Expert Paper

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Horizontal cooperation

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Introduction

The purpose of this paper is to contribute to the public consultation on EU competition rules on horizontal agreements. Since the online questionnaire made available by the European Commission is somewhat limited in the scope of its questions, we wish to respond in the present format.

I. Geopolitical challenges and global competitiveness

The European Commission's consultation and ERT's response relate specifically to horizontal cooperation. However, ERT submits that EU competition rules (including the rules on horizontal cooperation) should be considered in their wider context.

We live in an increasingly interconnected world of platforms and ecosystems and we face sustainability challenges. Collaboration between firms (including competitors) is increasing for reasons of interoperability, achieving environmental or regulatory targets and developing technological as well as other standards. European companies need to cooperate with one another on a broader basis, to ensure they are able to meet the challenges of today, prepare for the opportunities of tomorrow and to ensure that European products and services are at the forefront of digitisation and environmental and social responsibility.

All of these are justified and necessary activities but concerns about EU competition law can disincentivise companies from participating in horizontal cooperation. Whilst certain digital and environmental projects and initiatives have already begun, the ERT sees a need for a more open-minded and encouraging approach to such forms of co-operation coupled with greater legal certainty to address concerns about compatibility with EU and Member State competition laws.

Today, companies face rising geopolitical tensions – ranging from the adoption of protectionist measures in domestic law to competitive distortions as a result of extra-territorial enforcement (including within the EU). Global markets are going through a fourth industrial revolution, in which digitisation drastically changes the competitive landscape by enhancing the products offered to consumers. At the same time, the environmental and climate agenda has become part of our collective consciousness, often requiring companies to change the way they operate.

Implemented well, competition policy can stimulate economic growth and competitiveness but, if not, it can have a chilling effect on investment, economic development and advances in sustainability. The latest ERT Benchmarking Report demonstrates that it is crucial that the European Commission and the EU Member States support the competitiveness of the EU and European businesses.[1]

Building on the recent ERT paper on "Competing at Scale",[2] ERT submits that DG Competition should take a broader and more forward-looking approach – one which takes into account the global competition environment, technological developments and sustainability goals.

Guidance is required in order to (i) give firms confidence and clarity as to the legitimacy of any horizontal co-operation they may undertake – so that EU companies are not held back compared to their global competitors; and (ii) to promote horizontal cooperation that brings benefits to consumers. This review is an excellent opportunity to provide such guidance.

[1] ERT Benchmarking Report 2019 "European Competitiveness and Industry" on https://ert.eu/documents/benchmarking-report-2019/. See also the ERT Position Paper on Industrial Strategy "Turning Global Challenges into Opportunities – A Chance for Europe to Lead" on https://ert.eu/documents/turning-global-challenges-into-opportunities/. Both publications were released in December 2019.

[2] ERT Position Paper on "Competing at Scale – EU Competition Policy fit for the Global Stage", released in October 2019, on https://ert.eu/documents/competing-at-scale-eu-competition-policy-fit-for-the-global-stage/.

II. Need for increased clarity and updated procedures

A. Need for more clarity between the use of Articles 101(1) and 101(3)

For horizontal agreements that are considered to produce pro-competitive effects, the analysis of those effects should not occur only under Article 101(3) TFEU, but from the outset under Article 101(1).

If the scope for assessment of pro-competitive effects were limited to Article 101(3), there would be a risk of over-enforcement against pro-competitive agreements. Moreover, this is consistent with the different standards of proof that are applied to Articles 101(1) and 101(3).

Articles 101(1) and 101(3) are concerned with different types of efficiencies – see for example the MasterCard case which suggests that price, quantity and quality must be assessed under Article 101(1), while "*economic advantages in the form of an improvement of production or distribution, or of promotion of technical or economic progress*" can only be considered in the context of Article 101(3)).

B. Procedure

1. Increase in legal certainty

Horizontal cooperation between companies can improve European competitiveness in a changing geopolitical environment by delivering projects that increase consumer welfare. However, without greater legal certainty, companies face increased time and costs (e.g. self-assessment) and horizontal cooperation is more likely to be discontinued (for fear of breaching an unclear set of rules). Currently, as described above, the Horizontal Guidelines and BERs do not provide sufficient guidance for self-assessment (and there is little in the way of useful precedents from EU or Member States courts and Competition Authorities).

Therefore, as a first step, ERT submits that clearer guidance from the European Commission is required in the Horizontal Guidelines and the BERs through substantial review of the current framework to adapt it to new challenges.

