大成 DENTONS

Contribution to the Stake-holder Consultation on the Review of the HBERs

February 4, 2022

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Dentons supports the efforts of the European Commission and DG COMP to update the rules on horizontal collaboration with a view to creating a level-playing field for all economic operators active on markets. In addition to our answers to the questionnaire, we would like to take the opportunity to submit this position paper to complement and explain our view in more detail.

1. Introduction – Paradigm shift and the need for reform

The recent publication of the draft Vertical Block Exemption and the draft Vertical Guidelines (**VBER**) shows that the European Commission and in particular DG COMP have achieved a remarkably successful task in adapting the legacy instruments to the modern world while preserving their overall historic architecture.

Yet, when it comes to horizontal cooperation among companies, the task might be more complex, since types of horizontal cooperation cover a wide range of categories from upstream to downstream. Indeed, the consultation feedback demonstrates a diverse set of concerns including the ever-increasing emergence of novel business models. This is mainly the result of the rapid technological evolution, which is not a completed process; on the contrary, it is constantly evolving. In fact, there may be no end to it. This leads to the question of whether the architecture of the existing horizontal instruments is flexible enough to deal with the innovation explosion or whether we are in the middle of an emerging ´mega-trend´[1]. In our view, block exemption regulations and guidelines have different roles to play in face of this paradigm shift.

[1] As to the concept of a "megatrend", see Alexander V. Mirtchev, "The Prologue – The Alternative Energy Megatrend in the Age of Great Power Competition" (2021), a comprehensive study of the geopolitical security, economic, and environmental impacts of a major game-changing phenomenon.

A) The Horizontal Block Exemptions

The concept of block exemption remains practically relevant as long as it continues to be based on well-established antitrust doctrine in a consistent way, and its interoperation with other competition law instruments is appropriately fine-tuned to avoid inconsistencies that reduce clarity. Therefore, it is certainly worthwhile to maintain the two existing horizontal block exemptions (**HBERs**) subject to some modifications to address the concerns raised by various stakeholders in the consultation process. The block exemptions merely provide a safe harbour; therefore, we do not see any great risk of block exemptions becoming outdated. Indeed, the regulatory technique has already moved away from the straightjacket model in the earlier versions. Whatever emerges outside of the HBERs in terms of novelty can be assessed separately and individually.

B) The Horizontal Guidelines

However, there might be more need for reform for the Horizontal Guidelines (**HGL**).

First, there is an urgent need for clarification so that antitrust advisors are able to provide reliable guidance to their external or internal clients. In order to achieve this, the different guidance instruments should be aligned and reflective of essential antitrust doctrine. This means that the HGL should only deal with genuine issues of horizontal collaboration and not with different forms of predominantly unilateral conduct. The unilateral use of pricing algorithms or the practice of unilateral price signalling are unilateral forms of business conduct, whose potential anti-competitive impact may require assessment and guidance, but not in the HGL.

Incorporating these issues into the HGL would make it a catch-it all instrument and further blur the fundamental distinction between unilateral and collaborative conduct that is at the basis of the EU Treaty as well as of most of the other antirust regimes. The same reasoning applies to the potential anticompetitive impact of "ecosystem collaboration", where the ecosystem involves more than the aggregation of vertical and/or horizontal elements. A separate guidance instrument for ecosystem collaboration might in fact be required. Similarly, there may be a need for guidelines for unilateral conduct of companies with market power, following the recent legislative trend to define new forms of abuses. Such guidance could notably deal with data access issues. Accordingly, we believe that the revised HGL should be limited to forms of genuinely horizontal collaboration.

Second, there is the question of whether, and if so how, the HGL should address and provide guidance for novel types of horizontal agreements. The Commission´s evaluation of the HBERs and HGL[2] lists a significant number of novel collaboration types that the current HGL for obvious reasons do not cover, such as data pooling or block chain agreements. The question is how the on-going review can incorporate guidance for these novel types of agreements. The historic role of guidelines since pre-internet times was to "codify" existing practice, and given the pace of evolution of business models, such codification normally remained valid for 5 to 10 years[3].

