ASOCIACIÓN ESPAÑOLA PARA LA DEFENSA DE LA COMPETENCIA
(SPANISH ASSOCIATION FOR THE PROTECTION OF COMPETITION)
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COMMENTS ON REVISED 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 draft revised Horizontal Block Exemption Regulations on Research & Development ("R&D") and Specialisation agreements ("**R&D BER**" and "**Specialisation BER**" respectively, together "**HBERs**") and the draft revised Horizontal Guidelines ("**HG**").

2. The evaluation of the Commission has shown that HBERs and HG are not fully adapted to economic and societal developments of the last ten years, such as digitisation and the pursuit of sustainability goals. Some of the provisions in the HBERs were considered rigid and complex, while other provisions were considered unclear and difficult to interpret by companies. The level of legal certainty provided by the HG was found to be uneven for the different types of horizontal cooperation agreements covered. The AEDC welcomes the revised HG as they address many aspects that remained uncertain and needed some update.

3. The comments below are limited to 4 elements that are of particular interest to the members of the working of AEDC who have participated in the preparation of these comments[1].

II. THE TREATMENT OF JOINT VENTURES

4. Paragraph 13 of the HG, with reference to the judgments of the European Court of Justice (the "ECJ") in *Du Pont de Nemours*[2] and *LG Electronics*[3] proposes to treat agreements between joint ventures and their parent entities under a single entity approach, which would exclude any application of Article 101 TFEU.

[1] Participants of the working group were Diego García Adánez (abogado, White & Case); Íñigo Igartua (abogado, Gómez Acebo & Pombo); Irene Moreno Tapia (abogada, Cuatrecasas); Jorge Manzarbeitia (abogado, Callol & Coca abogados); Marcos Araujo (abogado, University of Glasgow); Patricia Vidal Martínez (abogada, Uría Menéndez); Victoria Rivas Santiago (abogada, Gómez Acebo & Pombo). The opinions contained in this paper are individually presented by the members of the working group and do not represent the opinion of their respective firms or institutions in which they participate/render services.

[2] Case C-172/12 P, *EI du Pont de Nemours/Commission* [ECLI:EU:C:2013:601].

[3] Case C-588/15 P and C-622/15 P, *LG Electronics/Commission* [ECLI:EU:C:2017:679].

5. Some members of the working group openly welcome this statement as well as those contained in paragraph 12, as they provide legal certainty to the companies that could before have some doubts as to whether a JV could be considered as a "single economic unit" (and hence, with each of its controlling parent companies). Maybe as a possible area of improvement it would be interesting to (i) not bring into the equation the concept of parental liability mentioned in paragraph 13 (as the traditional test is to "be able" to exercise influence rather than an actual exercise of such influence) and (ii) clarify the content of the possible restrictive areas mentioned in paragraph 13 concerning agreements between parent companies to "create the JV" or to "alter the scope of the JV".

6. By contrast, other members of the working group consider that the approach should be reconsidered for several reasons explained in the following paragraphs.

7. First, the above suggestion would conflict with the position adopted by the Commission in earlier cases such as its Decisions of 16 January 1991, *IJsselscentrale*[4] or of 15 May 1991, *Gosmé/Martell*.[5]

8. Second, the Court judgments on which the HG rely to arrive to that conclusion should not be read in the manner they have been. The finding made in *Du Pont de Nemours* that a joint venture ("**JV**") and its parent companies may be treated as a single unit was limited to parental liability, having the Court expressly declared that "(*w)here two parent companies each have a 50% shareholding in the joint venture which committed an infringement of the rules of competition law, it is only for the purposes of establishing liability for participation in the infringement of that law and only in so far as the Commission has demonstrated, on the basis of factual evidence, that both parent companies did in fact exercise decisive influence over the joint venture, that those three entities can be considered to form a single economic unit and therefore form a single undertaking for the purposes of Article 81 EC*" (paragraph 47). While it is true that in *LG Electronics* the Court disallowed a reductionist reading of *Du Pont de Nemours* and permitted to include for fine-setting purposes the turnover of jointly controlled undertakings, that only meant to avoid that the true economic importance of a restriction would not be considered. However, again the finding that the entities may be taken as one for those purposes was not meant to expand to all the functions of the single entity doctrine.

9. In contrast with parental liability or fine setting, the intragroup exemption is not only based on the existence of decisive influence, but especially on the logic that a parent company and its subsidiary, "*form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their course of action in the market, but carry*

[4] IV/32732 - *IJsselscentrale* [1991], OJ L 28/32, at 12-13.
[5] IV/32186 - *Gosme/Martell* [1991], OJ L 185/23, at 30.

out the instructions issued to them by the parent company controlling them".[6] As a result of this logic, the intragroup exemption should be limited to full control situations where affiliates lack any autonomy. That is by definition not the case with JVs, which are never fully controlled by their parents.

