Commission's consultation on horizontal cooperation agreements.

The EBU is the world's leading alliance of Public Service Media (PSM).[1] It is a not-for-profit organization and represents 116 member organizations in 56 countries. PSM organizations are entrusted with the performance of a service of general economic interest, which consists, *inter alia*, of the provision of high-quality content that fulfils the cultural and democratic needs of the society they serve.

PSM organizations vary significantly from one country to another (e.g. in terms of size, level of funding, the public service obligations they are expected to discharge to fulfil their remit, including the extent to which they may have engaged in R&D activities). As a result, PSM organizations have relied on the Horizontal Block Exemption Regulations and the Horizontal Guidelines to varying degrees. For this reason, we thought it would be appropriate to bring to the Commission's attention certain issues that are *common* to EBU Members.

More particularly, we will:

-Make certain broad remarks on the current framework, including the need to update the framework to cover digital markets more specifically;

-Request for guidance on the role of public interest considerations and qualitative efficiencies in assessing whether an agreement may benefit from an exemption under Article 101(3) TFEU;

-Discuss certain issues related to information exchange in general and data sharing in particular; and

-Identify certain issues relating to joint purchasing arrangements which would benefit from clarification (or might be ripe for review).

2. Broad remarks on the current framework

We understand that the Horizontal Block Exemption Regulations will expire on 31 December 2022. The EBU and its Members are of the view that the Commission should not let the Regulations lapse. Both the Regulations and the accompanying Guidelines have provided legal certainty on certain complex areas. Given the increasing use of emerging technologies and their practical applications, issues concerning horizontal cooperation (and, more broadly, competition enforcement) can only be expected to become more complex. However, the Regulations and Guidelines would benefit from a review to reflect technological and legal developments that have marked recent years.

More particularly, the Horizontal Guidelines were published in 2011. Since then, markets have changed dramatically. Though we understand that the purpose of this document is to provide guidance on issues that concern a variety of sectors, we believe that **it needs to be revised**

[1] More information about who we are can be found on our website: https://www.ebu.ch/about

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to take account of the increasing reliance on digital technologies. The Guidelines include numerous examples with a view to clarifying whether horizontal agreements would fall under the general prohibition of Article 101(1) and if so, whether the arrangements concerned would benefit from an exemption under Article 101(3) TFEU. However, these **examples concern the 'bricks-and-mortar' world** (e.g. coach companies, luxury hotels, bottled juice producers) and do not tackle some of the issues which have emerged over the past decade and which may challenge some of the assumptions the Guidelines make. In order to address the legal uncertainty surrounding such issues,[2] **we strongly encourage the Commission to include in the revised Guidelines more guidance on and examples from digital markets**. We will attempt to illustrate this point by making certain remarks on transparency and data sharing agreements (please see Part 4).

Finally, as regards certain issues, such as the basic principles governing the analysis of horizontal cooperation agreements and joint purchasing arrangements, the Horizontal Guidelines refer to the general Guidelines on Article 101(3) TFEU and the Commission's Notice on the definition of relevant markets. Though the Commission has recently announced that it would review the Notice in order to ensure that the exercise of market definition adapts to the challenges posed by digitization,[3] no such announcement has been made regarding the **Guidelines on Article 101(3) TFEU (the General Guidelines)**. The General Guidelines were published 16 years ago and they too **would benefit from a review**. More particularly, the Guidelines could provide guidance on the role of public interest considerations and qualitative efficiencies in the analysis of whether an agreement can benefit from an exemption. In any case, the Horizontal Guidelines should provide guidance on how the Commission would assess horizontal agreements that may promote public policy values (e.g. media pluralism) and generate significant efficiencies in the form of high quality services (e.g. high quality Public Service Media).