In addition, there is another way for the Commission to provide guidance in situations which appeared grey but were ultimately considered not to violate EU competition law. There are cases when the Commission conducts dawn raids, or even opens a formal investigation, in which the case team does not issue a formal Statement of Objections. In such cases, it is almost impossible to understand the factual and legal background behind the initial suspicions and final administrative closure. It is understandable that the Commission may not wish to make public its reasoning in each case, but the new version of the Horizontal Guidelines could reflect better these useful precedents.

2. Guidance

The European Commission should look into how best to provide informal guidance on a case-by-case basis. The European Commission could encourage companies to make more use of informal (confidential) meetings to examine specific questions relating to horizontal cooperation projects. In this respect, the European Commission should formally and confidentially commit that it will not use the information provided for any purpose other than offering informal guidance.

ERT would also encourage greater use of the Commission's Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (2004/C 101/06).

On the procedural front, we believe that a quick way to ask the European Commission for further guidance is needed in cases where the self-assessment of the parties does not provide sufficient legal certainty as to the compliance of the co-operation with Article 101 and the cooperation is of a certain magnitude and complexity. These cases would require a rapid response from the European Commission, as any ex post review may have major consequences for the concerned company.

In order for such a guidance process to be effective and manageable from the European Commission's perspective, the process should be voluntary, and limited in terms of both the information provided and the time taken for issuance of the guidance – in order to not to delay projects disproportionally. It is not desirable to create a burdensome, lengthy process, especially in fast-moving markets.

III. Horizontal guidelines (HG)

A. Definition of markets and market power

In a rapidly evolving environment, traditional definitions of markets and market power are not always adapted (for example digital markets or innovative services markets). In the context of the review of the Commission's Notice on the Definition of Relevant Market for the purposes of Community competition law (97/C 372/03), the Horizontal Guidelines should also be updated. Indeed, for horizontal co-operation agreements involving digital or innovative services markets a broader assessment should be considered which takes into account both actual and potential competition – and the overall impact of regulatory intervention on competitiveness of European companies.

B. Definition of a "potential competitor" (§ 10)

The definition of "potential competitor" [3] is too broad, **not practicable and prevents pro-competitive collaboration**. It is extremely difficult for companies to assess whether or not a company is a potential competitor, particularly where the other company has not publicly announced its entry plans.

Specifically, when dealing with **co-operation in the digital field, the notion of "potential competitor" is not suitable because** any company might be a potential competitor in a digital business (for example, a company could be considered a competitor from the moment it decides to write a new piece of code).

The revised HG should include reference to notions/criteria such as the ability and the publicly announced **<u>intention to enter immediately</u>** the market (i.e. actual evidence that the potential competitor has seriously considered entry and not rejected it).

The guidelines should also clarify whether the term "competitors" only refers to competition on the downstream selling market or whether "competitors" can also refer to competition on the upstream purchasing market. It is clear that where competitors compete downstream, upstream positions are relevant, however, the HG should give some guidance where companies do not compete on the selling (downstream) market, but exchange information or engage in wider forms of co-operation, including joint buying, on purchasing (upstream) markets.

[3] The European Commission indicates that "*The term 'competitors' as used in these guidelines includes both actual and potential competitors. Two companies are treated as actual competitors if they are active on the same relevant market. A company is treated as a potential competitor of another company if, in the absence of the agreement, in case of a small but permanent increase in relative prices it is likely that the former, within a short period of time, would undertake the necessary additional investments or other necessary switching costs to enter the relevant market on which the latter is active. This assessment has to be based on realistic grounds, the mere theoretical possibility to enter a market is not sufficient. (see Commission Notice on the definition of the relevant market for the purposes of Community competition law) (4) ('the Market Definition Notice')."* (§ 10)

C. Application of Article 101(1) to arrangements between parent companies and their jointly controlled subsidiaries

The Horizontal Guidelines[4] are expressly consistent with the "single economic entity doctrine"[5], insofar as they set out how the doctrine applies to cooperation among *solely controlled subsidiaries* and their parent companies, i.e. Article 101(1) does not apply to such arrangements. By contrast, the Guidelines are silent with regard to the circumstances in which Article 101(1) applies to arrangements among parent companies and their *jointly controlled subsidiaries.*

This creates considerable uncertainty for companies with large-scale global operations managed through jointly- and solely-controlled subsidiaries – which seems particularly perverse where the establishment of a joint venture (or the acquisition of joint control) has been subject to merger control (and approved). The consequence is that companies will often assume (conservatively) that the single economic entity doctrine does not apply when engaging with their jointly-controlled subsidiaries. These companies may then be unable to realise fully the synergies of operating as an integrated group, potentially causing harm to their customers and even the wider economy. This unfortunate outcome is generally considered an artificial interpretation of EU competition law.[6]

We submit that it would provide companies with the certainty that they require, if similar wording – as in the draft 2010 Horizontal Guidelines – is included in the revised Horizontal Guidelines, together with an explicit acknowledgement that "decisive influence" for this purpose is based on the EU Merger Regulation (EUMR) definition. We also submit that this change would not represent a material shift in policy for the Commission, but rather is supported by the commercial and economic reality of joint ventures and legal considerations as further explained in Appendix A: "Note on the application of Article 101(1) to arrangements between parents and their jointly-controlled subsidiaries".