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[2] Commission Staff Working Document – Evaluation of the Horizontal Block Exemption Regulations (SWD) - SWD(2021) 104 final, available at https://ec.europa.eu/competition-policy/system/files/2021-05/HBERs_evaluation_SWD_en.pdf.

[3] See for example the joint statement from the Belgian, Dutch and Luxembourg NCAs on challenges faced by competition authorities in a digital world (Joint Statement), available at: https://www.acm.nl/sites/default/files/documents/2019-10/benelux-memorandum-over-toezicht-mededinging-in-digitale-economie.pdf: "Competition authorities must develop the ability and willingness to offer ex ante guidance on specific issues also before they (and the courts) developed the relevant case law. Guidance papers cannot be expected to have an impact on new developments if they come after the market has waited for years for infringement decisions and their confirmation or annulment in court."

As to the novel agreements, there is not yet much experience available for codification, and the evolution of business models is much more fast-paced. Therefore:

- In light of the rapid and constant change taking place in the market, it is fair to say that the Commission might not be able to identify the potential harm of novel business practices, or the absence of such harm immediately.
- This may lead to a situation in which the Commission is unable to provide detailed guidance on novel agreements in the time available for the revision of the HGL.
- Even if the Commission were already in a position to accurately assess at least some of these novel horizontal agreements and embody this guidance into the text of the revised HGL, such guidance may quickly become obsolete, as business models evolve with great rapidity today. Therefore, we consider that the time is ripe to consider a novel approach to the provision of guidance.

2. New approach – expected benefits

We believe that there is a need for a new approach, which departs from the historic practice. In our current view, we believe it would be beneficial to base the provision of guidance on three pillars and we are happy to further explore these options with DG COMP.

First pillar: **Revised HGL**

The architecture of the current HGL covers the basic form of horizontal collaboration. The HGL is an instrument that is published in the Official Journal, is self-binding on the Commission and remains in force for a period of 10 years. The suggestion is to incorporate the stakeholder comments relative to ambiguities of the current HGL without touching the overall structure or prematurely including ambiguous language in relation to the novel agreements. The HGL as a concept and a document with a long life span survives as the "General Part" (akin to the "Allgemeiner Teil" of a Civil or Penal Code) which consists of the general rules and principles applicable to the assessment of horizontal collaboration.

Second pillar: **Real-time guidance**

Assuming that experience as to specific types novel agreements emerges quickly, the Commission may link the HGL to a new web page[4] on which it publishes up-to-date guidance based on decisions, studies, reports, policy briefs or other new insights as to novel practices as they emerge. Such a page could be updated in real time or short intervals, e.g., annually, and the specific guidance could be as self-binding as the HGL, albeit potentially for a shorter period of time.

[4] A general comment not related to this exercise: we find the current website of DG COMP more difficult to navigate than the previous version.

Third pillar: **Clearing mechanism**

Businesses active in novel economies may want to enter into horizontal business arrangements in good faith without knowing whether these arrangements have the potential to harm competition. Such undertakings may welcome the possibility to submit novel horizontal agreements to the Commission and the NCAs to obtain immunity from fines and, wherever possible, positive or negative feedback.

This system resembles the former Form A/B process (which was replaced by the introduction of self-assessment in 2004). However, it should be possible to mitigate the potential adverse effects of such a clearance system by requiring the undertakings to submit their agreements with a detailed self-assessment in form of a formal legal opinion by a specialised external counsel, meeting the criteria set forth by AG Kokott in Case C-681/11[5], and a commitment to provide explanations on the agreement if requested to do so.

Ideally, the Commission and the NCAs can collectively agree on such a clearance mechanism, which would contribute to an EU-wide uniform development of assessment criteria in relation to novel agreements. Further, by finding an allocation mechanism for the review of types of novel agreements between the Commission and the NCAs, those could share the workload among a wider group of regulators, even allowing for some degree of specialization.