3. The role of public interest considerations and qualitative efficiencies in the assessment of horizontal cooperation agreements

a. Public interest considerations and horizontal cooperation

In the section 'Basic Principles for the Assessment under Article 101', the Horizontal Guidelines make certain broad remarks on the conditions under which horizontal cooperation agreements could benefit from an exemption under Article 101(3) TFEU.[4] This section **does not address the issue of how to balance restrictions of competition introduced by an agreement against public policy considerations**. The Horizontal Guidelines refer to the General Guidelines on Article 101(3) TFEU for 'further guidance'.[5] However, this issue is not addressed in the General Guidelines either.

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[2] We understand that a similar request was made by a number of respondents to the Commission's consultation on the Vertical Block Exemption Regulation and Guidelines on Vertical Restraints. European Commission (2019). *Factual summary of the contributions received in the context of the open public consultation on the evaluation of the Vertical Block Exemption Regulation (EU) No 330/2010*. See, for instance, pp. 4 and 6. Retrieved from: https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-5068981/public-consultation_en

[3] Vestager, M. *Defining Markets in a New Age*. Chillin' Competition Conference, Brussels, 9 December 2019. Retrieved from: https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/defining-markets-new-age_en

[4] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C 11/1, paragraphs 20 et seq.

[5] Ibid., paragraph 53

The role of public policy values in competition analysis is an issue that has been discussed extensively in antitrust circles for a number of years. However, we believe that this issue remains unsettled and invite the Commission to take account of the following in reviewing the Guidelines.

In the past, public policy considerations have significantly influenced the outcome of competition decisions.[6] For example, agreements were granted an exemption under Article 101(3) TFEU on the grounds that the anti-competitive concerns they possibly raised could be outweighed by their contribution to employment stabilization[7] or pollution reduction.[8] In *EBU/Eurovision*, the Commission decided that the agreement entitling the EBU Members to participate in a system of joint acquisition of media rights justified an exemption under Article 101(3) TFEU on the basis that it enabled EBU Members 'to provide a broader range of sports programs, including minority sports and sports programs with education, cultural or humanitarian content'.[9]

Gradually, as a result of the shift to a more economics-based approach to competition analysis, antitrust control has mainly focused on *economic efficiency* and the protection of *price competition*, casting aside issues concerning other public interest objectives.

Though we support the view that competition assessments should be guided by robust economic evidence, we are concerned that the more economics-based approach may not have delivered what was expected. In fact, based on empirical findings, many warn that the economics-based approach may have harmed (rather than protected) consumer welfare.[10] We note that broader public policy concerns, such as the need to meet climate goals, are once again on the Commission's agenda for the reform of competition law.[11]

In addition, we are concerned that an excessive focus on efficiency may go against the spirit of the Treaties. More particularly, the Treaty on the Functioning of the European Union includes several provisions that establish that non-economic considerations relating to, *inter alia*,

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[6] For instance, Townley estimates that between 1993 and 1 May 2004, when Regulation 1/2003 on the modernization of the rules implementing Articles 101 and 102 TFEU started to apply, non-economic considerations were decisive in over 32% of formal Commission decisions that were adopted under Article 101(3) TFEU. See Townley, C. (2009). *Article 81 EC and Public Policy*. Oxford: Hart Publishing, 5–6

[7] See, for instance, *Decision of the Commission of the European Communities of 15 December 1975 relating to a procedure under Article 85 of the EEC treaty* (IV/847 – SABA) [1976] OJ L28/19. The Commission's decision was later upheld by the Court. See ECJ, Case 26/76 *Metro-SB Großmärkte GmbH & Co. KG v Commission of the European Communities* [1977] ECR 1875, paragraph 43. The same approach was followed in Commission decision of 12 December 1983, relating to a proceeding under Article 85 of the EEC Treaty [1983] OJ L376/22. The Court upheld the Commission's decision. See ECJ, Case 42/84 *Remia and others v Commission* [1985] ECR 2545, paragraph 42

