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Main Theses on Reform of Horizontal Guidelines (HGL), Specialisation Block Exemption Regulation (SBER) & Research & Development Block Exemption Regulation (R&D BER)

1. General comments

a) Introduction

- The SBER and the R&D BER as well as the guidelines on horizontal cooperation agreements (hereafter "Horizontal Guidelines") have generally contributed to a lot of legal certainty.
- However, some concepts were not practical, and markets and needs for collaboration have evolved as well. So it is the right time to revise and amend the Horizontal Guidelines to reflect new market dynamics and challenges resulting from an increasing focus on digitalization and other new forms of cooperation.

b) Digitalization and new forms of cooperation

- Over the past few years, **markets** have significantly changed and have become fast-moving due to **increasing digitalization**. This requires companies to act more agile and **to cooperate more** often to create innovative digital solutions for customers, to ensure interoperability and to create new technological standards all to the benefit of customers.
- European companies need to engage in **cooperations, form part of ecosystems and participate in creative formats** such as e.g. hackathons in order to foster innovation. This is all the more necessary if they want to catch up in the **digital field** which is currently largely dominated by big US and Asian incumbents.
- In addition, there is a strong **need on developing sustainable solutions** to reduce the environmental impact. This might equally require companies to cooperate to obtain better and faster solutions, thus fostering the 'Green' agenda of the new Commission.
- The Horizontal Guidelines should take these new market dynamics and new forms of cooperations into account. They should recognize that such cooperations and initiatives are **generally pro-competitive**.
- Since companies that fear to end up violating antitrust rules may be hesitant to engage in such cooperations or joint initiatives, **the Horizontal Guidelines should be revised in order to provide a higher degree of legal certainty to participants of such cooperations**, e.g. by:
    - Introducing **de minimis rules/safe harbors for digital markets** and more focused theories of harm. The current discussions about antitrust in the digital business often focus on the usual tech giants, but there are several cooperations

between smaller companies/companies with small to moderate market shares which are pro-competitive and should not be subject to the same restrictive rules.
  - Creating a **general safe harbor/exemption for nascent digital markets**, e.g. for a period of 5 years.
  - Allow specific types of cooperation, particularly those aimed at reducing the environmental impact of products or solutions, and take **sustainability effects** into account more prominently in any assessment.

c) <u>Removal of the "potential competitor" notion</u>

- The Horizontal Guidelines defines the term "competitors" as including both actual and potential competitors (para. 10 Horizontal Guidelines).
- The notion of "potential competitor" in the current Horizontal Guidelines (para. 10) is outdated and **creates significant legal uncertainty** with companies.
- The definition is too broad and **not practicable and prevented pro-competitive collaboration**. It is extremely difficult for companies to assess whether or not a company is a potential competitor in particular if the other company has not publicly announced its entry plans.
- Specifically, when dealing with **cooperations in the digital field, the notion of "potential competitor" is not suitable because** any company may be a potential competitor in the digital business field should it decide to write the respective code tomorrow.
- The revised Horizontal Guidelines should therefore clarify that the term "**competitor" only includes actual competitors** and **potential** competitors who publicly have announced their **immediate market entry**.

d) <u>Extension of the "single economic entity" notion to jointly controlled joint ventures</u>

- Para. 11 of the current Horizontal Guidelines states that "*when a company exercises decisive influence over another company, they form a single economic entity and, hence, are part of the same undertaking*".
- It is currently **unclear whether this also covers jointly controlled joint ventures**, in addition to solely controlled subsidiaries.
- Not extending the scope of the single economic unit notion would **contradict with the treatment of jointly controlled joint ventures in other areas**:
  - Under the EUMR, a company acquires joint control over another company if it has the possibility of exercising decisive influence over that company.
  - Under the EURM, the turnover of a jointly controlled joint venture is attributed pro rata to the parent companies when determining jurisdiction.
  - There is a presumption of parental liability for cartel infringements by joint ventures.
- The revised Horizontal Guidelines should explicitly **extend the notion of single economic unit to the relationship between a parent company and its jointly controlled joint venture** to align the treatment of jointly controlled joint ventures across the different areas of EU competition law.

e) Extension of the "customer welfare" notion

- The **notion of customer welfare** should be **extended** to include non-price factors. When considering the potential pro-competitive effects and/or benefits for customers, the Horizontal Guidelines should explicitly recognize that considerations such as improvements in sustainability, infrastructure, standards, innovation (and other factors) are equally important than prices.

f) Stronger focus on inter-brand instead of intra-brand competition

- EU Competition law protects equally strong inter-brand and intra-brand competition.
- In line with the US antitrust rules, the EU should adapt its policy and clarify that **restrictions of intra-brand competition can only harm competition in case inter-brand competition is not sufficiently strong**.
- The revised Horizontal Guidelines should also clarify that any restrictions or any information exchange between a manufacturer that sells its products directly in competition with its distributors relates to intra-brand competition only and therefore is not covered by the Horizontal Guidelines but only by the VBER.

