ASOCIACIÓN ESPAÑOLA PARA LA DEFENSA DE LA COMPETENCIA
(SPANISH ASSOCIATION FOR THE PROTECTION OF COMPETITION)
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COMMENTS TO THE COMMISSION'S EVALUATION OF EU COMPETITION RULES ON HORIZONTAL AGREEMENTS BETWEEN UNDERTAKINGS

I. INTRODUCTION

1. The Spanish Association for the Protection of Competition (Asociación Española para la Defensa de la Competencia, hereafter "**AEDC**") welcomes the opportunity to comment on the European Commission´s consultation for the evaluation of EU competition rules on horizontal agreements between companies (the "**Consultation**").

2. AEDC's observations have been provided by lawyers, economists and academics, all specialists in the competition law field. However, these observations have been made on an individual basis do not necessarily represent the views of all the members of the Association.[1]

3. The EC is currently evaluating two Commission Regulations which will expire on December 31, 2022: Commission Regulation (EU) No 1217/2010 (for research and development agreements, "**R&D BER**") and Commission Regulation (EU) No 1218/2010 (for specialization agreements, "**Specialization BER**"), together referred to as the "**Horizontal Block Exemption Regulations**" and the more general guidance provided by the Commission in the Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements or "**Horizontal Guidelines**". The evaluation will allow the Commission to determine whether it should let the Horizontal Block Exemption Regulations lapse, prolong their duration or revise them, together with the Horizontal Guidelines. The public consultation is part of the Commission's evaluation and aims to collect evidence and views from stakeholders.

4. AEDC has completed the *online* questionnaire prepared by the Commission and has concluded that while the Regulations and the Guidelines are in general terms welcome, certain aspects deserve clarification or need to be updated. In order to provide more

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information on the above, AEDC submits the present observations. In general, these observations follow the order of the Commission's Horizontal Guidelines.

II. GENERAL REMARKS

5. The new set of rules applicable to horizontal agreements as from the end of 2022 will need to tackle the challenges faced by the EU at global level, the most relevant being:

6. ***Digital markets***. Digitalization is giving rise to an accelerated transformation of markets, the emergence of new players and the appearance of complex legal issues never dealt with before, blurring the classic distinction between horizontal and vertical restrictions. The new competition rules approved by the Commission will built from previous rules and principles, but will also need to address these new challenges whilst ensuring legal certainty for companies that struggle to compete at a global basis. The need of legal certainly is particularly striking not only in relation to vertical agreements, but also in relation to horizontal agreements, where cooperation takes place between companies, sometimes also at different levels of the distribution chain, that are actual or potential competitors and which are therefore subject to closer scrutiny by competition authorities. The fact that companies in these markets are often at least potential competitors should not stifle these possibilities of cooperation.

7. ***Restrictions by object/effect.*** The Commission's current review of rules applicable to horizontal agreements represents a unique opportunity to clarify the rules regarding the notion of restrictions "by object", in particular in view of the judgements of the European Court of Justice objecting to the excessive recourse to this category and insisting on the need of a restrictive interpretation (see, among others, judgement of the Court of 11 September 2014, *Groupement des Cartes Bancaires (CB) vs. European Commission*, case C-67/13 P, the most recent judgement of the Court of 30 January 2020, *UK Generics vs. CMA,* case C-307/18 and the Opinion delivered by Advocate General Bobek on 5 September 2019, *Budapest Bank,* case C-228/18). A clear delimitation of the boundaries of the category of restriction by object is particularly necessary regarding horizontal cooperation agreements in view of their greater exposure to competition rules, the principle of legality and the implications that too broad interpretations have on the burden of proof and the rights of companies subject to an investigation. This concern is even greater in the case of "restrictions by object" that are considered "cartel cases" in the field of exchanges of information of non-homogeneous products: the new regime for private damage claims and presumptions of damages in cartel cases may have very negative consequences if the concept of cartel is applied in an extensive manner. In this delimitation, and in line with the most recent case-law, more clarity on the role of appreciability and ancillary restraints would be desirable.

8. ***Sustainability considerations.*** The sustainability debate has become a central topic worldwide and has been placed at the top of the new European Commission's agenda. Indeed, it may be argued that there may be some tension between sustainability principles and EU competition law. In fact, companies may need to cooperate to comply notably with increasing environmental requirements and/or to achieve certain

sustainability goals.[2] It should be recalled that the 2001 Horizontal Guidelines contained a specific Section regarding environmental agreements. This Section was however repealed in the 2010 Guidelines, most probably as a result of the more economic approach advocated by the EC since the 2004 decentralization and the focus on economic efficiencies rather than in non-economic objectives (see in particular para. 59 of the Commission Guidelines on the application of Article 101(3) TFEU).[3] Under the more economic approach embraced by the Commission long ago, room for cooperation on sustainability initiatives has to be addressed. Thus, more specific guidance and flexibility for horizontal cooperation and codes of conduct to promote sustainability is expected. Sustainability considerations might embrace not short-run economic interests and their promotion through market forces to counterweight certain restrains of competition. More clarity is therefore needed on aspects such as how the conditions set forth in Article 101 (1) and (3) TFEU should be interpreted, i.e. whether and how to quantify the environmental gains, how to identify the beneficiaries (direct consumers, indirect beneficiaries, future generations, etc.) or how to interpret the non-elimination of competition condition when most companies in a sector adhere to a sustainability project.

9. ***Non-economic goals in the assessment of Article 101(3) TFEU in the framework of horizontal agreements***. Furthermore, there is an ongoing debate about whether competition law should take into consideration other non-competition related realities or effects (gender equality, consumer protection, fair competition, etc.) when analyzing, for instance but amongst others, horizontal agreements, specially under 101(3) TFEU. However, despite its flexibility, competition policy is not well suited for addressing any problem, but only the protection of the economic process. Therefore, clear indication that concerns unrelated with competition law should not be taken into account when analyzing, amongst others, horizontal agreements will reinforce legal certainty and economic efficiency, while not interfering with other policies or regulatory tools.

10. ***Consistency***. Procompetitive cooperation agreements should not be disincentivized, and they should receive a uniform treatment throughout the whole EU territory, regardless of the competition authority in charge of deciding a case. However, as will be discussed later, uniform interpretation on rules applicable to horizontal cooperation agreements has not always been the rule, in particular as regards certain categories of agreements, such as information exchanges, or as regards the type of justifications that may be invoked by companies in the framework of an article 101(3) TFEU defense. Certain rules contained in the 2010 Horizontal Guidelines need to be clarified in order to ensure legal certainty and uniform application at a national level. Furthermore, as it was done long ago with vertical restraints we would call on the Commission to consider

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[2] While sustainability goals use to be identified mainly with environmental protection, they may encompass also goals of public health, animal welfare, fair trade production, etc. See *"Vision Document Competition & Sustainability*", Autoriteit Consument & Markt, May 2014, at https://www.acm.nl/en/publications/publication/13077/Vision-document-on-Competition-and-Sustainability.

[3] See, however, paras. 329 and 331 of the Commission's Horizontal Guidelines, where sustainability initiatives on standardisation agreements based on environmental considerations play a role to meet the exemption criteria.

adopting a general horizontal regulation addressing also horizontal cooperation agreements on information exchanges, joint purchases and commercialization to give room to certain safe harbors to the benefit of legal certainty and good administration.

11. ***Uniform application of EU competition law.*** The role of the EC when reviewing proposal decisions from national authorities should also be more transparent for the parties, which shall be allowed to make comments or warn the Commission when they identity uncertainty and non-uniform application at a national level. If this is not done at an early stage in the proceedings, and the EC does not get direct comments from the parties, it may have little chance of influencing the final decision of the national authorities. The need of uniformity is particularly striking in relation to proposed commitment decisions from NCAs, where the theory of harm may not always be clearly articulated.

12. ***Transparency on admissible cooperation*** On a different matter, it is important to note that the Commission has acknowledged that when it finds that a certain agreement meets the conditions for an exception, the case is often not pursued further under the Commission's system of priority setting. In fact, since decentralization took place in the year 2004, the Commission has not adopted a Decision concluding that a certain agreement fulfills the conditions set forth in Article 101 (3) TFEU. The same may be said regarding novel cases and negative clearance decisions, which only the Commission may issue. Therefore, and although there is a body of precedents interpreting Article 101 (3) TFEU predating modernization, there are not so many public precedents dealing with new complex issues which are arising at present. For this reason the future Horizontal Guidelines should provide more detail and in particular deal not only with clear cases on one way or the other, but also with cases which are more in the grey or middle area and in relation to which guidance is more needed. This is even more important nowadays as national authorities do not have competences to declare that an agreement meets the exception requirements; either they condemn or declare that the agreement is note restrictive; and in case of doubt, they may sometimes tend to declare the existence of an infringement (which is something not clearly aligned with the principle of innocence). Further, the Commission might well consider the creation of a knowledge database on the above cases, including those dealt with by NCAs and consider as well a more generous use of the informal guidance letters mechanism (which so far has had very little use to our knowledge).