Unlike the Form A/B system, the new mechanism would not necessarily oblige the regulators to assess the submitted agreements in detail and provide feedback. The regulators could pick out the most interesting agreements. Even if the regulators revert with a negative opinion, whether shortly after the submission or several years later, the undertakings would not risk a fine.

The incentive of immunity from fines and the requirement of detailed self-assessments could motivate undertakings to submit many novel agreements and thereby accelerate the Commission´s understanding of the potential to harm competition of these novel agreements.

This approach would increase legal certainty for market players and have the potential to accelerate the development of assessment criteria for novel agreements. Currently, market players face a considerable amount of legal uncertainty when they are involved in a novel horizontal cooperation agreement. The proposed approach could also cover cases where the Commission formulates a new theory of harm in relation to a type of agreement that is not as such novel, as it was the case in the recent *AdBlue* case.[6] While the Commission acknowledged the novelty of the theory of harm and therefore proposed an additional reduction of the fine, the proposed clearing system might have enabled the Commission to spot the issue even earlier.

Last, the proposed method would allow the Commission regularly update its guidance on new issues. To give an example, there is obviously an urgent need for guidance concerning the treatment of sustainability or digitalization goals. Yet, discussions are still going on as to whether competition law and policy should factor in goals unrelated to competition and, if so, to what extent.

Indeed, there is a wide variety of views ranging from "sustainability scepticism" to "sustainability enthusiasm". Given the evolutionary nature of both the theoretical debate on one hand and of sustainability/digitalization-driven business models on the other, the proposed approach would allow to provide regularly updated and sufficiently detailed guidance.

[5] Schenker & Co. and Others, C-681/11, Judgment of 18 June 2013.

[6] Case AT.40178 – Adblue, see the press release available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581

3. No need to take additional legislative measures

We believe that the proposed method would be feasible within the existing legal framework without adopting additional legislative measures.

In fact, the very recent COVID-19 pandemic proved that the Commission together with the NCAs have the ability to address novel issues of competition law in an innovative and out-of-the-box manner for example via the ECN. When a need for cooperation to ensure the supply and fair distribution of certain products occurred, the ECN issued a joint statement noting that that it will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply. The Commission also adopted the Temporary Framework Communication[7], which provided the possibility of issuing ad hoc "comfort letters") on specific cooperation projects.

The cooperation between the Commission and the NCAs based on Article 11 of Reg. 1/2003 and the Commission Notice on informal guidance[8] provide the basis for such collaboration and guidance, although their respective scope is different from the Three-Pillar-Approach considered here. Nevertheless, Article 10 of Reg. 1/2003, Article 11 of Reg. 1/2003 and Informal Notice Guidance could be helpful as a starting point.[9]

Indeed, the Commission recently noted that it is ready to consider requests for individual guidance letters in relation to sustainability initiatives.[10] This approach could be generalized for all kinds of novel horizontal cooperation agreements.

The proposed mechanism could be enshrined in a similar statement issued by the ECN.

B. ADDITIONAL BACKGROUND ON ASPECTS COVERED BY THE QUESTIONS

1. R&D Regulation – Section 5.1. and 5.2.

The current R&D Regulation needs further clarification and guidance as to interpretation of some of the terms and concepts. More specifically:

Condition of "Full Access"

The requirement of "full access" in Article 3(2) of the current version of R&D Regulation is unclear. It is not apparent from the wording whether "full access" covers only specific ways of access (for example co-ownership, granting a license etc.) or access for a certain period. Furthermore, Article 3(2) notes that full access "might be limited accordingly". This section needs clarification explaining in detail the permissible ways of limiting such access.

We understand that the Commission is currently exploring potential policy options, such as limiting/removing the requirement of full access either for specific undertakings such as SMEs (Section 5.1.) or for all the market participants (Section 5.2.) These policy options could be helpful to address the above-mentioned issues.