[8] See, for example, *Philips/Osram* (Case IV/34.252) [1994] OJ L378/37, paragraph 27 and *CECED*, Commission Decision 2000/475/EC [2000] OJ L187/47, paragraphs 47–51 and 55–57

9 *EBU/Eurovision* (Case IV/32.150) Commission decision 93/403/EEC [1993] OJ L179/23, paragraph 62. This decision was subsequently annulled by the Court. NB: The Court's judgment did *not* contest that public interest considerations can be taken into account in an assessment of whether an agreement can be exempted under Article 101(3) TFEU. The Court only took issue with the fact that the Commission did not undertake a sufficiently detailed analysis supporting its finding. See CFI, Joined Cases T-528, 542, 543 & 546/93 *Métropole télévision SA and others v Commission* [1996] ECR II-649

[10] See, for instance, Lina M. Khan & Sadeep Vaheesan (2017). *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*. 11 Harvard Law & Policy Review, 235. For a comprehensive overview of this issue see Marco Colino, S. (2018). *The Antitrust F Word: Fairness Considerations in Competition Law*. CUHK Research Paper No. 2018-09. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3245865&download=yes

[11] In response to questions from members of the European Parliament's committee on industry, research and energy, it was reported that Thierry Breton said on 28 January that European Commission President Ursula von der Leyen and EU lawmakers share the 'wish to make competition rules evolve in light of what was pledged with the Green Deal, the digital transition and with the new geopolitical balance of power'. Mr Breton made similar remarks last week, telling the European Parliament's environmental committee on 3 February that EU industrial policy and antitrust rules must be revised if the European Union's 2050 carbon-neutrality goal is to be met.

environmental and 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. Article 7 TFEU, introduced by the Lisbon Treaty, establishes a general obligation of the EU to 'ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers'. In *Konkurrensverket v TeliaSonera*, the Court ruled that the function of the competition rules is 'to prevent competition from being distorted *to the detriment of the public interest,* individual undertakings and consumers, *thereby ensuring the well-being of the European Union*' [emphasis added].[12]

Against the above background, **we invite the Commission to provide guidance on how public policy values, including cultural diversity and media pluralism, may impact the assessment of whether a horizontal cooperation agreement may be exempted under Article 101(3) TFEU**. **We also encourage the Commission to provide worked examples to support the guidance.**

b. Qualitative efficiencies and horizontal cooperation agreements

Another issue which would deserve more attention in the revised Horizontal Guidelines is the role of qualitative efficiencies in competition assessments.

As already mentioned, in setting out the basic principles for the assessment under Article 101 TFEU, the Horizontal Guidelines refer to the General Guidelines on Article 101(3) TFEU. The latter note that '[i]n a number of cases the main efficiency enhancing potential of the agreement is not cost reduction; it is quality improvements and other efficiencies of a qualitative nature. ***Depending on the individual case such efficiencies may therefore be of equal or greater importance than cost efficiencies***' [emphasis added].[13] We believe that this is particularly relevant to digital (media) markets where competition is mainly driven by non-price parameters, namely quality, variety and innovation.

In our view, neither the General Guidelines nor the Horizontal Guidelines provide sufficient examples to enable undertakings that rely on them to assess how the Commission would examine whether a horizontal cooperation agreement generating qualitative efficiencies is eligible for an exemption under Article 101(3) TFEU. More particularly, the General Guidelines make certain broad remarks on the contribution of R&D and joint production agreements to technological advances and the creation of products with novel features respectively.[14] The Horizontal Guidelines mainly tackle issues specific to the types of agreements they deal with and do not always explain in a detailed manner how qualitative efficiencies would determine the Commission's assessment. For example, the Guidelines note that:

> 'commercialization agreements can give rise to significant efficiency gains. The efficiencies to be taken into account when assessing whether a commercialization agreement fulfils the criteria of Article 101(3) will *depend on the nature of the activity and the parties to the co-operation*. Price fixing can generally not be justified, unless it is indispensable for the integration of other marketing functions, and this integration will generate substantial efficiencies. *Joint distribution can generate significant efficiencies,*