2. Information exchange

a) No "per se" violation

- The Commission qualifies the exchange of commercially sensitive information between competitors outside the scope of a legitimate cooperation agreement as a restriction by object.
- This practice has created **significant uncertainty** within companies. Many companies have adopted an **extremely restrictive approach** to information exchange out of fear of ending up in the "restriction by object box".
- Information exchange outside the scope of a cartel agreement **should not be a "by object" restriction** but the actual effects of the exchange on competition should be assessed.
- Any abstract assessment of information exchange can lead to prohibiting information exchange which is neutral for competition or even pro-competitive.
- The revised Horizontal Guidelines should explicitly foresee that the **Commission should assess the actual effects of the information exchange on competition**.

b) Dual Distribution

- In the context of dual distribution, information flows originating in the vertical context may create certain horizontal effects. The current **lack of clear guidance** could deter companies from sharing information with their business partners in the vertical supply chain, which may ultimately cause inefficiencies to the detriment of the customer.

- The revised Horizontal Guidelines should, in dual distribution scenarios, **put the focus explicitly on the vertical relationship** and **give detailed guidance** with regard to the sharing of information.

c) Information exchange in the digital field

- The **uncertainty** on the side of companies in terms of what kind of information they can exchange becomes **even greater when dealing with these new cooperation models in the digital field** such as ecosystems, etc.
- These cooperation models indispensably require a certain degree of information exchange and data sharing between the participating companies. However, companies are **currently lacking clear guidance** with regard to the boundaries of **permitted information exchange** in such cooperations.
- Especially with regard to **ecosystems**, it should be clarified that exchange and collaboration within the ecosystem (**intra-ecosystem**) can only harm competition in case there is not sufficient competition from other ecosystems (**inter-ecosystem**).
- While companies see an increasing need to cooperate in the digital field, they often do not know which information they are allowed to share.
- The Horizontal Guidelines should provide **clear guidance on information exchange within these new cooperation models**.

d) Data pooling

- There is an **increasing need for data pooling** in the digital world both between competitors and non-competitors.
- Data pooling provides companies with a larger data base for analytical purposes and allows to improve their solutions and to create innovative solutions to the benefit of customers.
- The Horizontal Guidelines should explicitly recognize that data pooling is **pro-competitive** and therefore generally allowed between competitors and non-competitors.

e) Data access

- Any obligation to grant **access to data should be limited to clear Art 102 TFEU cases**.
- Also a **clear distinction between B2C- and B2B-relationships with regard to data access**, in particular when involving companies with market power, should be included in the Horizontal Guidelines.
- B2C relationships function very different from relationships in the B2B field. For B2B, customers are significantly more sensitive about their data, often insist on retaining

control over their data and have sufficient countervailing power. Therefore, a **less restrictive and more flexible approach is needed in the B2B area**.

3. Joint bidding

- The Horizontal Guidelines should clarify that joint bidding between competitors can **only create potential restrictive effects** on competition if a cooperation between competitors **effectively leads to a reduction of the number of bids** (i.e. competitive pressure) that a customer could receive. This should be the relevant test for assessing potential effects on competition of joint bidding between competitors.
- In that respect, the guidelines should clarify that it is sufficient if e.g. only one of two competitors cannot submit an offer independently. In such a case, a cooperation between those competitors will not reduce the number of bids (i.e., competitive pressure) on the market as one of the two competitors would not have the ability to bid alone at all. On the contrary, the consortia might be able to submit a lower or technically better bid as a result of the cooperation between competitors to the benefit of the customer.
- The Horizontal Guidelines should **provide practice relevant examples** of the reasons which can justify the creation of a consortium between competitors.

4. Joint purchasing

a) Increase of "safe harbor" thresholds

- Para. 208 of the Horizontal Guidelines states that purchasing agreements between competitors are unlikely to give rise to restrictive effects on competition if the parties to the joint purchasing arrangement have a combined market share not exceeding 15% on both the purchasing and the selling markets.
- These **thresholds** are too low and should be **increased to 30% (in line with the Vert BER)**.

b) Distinction between purchasing agreements for "direct" and "indirect" material

- The Horizontal Guidelines currently **do not distinguish between purchasing agreements in relation to so-called "direct" and "indirect" material**.
- Direct material refers to products and services that are a direct input into the final product that a company sells on the selling market.
- Indirect material refers materials that are used in a production process and which are no direct input to the end products sold by a party on the selling market (e.g. office supplies, travel agency services for employees, etc.).
- A **purchasing agreement** in relation to **indirect material** can have **no impact on competition on the selling markets**. Yet, the Horizontal Guidelines foresee the same

safe harbor threshold and guidance on individual assessment as for purchasing agreements for direct material.

- The Horizontal Guidelines should **explicitly clarify** that purchasing agreements relating to "indirect" material both between competitors and non-competitors on the selling markets are **unlikely to have potential restrictive effects** on competition **in the absence of a dominant position** by the purchasing alliance on the purchasing markets.