13. ***Non fully functional JVs.*** A further area of concern is the need to have clear rules on how to identify and analyze non-full-function joint ventures. The *Austria Asphalt* case of 7 September 2017, C-248/16, has excluded from the scope of application of merger control rules acquisitions of joint control over joint ventures which are not fully functional. Although the Commission's Consolidated Jurisdictional Notice deals with the conditions for full functionality (para. 91 et seq), the Commission's current practice is not totally clear. Most decisions concluding that a joint venture is not full-function do not include the arguments on which the Commission bases its conclusions and are not made public. However, as stated in para. 21 of the 2010 Horizontal Guidelines "*there is often only a fine line between full-function joint ventures that fall under the Merger*

Regulation and non-full-function joint ventures that are assessed under Article 101". The new horizontal rules should contain further guidance on this regard, including specific examples, based on the Commission's current practice, as to when a joint venture is not fully functional and therefore subject to Article 101 TFEU.

14. ***Ancillary restraints in JVs.*** Additional guidance is needed as to how perform an Article 101 TFEU analysis in line with a merger control analysis.

14.1. In particular, specific guidance is required in relation to the application of the ancillary restraints doctrine to non-full-function joint ventures (paras. 28-31 of the Commission Guidelines on the application of Article 101(3) TFEU). In particular, as to when a joint venture is not in itself restrictive of competition; which restrictions can be deemed necessary for the functioning of the joint venture or whether these restrictions should be deemed necessary for a certain period or along the duration of the joint venture.

14.2. Moreover, in a merger case, the elimination of competition between the parent companies and the JV's business is admitted provided that the concentration does not create significant barriers for third parties, the combined share of the parties is not significant, or even if it is significant, the parties are not close competitors and/or there are other players who exert an effective competitive constraint, etc. and there is no need to prove that the JV creates efficiencies and that the JV is "necessary" and "proportionate" to meet those efficiencies that compensate the restriction of competition. However sometimes using cooperative structures is more efficient than a merger (for instance, it is more efficient to use one of the parent companies production and distribution existing facilities rather than building new infrastructure or assigning that infrastructure to the JV whilst both parent companies retail veto rights over commercial activities, etc.). In these cases it is usually much more difficult to justify the cooperative JV structures (either of structural or contractual character) than in a merger, even when the merger leads normally to a theoretical more harmful situation (i.e., permanent change in the market structure and has long lasting effects on competition). It would be therefore advisable to assess this kind of cooperation structures by using criteria that are more similar to those used in merger analysis (e.g. closeness of competition between the parties, competitive pressure exerted by other players who do not participate in the cooperative structure, etc.).

15. ***Center of gravity.*** Most horizontal agreements consist of a combination of several stages of cooperation. However, the interpretation of the center of gravity of an agreement is not always clear and there are not precedents interpreting this notion. But the question of whether a particular agreement is within the scope of a Block Exemption may depend on this interpretation. Therefore, additional clarification and particular examples of different alternative combinations -like the Vertical Guidelines- would be welcome.

16. ***Minority shareholdings.*** The Commission may also take the opportunity of this review of the Horizontal Guidelines to address situations of minority shareholdings in competitors or interlocking directorates, basic rules of confidentiality, information barriers, etc. with the aim of clarifying situations where the applicability conditions to

apply art. 101 TFEU are met. The Commission seems to have taken the position that these minority shareholdings should not be subject to prior notification and monitoring under merger control rules.[4] Non-controlling minority shareholdings as such are not to be regarded a specific type of cooperation agreement. Without prejudice to more or less sound economic grounds to justify a competition law treatment, non-controlling minority shareholdings can raise concerns as regards access to sensitive information. We understand that these concerns should not be treated other than under the general rules applied to information exchanges. In certain cases, and with clear thresholds, a set of basic principles can be drawn from experience in order to try to reduce the risk of horizontal coordination. The basic idea should be that these shareholdings may not provide for access to sensitive information in a manner inconsistent with the general rules. Finally, regarding non-controlling minority shareholdings, common ownership situations are more prone to raise coordination problems, where the conditions to apply art. 101 TFEU could be more easily met.[5]

III. INFORMATION EXCHANGES

A. General comments

17. The current Horizontal Guidelines brought some necessary light to the treatment of information exchanges from a competition law perspective. However, despite their contribution, the Horizontal Guidelines are still imprecise and this may negatively impact in the generation of efficiencies and procompetitive effects that information exchanges may create, and, paradoxically, may be negatively affecting EU SMEs and non-vertically integrated companies.

18. Information exchanges are usually assessed as concerted practices, a form of coordination not requiring the existence of a formal and binding agreement between undertakings. In this regard, according to settled case law, the requirements to prove the existence of a concerted practice are: (i) undertakings concerting with each other, e.g., on a particular focal point; (ii) subsequent parallel alignment of conduct on the market; and (iii) a relationship of cause and effect between the two. However, we have observed that some competition authorities presume the existence of a concerted practice when they have only proved the existence of an information exchange.[6] This has been the case even when the parties have not directly agreed to exchange the data, and it is a third party who, at its own initiative, provides data not concerning those parties but its own data concerning sales of products supplied by those parties.[7] Thus, further guidance on how to determine the existence of a concerted practice in relation to information exchanges may be desirable. In particular, the existence of an exchange

4 After the public consultations launched in 2014 and 2017 on the possible extension of the scope of Merger Regulation to review certain acquisitions on non-controlling minority shareholdings, so far it appears to have been abandoned.

5 See OECD, *Common Ownership by Institutional Investors and Competition*, December 2017, DAF/COMP(2017)10.

6 See, for example, case S/0482/13 – *Fabricantes Automóviles*.

7 See decision from the Spanish Competition Authorities in cases S/DC/0607/17 – *Tabacos*.

of information among companies cannot directly be considered as a concerted practice, but the competition authority should prove the following: (i) reciprocal contacts between two or more actual or potential competitors (of strategic information that eliminates or substantially reduces strategic uncertainty as to a competitor's conduct on the market); (ii) subsequent conduct on the market; and (iii) a relationship of cause and effect (i.e. a causal link) between the discussions and that conduct.

19. In this regard, it should be clear that the authorities must take into account any alternative explanations provided by the companies, as if a party successfully demonstrates that an independent decision has been made, then, there is no causal link and no concerted practice (and, thus, the exchange of information could not be classified as a concerted practice).[8]

20. On the other side, the current Horizontal Guidelines provide limited guidance on the characteristics of the market and the nature of the information that would cause an exchange to be regarded as anticompetitive, with the risk that any information exchange may be challenged. Indeed, there are recent cases where competition authorities have followed a checklist approach and have considered an information exchange as anticompetitive *per se* without developing or identifying a clear theory of harm and just making hypothetical assertions that are not corroborated by real facts.

21. It must also be noted that the current Horizontal Guidelines do not identify any safe harbours in the field of information exchanges, in spite of the fact that: (i) it is widely acknowledged that information exchanges can in many instances enhance efficiency; and (ii) information exchanges which do not affect or refer to a substantial not to say majority part of the market are highly unlikely to generate anticompetitive effects. In particular, an information exchange between companies representing just part of the market (even if it is a significant part) is unlikely to lead to a collusive outcome, since these companies will not be able to impose the terms of a hypothetical coordination on clients, given the existence of alternative providers who are not part of such coordination. Similarly, an information exchange between companies representing just part of the market is unlikely to lead to foreclosure effects, in particular if the conditions for accessing the information are objective and non-discriminatory. The lack of safe harbours, combined with the interpretation made by competition authorities of the current Horizontal Guidelines, generates uncertainty and discourages efficiency enhancing information exchanges (e.g. between SMEs) which are highly unlikely to have any anticompetitive effect whatsoever.

22. It would be advisable that the Horizontal Guidelines:

22.1. First of all, clarify that exchanges of information are not prohibited by Article 101 TFEU. What this provision prohibits is agreements, concerted practices, or recommendations

[8] In this regard, the ECJ has already established that the Commission cannot require undertakings to take excessive or unrealistic steps to rebut the presumption, being sufficient to prove that the undertaking concerned did not receive the information or did not look at it until time had passed (*Eturas,* 41, ECLI:EU:C:2016:42).

of associations that have the object or effect of restricting competition. The fact that exchanges of information may be the tool/instrument used to restrict competition doesn't mean that competition authorities do not need to prove the existence of an agreement, a concerted practice, or a recommendation that has as the object or effect of restricting competition. This also means that every exchange of information that is not the instrument of an agreement, a concerted practice, or a recommendation with the object or effect of restricting competition is not an infringement of competition law. Thus, the Horizontal Guidelines should clearly establish that exchanges of information are not an infringement of 101 TFEU unless there is evidence of an agreement, a concerted practice, or a recommendation with the object or effect of restricting competition.