[12] ECJ, Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-527, paragraph 22
[13] Commission Guidelines on the Application of Article 101(3) TFEU [2004] OJ C 101/08, paragraph 69
[14] Ibid., paragraphs 70 and 71

stemming from economies of scale or scope, especially for smaller producers' [emphasis added].[15]

In the broadcasting sector, **partnerships for the provision of media content (e.g. partnerships for the creation of a joint Video-On-Demand (VOD) platform)** could qualify as commercialization agreements. However, the above observations (and the examples included in the relevant section of the Guidelines[16]) are arguably not sufficient to discern how the Commission would conduct its analysis. For example, in the case of a joint VOD platform, an assessment of whether such partnerships qualify for an exemption under Article 101(3) TFEU would need to take the following into account:

-The catalogue offered by a VOD platform involving European providers will be different from that of global players. As a result, a partnership will benefit the consumer through **a wider range of content** to choose from;
-**In the case of a partnership involving PSM organizations**, any anti-competitive effects the platform may create must also be assessed against the improvement of the **quality of the content offered** as a result of the agreement. In addition to a broad range of rules binding audiovisual media service providers, PSM organizations are subject to numerous obligations which tightly define the public service mission and which seek to ensure that the content reaching the national audiences is of the highest possible quality (with independent external mechanisms in place to monitor compliance with the public service mission);
-Such partnerships are also likely to **promote innovation**. For example, they may enable the parties to generate capital that would be invested in new projects, such as **digital applications and interactive services**. That capital could also be invested in the **acquisition of attractive content from independent production houses**; this would further stimulate competition in upstream markets, thereby promoting innovation across the entire value chain. Related to the above, given the commitment of PSM organizations to promote 'European works', the partnership may promote **cultural diversity** (as already mentioned, this is a parameter that the European Commission is expected to 'take into account' in competition assessments under Article 167(4) TFEU);
-It is an established principle that agreements must be assessed in their legal and economic context. As regards the economic context in particular, the restrictive effects on competition that PSM partnerships may generate must be assessed against the strong position of global VOD platforms in EU markets and the financial and technological resources those platforms have at their disposal.[17]

The Horizontal Guidelines mention that '[j]oint distribution can generate significant efficiencies, stemming from economies of scale or scope, especially for smaller producers'.[18] In a similar vein, Ofcom published a report in early 2018 that strongly encouraged PSM organizations to form partnerships with each other and with commercial competitors, including popular

[15] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C 11/1, paragraph 246
[16] The example in paragraph 254 concerns the online world, but would not capture the efficiencies that would arise from he horizontal cooperation agreement we are considering here
[17] In assessing a partnership of the type we are considering here, the Bundeskartellamt stated that while the individual services of both companies are very popular, *the partnership is not likely to harm competition, for the VOD market 'continues to be a rapidly expanding market and has strong competitors such as Amazon, Netflix, iTunes […]*. See Thomson, S. *German watchdog approves ProSiebenSat.1-Discovery JV*. Digital TV, 24 July 2018. Retrieved from: https://www.digitaltveurope.com/2018/07/24/german-watchdog-approves-prosiebensat-1-discovery-jv/
[18] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C 11/1, paragraph 246

platforms, in order 'to give themselves greater scale'.[19] This approach has been reinforced by Ofcom's decision to confirm that the BBC-ITV joint venture Britbox did not distort the market under the BBC's regulatory regime.[20] In the absence of specific guidance, we would invite the Commission to include in the revised Guidelines an example of how it would assess horizontal cooperation agreements for the provision of media content.