10. The foregoing does not mean that every agreement establishing a JV or between it and a parent is subject to Article 101 TFEU. Many of the restrictions in that context are eligible to be treated as ancillary to a valid transaction. That is clear from paragraphs 36 of the Notice on Ancillary Restrictions.[7] This legal basis would provide a more consistent basis to decide when some restrictions are acceptable and when they are not than the "blanket" approach of the intragroup exemption.

11. It would be noted in that respect that despite its underlying "blanket" logic, paragraph 13 of the HG pretends that the intragroup exemption would only be allowed within certain limits, which would arguably be difficult to justify if the position is taken that two entities are simply the same undertaking:

    - The exemption would only be available if it was demonstrated that the parent companies effectively exercise decisive influence, arguably with no presumption, raising evidentiary issues and allowing borderline debates;

    - the Commission would retain the right not to apply the exemption to agreements for the creation or altering the scope of the JV;

    - the exemption would only be available within the product and geographic scope of the activity of the JV, leaving in the hands of the parties the definition of the exempted field by enlarging their field of cooperation; and

    - The "involvement" of the JV in the agreement would be required for the exemption, adding a purely formal requisite liable to create its own set of difficulties.

12. Again, it is submitted that these "exceptions" confirm the logic that the exclusions should be based on an ancillary restraints approach, rather than an absence of duality among the parties.

13. It would finally be noted that the HG does not clearly differentiate between fully functional and other JVs, which may result in confusion concerning the situation of cooperative ventures, whether fully functional or not, under Article 101 TFEU.

14. For the above reasons some members of the working group are happy with the current wording of the HG (with the suggestion of the clarifications mentioned in paragraph 5).

[6] Case C-73/95 P, *Viho* [ECLI:EU:C:1996:405] at 16.
[7] OJ C 56/24.

However, some other members of the working group suggest that this part (paras 12 & 13) is revised maintaining the doctrine that:

- Agreements creating cooperative JVs, fully functional or not, and their implementation should remain subject to Article 101 TFEU; and

- For these members, concentrative fully functional JVs should be treated as separate entities to their parents, lest undertakings are allowed to create constellations of independent entities that may freely set up cartels with the only requisite of being limited to an area of business. These agreements may be treated as ancillary to the creation and operation of the JV itself if directly related and strictly necessary, with the result that Article 101 TFEU may not apply to them. However, the exclusion should not be based on the doctrine of the economic unit or the notion of undertaking adding further confusion to what is already a difficult area of competition law.

15. No general consensus has been reached concerning the proposals above and this is the reason why in this paper all the opinions of the members of the working group have been explained.

III. JOINT PURCHASING AGREEMENTS

16. Section 4 of the HG includes improved guidance on joint purchasing agreements. The clarifications on how to distinguish legitimate joint purchasing from buyer cartels, which take account relatively recent precedents on the subject (e.g. the car batteries recycling EC case and subsequent case law) are particularly welcome. Improved guidance on how to self-assess restrictions by effect is also pertinent. The HG also usefully discuss the application of the horizontal guidelines to cooperation other than joint purchase such as joint negotiations) across several economic sectors.

17. Despite the remarkable improvement of the guidelines when it comes to joint purchasing, we respectfully submit below a series of comments concerning some specific aspects of the HG.

18. The HG refers to the application of the guidelines to *licensing negotiation groups*, i.e. groups of potential licensees that jointly negotiate licensing agreements (paragraph 312 HG). Since Section 7 of the HG does not deal with the issue, it may be desirable, for clarity, to introduce further guidance in paragraph 312 of the HG or, perhaps, an example in its Section 4.4.

19. Paragraph 321 of the HG reads as follows: "*Joint purchasing arrangements can also lead to a restriction of competition by object if they serve as a tool to engage in a disguised cartel, that is to say, an agreement between purchasers fixing prices, limitating output or sharing markets or customers on the downstream selling market or markets*." In view

of its content, we suggest to move this paragraph from Section 4.2.2 (r*estrictions by object*) to Section 4.2.3.3 (*collusive outcome*).

20. Paragraph 322 of the HG and the last part of paragraph 334 of the HG are (almost) identical. We suggest editing or delete.