22.2. The lack of general safe harbour as regards horizontal restraints becomes particularly acute in relation to information exchanges. We are aware that this possibility was considered and rejected in the previous review, but some members suggested that the Commission may want to explore again the possibility of introducing a presumption of lawfulness for information exchanges between competitors with a combined share of less than 20%, perhaps absent information exchanges on future prices or quantities. This threshold can probably be brought to 25% for consistency with horizontal merger control, or even above considering that as previously noted an information exchange is unlikely to restrict competition if it does not affect a substantial or even majority part of the market.

22.3. Provide further guidance on the necessity and minimum requirements of a plausible theory of harm. That would include identifying the particular mechanism through which the information exchanged restricts competition. For instance, whether an exchange of information is positive or negative from a competition law viewpoint depends to a large extent on the market dynamics (e.g., price driven market *versus* volume driven market) and the type of data exchanged in each case. If competition in the market is mainly in terms of prices, and the information exchanged concerns past volumes, then the information exchange could only facilitate collusion if it contributes to facilitate monitoring of possible deviations with respect to a hypothetical collusive outcome. This will be difficult if the market is already transparent in terms of prices, and/or the information on volumes is insufficiently disaggregated. Similarly, if the competition authority develops relatively novel theories of harm, like the use of such past information on volumes to identify and respond immediately to any competitive action by rivals in order to discourage them, or to monitor and sustain a collusive agreement whose main objective is the stability of market shares, there should be a requirement to show that the information exchanged is useful for this purpose or that the proposed theory of harm is plausible at all, i.e. if the evidence shows that the information exchanged is not sufficiently granular or precise to identify or measure the rivals' competitive actions, or a hypothetical collusion is not feasible because market shares are affected by exogeneous variables which are outside of the control of industry players, then such theories of harm should be considered ungrounded and invalid. In sum, the Horizontal Guidelines should require to show what is the precise link between the information exchanged and the mechanism by which competition is harmed.

22.4. Also a deeper but simplified economic approach that distinguishes market models and the effects of different kinds of exchanges of information in each market model could possibly help the assessment. The Horizontal Guidelines should in general clarify that a checklist type approach which is largely restricted to enumerating the information exchanged and certain market and information characteristics that are listed in the Guidelines and can (arguably) fit with the case at hand is not sufficient to show a restriction of competition. The authority would need to undertake a detailed assessment of the market and the information exchanged and show how the information can actually lead to a competition harm.

22.5. Provide market-based references for the assessment of some of the criteria provided in the current version of the Horizontal Guidelines. For instance, the Horizontal Guidelines correctly point out that exchanges of disaggregated information are more problematic. However, the level of aggregation is something that should be assessed in the particular market context because what is relevant is not whether the data are more or less aggregated, but whether the level of aggregation is enough to work as a focal point and/or to reduce competition. Similarly, in markets where products are homogeneous and there is little price discrimination, the exchange of relatively aggregated data can be sufficient to facilitate a collusive outcome. However, in markets where products are highly differentiated and prices vary by customer segment or even customer by customer, region or transaction, the exchange of more disaggregated data (even if the name or identity of the company can be identified) can be innocuous from a competition perspective. The level of aggregation cannot be therefore assessed in abstract terms or in the vacuum but need a case by case analysis and the use of market-specific references. The mere fact that the “name of the company” can be identified should not be the key criterion for determining whether the level of disaggregation of the data is sufficiently harmful so as to presume that it causes negative effects in the market. Similarly, whether the data is recent or old/historic and whether the exchange of information is frequent should also be assessed on a case by case basis and taking into account the particular characteristics of the industry. The exchange of data from last month or week on a monthly or weekly basis can have different consequences in industries where there are frequent transactions and prices change on a daily basis than in industries where prices are more stable and do not change so frequently.

22.6. Remind of the need to carry out an effects analysis having regard to the market situation to confirm or discard the theory of harm. For instance, it is highly unlikely that an information exchange may facilitate or had facilitated collusion in a market where there is evidence of intense competition (such as high customer churn, market share volatility, etc.).

22.7. The Horizontal Guidelines should note that reducing the market uncertainty and allowing companies to use the information exchanged to better adapt to the market circumstances is not necessarily negative. What may be negative or positive is the outcome of such adaptation.

22.8. Likewise, when information exchanged can be used both for restricting competition but also to foster competition or generate efficiencies which favour competition, even if the latter do not meet all the exception criteria set forth by article 101(3). In these cases, and in line with the recent ECJ case in C 307/18, *Generics*, and the conclusions of General Advocate Bobek in case C-228/18, competition authorities must analyse, taking into account the specific effects in the market, whether there is an infringement of article 101(1) TFEU, which cannot be presumed and considered that a "restriction by object" exists. The burden to prove the agreement and the object or effect lies on the competition authority.

22.9. The information exchanged may lead to a reduction in the competitive dynamics between undertakings but may also serve to discard inefficient options, reduce transactional risk (and hence costs) and learn from others' experiences with a general positive outcome. Hence, reduction of uncertainty and the possibility of using the information received to adapt one's own behaviour should not be the key criterion for determining whether the exchange is negative or positive for the market. In this regard, it is important to take into account that, by definition, every information exchange relates to confidential information (that's why the data are exchanged, because they are not publicly available), and what makes an exchange of information a potential competition law infringement is whether it is the tool agreed by economic operators to restrict competition in the market. Of course, an exchange of information may potentially be neutral because the information is not strategic or is historic (therefore, no risk of restrictive or positive effects exist) or be useful (with potential positive and/or negative effects).

22.10. The distinction between positive and negative should not rely in a simplistic manner on whether the information (i) is confidential or not (sometimes the information is public and may lead to coordination as well; in other cases confidential information, due to the market characteristics and type of data is useless to lead to a focal point of coordination on an strategic aspect of competitive behaviour of the companies); or (ii) can be used to adapt the companies' behaviours (as said, the key point is whether the use of the data and the adaptation leads to negative outcome reducing competition not to whether it may be used to improve and gain efficiencies even if this entails adaptation) or (iii) whether the identity of the companies is revealed (still the data can be very disaggregated and innocuous). If there is no evidence of an agreement or of a concerted behaviour in the market, there is no infringement of Article 101 TFEU.

22.11. It should be clarified that exchanges of information are as a general rule not restrictive or, if so, they are restrictive "by effects". For instance, in the French/Spanish cases of exchanges of information on current volume and income in the car rental sector (both of which referred to information collected and requested by airport managing companies to determine the location rent) gave rise to different substantive analysis and to divergence in the application of Article 101 TFEU. It was considered a restriction "by object" by the Spanish authorities and a restriction "by effect" by the French ones, with the particularity that the French authority concluded after a deep economic

analysis that the exchanges were not even restrictive as it was not plausible that negative effects could arise.[9]

22.12. It would be desirable to develop more the efficiencies aspects derived from information exchanges. In particular, it is widely acknowledged in the economic literature and also in the current guidelines that information exchanges can lead to efficiencies. For instance:

- information on rivals' costs facilitates benchmarking and can help companies to improve efficiency, identify and adopt best practices and implement incentives mechanisms to attain cost reduction goals;

- information exchanges can lead to a better understanding of the market and the demand structure and thus facilitate the development of better and more efficient commercialization and distribution strategies;

- can also facilitate entry by new players who otherwise would not have been able to evaluate business opportunities in the sector;

- can also help to improve demand forecasting and optimize management of stocks, etc.

22.13. However, the recent practice of competition authorities shows that the pro-competitive and efficiency-enhancing nature of information exchanges is often neglected, and that any information that is useful to inform strategic decision such as those mentioned above (benchmarking with competitors, design of marketing and distribution strategies, demand market monitoring, etc.) is automatically considered an anticompetitive exchange of strategic information. In this regard, the Horizontal Guidelines should provide further guidance and clarification on the kind of strategic decisions that can be informed by efficiency-enhancing information exchanges, as well as on the characteristics of the information that can be exchanged in each particular case, bearing in mind that (as noted above) each sector is different and therefore the information that can and needs to be exchanged in order to attain the efficiency gains can also differ in terms of level of aggregation, etc.

22.14. In this last regard, it must be noted that certain kind of efficiencies can only be attained if the information exchanged is individualised by competitor and explicitly identifies the company to which the data belongs. This will be the case of any benchmarking exercise aimed at reducing costs or improving management of assets or distribution networks (i.e., not at aligning commercial policies but simply to better manage and organize assets and resources in a more efficient manner), for instance. In markets where companies are heterogeneous and produce differentiated goods, the market average will in general be useless as a comparator for most companies. The relevant

[9] See Decision from the Spanish Competition Authorities in case S/0404/12 – *Servicios Comerciales AENA* and Decision of the French Competition Authority 17-D-03 of 27 February 2017.

benchmark will be the costs of those companies who are more alike and supply products of similar characteristics.