4. Information Exchange and Data Sharing

a. Information Exchange

The Horizontal Guidelines are currently based on the presumption that transparency harms competition.[21] For example, the Guidelines note that sharing strategic data 'can give rise to restrictive effects on competition because it reduces the parties' decision-making independence by decreasing their incentives to compete'.[22] However, as recent developments illustrate, on many occasions, transparency may promote rather than hinder competition.

More particularly, following a consultation whose results were published in 2016, **one of the main problems that businesses across the EU identified in their dealings with online platforms is lack of transparency**.[23] This has eventually led to the adoption of the platform-to-business Regulation which lays down that 'business users of online intermediation services should be afforded appropriate transparency […] in order to […] improve the proper functioning of the internal market'.[24] The Regulation imposes on platforms a series of transparency obligations, including the duty to disclose the main parameters determining ranking and whether platforms grant preferential treatment to their own services (or services offered by certain business users) as well as imposing requirements relating to the nature of any access to data relating to a business user (or lack of such access).[25]

It must be noted that **most popular online platforms are vertically (and/or diagonally) integrated**. In many cases, they compete with their business users in downstream and/or upstream markets. Those business users must subscribe to the Terms of Use set by platforms. Subscribing to a platform's Terms of Use almost always involves accepting that the platform in question is entitled to collect and process data concerning, for instance, the interaction between online users and the services offered by businesses through the platform in question.

We understand that the Commission is currently investigating whether Amazon's 'dual role as marketplace and retailer' may amount to an abuse of a dominant position.[26] However, in addition to the competition concerns arising from the disclosure of information by business

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[19] Ofcom (2018). *Public Service Broadcasting in the Digital Age*. Retrieved from: https://www.ofcom.org.uk/__data/assets/pdf_file/0026/111896/Public-service-broadcasting-in-the-digital-age.pdf Ofcom took the view that, in assessing these sorts of partnerships, *'the competition framework needs to be more sensitive to the intensity of global competition'*. See paragraph 4.11

[20] https://www.ofcom.org.uk/__data/assets/pdf_file/0028/167149/statement-britbox-final-determination.pdf

[21] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C 11/1. See, for instance, paragraphs 65 and 78

[22] Ibid., paragraph 61

[23] See European Commission (2016). Synopsis Report. The public consultation on the regulatory environment for platforms, online intermediaries and the collaborative economy**.** Retrieved from: https://ec.europa.eu/digital-single-market/en/news/full-report-results-public-consultation-regulatory-environment-platforms-online-intermediaries

[24] 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*,* Recital (7)

[25] Ibid., Articles 5, 7 and 9 respectively.

[26] European Commission. Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon. Press Release of 17 July 2019. Retrieved from: https://ec.europa.eu/commission/presscorner/detail/en/ip_19_4291

users to vertically integrated platforms that may foreclose competition in adjacent markets, the platform-to-business Regulation introduces a horizontal element in platform-to-business relations. In other words, would the information exchanges between platforms and business users that are based on the requirements set by the platform-to-business Regulation and the platforms' Terms of Use amount to an exchange of 'strategic data' that could raise competition concerns? We believe that this question must be answered in the negative. In fact, we believe **that more transparency on behalf of platforms is needed since there are significant information asymmetries which inhibit competition in digital markets** (NB: To our understanding, an arrangement whereby platform A grants to 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. In this case, the data is the business user's data and such arrangements must fall outside the scope of Article 101(1) TFEU).

Since the platform-to-business Regulation explicitly states that it is without prejudice to the EU rules on competition,[27] we strongly encourage the Commission to address issues such as those described above. More broadly, **in view of the increasingly important role of transparency in protecting competition, it may be appropriate to reverse the presumption on which the Guidelines are currently based, at least in some contexts**. For example, the presumption could be reversed where certain market share thresholds are met.