21. Paragraph 329 of the HG reproduces the safe harbour included in paragraph 208 of the current horizontal guidelines. Pursuant to the said paragraph *"… in most cases it is unlikely that market power exists if the parties to the joint purchasing arrangement have a combined market share not exceeding 15% on the purchasing market or markets as well as a combined market share not exceeding 15% on the selling market or markets. In any event, if the parties' combined market shares do not exceed 15% on both the purchasing and the selling market or markets, it is likely that the conditions of Article 101(3) are fulfilled*."

22. In our view, there is scope to argue that the proposed 15% market share thresholds are too low to exempt joint purchasing agreements that are procompetitive. Raising the market share threshold would align the horizontal guidelines with the Specialisation BER or the R&D BER, which establish higher market share thresholds.

IV. BIDDING CONSORTIA

23. The AEDC welcomes the introduction of the new Section 5.4 for bidding consortia in the horizontal guidelines, which seek to provide clarity between legitimate forms of joint bidding and bid-rigging ("*illegal agreements between economic operators, with the aim of distorting competition in award procedures*").

24. Paragraph 392 of the HG rightly says that the fact that parties of a joint bidding consortia can carry out the contractual activity independently does not automatically make the parties competitors and the collaboration illegal. There must be a realistic assessment of "*whether an undertaking will be capable of completing the contract on its own*" taking in consideration the specific circumstances of the cases. Here, it would be worth: (1) to emphasize that the mentioned elements (e.g. the size and abilities of the undertaking, and its present and future capacity) are only indicative; and (2) to specifically mention the risk assessment of the undertaking. While an undertaking can have the size, abilities and capacity to carry out the contractual activity alone, it should be able to freely decide whether or not it wants to participate in projects individually. It would legitimate prefer to be part of a joint bidding consortium agreement to mitigate the default risk and dedicate its capacities to other clients that may arise.

25. Paragraph 395 of the HG notes that even if the parties are regarded as competitors, a specific and concrete assessment of the consortium agreement under Article 101(3) of the Treaty on the Functioning of the European Union ("**TFEU**") is necessary "*on the basis of different elements such as the parties´ position in the relevant market, the number*

and the market position of the other participants to the tender, the content of the consortium agreement, the products or services involved and the market conditions". Here again, it would be worth to emphasize that these elements are only indicative.

26. This analysis under Article 101(3) TFEU means that the consortium agreement needs to be indispensable to generate efficiencies which must be passed on to consumers and not eliminate competition. In the Commission´s view, these criteria are fulfilled if "*the joint participation to the tender allows the parties to submit an offer that is more competitive that the offers they would have submitted alone – in terms of prices and/or quality – and the benefits in favour of the consumers and the contracting entity outweigh the restrictions to competition*".

27. While it is welcome and appreciated the clarification of the methodology to be followed by the competition authorities in relation to bidding consortia, it is suggested to include a confirmation that price fixing in the framework of a consortia should not be independently regarded as a restriction by object. Sinilarly, guidance on how price fixing (and other practices such as information exchanges) in the framework of a consortia should be analyzed under Article 101(3) TFEU and what evidentiary efforts will be required from competition authorities would be very welcome.[8]

V. SUSTAINABILITY CONSIDERATIONS

28. The notion of "sustainability" used by the HG risks being too ambitious by including concepts such as labour and or human rights (paragraph 543 HG) rather than environmental initiatives. Even if labour and human rights were embedded alongside as sustainability it is unclear whether the applicable standards should be the same. In short, the European Commission's (the "**Commission**") laudable ambition may lead to serious uncertainties about how to apply these guidelines to sustainable agreements other than those focusing on environmental objectives.

29. As proposed by the AEDC in its comments to the Green Deal proposal, the achievement of environmental goals contrasts with labour or other goals given the permanent nature of the damage. This may justify a more flexible approach towards cooperative agreements aimed at accelerating the introduction of stricter environmental standards and the development of environmentally friendly technology. It is not clear than the need for this much more flexible approach for environmental goals is also needed for assimilated goals.

[8] The Spanish High Court, in its recent judgment December 27th, 2021 (appeal 43272016), considered that although the companies taking part in the temporary union where competitors, it does not imply that its union is anticompetitive. In fact, the High Court considered that the temporary union was justified, and, from this consideration, it criticized the CNMC for not making a greater effort to explain why the information that was exchanged in the consortia framework was beyond what was essential in its contractual collaboration.