22.15. Provide guidance on the conditions under which a public unilateral communication of a price change by a given company should be regarded anticompetitive price signalling aimed at facilitating collusion around a focal point. In this regard, it must be noted that in certain investigations competition authorities have considered the possibility of regarding this kind of public announcement as part or evidence of a collusive agreement. Therefore, it is advisable that the Horizontal Guidelines:

- clarify that barometric and other kind of price leadership, whereby price changes in response to changes in demand and cost conditions are normally made by the market leader and then followed by the rest of market players, is different from anticompetitive price signalling and should not be regarded an anticompetitive practices;

- specify the minimum conditions that should be met in order to support the finding of anticompetitive price signalling. These conditions should be rather restrictive and include e.g. that the communication should be non-binding or even conditional on the behaviour of other players, be accompanied of evidence showing that this is part of a collusive strategy and that a collusive result is likely, lead to an outcome which is different from the one that would have been observed in the absence of the communication or in a competitive setting, and have no objective justification other than establishing a focal point for collusion;

- clarify the (lack of) responsibility of those companies who modify their behaviour in response to a price change announcement by the market leader, in particular if it is clear that such companies would otherwise have suffered from or risked heavy retaliation or if it was a reasonable economic way to react.

22.16. It would be desirable to provide further guidance and clarity on what is or is not allowed regarding information exchanges between members of associations of undertakings, due to the increasing importance of associations.[10] For example, it could include guidance on: (i) which statements of the market (turnover, sales, cost of inputs, etc.) could be exchanged and which could raise issues; (ii) which price comparisons are admissible and which anti-competitive; (iii) which information on expected market changes comparisons are admissible and which anti-competitive; and (iv) which modules and formulas for cost calculation and determination of prices could be

[10] See, as an example, the (Belgian Competition Authority's Guide on information exchanges in the context of associations of undertakings). In particular, these guidelines include indications on: (i) what type of statements (turnover, sales, cost of inputs, etc.) could be exchanged and which could raise issues; (ii) which price comparisons are admissible and which are anti-competitive; (iii) which information on expected market changes comparisons are admissible and which anti-competitive; and (iv) which modules and formulas for cost calculation and determination of prices could be exchanged and which could raise issues. In addition, it could provide examples in each category.

exchanged and which could raise issues. In addition, it could provide examples in each category.

22.17. Finally, the Commission might want to consider shedding some light on Information exchanges and human resources[11] and information exchanges and merger control, pre-closing, in particular, clarifying when an information exchange can be considered gun jumping and when a stand-alone breach of Article 101 TFEU.[12]

B. Specific comments

(i) Exchanges of information on current/future prices-quantities as an isolated practice not accompanying other restrictive agreements/practices

23. It should be clarified that exchanges of information should only be prohibited when the authority or plaintiff establishes they give rise to restrictive effects. An analysis "by effects" should thus be the general rule.

24. According to the current Horizontal Guidelines, certain types of individualised information exchanges on future price and quantities are considered almost in every single occasion as a restriction of competition by object and treated and fined as cartels, based on article 101.1.a) TFEU that expressly forbids conducts such as " *directly or indirectly fix purchase or selling prices or any other trading conditions*".

25. However, exchanges of information alone (i.e., not accompanying other anticompetitive practices) should not be considered as a restriction "by object" in any event –and much less a "cartel practice", **if they do not directly refer to "*future*" prices or quantities** for the following reasons:

25.1. The reference in the current Horizontal Guidelines to these "by object" situations (even if disconnected to future prices or quantities or if the connection is artificially made and construed by the authority) has led to a *per se* approach. This has been the case even without any examination on the ability of the information to influence prices (because they are increased rather than decreased), quality or quantities. Even in these cases it is still necessary to analyse the likely impact of the exchanges in the development of competition and not to discard from the outset the possibility to generate efficiencies.

25.2. Moreover, even in the field **of future prices and quantities** some cases demonstrate that precisely the exchange of information has led to a reduction of prices as compared to the ones that the companies would have otherwise applied.[13] However, the fact that these exchanges are automatically considered a restriction by object in the practice leads to the perverse effect that competition authorities completely disregard their actual effects and even refuse to analyse them and when they –exceptionally– accept

[11] Along the lines of those published by the US authorities, see, https://www.justice.gov/atr/file/903511/download

[12] E.G. Fed. Trade Commission "Avoiding antitrust pitfalls during pre-merger negotiations and due diligence," (March 20, 2018), https://www.ftc.gov/news-events/blogs/competition-matters/2018/03/avoiding-antitrust-pitfalls-during-premerger?utm_source=govdelivery.

[13] See for instance the Spanish case concerning prices for short messages in the telephony sector.

to analyse them, they apply the very restrictive criterion of Article 101(3) TFEU (i.e., the exchange is essential to achieve the alleged efficiency). However, in the field of exchanges of information it is not possible to consider that by their nature they have a predictable negative outcome in the same way as explicit price fixing agreements. It is obvious that parties that enter into a price fixing agreement do so to increase prices or obtain higher margins. The negative effect can be presumed. However, in a mere exchange of information on prices –much more if the market is very heterogeneous and final prices are set as a result of individual and non-predictable negotiations– the outcome is much more difficult to predict. The exchange may lead to a decrease of prices as well as to an increase of prices. Hence, a minimum analysis of effects is always required; the effect cannot be presumed *per se.* Hence, in our view no presumption of harm and of negative consequences should be applied for cases of pure exchanges of information in general, and even for future price/quantity information.

25.3. In addition, although it is not impossible, it is indeed more difficult to probe (and courts and competition authorities are less keen to analyse these sort of arguments) that the exchanges led to efficiency gains that overcome any negative effects when the exchange is classified as a by object infringement and a cartel than when the case requires an effect analysis.

25.4. In the same line, considering the exchanges of current –future prices/ quantities as a "*cartel practice*" when they do not accompany other restrictive agreements, without really analysing the effects of the exchanges of information, may have a negative effect in antitrust enforcement policy. The implementation of the Directive on damage claims generates presumptions of harm in "cartel" cases that are so far nearly impossible to rebut in civil courts of some jurisdictions as judges are not open to even consider economic analysis demonstrating that a mere exchange of information does not lead to real harm. The fact that the exchanges are *ex-ante* qualified by a competition authority as a "cartel" and are placed in equal foot to a price fixing agreement limits the rights of defence in damage claims proceedings. However, from an economic perspective, a price fixing cartel agreement is quite different from a mere exchange of information where no focal point has been agreed or even identified between the parties participating in the exchanges and therefore, the likelihood of causing a damage to the market is much lower.

25.5. Thus, placing these two very distinct situations (price exchanges and explicit price fixing agreements) in equal foot under the general umbrella of a "cartel" behaviour will clearly disincentive voluntary cooperation with competition authorities as companies would prefer to not voluntarily report these types of practices in view of the huge negative consequences that this may have from a civil damage claim procedure perspective. Unless the EC Commission and the national authorities consider other types of voluntary cooperation to self-report other doubtful conducts, aside cartel cases, that allow to obtain immunity and reduction of fines, companies will have no incentives to self-report doubtful exchanges of information with no clear and evident harm to competition unless they form part of a more comprehensive cartel practice.

26. In short, for these reasons, the Horizontal Guidelines should clarify that exchanges of information should only be prohibited when they give rise to restrictive effects, being an analysis "by effects" the general rule to assess any information exchange (even when assessing isolated exchanges of information on current/future prices-quantities). At most, in these exchanges of information the burden of proving the effects may be softened somehow, but in no event, be completely set apart, as it is the current situation.

27. Finally, please note that paragraph 63 of the Guidelines, together with footnote 52 introduces a number of rules on public announcements. Pursuant to these rules: "*Where a company makes a unilateral announcement that is also genuinely public, for example through a newspaper, this generally does not constitute a concerted practice within the meaning of Article 101(1)*". The footnote clarifies: "*This would not cover situations where such announcements involve invitations to collude*". This should probably not be left to a footnote. Also, additional information should be included on the meaning of an "invitation to collude".

(ii) Exchanges of information in mixed vertical/horizontal agreements: category management

28. It would be desirable that the Commission establishes clear guidelines on how to deal with category management agreements, in which one competitor provides "consultancy" services to a retailer on how to better market its own products and also its competitor's products. Although the Vertical Guidelines deal with category management agreements, additional guidance is needed in relation to the horizontal aspects of those agreements. The guidelines may consist on establishing information barrier systems, preventing reporting to internal sales units, legal audits, etc. The Horizontal Guidelines should be sufficiently flexible so as to be applied in the *off-line* and in the *on-line* sector, where the market place is vertically integrated and sells its own products in competition with the products of third-party sellers that offer their products in the marketplace.

(iii) Exchanges of information in digital ecosystems

29. In view of the increasing use of algorithms, it is desirable that the EC incorporates in its Guidelines a specific reference to the assessment of exchanges of information using algorithms. The EC should state an effects-based analysis in order to take into account the efficiencies derived from these systems, which may have a positive outcome for competition. Concretely, it should consider the impact of the use of algorithms on R&D and innovation, which is considered a major goal of competition law and a particularly prominent feature of the digital economy.