Related to the above, in an attempt to define 'strategic information' the sharing of which may lead to a collusive outcome, the Guidelines mention that '[g]enerally, information related to prices and quantities is the most strategic, followed by information about costs and demand. However, if companies compete with regard to R&D it is the technology data that may be most strategic for competition'.[28] We believe that, in addition to acknowledging that transparency may benefit competition, **the definition of 'strategic information' should also be reviewed to reflect market and technological developments**. For example, the sharing of 'technology data' (e.g. data concerning the decision-making process of an algorithm) is becoming increasingly relevant in cases where companies do not necessarily compete for R&D. This is reinforced by the requirements of the Platform-to-Business Regulation which requires online intermediation service providers and search engines to disclose the main parameters determining ranking as referred to above.

b. Data Sharing

One pressing matter that illustrates that information exchange may benefit competition is data sharing. It is now widely acknowledged that access to data 'may allow firms to produce better products/services than they could develop based on their "own" data alone. To the extent that data is the "raw material" for quality competition and innovation, enhancing data access will frequently promote, rather than impede competition'.[29] Data sharing (e.g. a data sharing agreement between a PSM organization and a platform which it uses to reach its audiences) may enable PSM to serve audiences with new content tailored to the users' needs and/or improve the functionalities of already existing services.

[27] 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, Article 1(5)
[28] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C 11/1, paragraph 86
[29] Schweitzer, H., Jacques Crémer Yves-Alexandre de Montjoye (2019). *Competition Policy for the Digital Era*, p. 94. Retrieved from: http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf

It is encouraging to see that the Commission intends to provide more guidance in March on how the larger tech companies in particular can share data without infringing EU competition law. We note in particular Margrethe Vestager's comments that tech companies can 'build better products and compete more successfully' if they share the data generated in the digital economy.[30] Whilst the guidance is welcome, and we assume it will be consulted upon, we consider that this sort of guidance should be included in the Horizontal Guidelines too.

Recent initiatives attempt to address issues related to access to data. For example, the platform-to-business Regulation establishes the platforms' obligation to 'include in their terms and conditions a description of the technical and contractual access, or absence thereof, of business users to any personal data or other data, or both, which business users or consumers provide for the use of the [platforms' services] or which are generated through the provision of those services'.[31] The Payment Services Directive (PSD) goes a step further by establishing a data sharing regime in order to ensure interoperability between different services.[32] However, given that **the PSD is a sector-specific instrument** that concerns the provision of financial services, data sharing in other sectors of the (digital) economy is mainly the result of commercial negotiations. This often places PSM at a disadvantage given the imbalance of power between PSM and the larger global platforms with which they are left to negotiate on a purely commercial basis.

The Commission's Communication 'Towards a European data space' and accompanying Staff Working Document on Private Sector Data Sharing lay down that one of the main principles that would ensure fair markets for products and services relying on data is **'shared value creation'**.[33] The Communication further mentions that 'the existing regulatory framework is fit for purpose and that it is too early for horizontal legislation on data sharing in business-to-business relations'.[34] In other words, according to the Commission, the principle of shared value creation is one that should govern contractual arrangements. However, **neither the Communication nor the Staff Working Document provide guidance on the parameters that would determine assessments of data sharing agreements under Article 101 TFEU**.[35]

The Special Advisers' Report acknowledges that data sharing is an understudied topic and that, as a result, more legal clarity on the principles guiding relevant competition analysis is needed.[36] The Report makes three proposals on how to address this matter, namely guidance letters, 'no infringement' decisions under Regulation 1/2003, and the review of the Horizontal

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[30] Vestager, M. *Shaping a Digital Future for Europe*. Symposium on digitalization. The Hague, 3 February 2020. Retrieved from: https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/shaping-digital-future-europe_en

[31] 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, Article 9(1)

[32] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market 2015] OJ L 337, Articles 66 et seq.

