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Draft Revised Horizontal Block Exemption Regulations (HBER) and Draft Guidelines on Horizontal Cooperation Agreements

Commission Consultation

Horizontal cooperation between companies is becoming increasingly important to generate efficiencies and benefits to society and provide customers with complete solutions and product portfolio offerings, in particular, in changing industries such as those impacted by digitalisation. However, there is a real risk that companies will refrain from cooperating if they have undue fear that they could be infringing competition rules considering that normally it will be for the parties themselves to assess whether collaboration is compatible with competition laws. A self-assessment on the question of whether a particular form of cooperation between competitors is admissible is always associated with a high degree of legal uncertainty. To avoid such legal uncertainty - and a potential underinvestment - the Commission should give clear and detailed guidance, including examples, when, and under what conditions, cooperation is acceptable.

The existing HBER and the Guidelines have been providing a valuable guidance for undertakings on the application of Article 101 TFEU, and, at large, the proposed changes to the current regime enhance legal certainty, making the guidance even more valuable. Small and large businesses have made, and are expected to make, frequent use of this regime.

As the Commission sets out, society has undergone significant changes since the previous rules were adopted, which have impacted commercial relations and will continue to have a substantial impact in the coming years. Joint research and development projects or collaborations through industry platforms play an important role. Platforms offer new opportunities and business models for companies on both the provider and customer side. Businesses are adapting to technological innovations and to changing consumer trends. This requires flexibility in the organisation of both horizontal and vertical relationships, and we appreciate that the newly proposed rules reflect these developments even though there could be more guidance on how cooperation agreements could foster the resilience of the EU economy.

First and foremost, competition policy should ensure that effective competition between companies exists and is maintained. It should ensure that companies that are investing, for example in sustainable technologies and innovation, can expect to reap the benefits thereof without fear of being unfairly crowded out by cartels or dominant companies abusing their position. Competition is the driving force of achieving results considering that it incentivises companies to be competitive and to achieve results in the most efficient manner. As such, competition policy complements specific legislative actions to reach other policy objectives and we are pleased that the Commission plays an important role in this debate. It is important to engage with other national and international authorities to ensure a consistent approach across the EU, and globally.



BusinessEurope commends the Commission for having published draft revised block exemption regulations and draft revised guidelines which complement and clarify the existing guidance. We appreciate the increased guidance on the different types of cooperation to determine whether an agreement could be problematic, ancillary restraints, or restrictions by effect. We support proposed amendments that would provide more legal certainty to companies which are cooperating in R&D and specialisation agreements. We similarly support the clarifications on the types of joint purchasing arrangements that are acceptable and the additional guidance regarding commercialisation agreements and information exchange.

We particularly support the proposal for a specific section on bidding consortia that clarifies the assessment of consortia agreements. Current strict competition law enforcement in some Member States can discourage such collaboration between companies because of the legal uncertainty and risk of breaching the rules so the additional guidance is very welcome and will ultimately also be beneficial to potential customers who will receive better offers. Having said this, one of the key challenges when dealing with consortia, is the assessment of whether an undertaking will be capable of completing the contract on its own (its capabilities etc.). It is important to avoid an overly theoretical and unrealistic approach in assessing the companies' capabilities. For example, hypothetical assumptions of companies hiring additional personnel or buying additional machinery, are often not commercially viable. We would welcome more guidance on this. Another point of concern is that in a consortium there will almost always be a discussion on issues such as pricing, which automatically prompts a "by object" assessment. In the draft guidelines the "by object" approach also seems to be prevailing, so we suggest that the guidelines move away from this more theoretically based approach to a "by effect" approach. Lastly, with respect to the assessment by the companies of whether the real competition would be for the entire contract or for parts of contracts, companies which have good reasons to believe that the real competition is for the entire contract (allowing for a reasonable margin of error), will often have commercially sound reasons to engage in a consortium, such as the need to diversify risk, reserving capacity for existing customers, etc.

Regarding the proposed new chapter on sustainability agreements, BusinessEurope appreciates the proposed clarifications and broadening of which types of cooperation for sustainability reasons are permitted and how these should be assessed under the current competition law framework, including indication of the circumstances in which sustainability projects will likely fall outside the scope of Article 101(1) TFEU, rather than defaulting to a detailed Article 101(3) TFEU analysis. In particular, the assessment of sustainability agreements under Article 101(3) TFEU should build on and develop existing precedent that acknowledges that the harm caused to competition should be weighed against the benefits, including environmental and sustainability benefits, brought to the wider society and move away from a narrow assessment that only takes account of the benefits that accrue specifically to consumers in the market where the co-operation is taking place. This approach to Article 101(3) TFEU is necessary under the Treaty in light of the environmental and other sustainability-related obligations therein. In this context, BusinessEurope believes that collective benefits that accrue to parties that are not (also) consumers within the relevant market should also count towards the fair share for consumers. With respect to the sustainability standardisation agreements, we suggest deleting or further clarify the condition that a sustainability standard should not lead to a significant increase in price considering that this condition is vague and difficult to apply in practice.



BusinessEurope encourages the Commission to take a pragmatic approach to business' needs, so that the final HBER and Guidelines will provide the necessary legal certainty for the diverse and hybrid situations in which businesses may find themselves in the future. To stay ahead with the dynamic reality, the Guidelines should be continuously amended or supplemented when authorities' decision-making practices and case law becomes a source of legal uncertainty. The Commission should set a clear standard for enforcement as regards certain practices at national level to avoid fragmentation. Divergent approaches in some Member States would give rise to doubts about the validity of the agreements concerned, thereby increasing legal uncertainty, something that the new HBER and Guidelines effectively seek to reduce. Although the guidelines clearly say that the fact that public authorities encourage a horizontal cooperation agreement does not mean that it is permissible under Article 101 TFEU, we suggest that the Commission will refrain from imposing any sanctions in such circumstances.