D. Joint bidding

Joint or consortium bidding between competitors is common in many markets. It serves as mechanism to reduce risk on larger transactions, e.g. syndicated lending and insurance. It also meets customer requirements for a single offer in response to products supplied by different companies (either directly or through a single distributor appointed by the customer). **The European Commission should provide additional guidance** (including clarifying that joint bidding arrangements may benefit from the rules and exemptions on joint production and specialisation if the intended cooperation qualifies as such[7]) under the following considerations:

- The fact that at least one of the teaming companies cannot submit a bid alone. From a customer perspective this will lead to an additional bid, or at least an improved bid.
- The fact that a customer/authority may request companies to bid jointly (i.e. where joint bidding is a pre-requisite)
- The fact that a company may be unwilling or unable to finance a development on its own in view of the costs or commercial risks at stake
- The impact of transparency with the customers (identity of the bidders and nature of the joint bid)
- Joint bidding by potential (but not actual) competitors

In such cases, joint bidding should not be problematic unless there is evidence that competition is actually restricted and that it leads to a less favourable offer to the customer/authority in terms of price, innovation, or timing (e.g. if in the former case no other choices remain or, in the latter, there is an agreement not to enter).

[4] See para. 11
[5] Case C-73/95 – *P. Viho v Commission*, paras. 16-18.
[6] This approach is at odds with both EU competition law as it relates to parent company liability (as the actions of a jointly-controlled subsidiary are attributed to its parents) and accepted principles of EU merger control.
[7] See judgment by the Danish Supreme Court of 27 November 2019 – *Konkurrencerådet mod Eurostar Danmark A/S og GVCO A/S*

E. Information exchange

The assessment of the anti-competitive nature of information exchanges under the existing guidelines has become too broad. The current approach places many legitimate information exchanges at risk of a "by object" infringement finding (even though the current Horizontal Guidelines only attribute a "by object" infringement to exchanges of future price or quantity information). The broad interpretation of the current Guidelines has created significant legal uncertainty and caused companies to take an unduly restrictive approach, which in turn has limited the scope for legitimate collaborations.

Information exchanges should not automatically be regarded as "by object" infringements. Rather, the competitive assessment should be based on the facts of each case and consider the legal and economic context in which the information exchange occurs. Information exchanges outside the framework of a selling cartel should not be qualified as restrictions by object but should systematically be assessed based on their actual effects on competition, in particular through the analysis of intended efficiencies. Indeed, an abstract assessment can lead to prohibiting information exchanges which are neutral for competition or even pro-competitive and makes risk assessment even more problematic for undertakings.

Furthermore, best market practices for horizontal co-operation agreements where the exchange of competitively sensitive information is indispensable should be explicitly recognised as compatible with Article 101 (for example, clean teams or black box arrangements).

In addition, the European Commission should clarify in what circumstances information exchanges relating to upstream buying markets could be considered as potentially anti-competitive where the companies are not competitors on any downstream selling markets.

F. Joint Purchasing

The analytical framework for the assessment of joint purchasing agreements under the current HG draws a distinction based on whether or not the participants are competitors.

The HG focus on the possible restrictive effects of joint purchasing on the downstream (selling) market is not helpful when co-operating buyers do not compete downstream.

The HG provide little insight as to whether there is any need to analyse whether upstream (purchasing) cooperations can lead to potential anticompetitive behaviour (either by object or effect), where the companies are not "competitors" on the downstream selling market.

Guidance on this issue is welcome, not only in relation to joint buying, but also cooperations and exchanges of information falling short of joint buying, including:

- Buying alliances,
- Aggregating volumes to reach discount levels but purchasing separately,
- Approaching a supplier jointly to align on purchasing prices and terms & conditions,
- Non-aggregated benchmarking of supplier costs.

In addition, the HG should reconsider relevant market share thresholds. The current threshold of a 15 % market share threshold on the upstream market is far too conservative where there is no competition on the downstream markets, and the Commission should consider increasing this to 30%. market.

Where companies do compete on the downstream selling market, the HG should clarify in which circumstances the communality of buying cost of competing companies could create potential negative effects on the downstream selling market. We would expect this would only occur when the proportion of aligned common costs is high.