[33] Commission Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. *Towards a common European data space*, p. 10. Retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0232&from=EN; Commission Staff Working Document. *Guidance on sharing private sector data in the European data economy* SWD(2018) 125 final, p. 3. Retrieved from: https://ec.europa.eu/digital-single-market/en/news/staff-working-document-guidance-sharing-private-sector-data-european-data-economy

[34] Commission Communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. *Towards a common European data space*, p. 9

[35] The Communication and accompanying Staff Working Document simply mention that '[t]he relevant contractual agreements should address the need to ensure undistorted competition when exchanging commercially sensitive data-. The Staff Working Document further mentions that ['w]here the data sharing is exclusive, it would need to comply with the competition rules'

[36] Schweitzer, H., Jacques Crémer Yves-Alexandre de Montjoye (2019), *supra* n. 29, p. 93

Guidelines.[37] However, **guidance letters and 'no infringement' decisions would concern specific undertakings involved in specific data sharing projects and operating in specific markets. Moreover, building a practice through guidance letters and 'no infringement' decisions would be a lengthy exercise and will not deliver the degree of legal certainty which is required in the present day.**

It must further be noted that **most cases tackling efficiencies arising from data sharing concern the credit and insurance industries**.[38] Though these cases may provide some guidance on certain issues arising from data sharing, they are not sufficient to establish a comprehensive set of principles that would be relevant to a variety of markets, including digital (media) markets.

Finally, **the current framework does not appear to be appropriate to deal with data sharing**. We agree with the Special Advisers' Report, which states that '[w]hile it may seem that the assessment of data sharing or pooling arrangements could be similar to the assessment of R&D agreements or patent pools […], data pools arguably require a distinct assessment. While patents can – to some extent – be categorized as substitutable/non-substitutable and essential/non-essential, and can be categorized by field of use, these categorizations are much more difficult for data [...]'.[39]

In view of the above**, we would strongly encourage the Commission to provide guidance in the revised Guidelines on the conditions under which data sharing arrangements may benefit from an exemption under Article 101(3) TFEU**.

More particularly, we invite the Commission to answer the following questions regarding data sharing:

-What are the main parameters that could lead to the finding that data sharing agreements are **restrictive 'by object'**? In addition to 'traditional' restrictions, such as price-fixing or customer allocation, would other factors determine the Commission's assessment?

-If restrictive 'by effect', what are some **examples of efficiencies** that would render a data sharing agreement eligible for an exemption under Article 101(3) TFEU?

-In addition to restrictions on data access (NB: we understand that the Commission is currently investigating whether the conditions of *access* to an insurance database has had an adverse effect on competition[40]), data sharing arrangements may also impose restrictions on data *use*. Could the Commission provide guidance on the **circumstances under which restrictions on data use may raise competition concerns**?

-According to the Horizontal Guidelines, horizontal cooperation may create restrictive effects on competition 'where it can be expected with a reasonable degree of probability that, due to the agreement, the parties would be able to profitably raise prices or reduce output, product quality, product variety or innovation. This will depend on several factors such as […] the extent

[37] Ibid.
[38] See, for instance, ECJ, Case C-238/05, *Asnef/Equifax* [2006] ECR I-11125; and Commission Regulation (EU) No 267/2010 of 24 March 2010 on the application of Article 101(3) to certain categories of agreements, decisions and concerted practices in the insurance sector [2010] OJ L 83/ 1
[39] Schweitzer, H., Jacques Crémer Yves-Alexandre de Montjoye (2019), *supra* n. 29, p. 96
[40] European Commission. *Antitrust: Commission opens investigation into Insurance Ireland data pooling system*. Press Release of 14 May 2019. Retrieved from: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2509

to which the agreement contributes to the creation, maintenance or strengthening of […] market power or allows the parties to exploit such market power'.[41] **Under what conditions could data sharing arrangements amount to exploitation of market power** (aside from charging 'excessive' prices for the use of data)?