5. Joint R&D agreements

a) Need to clarify that joint R&D agreements are generally pro-competitive and simplification

- The strict requirements and the complexity of the R&D BER create great **uncertainty** with companies as to whether or not their joint R&D agreement is compliant with EU competition rules. This is particularly true in cases where the joint R&D agreement **does not strictly comply with all requirements of the R&D BER**, especially those included in Art. 3 R&D BER.
- The revised R&D BER and the Horizontal Guidelines should **emphasize** more strongly the generally **pro-competitive nature** of joint R&D cooperations and provide clearer guidance to ensure that companies have sufficient comfort entering into a pro-competitive R&D cooperation even if not all requirements in Art. 3 of the R&D BER are strictly included.
- Overall, the **R&D BER should be simplified**. It is a extremely complex BER which makes it difficult to get the desired legal certainty.

b) Mere paid for R&D should be treated under subcontracting notice

- Sometimes companies consider outsourcing &RD to another company. This might have several reasons such as e.g. lack of expertise, lack of capacity, etc. The idea when outsourcing R&D is usually similar to a subcontracting whereby the subcontractor produces the products and supply them exclusively to the principal. Therefore, it should be treated under the subcontracting notice.
- Currently it would qualify as "paid for research" and thereby fall within the scope of the R&D BER.

c) Removal of the reference to market shares on technology markets

- The current R&D BER foresees that joint R&D agreements between competing companies are block exempted if the combined market share of those companies does not exceed 25% on the relevant product and technology market. A similar provision applies for non-competing companies after 7 years as from exploitation.
- The **notion of technology market is not practical and does not add any value for the assessment**. In practice, it is highly unlikely that companies have a clear overview

of all competing technologies. It is even more unlikely that companies can calculate their market share on such a market.

- In view of the fact that R&D agreements are generally pro-competitive, the revised R&D BER **should** remove the reference to technology markets and **limit the market share threshold to relevant product markets**.

d) Increase of market share thresholds for R&D cooperations

- Joint R&D agreements are generally pro-competitive and drive innovation.
- The revised R&D BER should therefore **increase the market share thresholds** from 25 % to **at least 30%**.

e) Removal of the requirements in Art. 3.2 R&D BER

- Art. 3.2 R&D BER requires that any joint R&D agreements must **explicitly stipulate full access rights** to the results for the purposes of further research and development.
- This requirement is **unnecessary and has a chilling effect on innovation.** The pro-competitiveness of a joint R&D does not depend on future R&D efforts which are based on the results. Future competition on innovation is sufficiently safeguarded **by the prohibition of Art. 5 (a)** to include a hardcore restriction that limits the parties R&D activities in the same or a connected field after the completion of the joint R&D.
- The revised R&D BER should therefore remove the strict and **unnecessary and unpractical requirements** in Art. 3.2.

f) Removal of the obligation to license background IP

- **Article 3.3** of the R&D BER states that companies must stipulate in their R&D agreement that each party must be granted **access to any pre-existing know-how** (i.e. background know-how) of the other party, if this is indispensable for the exploitation of the results.
- This requirement has a **significant cooling-off effect** on the willingness of companies to engage in joint R&D which would eventually be contravening the spirit of the R&D BER.
- In times where innovation is crucial, the revised R&D BER should remove this requirement and **leave it to the parties to the joint R&D agreement to stipulate access rights to background IP and rights of exploitation**.

g) Introduction of the possibility to restrict passive sales in any type of specialization

- Under the R&D BER, companies can generally agree by way of specialization that only one company will distribute the products while the other company will not distribute the products at all (i.e., will not sell the products actively and passively).

- Companies can also agree to allocate exclusively certain territories or customers to each other by way of specialisation.
- In that scenario, which is less far-reaching than the previous scenario in which only one company distributes the products, companies can only restrict active sales into the respective territory or to the respective customers allocated exclusively to the other company.
- There is an **obvious contradiction** between these two scenarios.
- Companies might have a **legitimate interest to limit active and passive sales** of the products by the other party of the R&D agreement. For example, companies might want to prevent that any party to the joint R&D cooperation sells the products to their competitors. Under the current rules, this would be a hardcore restriction.
- In view of the overall pro-competitive nature of R&D cooperations, the revised R&D BER should **remove this restriction on limiting passive sales** and should **allow** the parties of an R&D cooperation to **impose restrictions on each other under any form of specialization** in the context of exploitation.

6. Specialisation

- The antitrust assessment of specialisation agreements continues to be very difficult. Further guidance should be provided to **increase legal certainty**.
- The **market share threshold should be increased to 30%** to allow also larger companies and thus their consumers to benefit from the efficiencies generated by a specialisation. This is especially important where European companies lack the scale of non-European players (e.g. digital field) to enhance their competitiveness and create a level playing field.
- Also mere joint production or supply agreements between competitors should be exempted.