G. Sustainability co-operation

As part of the ambitious plan launched by the European Commission with the Green Deal, we consider that horizontal agreements aimed at reducing ecological footprint (carbon emissions, recyclability and recycling, reduction of plastics and composting projects), to gain efficiencies and to share infrastructure and costs, as well as agree standards to reduce environmental impact and to increase the commercial viability of environmental projects, should be considered pro-competitive.

Commissioner Vestager stated that the "*review of the rules and guidelines on horizontal cooperation could be another opportunity to explain how companies can put together sustainability agreements without harming competition*"[8].

Accordingly, we propose to include sustainability criteria among the key elements in the assessment of the legal and economic context (under Article 101(1) and as cumulative criteria in point 1.2.2 of the Guidelines when evaluating horizontal cooperation under Article 101(3).

H. Reviewing the notion of "consumer welfare"

When considering benefits to consumers, there needs to be a shift away from focusing only or mainly on prices. Considerations such as improvements in sustainability, infrastructure, standards, innovation (and other factors) are often equally critical to consumer welfare.

There is an urgent need for complementary assessment tools for measuring consumer impact.

Traditional economic analysis focusing on pricing is no longer sufficient. The Commission should develop analysis for measuring the positive impact of e.g. sustainability and other welfare-enhancing initiatives.

I. Considering efficiency of horizontal cooperation vs unilateral approach

In the context of digitalisation, global competitive dynamics and growing need for collaboration to realistically meet climate change goals, European companies need to co-operate in a flexible way to achieve the scale necessary to develop innovative products and services as well as to invest in sustainability projects. Long gone are the days in which such goals could be achieved unilaterally – even for large European companies. Currently, any industry-wide co-operation project which involves several competitors is likely to raise suspicions of anti-competitive conduct. For companies to ensure adequate competition law compliance, they need to respect burdensome and time-consuming processes which tend to discourage co-operation.

When analysing industry-wide forms of horizontal co-operation, the European Commission may ask companies to demonstrate why cooperation between several industry actors is necessary. However, the analysis should go beyond whether individual companies can or cannot undertake a project unilaterally, and look at whether the cooperation will:

- achieve minimum viable scale in order to compete at global level and create new digital or environmental propositions for consumers and industry.
- achieve minimum viable scale for sustainability projects (e.g. recycling)
- allow the emergence of alternatives to the ecosystems created by global digital actors and enhance competition and innovation to digital markets,
- promote alternatives to carbon-intensive ways of doing business
- drive improvements in consumer welfare, environmental protection, delivering a single market.

ERT submits that industry-wide horizontal co-operation which leads to any of the positive outcomes outlined above should be considered as pro-competitive and compatible with Article 101 (1) TFEU.

[8] Speech to GCLC Conference on Sustainability, 24/10/2019.

J. Standardisation agreements

Standardisation agreements, i.e. standards development, takes place globally across sectors and industries. This has two key implications:

- Participants in standardisation agreements are not necessarily competitors, as they are often active in different markets. It would therefore be useful for the Horizontal Guidelines to acknowledge this by adding the following sentence to paragraph 264 (bold text is new):

  > "264. **Participants in standardisation are not necessarily competitors**. Standard-setting can, however**, in specific circumstances where competitors are involved,** also give rise to restrictive effects on competition by potentially restricting price competition and limiting or controlling production, markets, innovation or technical development. This can occur through three main channels, namely reduction in price competition, foreclosure of innovative technologies and exclusion of, or discrimination against, certain companies by prevention of effective access to the standard."

- The Guidelines need to be applied in an open-ended manner in order to accommodate different sectors and different standards development language, without imposing regulatory burdens on EU standardisation that do not apply elsewhere in the world. The ability to comply with different competition law standards in different jurisdictions is also a challenge to industry. We suggest addressing these issues by adding the following paragraph after paragraph 269 (bold text is new):

  > **"269bis. In analysing standardisation agreements, the characteristics of the sector and industry, and the global nature of the standardisation where applicable, shall be taken into consideration."**

Secondly, EU legal terminology refers to "standardisation" or "standards development."[9] Standards, especially in the information technology sector, are "developed" in "standards development organisations". They are not "set" in "standard-setting organisations." We therefore encourage the Commission to harmonise the language in the Guidelines with other EU law by using the terms "develop" or "development" throughout the Standardisation rather than the words "set" or "setting". This would be done by replacing references to "set/setting" with "develop/developing" throughout Chapter 7 of the guidelines.

