

EU competition rules on horizontal agreements between companies

*Contribution by Zalando SE to the European Commission's Public Consultation,
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1. Introduction

Zalando welcomes the European Commission's announcement that it will evaluate and review the EU competition rules on horizontal agreements between undertakings. It is a timely opportunity to adapt this framework to today's digital era.

Zalando (www.corporate.zalando.com) is a European online retailer for fashion (clothing, footwear and accessories) and beauty products, complementing its retail activities with a marketplace element ("Partner Program"). Founded in Berlin in 2008, we serve today around 30 million active customers in 17 European markets. Our assortment of over 450,000 products ranges from world famous brands to local labels.

Given Zalando's business model, the two Commission Regulations referred to as the "Horizontal Block Exemption Regulations" (HBERs) (ie. Regulation 1217/2010 for research and development agreements and Regulation 1218/2010 for specialisation agreements) are not of particular relevance to our daily business. For this reason, we cannot comment on the past application of HBERs. However, we wish through this note to contribute ideas to the review of HBERs and the related Commission's Guidelines for the assessment of horizontal cooperation agreements.

We believe Zalando's openness to sharing information with partners, within legal boundaries, is a differentiating factor compared to other online platforms or offline retailers in the fashion market. At operational level, it also creates possibilities to improve our services to customers, from speeding up reassortment when a product is in high demand to improving logistics and delivery time, while reducing our operational costs, to mention just a few examples.

The review of the HBERs and the Guidelines constitutes a tremendous opportunity to support Europe's data economy. The existing HBERs do not cover this topic in detail, while the existing Horizontal Guidelines provide some orientation on the sharing of information/data. However, none reflect its growing importance for the digital economy.

The value of this particular sector had been estimated to grow steadily over the past years up to 4% of the EU's GDP in 2020¹. Creating a legal framework for the voluntary exchange of information between companies for legitimate business reasons would - in our views - significantly enable further growth and innovation in the sector.

¹ See European Commission's projections, 2017:
<https://ec.europa.eu/digital-single-market/en/policies/building-european-data-economy>

2. Data sharing between businesses is the “new oil” of the 2020s

a) Data sharing is crucial for innovation in Europe

Data is often referred to as the “new oil”. Such a metaphor captures the role of data in enabling technological change and new business models, but it is also misleading. Whereas the value of a certain amount of oil reduces when it is shared (ie. divided), data can gain value if it is shared in the context of specific and voluntarily-chosen business relationships.

For instance, certain data about customer preferences might be used to provide an enhanced customer experience, guarantee product availability or facilitate logistics. However, such intrinsic value might only be extracted if the relevant data is shared between the different entities involved.

In this decade, companies will thrive in the digital economy if they are able to create innovation based on data. In this context, a sound EU-wide legal framework for voluntary data sharing would create the right conditions for new business models to come to fruition. This is all the more important as European companies will - in our views - rather be dependent on cooperation, in contrast to the world largest tech conglomerates which have the ability to create value from data in-house or through acquisitions.

b) E-commerce will further grow with data sharing

For Zalando and other e-commerce companies, the relevance of data and data sharing is extremely high. Data is an important asset in e-commerce, as companies compete on convenience, inspiration and personalisation.

In the fashion sector, this translates into the ability to spot trends (so as to adapt marketing or to ramp up stocks in advance for faster delivery), to create inspirational features or events (for brand image or to increase footfall in shops or visitor numbers online), as well as to personalise product offers to individual preferences (style, price, etc) amid millions of potential looks. These features are data-driven.

When sharing information with brands, Zalando faces the special characteristic of being a “hybrid platform”. This means that we collect different types of data and that we have different forms of relationships in which data could be shared (vertical and horizontal). With certain brands, we have a vertical relationship (i.e. a brand being supplier for our wholesale business) as well as a horizontal relationship (e.g. if this brand is also active as a partner in our marketplace business, which is operated on the same platform).

Today’s legal framework (i.e. the applicable antitrust and data privacy rules) enables data sharing to a certain extent, although it generally lacks legal clarity and certainty (see sections 3 and 4 below). From a competition law perspective, certain information must not be shared between actors, in particular sensitive data that might impact the economic decisions of competing companies. This makes it all the more important for companies in Europe to have clear rules to rely on when determining the extent to which data sharing is admissible.