30. On a related vein, paragraphs 546 and 583 of the HG suggest that cooperation between undertakings may not be justified if the relevant market failures (of environmental kind, for instance) are "*addressed by appropriate regulation*". This assertion does not sufficiently factor the urgency of the situation. Addressing the climate change requires urgent action and if an industrial sector agrees to push for the earlier implementation of sustainability goals established by the regulation, this should be fostered or at least should not be disregarded. As an example, if certain regulation prohibits the use of plastic for certain uses as from a given date, sectorial industrial agreements may accelerate the implementation of that regulation.

31. In the above example, "appropriate" legislation exists. However, undertakings with their collective action contribute in terms of timing to the same goal as the regulation. This improvement in terms of "timing" -and regardless of whether it is more costly effective (see our comments below, but we do not agree with this requirement of paragraph 583 HG) should be considered under art 101(3) TFEU. When dealing with environmental aspects, regulation only establishes "minimum" requirements to avoid deeper disasters; but society and enterprises can decide to go much beyond and faster than the regulators, and it is unclear if competition law should be an obstacle to that? Accelerating calendars and timing of implementation of regulatory measures (even where no "residual market failures" exist) should not discarded ex ante as a "justifiable" efficiency ex art. 101(3) TFEU (we are not suggesting that it is the sole ground to invoke not application of art. 101(1) TFEU - paragraph 548 HG), a great proportion of positive cooperative agreements that contribute to sustainability goals would unreasonably not meet the antitrust standards. Maybe it is worth clarifying in the Guidelines that agreements that foster early implementation the regulatory requirements the cooperation are deemed necessary/justified in terms of tacking the environmental problems more rapidly and efficiently.

32. Paragraph 553 HG addresses the creation of databases containing information on suppliers/distributors compliant with sustainable value chains. It is submitted that the general antitrust principles for other cooperative databases should apply to these. For instance, when creating a database of professionals compliant with certain standards (see the old insurance regulation and fire installers and devices[9]), it was important to ensure that the criteria of considering "compliant" and hence, with a right to be included in the list, was clear and objective, no subjective valuations should be included in those databases as they may align conduct as to whether to contract or not with certain operators. Similarly, the source of information and whether the operator is supplier/distributor of a particular company should not be mentioned in order to avoid exchanges of information. Maybe a cross- reference to cases such as *Asnef/Equifax*[10]

[9] As a mere example see the old exemption regulation for agreements in the insurance sector (EU Regulation 358/2013, article 9: evaluation and homologation of security devices in the insurance sector, superseded).
[10] Case C-238/05, *Asnef-Equifax*, [ECLI:EU:C:2006:734].

would be useful to make clear that sustainability goals do not change the classical antitrust principles in this field in particular[11]

33. Paragraph 557 of the HG refers to principles on joint purchasing. However, an agreement -without joint purchasing- to only purchase form sustainable suppliers or to exclude clearly unsustainable suppliers (a short of boycott), does not have the same degree of negative impact of alignment of purchase prices as joint purchasing agreements may have. it would be important to develop specific principles when no joint purchasing takes place, as more flexibility should be accepted (for instance, higher market share threshold or no market share at all, as it would be tantamount to a voluntary standardization agreement whereby partners agree to use that sustainable standard).

34. Paragraph 560 of the HG correctly indicates that in sustainability agreements the purpose is important for the purposes of defining the restriction by object/effect. Within this context, it would be worth to include an express reference to valorization agreements (see the AEDC's comments to the Green Deal proposal). This type of agreements entails supplier/raw material sharing and services allocation but nothing else (not price agreements, etc.) but have a clear and sometimes unique, object: improve sustainability.

35. Concerning sustainability (or environmental) quality labels/marks, the HG, by analogy with general standardization agreements (paragraphs 472 HG et seq. as compared to paragraph 571 HG) mentions that attempts to put pressure on third parties to refrain from marketing products that do not comply with sustainability standards/logos brands, may amount to a restriction by object, an outcome the AEDC does not question. However, it would be useful that the Guidelines expressly indicate that collective lobbying of ensuring that public administrations also value (or give extra points, for instance, not a compulsory requirement but a sort of bonus) to those applicants for public contracts that have the private sustainability logo is excluded from this logic. At the end of the day, it is the administration who decides on whether or not to value and give extra credit to these suppliers and is not a collective boycott of pressure against competitors. If access to the quality label is opened to third parties on a non-discriminatory manner, lobbying with the aim at ensuring the success of the standard should not be negatively regarded ex-ante (only by effects).