-**To what extent would the size of a data pool determine whether the firms controlling the pool would be subject to an obligation to grant access to data?** For example, the Special Advisers' Report proposes that the obligation to grant access be proportionate to the pool's market power, 'i.e. a group of smaller players pooling their data to gain a competitive advantage should not be forced to give their pooled data to a much larger player'.[42] Related to the above, how would the Commission decide whether a data pool has market power? Would a 'safe harbor' market share be appropriate in these cases (e.g. similar to joint purchasing agreements)? If so, how would the Commission define the relevant market in such cases?

-The Commission's Staff Working Document on Private Sector Data Sharing mentions that data sharing arrangements 'should address the need to ensure undistorted competition when exchanging commercially sensitive data'.[43] What information could be regarded as 'commercially sensitive data' in this context?[44] Similar to the Insurance Block Exemption Regulation, **would arrangements focusing on *aggregated data* have higher chances of being eligible for an exemption under Article 101(3) TFEU**? If so, would this be appropriate to boost competition in data-driven markets?

5. Joint Purchasing

As regards joint purchasing, one topic that would arguably benefit from further clarification concerns joint bidding, especially for media rights (including for example, sports rights).

Though the Guidelines currently tackle joint purchasing, issues specific to joint bidding are not addressed in detail. As pointed out in a number of recent policy reports, digital markets have a natural tendency to concentration. For example, strong network effects and the ability to reap large economies of scale tend to tip the market towards a single winner. Against this background, **horizontal cooperation of smaller players in general and joint bidding arrangements in particular may benefit competition**. This is particularly so in cases where those smaller players would be unable to exercise constraints on the undertaking that controls the valuable input concerned *absent the cooperation*.

We believe that the following issues would benefit from clarification (or review) in an updated version of the Guidelines.

The Guidelines acknowledge that joint purchasing agreements should not be condemned at the outset on the grounds that they might involve price-fixing. More particularly, they mention that an effects-based assessment is required where the involved firms 'agree on the purchasing prices the joint purchasing arrangement may pay to its suppliers for the products

[41] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C 11/1, paragraph 28
[42] Schweitzer, H., Jacques Crémer Yves-Alexandre de Montjoye (2019), *supra* n. 29, p. 97
[43] Commission Staff Working Document. *Guidance on sharing private sector data in the European data economy* SWD(2018) 125 final, p. 3
[44] It is difficult to extract from the Guidelines information about what could qualify as 'commercially sensitive information' that could raise competition concerns in the case of a data sharing agreement. See, for instance, paragraphs 70 and 107

subject to the supply contract'.[45] However, **the Commission does not provide further guidance on the parameters that could determine the assessment of joint bidding arrangements under Article 101 TFEU**.

As regards the assessment of market power, the Commission sets a 'safe harbor' threshold. More particularly, the Guidelines state that 'it is unlikely that market power exists if the parties to the joint purchasing arrangement have a combined market share not exceeding 15% on the purchasing market or markets as well as a combined market share not exceeding 15% on the selling market or markets. In any event, if the parties' combined market shares do not exceed 15% on both the purchasing and the selling market or markets, it is likely that the conditions of Article 101(3) are fulfilled'.[46] However, in practice, the Commission and the CJEU have accepted joint purchasing arrangements between competitors creating a buying group with a much higher market share.[47] Given the relevant decisional practice and the degree of market power that firms acting as sellers occupy in digital (media) markets, we believe that **the above thresholds should be revisited**.

Finally, we would encourage the Commission to update the section on joint purchasing with **more examples from digital (content) markets, including in particular examples on joint bidding (such as for media rights)**.

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[45] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C 11/1, paragraph 206
[46] Ibid., paragraph 208
[47] See, for instance, ECJ, Case C-250/92, *Gøttrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvareselskab AmbA* [1994] ECR I-5641; Case IV/35522, *Michelin*/Continental, Commission Notice pursuant to Article 19(3) of Council Regulation n°17 OJ [1996] C 236/9); Commission Notice concerning the alliance between *Lufthansa, SAS and United Airlines*, [2002] OJ C181/2