3. Existing competition rules suffer from lack of legal clarity

While the legal basis of Art. 101 TFEU is clear in principle, its application to information exchange and data sharing in particular is not. This results in a slower business development to the detriment of consumers on the one hand and at the expense of lost business opportunities on the other hand.

Today, there are indeed no clear rules setting out what types of data can be shared, and in which context. Antitrust and privacy rules apply, guidelines accompanying the VBER and HBERs (as well as publications by national authorities) provide some guidance for data-sharing, but this corpus remains limited. This unclarity also stems from the fact that time (i.e. the “freshness” of data shared) plays a decisive role in determining what data can be shared. However it is not clear if these old rules are still adequate in today’s fast-paced data economy, characterised by the rapid emergence of new business models and new technology. In addition, the existing case law is not coherent across the EU. For instance, the German authorities rather chose a narrower interpretation than other Member States authorities in the past.

Under the current legal framework, it is up to companies to self-assess whether their proposed data sharing is in line with applicable laws. This is done on a case-by-case basis, necessarily resulting in diverging interpretation and leading to an administrative and resource burden. In addition, this results in lost opportunities to launch new forms of data cooperation, as undertakings wish to be in line with applicable laws amid uncertainty and therefore implement a careful legal approach.

This situation is neither adequate for companies, big or small, interested in today’s opportunities offered by data sharing, nor for the emergence of innovative business models. In particular, it puts European companies wishing to stay compliant with EU antitrust laws (i.e. when compliance is the number one priority) at a competitive disadvantage compared to companies that do not follow such a principle.

Lastly, the existing situation is not future-proof, as today’s lack of legal clarity creates hurdles for start-ups on the path to scaling up, especially in the case of business models whose customer base is bigger than one given national market. The EU can therefore add real added value for Europe’s digital economy by clarifying rules for voluntary business-to-business data sharing.

4. Suggestions for reducing legal uncertainty

The revision of competition rules on horizontal agreements between companies (HBERs and the Guidelines) is a timely opportunity to define clear rules for voluntary business-to-business data sharing.

It is so central to Europe's digital economy and to European companies that - in our views - clear rules and their uniform application across Europe would best be addressed in the form of a new block exemption regulation. The alternative of solely updating the existing HBERs and the Commission's Guidelines is too limited in scope to generally address today's challenges.

Such a new "Block Exemption Regulation for Data Cooperation" could clearly define under which conditions certain data sharing agreements are exempted, covering both the vertical as well as the horizontal dimension. It could strike a balance between prohibiting the sharing of information that might lead to anti-competitive results while at the same time enabling European companies to fully capture the chances of the data economy.

It would also remedy the current incoherent application of competition law by national competition authorities in the particular field of information exchange.

This new Regulation could be accompanied by the creation of new Guidelines or the revision of the existing ones. In any event, a new legal framework for voluntary business-to-business data sharing should take into account the following three dimensions:

- **Horizontal level:** The Horizontal Guidelines include a section on information exchange (para. 86 et seq.), but examples focus on companies from the "old economy" (petrol stations, hotels, tourist offices, etc) based on practices common in the 2000s and 2010s. These examples could be updated to include data cooperation between digital business models. In general, the Guidelines should be adapted to the realities of today's digital companies.
- **Vertical level:** Different competition rules apply to data-sharing in a vertical relationship (e.g. between a producer and a retailer), and the Commission's Vertical Guidelines and the VBER cover information exchange in the context of retail price maintenance.
- **Holistic perspective:** Equally importantly, digital disruption changes the former clear separation between horizontal and vertical relations in the case of integrated business models. This is of particular relevance for hybrid platforms. A future proof EU legal framework should also explore this dimension.

5. Conclusion

To conclude, a holistic competition law approach for voluntary business-to-business data sharing, addressing horizontal as well as vertical aspects, e.g. through a new BER for data cooperation, would support the further growth of Europe's data economy. Its legal nature (a Regulation) would provide legal clarity, create a safe harbour to rely on and incentivise companies to engage in new data-based innovative concepts.

6. Annex - Contact details

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