Thirdly, the effects analysed in a case-by-case analysis of a standardisation agreement could be different depending on the targeted market. Effects are analysed over the product and service markets, the technology and the standards markets and the conclusion of this analysis is usually different. Therefore, clear rules on how to balance the effects affecting the different markets would be welcome in the Guidelines.

Finally, digitalisation and sustainability objectives make cross-sectorial standardisation agreements key for European stakeholders to be able to compete in the digital and global economy, especially in areas where interoperability is needed such as digital services and data-related cooperation projects as well as creating sufficient mass for increased sustainability projects such as recycling. APIs for data sharing and data access, algorithms models and packaging and environmental information should be considered in the review of the Guidelines.

[9] See eg Regulation 1025/2012, Article 7 ("increased **development of standards**"); Article 10 ("**development** of voluntary European standards with the aim of facilitating compatibility"); Article 19 ("**development** of European or international standards for goods and technologies"); and in numerous other places throughout this Regulation.

K. Collaboration within ecosystems, platforms and data

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. In the digital field, an ecosystem typically comprises a platform which operates in the cloud and, for that reason, needs a cloud infrastructure. On this platform, various applications or offerings may generate a specific customer benefit or meet a specific customer demand. The very same company could be simultaneously competitor, supplier and customer, e.g. the infrastructure provider is supplier to the platform operator but could also offer applications for the platform and, ultimately, offer its own platform to customers.

The following considerations should be taken into account in the competitive assessment:

- These cooperation models invariably require a certain degree of information exchange and data sharing between the participating companies. For example, they have to exchange technical data to make the applications interoperable with the platform and other applications. The various ecosystem participants might also want to pool and share data in order to offer value add solutions to the customers. In all these cases, companies **currently lack clear guidance** with regard to the boundaries of **permitted information exchange** in such cooperations.
- The Horizontal Guidelines should **generally encourage such cooperation** models as they create customer benefits and allow European companies to team up to compete effectively in the digital era.
- 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**).
- There is also an increasing **need for data pooling** and **data sharing** in the digital world both between competitors and non-competitors. Data pooling provides companies with a larger data base for analytical purposes and allows them to improve solutions and to develop innovative ways of operating 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.
- With respect to **data access,** the Horizontal Guidelines should clarify that any obligation to grant access to data should be limited to clear Article 102 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 insisting 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.

IV. Block Exemption Regulation (BER)

A. Rationale for keeping BERs and for expanding scope

Although the European Commission's various guidelines also provide a degree of legal certainty, BER's are different as they are legal instruments with the force of law. Companies are therefore more comfortable in tailoring their business operations to fall within the safe harbours provided by BERs as opposed to relying on self-assessments based on guidelines.

In the current geopolitical climate, legal certainty from the European Commission and Member States is paramount to enable European companies to become more innovative and successfully and sustainably meet the opportunities and challenges of the (digital and climate change) era in an agile manner.

Legal certainty increases the confidence of an undertaking to engage in certain business practices and focus on their core operations without costly and time-consuming self-assessments. Whilst the Horizontal Guidelines and Article 101(3) guidelines do provide some direction, they are generic instruments with a broad application – not only in terms of the subject matter covered but also in terms of the industries to which they apply. Legal certainty extends to confidence that Member States will apply antitrust rules in a similar manner as the European Commission and as between one another. It is critical that Member States stop issuing divergent decisions such as has been seen in respect of vertical agreements.

B. Where to expand?

ERT believes the current framework is still workable for companies to analyse whether horizontal agreements comply with the requirements needed to fall under Article 101(3) or are anticompetitive. However, the current rules do not give sufficient flexibility [to European companies to facilitate procompetitive cooperations that are nowadays key to compete in a world characterised by globalisation and digitalisation. The following proposals try to achieve that outcome.

Introducing tailored BERs using realistic market share thresholds (and when more pertinent, other adapted conditions) to provide guidance to undertakings wishing to cooperate, including: standardisation and sustainability agreements; joint production and commercialization agreements: data pooling/data access and infrastructure sharing agreements and updated BER for research & development, would reflect the new competitive dynamics within existing markets and foster innovation,

For example, in the context of container liner shipping, the Consortia BER (which is an industry specific specialization block exemption) has recently been recommended by the Commission for renewal. It is an instrument that has greatly assisted the container liner shipping industry to conclude operational cooperation and respond in an agile manner to fluctuations in supply and demand, thereby creating efficiencies to the benefit of customers, more so than any other document, and is internationally accepted as the standard for agreements in the container liner shipping sector.