30. For instance, comparison platforms may create such a degree of transparency that even unintentional exchanges of information take place, thus reducing or even eliminating almost every uncertainty in the market when the products and the quality are very homogeneous. However, on the opposite site, an algorithm that incorporates artificial intelligence, after sufficient training, may lead to a situation that it can predict

competitors' responses to price changes, interpret logic and intention behind competitors' price, resulting in an increase of transparency and of consumer's choice. But monitoring and reacting to competitors' actions is an integral part of the competitive process and not necessarily negative.

31. Another examples are pricing or learning algorithms. Guidelines should differentiate the situations in which an algorithm merely unilaterally observes, analyses, and responds to the public observable behaviour of the competitors' algorithms, which may be categorized and treated as intelligent adaptations to the market (i.e. market intelligence), from situations where the competitors themselves create a data pool to exchange information that may lead to a collusive outcome. Likewise, the Commission should formally express a clear opinion on whether learning algorithms could breach or not competition law, although there is no formal exchange of information between competitors.

32. Moreover, it would be desirable that the Guidelines include the criteria to evaluate potential damage to competition within algorithms interventions. In addition to classical criteria (aggregated/individualised data, type of data, age, frequency, public/non-public information), the EC should clearly define what other parameters specific to algorithms should help competitors to evaluate their own actions as well as what limitations should be implemented in order to design algorithms compliant with competition law.

33. In close relation to previous paragraph, the EC should answer some questions as to whether the liability of a conduct could be attributed to the company or to the external software developer/provider, who might sell a similar algorithm designed to facilitate collusion to multiple actors being competitors in the same market.

34. Finally, the EC should engage internationally on the recommendations it chooses to adopt from this review, encouraging closer co-operation between NCAs in the monitoring of potential anti-competitive practices arising from new technologies and sharing best practices to develop a common approach to issues across international digital markets.

III. R&D AGREEMENTS

35. Regulation 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 (hereafter the "**R&D BER**") and the R&D Section of the Horizontal Guidelines replace former Regulation 2659/2000 and the preceding Horizontal Guidelines. The R&D BER extends the scope of the Block Exemption in order to cover not only joint R&D but also paid-for research, where one party carries out the R&D activity. It also introduces more flexibility for the joint exploitation of R&D resulting from the cooperation.

36. In *Dow/DuPont* the Commission appears to expand the scope of scrutiny of competition innovation to early stage R&D efforts –so called "*innovation spaces*" or

"*discovery targets*" over which firms compete–, where products are years away from reaching the market.

37. "Innovation spaces" are not mentioned in the Horizontal Guidelines. "R&D poles" are mentioned in para. 120 of the Horizontal Guidelines but both are related concepts only: "R&D poles" seem to compete at industry level for certain "innovation spaces" or "discovery targets". For legal certainty, the notion of "innovation spaces" must be clarified in full in the Horizontal Guidelines if relevant for the assessment of r&d cooperation agreements under 101 TFEU.

38. If applicable, in order to assess if the 25% market share threshold is met –see para. 126 of the Horizontal Guidelines–, it must be explained if parties competing in innovation should calculate their market shares in such "innovation spaces" only or in terms of R&D efforts or in both of them. If applicable, it must be explained how parties should calculate their market shares in "innovation spaces".

39. If the policy aim is to increase R&D cooperation at a EU level, then it must be considered if parties competing in innovation should only calculate their market shares in "innovation spaces" to assess whether the 25% market share threshold is met. All this under the assumption that the wider the market is –i.e. "innovation spaces"–, the lower the market shares of the parties involved would be and the greater R&D cooperation would be possible under the safe harbour provided in the 25% market share threshold.

40. The category of restriction by object does not fit well with R&D agreements. Cooperation in R&D may be analysed under the effects category, as does the FTC, i.e. "*Most such agreements are procompetitive, and they typically are analyzed under the rule of reason*".[14]

IV. SPECIALIZATION AGREEMENTS

A. General

41. Regulation 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 specialisation agreements (hereafter the "Specialisation BER") replaced Regulation 2658/2000, which in turn had substituted Regulation 417/85.

42. Along this process of replacement, several features have remained constant. Among them, notably, the scope of the BER (with a welcome clarification in 2000 concerning unilateral specialisation) and the 20% market share threshold, quite a novelty back in 1984 but nowadays a standard feature of vertical and horizontal block exemption regulations.

[14] https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf page 14.

43. The most recent reform brought the Specialisation BER broadly in line with all other block exemption regulations. Its structure contains definitions, an exemption, a market share threshold and a black list of "hardcore provisions". It has however some particularities, most notably being the only BER that does not have a "grey list" of excluded restrictions.

44. The Horizontal Guidelines supplement the treatment of these restrictions and are therefore also discussed in this contribution in so far as they address specialisation agreements.

45. Genuine specialisation agreements are generally efficiency enhancing. By favouring the division of tasks, undertakings can achieve economies of scale, play to their strengths and concentrate in the production and distribution of better products. Conversely however, specialisation agreements tend to limit competition between horizontal competitors. That limitation is often structural, on occasions causing the agreements to fall outside the realm of behavioural provisions and into that of merger control rules.

46. Specialisation agreements of EU dimension carried through fully functional JVs may be examined under the procedures of the Merger Regulation. If the JV is not considered fully functional, the merger procedure is unavailable. Specialisation JVs with no EU dimension, whether fully functional or not, are subject to general EU competition law under Article 21.1 of the Merger Regulation despite potentially qualifying as concentrations under national laws. These procedural differences result from the Merger Regulation and will not be discussed here further.

G. Specific comments

(i) *On the Specialisation BER*

47. As a general comment, we would suggest that consideration should be given to adopting a general horizontal regulation, as it has been done with vertical restraints. The lack of a general framework risks pushing regulation of horizontal restraints under EU Competition law appears to be confined to a pre-modernization world and is similar to the pre-1999 world in vertical restraints, which featured specific regulations for franchising, etc. This might push undertakings to tailor their agreements towards specialization or R&D out of antitrust concerns, and not out of business needs. The situation becomes particularly striking since the Horizontal Guidelines do purport to apply to all horizontal restraints, which suggest such a holistic approach is indeed possible.

48. Moreover, the principle whereby agreements between competitors with combined market shares below 20% and containing no restrictions by object should be presumed lawful is accepted by other jurisdictions.[15] In an increasingly globalised world, it would

[15] See, e.g., the "safety zone" provided for under Section 4(2) of the joint DOJ, FTC Antitrust Guidelines for Collaborations Among Competitors.

be useful if the treatment could be more similar to that in other major jurisdictions, lest efficient cooperation was abandoned merely because of higher antitrust risk.

49. Recital 8 declares that "*the application of this Regulation to unilateral and reciprocal specialisation agreements should be limited to scenarios where the parties are active on the same product market*". It is submitted that this requirement is not needed. The fact that the parties are only potential competitors, or even no direct competitors at all, should not cause losing the protection of the safe harbour. Indeed, as Recital 4 recalls, the exemption need not to establish a restriction of competition in the first place.

50. The definition of "connected undertakings" in Art 1.2 is confusing. An undertaking is, according to the case-law of the Courts, "an economic unit for the purpose of the subject-matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal" (Case 170/83 *Hydrotherm*, para 11; Case C-97/08 P *Akzo Nobel*, para 55). As other regulations do, the Specialisation BER refers to "undertakings" having certain powers over other "undertakings", which is inconsistent. It is submitted that the Regulation should refer to "connected companies" or "connected entities" as there should only be one "undertaking". The fact that this is not just a problem only in the Specialisation BER, but also in many other secondary law instruments, including the Merger Regulation, does not justify postponing addressing this source of confusion. It can be recalled that, under Article 13.5 of Directive 1/2019, Member States will have to apply a consistent notion of undertaking for the purpose of calculating fines, making consistency in this area more important. A revision of this issue is therefore advised.

(ii) *On the Horizontal Guidelines*

51. Various paragraphs of the Horizontal Guidelines link the legality of an agreement to the proportion of costs (and, in particular, variable costs) the practice involves (see, e.g., paras 158 and 176). There is however little guidance as to the point where a commonality of costs shifts the situation from non-problematic to problematic. In our view, this reference (i) requires clarification (does it refer to the costs for the affected product? the overall costs of the undertaking? Which degree of commonality is problematic?); (ii) requires complicated and detailed investigations into costs and (ii) might lead to counterintuitive results in relation to digital markets, where variable costs are often zero or close to zero.

52. While the system of BERs and Guidelines brings a certain degree of internal consistency to the application of Article 101 TFEU, there are arguably still substantial analytical discrepancies between the application of Article 101 TFEU and other EU Competition law provisions, in particular, the Merger Regulation 139/2004 ("the **EUMR**"). These analytical discrepancies complicate consistency of EU Competition law.

53. By way of example: under the production provisions in the Horizontal Guidelines, a production agreement needs to meet a 20% market share threshold and not to contain restrictions by object to avoid a full-scale Article 101 TFEU review. However, if a

similar agreement is carried out through a merger, its assessment is carried out under the Horizontal Merger Guidelines ("**HMG**"), where combined market shares below 25 % are considered unproblematic (paragraph 18 HMG). This could push undertakings engaging in horizontal cooperation towards the much deeper level of integration of mergers in order to avoid competition law concerns.