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[7] Communication from the Commission Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak (Temporary Framework) 2020/C 116 I/02, OJ C 116I , 8.4.2020, p. 7.

[8] Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) (Informal Guidance Notice), OJ C 101, 27.4.2004.

[9] See for example Joint Statement: "Case-by-case guidance letters: (...) We propose to examine the possibility of developing an approach that would allow the European Commission and Member State competition authorities to sidestep the infringement route in a much less formal and fast track commitment procedure, e.g. as a development of the practice under article 10 of Regulation 1/2003 or in line with the Notice on informal guidance. (...) The introduction of such a procedure may not require a legislative change. But it might require a change of culture and the willingness to abandon in some cases the possibility or even probability to establish an infringement in order to give priority to a faster outcome that will not only provide specific guidance to the parties involved but also to others."

[10] Competition policy brief, 2021-01, available at: https://op.europa.eu/en/publication-detail/-/publication/63c4944f-1698-11ec-b4fe-01aa75ed71a1/language-en/format-PDF

However, it is essential for the Commission to provide a detailed guidance on the concept of access (and limiting the access) preferably by way of providing concrete examples. In line with this, primarily, we endorse Option 2 under Section 5.2.; which means that the condition for full access should be limited/removed for **all the market participants**. Alternatively, we endorse Option 2 and Option 5 in Section 5.1.; which means that there should be specific category of R&D agreements concluded by SMEs and the condition for full access should be limited/removed for SMEs.

Last, the wording of the current R&D Regulation is not very clear as to whether and under what conditions parties have to provide access to the results for "further research" when parties limit their exploitation by way of specialization.

Expiration of the exemption

It is not clear in the current version of the R&D Regulation what will happen when the term of the exemption is over. In cases where parties limit access to the final results (as they limit their rights of exploitation in the context of specialization), it is not clear whether parties have to provide full access to each other again when the exemption is over.

The obligation to provide full access to the final results and in particular to the background IP poses a problem to R&D collaborations between unequal partners in vertical and joint venture relationships. To give an example:

Scenario 1: A well-established EU-based defense company creates a joint venture with a recently established defense company in an emerging country, one objective of which is to allow the partner in the emerging country to build up its defense capability. The JV agreement includes joint R&D. The EU partner has a legitimate interest in refusing full access to its background IP and to protect its geographic market from post-JV competition.

Scenario 2: Supplier and buyer engage in joint R&D where the supplier is the one that contributes essential background IP and manufactures and supplies the product to the buyer. As in the JV scenario, the supplier has no legitimate interest in providing full access to the final results or give access to the background IP post contract.

The R&D Regulation should confirm that and clarify how the IP contributor can protect their background IP, and it should clarify how in such cases the R&D Regulation interoperates with the Vertical BER and other applicable instruments.

2. General Questions – Section 6.3.

Our answer to Q-79 is affirmative, meaning that the HGL should clarify whether, under which circumstances and how Article 101 TFEU applies to the horizontal agreements between a lawful joint venture and its parent(s). Joint Ventures are similar to "ecosystem collaboration" in that they may involve different types of relationships ranging from horizontal to vertical and conglomerate. In addition, considerations from merger control doctrine cold play a role. This raises the question whether it would not be more practical to deal with joint ventures in a stand-alone guidance document.

3. Information Exchange - Section 6.2.

Concept of commercially sensitive information

The concept of "commercially sensitive information" needs further elaboration, preferably via concrete examples. In light of the fact that the Commission can always come up with novel theories of harm (see for example recent *AdBlue* case), undertakings are in need of further guidance as to what constitutes commercially sensitive information and how much collaboration can be safely engaged in without coming under competition law scrutiny. This becomes especially relevant and challenging as undertakings attach more and more importance to issues such as ESG, diversity and inclusion.