1. <u>Industry wide cooperation agreements</u>

In addition to changes in the Guidelines suggested above, and given the growing importance of having more flexibility to work on industry wide initiatives requiring a necessary scale, new block exemption regulation shall be considered for horizontal cooperation agreements where parties seek to become competitive in the context of global actors or to be efficient in sustainability projects. For instance, industry wide initiatives in the markets where the only alternatives are proprietary solutions of global digital companies or where companies need to agree to achieve a wide interoperability or to meet environment objectives. Such cooperation agreements exert clearly net procompetitive effects and are key in the context for Europe to become a leader in the digital economy and to fight against climate change, key objectives of the new Commission.

2. Standardisation and sustainability agreements

In addition to changes in the Guidelines suggested above, and given the growing importance of sustainability and standardisation to everyday life we believe that both standardisation and sustainability agreements should be considered as topics for new block exemption regulations where they exert clearly net procompetitive effects [for instance, standardisation agreements in markets where the only alternative are proprietary solutions of dominant companies or where companies need to agree on certain standards to meet environment objectives]. Besides their procompetitive effects, both kind of agreements are key in the process of digitalisation and the fight against climate change, key objectives of the new Commission.

3. Specialisation BER

While we appreciate the current Specialisation BER and the underlying rationale of efficiencies which are the result of specialisation, we would propose to raise the combined market share threshold from 20% to 30% to allow larger companies to benefit from the efficiencies generated by specialisation. As of today, none of the ERT Member companies has experience in practice with the Specialisation BER. More guidance as to the application of joint production/specialisation in the context of services would be welcomed. Particularly, where European companies lack the scale of non-European players, specialisation could pave the way for increased competitiveness of European players.

4. Research and development agreements

Both the Guidelines and the block exemption regulation on R&D agreements should be reviewed in order to extend the current framework to cover other kinds of horizontal agreements that boost the creation of innovative technologies within the Digital Economy environment: platforms, cloud services, Big Data etc. Cooperation on R&D is also indispensable for companies to meet sustainability objectives.

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 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 Article 3 R&D BER.
- The revised R&D BER and the Horizontal Guidelines should **emphasize** more strongly the **pro-competitive nature** of joint R&D co-operations 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 Article 3 of the R&D BER are strictly included.
- Overall, the **R&D BER should be simplified**. It is an extremely complex BER which makes it difficult to get the desired legal certainty.
- **Mere paid for R&D should be treated under subcontracting notice and not under the R&D BER.**

b) *Removal of the reference to market shares on technology markets*

- The current R&D BER provides that joint R&D agreements between competing companies (see also comment above on the notion of "competitors") are block exempted only 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**.

c) *Increase of market share thresholds for R&D cooperations*

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

d) *Removal of the requirements in Article 3(2) R&D BER*

- Article 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 the willingness of companies to engage in joint R&D**.** The pro-competitiveness of 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 Article 5(a) prohibition** of including 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 Article 3(2).

e) *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 chilling effect** on the willingness of companies to engage in joint R&D which is at odds with 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.**

f) *Introduction of the possibility to restrict passive sales in any type of specialisation*

- 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, a company might want to prevent the other party from selling the products to the first company's competitors. Under the current rules, this would be a hardcore restriction.
- In view of the overall pro-competitive nature of R&D co-operations, the revised R&D BER should **remove this restriction on limiting passive sales** and should **allow** the parties to an R&D cooperation to **impose strict restrictions on each other under any form of specialisation** in the context of exploitation

5. New block exemption regulation for joint production and commercialisation agreements: data pooling/data access and infrastructure sharing agreements

A **new block exemption regulation for joint production and commercialisation agreements** is needed. The procompetitive effects of this kind of horizontal cooperations justify their exemption which would provide stakeholders the necessary legal certainty to ensure such kind of horizontal agreements comply with Article 101(3) under certain requirements. The following kind of agreements should be covered either in this new BER or in a specific BER for each one:

- **Infrastructure sharing agreements**: Such agreements have become a usual and effective way for companies (mainly telecom operators) to deploy infrastructure (such as networks) across Europe due to their procompetitive effects: substantial efficiencies, costs-savings, reduction of environmental impact, co-investments; as well as the benefits for consumers: increase coverage, innovation, high quality and speeder networks.

  Moreover, network sharing agreements are even more key with the upcoming deployment of 5G technology. The huge investment required for the roll out of 5G with ambitious expectations from public authorities and consumers regarding roll-out timing and coverage will not be possible to achieve without infrastructure sharing agreements among operators in order to ensure business sustainability, reduce environmental impact and satisfy high quality connectivity demand in accordance with regulatory obligations.

- **Data sharing and pooling agreements**: As data provide the infrastructure of the Digital Economy, such agreements will become a very common type of cooperation among competitors with the aim of offering innovative digital services. Facilitating such horizontal agreements among European competitors under certain requirements, will allow stakeholders to compete with non-European competitors in the digital world, as well as to resolve current issues arising in digital markets: barriers to enter, bottlenecks, quasi-monopolies, conglomeral effects etc.