53.1. A similar problem can arise for cooperation in markets where the combined market share of the parties leads to HHI concentration levels below the thresholds considered safe under paragraph 20 of the HMG. The detailed figures contrast with the unspecified "concentration ratios" as regards horizontal cooperation under Article 101 TFEU (paragraph 168 of the Horizontal Guidelines).

53.2. In a same vein, it is noted that a merger with a "maverick" firm (with a "high likelihood of disrupting coordinated conduct") or an undertaking whose importance, is not accurately reflected by its market share is considered problematic under, e.g., para. 20 HM but the GHC contain no such reference to horizontal cooperation with such an undertaking.

53.3. Also, the references in the HMG to coordinated effects (paragraphs 39 ff HMG) should probably be relevant to the assessment of horizontal cooperation. As a general rule, it is not clear to us why the existence of market power in a market is to be ascertained under a different analytical framework for the purpose of merger control and for Article 101 TFEU.

54. As regards the Section of restriction by object, para. 160 of the Horizontal Guidelines identify joint production agreements which involve price fixing, unless a production agreement also provides for the joint distribution of the jointly manufactured products envisaging the joint setting of the sales prices for those products. In this case, however, an additional condition to those contemplated in the Specialisation BER is included, i.e. that the parties would not otherwise have an incentive to enter into the production agreement in the first place. This last condition is difficult to demonstrate and may lead to legal uncertainty. In that sense, we take note that the BER exempts price fixing in the context of joint distribution without referring to the need to demonstrate that joint distribution was essential to enter into the production agreement.

55. We believe that a specific Section on ancillary restraints in relation to joint production agreements should be included in the Horizontal Guidelines. It is true that the Commission Guidelines on the application of Article 81(3) of the Treaty contain a reference to ancillary restrictions but we believe that the Horizontal Guidelines should expand on that.

56. In particular, non-compete provisions in joint production/specialization agreements are often a key condition for the realization of the efficiencies which these types of agreements as a rule give rise to and should therefore be considered ancillary. However, para 31 of the Commission Guidelines on the application of Article 81(3) of the Treaty refer to the TPS case, where the Commission accepted a non-compete clause only during the initial phase and for a period of three years. That example is not

in line with the current treatment of non-compete clauses in the context of full function joint ventures, which the 2005 Notice on Ancillary Restraints admits for the lifetime of the joint venture. Similarly, the current legal treatment of post term non-compete clauses should be brought in line with recent decisions such as in the *Siemens/ Areva* case (Decision of 18 June 2012, COMP/39736). We would therefore further suggest that the Horizontal Guidelines should discuss such clauses in detail and in the framework of each particular category of horizontal agreement, including joint production agreements, so that parties and eventually national Courts obtain relevant guidance on their compatibility with Article 101 TFEU.

57. We also propose that reciprocal specialization agreements under which one of the parties to the agreement agrees to supply the product concerned only where the capacity of the other party is fully utilized are also exempted. Such arrangements pose no more risk to competition than the long-term, exclusive arrangements that are permitted under the BER, but may enable parties to achieve added efficiencies through specialization.

58. Finally, we would propose to expand the discussion of the differentiation between an unlawful market allocation arrangement and a legal specialization arrangement, and not merely left to an example (see para. 190 of the Horizontal Guidelines). The Horizontal Guidelines should issue guidance on the circumstances under which an arrangement does not constitute a market sharing arrangement, eventually with examples of an admissible specialisation agreement.

59. The last example included by the Commission refers to swap agreements. Although the Commission agrees that said agreements may give rise to significant efficiency gains, it does not recommend the exchange of information regarding production and transport costs and it recommends the setting of a price formula which does not entail the disclosure of such costs. It would be very useful to receive additional guidance as to how this price formula would be set without referring to production and transport costs and on whether there may be alternative ways to reduce the risk of information exchanges in the framework of a swap agreement.

V. JOINT PURCHASING AGREEMENTS – RETAIL ALLIANCES

60. Joint purchasing agreements are a very common category of cooperation between companies. There is wide consensus about the procompetitive nature of these agreements. However, certain retail alliances have recently been under scrutiny by the EC and certain NCAs (e.g. the French authority identified such agreements as a key priority in 2019). Therefore, it would be appropriate for the Commission to draw conclusions from experience gained during the last years and take the opportunity of the Horizontal Guidelines reform to clarify some of the rules applicable to joint purchasing agreements as regards their compatibility with Article 101 TFEU. In that context, some AEDC members suggested the possibility to include in the BER joint purchasing agreements meeting certain criteria and leaving to the Guidelines the cases that exceed the thresholds or the criteria set in the BER. This would be consistent with the other BER and also with other practices covered by the BER.

61. Even though the definition of joint purchasing refers to all kind of situations, the most common examples of joint purchasing (e.g. supermarket/retail alliances) may not currently be treated with the level of detail needed to guarantee legal certainty. In addition, each kind of contractual arrangement requires a specific treatment which has barely been sketched out by the Commission in the current Horizontal Guidelines. From a general standpoint, we would suggest a more practical approach to the Guidelines.

62. In that regard, a distinction should be drawn in the Horizontal Guidelines between two figures that may converge or not in the same alliance. On the one hand, we refer to (i) joint negotiation agreements, where the parties/purchaser do not purchase jointly but only agree to negotiate together or through an intermediate third party certain commercial conditions with the same supplier or group of suppliers. Then the agreed commercial conditions will be applicable to all purchasers, the latter will continue to adopt its own commercial policy (e.g. decide on their volumes individually); and, on the other hand, (ii) joint purchasing agreements, where parties not only negotiate but also purchase jointly, with or without the intermediation of a third party –in that latter case, being bound to acquire the volumes they have agreed. Given the different level of antitrust risks involved –(i) being "safer" than (ii)– such distinction would enable the Commission to provide more specific guidance to companies. In turn, companies would welcome this increased legal certainty as it would help them tailor their agreements based on the guidelines.

63. Moreover, over last years, the Commission has reviewed a wide range of agreements (joint purchasing and joint negotiation) that were presented by companies from various sectors for the Commission's consideration. Indeed, it is common practice for e.g. a new retail alliance to present the scope, objectives, organizational structure of an agreement (before signing) to the Commission for his views. While there was no official approval mechanism, we believe that this is a valuable resource that should be used when rethinking Chapter 5 of the Horizontal Guidelines.

64. This also leads to the debate of whether it is necessary (or even mandatory) to distinguish between (i) retailer alliances that purchase jointly without any intermediate structure, and (ii) central purchasing organizations which establish a vertical relationship with companies that purchase together thereby reducing the risk of exchanging sensitive information among the participating companies. Therefore, another important question to be clarified is which are the main criteria or best guidelines to be followed by companies participating in the cooperation in order to reduce competition risks, what consists of an adequate intermediate structure (e.g. distinct personnel, office, staff, firewalls, compliance/training programs for personnel, aggregation of information, rules around meetings with all participating companies, confidentiality of data of the other partners, incompatibility of dual roles in a partner and in the purchasing entity, minimum number of buyers of a given product so as to ensure that aggregation of data prevent identification of a competitor). The combination of both vertical and horizontal restrictions in this case would require particular attention from the EC.

65. Furthermore, another relevant question could be whether it would be worth raising the 15% threshold which is currently used to presume that joint purchasing agreements do not pose competition problems (according to para. 208 of the Horizontal Guidelines, the market power threshold) up to a 20%, which is typically the lowest threshold used in the context of merger control. It could be worth exploring an increase of this threshold, at least for those agreements in which the parties clearly establish and show that they have a strict mechanism to avoid any anticompetitive coordination or risks of exchanges of information on volumes or fixing the exact purchase price they will pay (in case it varies depending on the volume of purchases agreed). This would reduce the burden of the Commission so that it can focus on the "riskier" agreements.

66. In the same line, one could consider setting a higher threshold at the sales level, i.e. paras. 204 and 214 of the Horizontal Guidelines already recognize that the main problems take place at the sales market level. However, this possibility may raise the issue of how to measure different market shares at different levels which in turn may affect legal certainty.

67. When joint purchasing agreements are analysed, another frequent question which is not sufficiently addressed in the Horizontal Guidelines is which restrictions (in particular, vertical, when the purchasing agreement is set up through a company or an association) are ancillary to the agreement in question. Is a restriction in relation to the possibility to participate in other parallel joint purchasing agreements necessary for the parties to have real negotiating power *vis a vis* their suppliers? Is a minimum purchase commitment ancillary? Is an obligation to cooperate with all purchase capacity and in relation to all references and input ancillary to the joint purchasing agreement? In this respect, the Horizontal Guidelines seem to indicate that the agreements will have to be analysed first under the Horizontal Guidelines and afterwards, also pass the filter of the vertical BER or the Vertical Restraints Guidelines (for instance, an exclusive purchase obligation through the joint purchasing entity for more than 5 years). However, if these agreements are really ancillary, and hence, necessary for the first and "main agreement" (i.e., the horizontal cooperation), they should be approved together with the main agreement. Hence why should these "ancillary" restraints also pass the filter –and be analysed and acceptable– under the vertical BER or the vertical guidelines? If what the Commission is seeking to say is that it will only consider that vertical restraints are ancillary when they are at the same time covered by the Vertical BER or are acceptable under the Guidelines and article 101(3) TFEU it should indicate it clearly in order to avoid confusing concepts.