Normally, information exchange and/or cooperation on these aspects does not create any competition law concerns. Yet, the legal uncertainty may still lead the market players to be reluctant on engaging in such lawful cooperation. Therefore, there is a need for specific exemption for information exchange/cooperation types between undertakings that serve a "good cause" and that does not unnecessarily restrict the most decisive competitive factors in the market.

Information exchange in dual distribution scenarios Q-89

The draft Vertical Guidelines do not provide ample guidance for information exchanges in dual distribution scenarios. Instead, they refer to the HGL, which, however are currently silent as the particularities of the exchange of distribution-related information in a dual distribution setting. The HGL should make clear that any exchange of information needed to implement the vertical supply relationship (quantities, purchase prices, recommended selling prices etc.) should be permissible in such a setting. In addition, any information exchange that supports or promotes the vertical supply relationship should also normally be permissible. For any other information without such link to the vertical supply relationship (such as e.g. future pricing information), guidance should be provided on necessary precautions within the supplier's organisation to prevent a flow of such information between the supplier-dealer and own sales businesses. It would be preferable to provide basic guidance on information exchange in a dual distribution scenario in the Vertical Guidelines as the changes to dual distribution in the VBER will come into force well before the new HGL.

Pre-merger information exchange

The current version of the HGL lacks any guidance on information exchanges between parties to a horizontal merger. The generic guidance in the HGL is too restrictive to for information exchanges in merger scenarios. Therefore, additional would be welcome, but a separate instrument providing guidance for all types of mergers may be the better place for this.

4. Standardization Agreements- Section 6.3.

It cannot be excluded that even the most transparent and democratically organized standard setting body might seek to block the emergence of a disruptive technology that threatens a majority of less innovative members. This could reduce innovation and competition if there is no competing standard setting body in the same industry. One way to solve this issue could be to require standard setting bodies to provide for "minority protection" mechanisms, under which proponents of overruled technologies could achieve something like an "alternative standard".

5. Horizontal commercialization agreements - Section 6.5.

Joint distribution

The section on commercialisation agreements leaves much uncertainty concerning the assessment of distribution agreements between competitors. For example, where A "merely" distributes its products through competitor B, the vertical rules require that B be free to determine the retail price. However, while there is no bilateral price fixing *stricto sensu*, (as B is acting unilaterally), this may lead to the same uniformization of sales prices at distributor level that is common to joint selling. It should therefore be clarified under which conditions distribution may facilitate a potentially anti-competitive outcome, looking at factors such as (for example): Does A have alternative forms of market access or is B the only available reseller? Are A's and B's products differentiated or do they compete mainly on price? Would it be better to let A determine the selling price, for example if it were lower than B's price)?

We are happy to discuss these and any other question with DG COMP, fuelled by our spirit to contribute to the shaping of a well-functioned system of guidance and enforcement to ensure a level-playing field.

Key Contacts

Dr. Bertold Bär-Bouyssière
Of Counsel, Berlin/Brussels
D +49 30 26473 250
D +32 2 552 2977
E bertold.baer-bouys-siere@dentons.com

Caglagül Koz
Associate, Berlin
D +49 30 26473 455
E caglaguel.koz@dentons.com

Jim Venit
Partner, Brussels
D +32 2 552 2941
E james.venit@dentons.com

Dr. Jörg Karenfort
Partner, Berlin
D +49 30 264 73 305
E joerg.karenfort@dentons.com

Emmanuelle van den Broucke
Partner, Paris
D +33 1 42 68 49 45
E emmanuel-le.vandenbrou-cke@dentons.com

Dr. Josef Hainz
Partner, Berlin
D +49 30 2 64 73 241
E josef.hainz@dentons.com

Dr. René Grafunder
Partner, Berlin
D +49 30 26473 307
E rene.grafunder@dentons.com

Anouk Rosielle
Partner, Amsterdam
D +31 20 795 37 04
E anouk.rosielle@dentons.com

Adele Behles
Senior Associate, London
D +44 20 7246 4884
E adele.behles@dentons.com

dentons.com