  There is also 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 them to improve solutions and to develop innovative ways of operating 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.

- **Recycling and other environmental agreements**: in order to increase the commercial viability of implementing circular economies, companies will need to agree on a wide range of topics, e.g. joint recycling and transformation projects.

V. Appendix A: Note on application of Article 101 to arrangements between a joint venture and its parents

A. Introduction and recommendation

Paragraph 11 of the Horizontal Guidelines states that: "companies that form part of the same 'undertaking' within the meaning of Article 101(1) are not considered to be competitors for the purposes of these guidelines. Article 101 only applies to agreements between independent undertakings. When a company exercises *decisive influence over another company they form a single economic entity and, hence, are part of the same undertaking. The same is true for sister companies, that is to say, companies over which decisive influence is exercised by the same parent company. They are consequently not considered to be competitors even if they are both active on the same relevant product and geographic markets*."

The Horizontal Guidelines are therefore expressly consistent with the "single economic entity doctrine"[10], insofar as they set out how the single economic entity principle applies to cooperation between solely controlled subsidiaries and their parents, i.e. that Article 101(1) does not apply to such arrangements.

By contrast, the Horizontal Guidelines are silent with regards to the precise circumstances in which Article 101(1) applies to arrangements between parents and their jointly controlled subsidiaries.

This creates considerable uncertainty for companies with large scale global operations managed through both jointly and solely controlled subsidiaries. The consequence of this uncertainty is that companies often feel compelled to take a conservative approach and assume that the single economic entity doctrine may not apply when engaging with their jointly controlled subsidiaries[11]. This means they are then unable to fully realise the synergies of operating as an integrated group, causing harm to their customers and the economy as a whole. This is unfortunate and seems artificial to companies.

As operations through joint venture companies seems to be an increasingly important and relevant form of doing business globally, we believe that it is important to revisit this issue.

The prevailing uncertainty seems particularly artificial where the establishment of a joint venture/acquisition of joint control has been subject to merger control (and approved). This is so, as the substantive merger assessment for such acquisitions effectively assumes that they will form part of a single undertaking with their parents such that Article 101 will not apply to dealings between them. Article 3(2) the EU Merger Regulation[12] (EUMR) is based on the 'possibility of exercising decisive influence' which can be met on a purely legal assessment basis and satisfied as a result of parents having veto rights over strategic commercial decisions of the jointly controlled subsidiary. There is no need to consider the degree of operational autonomy that the jointly controlled subsidiary will in practice have and is a practical and operational legal test.

We understand that in the draft 2010 Horizontal Guidelines the Commission intended to include an explicit confirmation that Article 101(1) would not apply to dealings between parents and their jointly controlled subsidiaries: *"… as a joint venture forms part of one undertaking with each of the parent companies that jointly exercise decisive influence and effective control over it, Article 101 does not apply to agreements between the parents and such a joint venture, provided the creation of the joint venture did not infringe EU competition law*."[13]

[10] Case C-73/95 – *P. Viho v Commission*, paras. 16-18.

[11] This memo does not deal with the separate issue of the application of Article 101 to the relationship between competing parents and a joint venture and any resulting safeguards to avoid improper information flows and coordination between any such parents.

[12] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

[13] See Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, SEC2010(528)/2, para. 11.

The ERT submits that including this or similar wording in the revised Horizontal Guidelines, together with an explicit acknowledgement that “decisive influence” for this purpose is based on the EUMR definition, would provide companies with the certainty that they require in order to freely exchange information and align commercial strategies (including price structures) between one parent company and its JV.

We also respectfully submit that this change would not represent a material shift in policy for the Commission, but rather is supported by (a) the commercial and economic reality of joint ventures described in Section B below, and (b) the legal considerations that are described in Section C below.

B. The commercial and economic reality of joint ventures support our recommendation

Companies enter into joint ventures for a variety of reasons, including:

- Regulatory requirements. For example, certain Asian jurisdictions require joint control with a local partner as a condition for foreign companies to run local operations. The role of the local partner may vary, but in many cases the partner does not participate in day-to-day operations, and will merely retain the ability to veto strategic matters.
- Market access. In certain jurisdictions, obtaining market access will de facto require a local partner who is familiar with local systems, practices, and the legal and regulatory environment.
- Obtaining additional capabilities. Companies may partner with another company when they lack additional capabilities to improve product or service offerings to their customers.
- Sharing the investment burden and risk in case of large investments. Particularly in the case of greenfield joint ventures, the costs of development and commercial risk associated with the project are often prohibitive for a single company.
- Creating a stand-alone commercial structure which can focus solely on the products or services in question.