68. In relation to the above, the question as to whether information exchanges in the context of joint purchases may be considered ancillary also deserves some clarification. When negotiating purchasing conditions, it may be necessary to put in common sensitive information on volume, qualities, categories of input, etc. Therefore, it would be interesting that the EC indicates under which circumstances and safeguards should be put in place to avoid restrictive effects on competition. Among other questions, a clarification that an information exchange on future purchase prices (or maximum purchase prices that an entity is willing to accept from a supplier) may be ancillary in the context of the joint purchasing agreement, so these type of

exchanges (which may be channeled through specific individuals subject to strict confidentiality commitments and without any role in the sales teams of the parties) are clearly separated from information exchanges on future prices which constitute a restriction by object as set forth in the relevant Section on information exchanges of the Horizontal Guidelines. A clarification from the Commission is needed so that the necessary legal certainty is guaranteed in order to avoid diverging interpretations from NCAs.

69. A clarification of the notion "*intensity of links*" referred to in para. 211 of the Horizontal Guidelines is also needed.

70. A common feature of joint purchasing agreements, in particular, in retail distribution, is the fact that they are increasingly used in combination with other horizontal agreements, for example joint commercialization, and with the provision of services by distributors or central purchasing centers to its suppliers (joint vertical cooperation with a common supplier). However, para. 205 of the Horizontal Guidelines, defining restrictions by object in the context of joint purchasing agreements, lacks the required flexibility and can lead to the conclusion that certain restrictions, while having a clear procompetitive object and effects, may be deemed restrictions by object. It would therefore be very useful to provide certain guidelines setting out which are the relevant questions, and to establish the general principle that specific or *ad hoc* cooperation between companies which purchase jointly in order to better compete with other operators of bigger size in downstream markets, will not normally pose competition problems under certain circumstances.

71. One of the risks that joint purchasing agreements may pose is cost homogenization (para. 213 et *seq*. of the Horizontal Guidelines) which can cause a downstream reduction in competition. However, this risk may materialize when common costs represent an important part of total costs of the product or service, for mono-product companies, or of the portfolio of products they acquire (if they sell different products, in which case, the common cost taken into account should be all aggregated costs of the companies, and not the individualized cost of each product). In that regard, it would be very useful to have an assessment of which would be the thresholds based on which cost homogenization should be analysed with more detail in order to avoid a downstream reduction in competition, or, if possible, a "safe harbor" based, for instance, in the percentage of total costs of the products or services commercialized in the downstream market that the collectively purchased products represent.[16]

72. Last but not least, the members discussed the need to review the theoretical foundation from an economic point of view of the EC's approach to joint purchasing agreements. It was discussed whether more focus should be placed to foreclosure effects of competitors or suppliers (relevant to the application of Article 101.1 and 101(3) TFEU)

[16] See, in this regard, the document "Guidelines on collective procurement of prescription drugs for medical specialist care" published by the Autoriteit Consument & Markt, available in the following link: https://www.acm.nl/sites/default/files/old_publication/publicaties/16341_guidelines-on-collective-procurement-of-prescription-drugs-for-medical-specialist-care.pdf

rather than whether efficiencies are passed-on to consumers (relevant for the application of Article 101(3) TFEU). In economic terms, only when there are foreclosure effects it would be necessary to prove that efficiencies are passed-on to consumers.

73. Also, the reform and clarification of the guidance around the joint purchasing agreement would avoid that the NCAs (or national governments) develop their own guidelines, legal requirements thereby reducing even more the legal certainty across the Union. For example, in the French Parliament issued a wide-reaching report on retail alliances in September 2019. From a competition law perspective, it proposes notably to establish (i) a control by l'Autorité de la Concurrence similar to merger control and (ii) a threshold above which such agreements could be prohibited. Irrespective of the AECD's views on the propositions made in the report, such initiatives demonstrate the pressing need for further guidance from the European Commission. Otherwise, we risk creating a unequal legal landscape within the EU.

VI. COMMERCIALIZATION AGREEMENTS

74. Commercialization agreements involve cooperation between competitors (usually, but not necessarily always) at the last level of the production and distribution chain of products or services. In general terms the EC and the current horizontal guidelines consider that these agreements are more likely to have an effect on prices and, therefore, are treated with greater care by the European Commission. However, these agreements cover a wide variety of arrangements whose likelihood of negative impact in the market may be quite different. For instance, these agreements may refer only to the joint negotiation of the "selling" quantities/prices and conditions (which may lead to efficiencies for clients that benefit from transactional efficiencies when using a single point of contact, rather than several points of contact in case they need to contract the products or services from different sources).[17] In other cases, these agreements may go an step further and also embrace the cooperation in the sale and distribution of the products / services and the split of income between the parties. In view of these differences in nature and scope of commercialization alliances it would be worth that the future Horizontal Guidelines try to avoid excessive generalization and treat them differently.

75. Although the Horizontal Guidelines provide useful insight on how these agreements should be analysed, there is still room for improvement and clarification, in particular in the public procurement area.

A. Temporary unions of undertakings or *consortia*

76. Some NCAs, including the Spanish CNMC, have identified as an enforcement priority

[17] As an example, we may refer to alliances for the sale/negotiation of on-to international services of retail chains that operate in several countries and negotiate with the centralized purchasing unit of suppliers (for instance, large multinational branded products). In some jurisdictions (for instance Brazil) this type of alliances are considered concentrations and should be notified and cleared prior to their implementation and there are several cases in which they have expressly approved them.

the investigation of anticompetitive practices in the public procurement sector, the so-called bid rigging practices. For this purpose, they have developed detection tools, have increased training to contracting authorities and are in constant communication with them.

77. It is relatively common for companies participating in a public bid to submit a joint offer in the framework of a public or private bid, by constituting a *consortia* or, in Spanish, a temporary union of companies. This cooperation helps companies to participate in projects not only where they cannot participate individually (i.e., they are not actual or potential competitors, as they do not meet the technical or financial conditions established in the tender) but they also when they can participate on an autonomous basis but the cooperation allows the companies to submit an improved offer in a specific awarding procedure, so they increase the chances to win the offer and, at the same time, they compete more effectively with other companies.

78. This latter type cooperation is facing an increasing scrutiny by NCAs under legal tests which in our view may be too narrow. NCAs usually take the position that these consortia are only admissible when the parties cannot compete on their own or an unable on their own to meet the tender requirements (i.e., when the parties are not actual or potential competitors). However, they do not admit as a matter of principle the second type of cooperation (i.e., in order to improve the offer) and usually consider them as "restrictions by object" refusing to even analyze whether they comply with the requirements of article 101(3) TFEU.

79. In particular, when investigating a cartel concluded between certain companies, a specific consortia will very likely be analysed as evidence of collusion within the wider infringement. In that case, there will be little room –if any– to justify this consortia. However, there are many other cases where competition authorities analyze stand-alone temporary unions of companies –not within a wider cartel– and automatically conclude that they amount to a restriction by object and a cartel by itself, unless the parties fail to demonstrate that they could not participate separately (the so-called "*indispensability test*").

80. The exclusive application of the indispensability test by certain NCAs is excessively restrictive and has serious implications as regards standard and burden of proof. In fact, it entails that NCAs only accept this type of cooperation when the practice is not able to be caught by article 101.1 TFEU (as the parties are not competitors). However, companies are placed in a situation of legal uncertainty and the conclusion of consortia which, although not being indispensable (and hence, being theoretically caught by article 101.1. TFEU), may be clearly procompetitive, is discouraged.[18]

81. Within this context, the majority of the AEDC members that have participated in this

[18] The situation is even worse if the Administration or the entity organizing the tenders repeat the same requirements or even increases the requirements for future tenders and the parties to the initial consortia (once they know the conditions of the new tender), decide to renew the consortia agreement because they cannot still meet the requirements on an individual basis. In these cases some NCAs consider that the first initial

paper consider that consortia that do not form part of a wider cartel agreement (for instance, in cases of clear market sharing agreements or bid rigging) should be considered restrictions by effect. In particular, more clarity is needed on how to define a market before the deadline for submitting an offer expires; which is the relevant criterion to exclude the existence of a restriction of competition and to assess whether a consortia which is not indispensable can nonetheless be considered compatible with competition rules when it gives rise to efficiencies (i.e. lower prices or better services) which can be passed-on to consumers.

