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COMMISSION STAFF WORKING DOCUMENT
STAKEHOLDER CONSULTATION - SYNOPSIS REPORT

Accompanying the document

COMMISSION NOTICE

on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union that arise in individual cases (guidance letters)

{C(2022) 6925 final}

1. Introduction

This document summarises the responses submitted to the call for evidence and the consultation on the draft text of a revised Commission Notice on informal guidance for novel or unresolved questions in individual cases concerning Articles 101 (agreements distorting competition) and 102 (abuse of dominant market position) of the Treaty on the Functioning of the European Union (“TFEU”) (hereinafter, the “Notice”), which ran from 24 May to 21 June 2022. Such informal guidance is issued in the form of ‘guidance letters’.

The aim of the call for evidence and of the stakeholder consultation on the draft text was to gather the views of interested citizens and stakeholders on the proposed revision of the Notice, originally adopted in 2004. The main purpose of the revision is to update the criteria in the Notice to enable the Commission to provide informal guidance to businesses in line with recital 38 of Regulation 1/2003, in cases which raise genuinely uncertain questions about the application of antitrust rules. This will enable the Commission to use this tool more flexibly, to the benefit of businesses and to increase legal certainty.

2. Results of the stakeholder consultation on the call for evidence and the draft text of the Notice

The Commission received 21 submissions from a series of different stakeholders, namely trade associations (10), national public authorities (4), law firms or lawyer associations (4), private companies (2) and a non-governmental association (1).

In general, the feedback was positive, both on the decision by the Commission to amend the existing Notice and on the specific changes introduced in the proposed draft text of the Notice. A series of amendments were suggested to further improve the text and to clarify the procedure to be followed by the Commission upon receipt of a request for guidance.

It was observed that the thresholds for the criteria for providing guidance were still too high. In particular, it was suggested that the condition of the interest in issuing a letter if guidance would provide “significant added value” should be replaced with the old text (where the guidance letter was conditional on being “useful”), or at least the adjective “significant” should be deleted. Moreover, the obligation for the applicant to provide its own preliminary self-assessment with the request for guidance was seen as too burdensome and it was suggested that it should be removed, or alternatively made less strict. The same comment was made on the obligation for the applicant to provide full and exhaustive information on all points relevant for an informed evaluation of the questions raised. One stakeholder also suggested that there should be a possibility for the applicant to remain anonymous for the purposes of requesting guidance from the Commission.

Some national public authorities requested to mention explicitly sustainability as one of the Commission priorities to be taken into account in the evaluation of the interest in providing guidance.

Some stakeholders observed that the Notice should include clear timelines for the Commission to respond to applicants, concerning both the course of action that the Commission intends to take with regard to the request for guidance and the adoption of the guidance letter. Some stakeholders suggested that the Commission should also introduce a possibility for informal discussions before a potential applicant submits a request for guidance. Moreover, some stakeholders proposed that the Commission should indicate its reasons in case it decides not to provide guidance in specific cases.

The role of third parties in the process was also questioned by some stakeholders. It was stated that third parties should play a larger role in the Commission's assessment, rather than only in exceptional circumstances as suggested in the draft Notice. Conversely, others stated that additional safeguards on applicants' procedural rights and professional secrecy should be made more explicit, particularly where customers and competitors of an applicant for guidance are consulted. One stakeholder suggested that it should also be possible for companies which are not parties to an agreement or practice to also request guidance from the Commission.

Two stakeholders also requested that any temporal limitation of the guidance provided should be removed: guidance letters should not be restricted by any limited time period and should apply during the lifetime of the agreement or the unilateral practice subject only, for example, to changes in the underlying facts or significant market developments.

With respect to the relationship with national competition authorities of the Member States, a stakeholder submitted that a guidance letter should have a guiding effect on national competition authorities in order to ensure a uniform application of competition law within the EU. More cooperation between the Commission and the national competition authorities could be necessary, to avoid divergent approaches in single cases. Another stakeholder questioned that Commission guidance letters should not be binding on the national competition authorities.

Finally, some stakeholders observed that guidance letters should be binding for the Commission itself so that the Commission could not initiate proceedings on the same agreement/practice, as long as the underlying legal framework and facts have not changed.

3. Inclusion of the stakeholder consultation results in the legal proposal

Stakeholder views have been analysed and taken into account, to the extent possible, in particular regarding the obligations for applicants to provide information, the possibility of informal contacts before the formal submission of the application, the protection of the confidentiality of the information submitted and the timing of the Commission's first reply to the application.

The criteria to be fulfilled for providing guidance have been further clarified. In particular, a request may be accepted if the guidance will provide added value with respect to legal certainty. Moreover, the Notice will include the clarification that the obligation by the

applicants to provide in the application (i) a preliminary assessment of the application of Articles 101 or 102 TFEU to the novel or unresolved question, and (ii) a declaration of the absence of ongoing proceedings regarding the same question, is limited to the best of the applicants' abilities or knowledge, to take into account objective difficulties that may arise for certain applicants. However, the Commission considers that it would not be appropriate to enable applicants to remain anonymous vis-à-vis the Commission for the purposes of requesting guidance, as the Commission needs to be aware of which party is seeking guidance to ensure an accurate understanding of the circumstances at hand. Anonymity could be ensured by the Commission when a guidance letter is published or if the Commission were to contact third parties during the processing of the request. In addition, as for the explicit mentioning of sustainability as one of the Commission priorities to be taken into account in the evaluation of the interest in providing guidance, the Commission considers that sustainability is in fact an existing, horizontal Commission priority and that it is therefore not necessary to reference this in the context of the Notice.

The Notice will explicitly include the possibility for undertakings to contact the services of the Directorate-General for Competition of the European Commission, prior to the formal submission of the request for a guidance letter, to discuss their intended submission informally and in confidence.

The Notice will also include the clarification that, in the exceptional cases where third parties will be involved, those parties will be contacted by the Commission in full respect of the confidentiality of the information provided by the applicants. However, the Notice will not introduce the possibility for companies, which are not parties to the agreement or practice to request guidance for the Commission as only the parties directly involved have grounds for asking for guidance.

In addition, the Notice will clarify that the Commission will use its best efforts to inform the applicants of the course of action that it intends to take with regard to the request for guidance within a reasonable time, depending on the circumstances of each case. In case the Commission decides not to issue a guidance letter, the applicants will be informed in writing.

Finally, in order to protect legitimate expectations and to safeguard legal certainty, the Notice clarifies that in principle the Commission will not impose any fines on applicants, with respect to any action taken by them relying in good faith on the Commission's guidance letter.