The economic rationale for joint ventures typically assumes a degree of cooperation and alignment between parents and joint ventures. While the degree of operational autonomy given to a joint venture will vary, parents will typically seek to exercise decisive influence or control through their management and board appointments, control of accounts and strategic decisions, and leverage their knowledge and expertise in that respect. If it was unambiguous that Article 101(1) excludes from its application engagements between a joint venture and its parents, companies would likely seek to integrate joint venture companies more extensively (as if they were solely-owned subsidiaries), including in respect of IT systems, commercial and marketing strategies as well as best practices and group policies.

In particular, companies should not have to be concerned about internal horizontal information sharing (either when subsidiaries and joint ventures are operating in the same market(s) or when subsidiaries and joint ventures purchase/procure similar goods/services and might otherwise have to limit such sharing, e.g., through establishing Chinese walls). They would also have greater scope to coordinate on operational, procurement and commercial matters, thereby fully realising the efficiencies of the joint venture transaction.

C. Legal developments support the recommendation

- *All of the Commission’s block exemption regulations (Regulations) include “connected undertakings” in the definition of “undertakings” to which Article 101(1) does not apply*

The Regulations contain general provisions stating that Article 101(1) does not apply to arrangements between undertakings within a single economic entity. The Regulations are, thus, irrelevant to such arrangements.

The Regulations defines an “undertaking” to include subsidiaries as well as “connected undertakings” – which explicitly includes jointly controlled companies. Moreover, the assessment of joint control for these purposes is based on the EUMR concept of the “right to manage” the joint ventures affairs, which can be met on a legal assessment basis and does not require a consideration of how the joint venture will operate in practice.

For example, it follows from Article 1(2) of the Block Exemption for Vertical Agreements[14] that the term "undertaking" includes "connected undertakings". The definition of connected undertakings in Article 1(2)(e) is intended to catch jointly controlled companies, namely companies where there is (i) a right to jointly exercise more than half the voting rights, or (ii) the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking is jointly held, or (iii) the companies have the joint right to manage the undertaking's affairs.

Identical provisions can be found in the block exemptions for Research & Development[15] and Specialization respectively.[16]

- *Jurisprudence of the Court of Justice confirms that Article 101(1) may not apply to arrangements between a parent and its jointly controlled subsidiaries*

It is widely accepted that the jurisprudence of the Court of Justice concerning the scope of an undertaking when imposing fines is transposable to the application of Article 101(1) to arrangements between a parent and its joint venture. Indeed, this point was explicitly confirmed by Advocate General Mischo in Case C-286/98 P.[17]

- *The EUMR supports the position that Article 101(1) should not apply to arrangements between a parent and its jointly controlled subsidiaries*

As described above, the substantive assessment of the creation of joint ventures and acquisitions of joint control under the EUMR, assumes that they will form part of a single undertaking with their parents (i.e. that Article 101 will not apply to dealings between the joint venture and its respective parents).

As for the relationship between the joint venture's parents, recital 27 of the EUMR states: "In addition, the criteria of Article [101(1) and (3)] should be applied to joint ventures performing, on a lasting basis, all the functions of autonomous economic entities, to the extent that their creation has as its consequence an appreciable restriction of competition between undertakings that remain independent."

Should the EU legislator have been of the opinion that Article 101(1) would also be applicable to the relationship between a jointly controlled venture and its parents, it is respectfully submitted that explicit wording to this effect would also have been included in the recitals. The same logic should apply if filing thresholds are not exceeded, as there would be no clear legal reason for adopting another approach.

Furthermore, under the EUMR, for the purposes of considering jurisdiction when applying the turnover thresholds, JV turnover is attributed to the relevant notifying Parties and when notifying full-function JVs, the turnover of each notifying Party is considered. This also supports the position that Article 101(1) should not apply to arrangements between a parent and its jointly controlled subsidiaries.

[14] Commission Regulation (EU) No 330/210 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.
[15] Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, para 1(2), Article 1(2).
[16] Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialization agreements, Article 1(2).
[17] Stora Kopparberg v Commission (para. 26): "…*But that principle of imputability does not work in only one direction, that is to say, it does not serve solely to place on the parent company responsibility for an infringement committed by the subsidiary; it also serves to take certain conduct outside the scope of Article [101] because 'where the subsidiary does not enjoy any real autonomy in determining its course of action on the market, the prohibitions laid down by Article 101(1) may be considered to be inapplicable in the relationship between it and the parent company with which it forms one economic unit*…"

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