82. For this reason, it would desirable to include in the Horizontal Guidelines a clear statement in this regard, indicating that stand-alone temporary unions are not a restriction by object in any case and that an effect analysis is always desirable. In this regard, when the indispensability test shows that the companies taking part in the temporary union are competitors, a business reasonability test to determine whether the temporary union can be justified on business grounds (for example because risks and costs are shared)[19] should be carried out.

83. In addition, the following questions should be taken into account when reviewing the relevant Sections of the Horizontal Guidelines.

83.1. Consortia or temporary unions are considered by the current Horizontal Guidelines under the effects Section (see para. 237, where it is stated that temporary unions which are indispensable do not give rise to restrictive *effects* on competition). From that paragraph, however, it cannot be extracted that a consortium which is not indispensable amounts to a restriction by object –or to a cartel–. It would be worth to emphasize this Section in order to provide further guidance to NCAs.

83.2. In fact, para. 235 of the Horizontal Guidelines states that even when the parties to a commercialization agreement jointly fix prices, there should not be a restriction by object if the agreement is not exclusive (i.e. it refers only for a specific bid) and it does not have the object to generally coordinate the parties' prices (i.e. the parties will keep on competing in the relevant market for other bids or contracts).

83.3. Price fixing in the framework of a consortia cannot therefore be considered *ab initio* as a restriction by object, but as a joint production and selling agreement. It should be treated as a specific restriction necessary for the *consortium* to take place. A similar principle applies in relation to production agreements where the European Commission

consortia could be acceptable because the parties were not actual or potential competitors for that tender but do not accept the possibility that the parties can still not be actual or potential competitors in future similar (or even more stringent) tenders. In these cases, each tender should be analysed on its own merits and the potential "repetition" of the consortia should not be considered as an evidence of restrictive agreements.

[19] In fact, this was the view adopted by the High Court in Spain in its judgement 22 February 2018 (appeal 115/2015), in which the High Court considered that although the companies taking part in the temporary union where competitors, its union was justified as its creation responded to business reasons (economic advantages in the form of sharing risks, fleet and costs savings, and experience of some companies in similar projects). In fact, the CNMC has recently close a case of stand-alone temporary unions (S/0010/19, ITV COMERCIALES EN CARRETERA), although it was not on efficiency grounds but because, according to the decision, the authority did not find during the dawn raids evidence to counter the alternative explanations provided by the companies to the existence of a concertation during the investigation.

clearly states that a price fixing clause should not be analysed separately but in light of the global effects of the joint production agreement in the market (para. 161 of the Horizontal Guidelines).

83.4. It is therefore necessary a clarification of the methodology to be followed in relation to *consortia* and confirmation that price fixing should be analysed within the framework of the analysis of restrictive effects, and not as a factor determining the existence of a restriction by object. In that regard, account should be taken to recent case law limiting the notion of restriction by object, as already discussed in the introductory Section of these comments.

83.5. The risk of divergence is not theoretical. For example, the EFTA Court in the *Sky Taxi c*ase[20] and the Supreme Danish Court in the road transport case of November 27th, 2019 have both concluded that joint bidding amounts to a restriction by object. It is also worth stating that the Supreme Danish Court expressly refused to refer a preliminary ruling to the European Court of Justice. Therefore, specific guidance in this matter, based on an economic analysis of restrictive effects, is essential.

83.6. In addition, specific guidance is also needed in order to (i) stress that even if a consortia may lead to theoretical restrictive effects because the parties can technically/financially meet on an individual basis the conditions of the tender it may still be exempted and declared compatible with competition rules if the cooperation gives rise to efficiencies (for instance a better offer which also has more chances of success) and meets the other conditions of article 101(3) TFEU (as indicated, some NCAs do not seem to accept the application of article 101(3) TFEU to these agreements); and (ii) determine how to carry out an analysis of the conditions of 101(3) TFEU in case it is found that a specific consortia gives rise to restrictive effects.

B. Commercialization agreements and Internet

84. New technologies are also bringing new challenges in the context of commercialization agreements.

85. In this regard, it would be very useful if the new Horizontal Guidelines analyze whether certain conducts carried out in the digital context may give rise to restrictions by object or by effect.

86. In particular, when para. 234 refers to commercialization agreements that give rise to price fixing between competitors, it would be advisable to make an explicit reference to pricing algorithms and to clarify in which cases the use of the parties of a commercialization agreement of said tools can be considered an infringement by object or an infringement by effects.

87. In addition, when para. 236 refers to the fact that commercialization agreements can also be used to compartmentalize markets, it would be advisable to mention the market

[20] https://eftacourt.int/cases/e-03-16/.

sharing risks derived from restrictions to online sales agreed in the framework of a commercialization agreements (in particular if the restrictions are made on the basis of geographical areas).

VII. STANDARDISATION AGREEMENTS – PATENT POOLS

88. Standardization projects will be increasing in the following years, especially in areas where interoperability is needed, such as digital products and services and data-related cooperation projects. Therefore, a review of this Section of the Horizontal Guidelines would be convenient.

89. The obligation to guarantee an unrestricted participation in the standard-setting should have clearer limits. Para. 295 of the Horizontal Guidelines accepts that some restrictions could be adopted when it is necessary and only "*ensuring that stakeholders are kept informed and consulted on the work in progress*". This rule should be further developed in order to better explain when and to what extent restricted participation is allowed and what transparency rules should be included. From a practical point of view, in cases where the existence of too many participants makes working all together simultaneously impossible, there must be clear rules on how a smaller group can advance, what level of information/consultation is needed, if there is a need for balance among different types of participants, etc. At the same time, there is a need for rules on how the obligation to allow participation is fulfilled, avoiding the miss-use of competition law arguments by those who want to block standardization processes; for instance, what happens if companies invited to participate decline to do it but afterwards block the process?

90. Many times, standardization projects entail other components which are not purely standardization. Further guidelines on how to treat those mixed cooperations would be highly useful.

91. The procompetitive nature of standardization agreements should also be considered. In this sense, it would be relevant to take into account in the analysis that in some cases the counterfactual of the considered standardization is not a different standardization but proprietary systems imposed by dominant companies. In those cases, there must be a presumption of legality for those standardization cooperations.

92. In standardization agreements, the effects over the products and services markets, the technology and the standards markets are analysed. Many times the outcome of such analysis is different in each market. In this sense, clear rules on how to balance the effects affecting the different markets would be needed.

93. It would also be useful to distinguish between the setting of the standards and its implementation. Those two different levels should be clearly separated and the Horizontal Guidelines related to standardization agreements should only be applied to the setting but not to the implementation. This should be clearly stated in the Guidelines.

94. Finally, cooperation among competition authorities at an international level is absolutely needed given that standards are usually set at a global level and by global organizations. Therefore, a uniform application of competition law to this kind of cooperation would be very much welcome.

95. One of the circumstances under which standard-setting agreements which risk creating market power will normally fall outside the scope of Article 101(1) TFEU is when the standard-setting organization's rules ensure effective access to the standard on FRAND terms. (paras. 278, 280 and 283) The updated Horizontal Guidelines could provide additional clarification as to what constitutes FRAND terms in this context.

96. The Horizontal Guidelines state that the non-fulfilment of the principles set out in them will not lead to any presumption of a restriction of competition within Article 101(1) (para. 279). If a standard setting organization does not ensure access to the standard on FRAND terms, a self-assessment is still required to establish whether the agreement falls under Article 101(1) TFEU and, if so, if the conditions of Article 101(3) TFEU are fulfilled. Therefore, the Guidelines provide insufficient legal certainty as to the consequence of non-compliance with FRAND terms for access to a standard.

97. In the case of standards involving IPR, participants wishing to have their IPR included in the standard should provide an irrevocable commitment in writing prior to the adoption of the standard to offer to license their essential IPR/SEPs to all third parties on FRAND terms. (para. 285) Compliance with Article 101 TFEU by the standard setting organization does not require the standard setting organization to verify whether licensing terms of participants fulfil the FRAND commitment (para. 288). For the self-assessment by participants, currently the Guidelines establish as a benchmark the economic value of the IPR and suggest comparing the licensing fees charged by the company in question before the industry was locked into the standard. (para. 289) As implicitly recognized by the Guidelines, this comparison cannot always be made in a consistent and reliable manner. Then, parties need to rely on an independent expert assessment or other methods of assessment. The Horizontal Guidelines do not provide an exhaustive list of appropriate methods to assess whether the royalty fees are excessive (para. 290). Parties may also have recourse to civil or commercial courts (para. 291). The Horizontal Guidelines could provide additional clarification as to what constitutes FRAND terms, especially in terms of fees.

98. The Horizontal Guidelines could clarify whether guidance from Art. 102 TFEU case law (e.g., *Huawei v. ZTE*) may be incorporated to the Guidelines with regards to SEP licensing. In addition, given that licensing agreements fall under the scope of the TTBER, the Horizontal Guidelines could also clarify the interaction between Horizontal Guidelines and TTBER/Technology Transfer Guidelines.

Asociación Española para la Defensa de la Competencia
Spanish Association for the Defense of Competition

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