36. It is noted that there is some ambiguity when protecting sustainable standard agreements. In this respect, the HG acknowledge that the development of projects aimed at the development of sustainable standards entails certain costs and that, as a consequence, there may be a rise in the prices of the products concerned (paragraph 565 HG); however, the HG warn that the exchange of commercially sensitive information

[11] Only objective facts can be exchanged -no recommendations of behaviour- and the identity of the source of the information is not revealed so anyone can determine whether an entity is a client/supplier.

or price coordination may be sanctioned (paragraph 572 HG). It is observed that during the development and implementation of sustainable standards, certain information considered potentially "commercial" needs to be shared; this is necessary because when designing a sustainable cooperation agreement, companies have to jointly analyse whether it is economically viable. It would be important to make it clear that this exchange does not “go beyond” what is needed for the development of the new standard (paragraph 572 HG) (for instance, by analogy a cross reference to paragraph 500 HG, which clarifies that revealing ex-ante the royalties to be applied in cases of IP standards could be helpful).

37. The idea in paragraph 608 HG that sustainable objectives benefit not only the individual consumer, but also take into account the collective benefits for society, is to be welcomed. This will allow companies in charge of developing the sustainable agreements not only to think about the benefits for their customers or consumers, but also to set ambitious targets and bring wider benefits to society as a whole.

38. Paragraph 572 of the HG indicates that the adoption of sustainability standards that lead to a significant increase in prices of products should be carefully assessed as this may cause that the practice becomes restrictive by effects. From our perspective, if the price increase results from cost increases (and this can be proved) any suspicious of restrictive effects should be raised. Moreover, effective competition is concerned with the market structure and not with higher prices as such. Using competition law to reduce inflation or keep prices down despite that competition works perfectly well may go beyond its own goals. If competitors continue competing aggressively with the new standard (although at a higher price level because inputs or procedures are more costly) this does not reduce competition. Maybe it reduces consumer choice if all the industry abides to the new standard but provided that companies are free to not follow the standard we see no reason for antitrust rules to control prices unless alignment or price increases result from agreements or concerted practices to increase prices and or increase margins. Moreover, members of an association using a new standard may agree to not increase prices and absorb themselves (at least for an initial period) the higher costs of the environmentally friendly standard. This would be a price agreement, but likely a positive one and acceptable under art. 101(3) TFEU. If an agreement of this nature is acceptable, why a price increase caused by input price increases be not acceptable whilst no agreement to increase prices exist?

39. The analytical framework proposed for the application of Article 101(3) TFEU seems overly rigid. It seems that at first the HG gives some freedom to companies on "how" to develop sustainable agreements in order to achieve the proposed objectives (paragraph 582 HG). However, the HG determines how these objectives are to be achieved: in the most economically efficient way possible, and in the least restrictive way for competition possible. These two requirements, especially the economic one, could generate uncertainty for companies, as they would have to consider each and every one of the

existing alternatives, and if they do not do so, they would be at risk of being sanctioned. In this respect, a more flexible approach would be welcomed. Maybe the Commission was considering adding this requirement to the existence of "less restrictive means" that additionally are economically viable or efficient. If the intention is to include an additional cumulative requirement to examine whether a less restrictive means exist (not only in theory but also in practice, as such alternative means are economically efficient and viable), a clarification would be useful.

40. Similarly, in paragraphs 582 and 583 of the HG consider that an agreement to increase demand for sustainable products that are produced/marketed in a more costly efficient manner should be considered indispensable. By contrast if no efficiencies in terms of costs are created and demand already exists for that product, cooperation through the sectorial standard would not be justified. Sometimes demand for sustainable products exists but is marginal or is not sufficiently high and the goal would be to increase demand of such a sustainable product and also reduce the timing for that change in demand trends. Again, we refer to the efficiency in terms of timing and increasing demand of sustainable products. We consider that this efficiency should not be totally disregarded.

41. It would also be advisable that in each of the other sections of the HG concerning agreements whose main goal is not to improve sustainability (i.e., are not "sustainability agreements/standardization) specific reference is made to possible sustainability efficiencies. If sustainability efficiencies are obtained with other agreements (for instance, joint purchasing hint production etc.), such efficiencies should also be bore in mind when analysing the exemption under art. 101.3 TFEU of those agreements. The assessment and due consideration of efficiencies sustainability efficiencies should not be reserved or limited to agreements whose sole or main object is to achieve sustainability goals. It should be a horizontal and wide approach benefiting all kinds of agreements.

42. Finally, it is most welcomed that the Commission has made it clear that "*the parties to a sustainability agreement that restricts competition will not be held liable for competition law infringements if they have been compelled or required by public authorities to conclude the agreement or where the public authorities reinforce the effect of the agreement*". This mention is especially useful as these situations are relatively frequent and their recognition provides certainty.

Asociación Española para la Defensa de la Competencia
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