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Statement on the revision of the two European Block Exemption Regulations for horizontal cooperation agreements, Commission Regulations (EU) No 1217/2010 and No 1218/2010 and the Commission's Guidelines on the application of Art. 101 TFEU to horizontal cooperation agreements 2011/C 11/01 („Horizontal Guidelines“) in the course of the Commission's Public Consultation as part of the Impact Assessment Phase (“Horizontal Reform”);
Here: Sustainability and Digitalization; and Information Exchange in Dual Distribution Systems

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The German Federal Bar (Bundesrechtsanwaltskammer, BRAK) is the umbrella organisation of the self-regulatory bodies of the German *Rechtsanwälte*. It represents the interests of the 28 German Bars and thus of the entire legal profession in the Federal Republic of Germany, which currently consists of approximately 166,000 lawyers, vis-à-vis authorities, courts and organisations at national, European and international level.

Opinion

A. Contributions in the Revision Process

The Commission has conducted a first public consultation between 6 November 2019 and 12 February 2020 inviting stakeholders to comment on the revision of the HBERs and the Horizontal Guidelines. BRAK also participated in this consultation, focusing its contribution on comments to the block exemption regulation rules for technology transfer agreements and the assessment of information exchange.

Following the evaluation of the contributions received during the public consultation, the Commission published its Staff Working Paper in May 2021 and subsequently the Inception Impact Assessment in June 2021 in which it summarized its policy options going forward. This paper summarizes BRAK's comments to the current Public Consultation on the Commission's policy options as part of impact assessment phase. It is provided as supplement to BRAK's responses to the Commission's online Questionnaire.

BRAK welcomes the Commission's intention that initially transpired in the Inception Impact Assessment to provide specific guidance for cooperation agreements between competitors resulting from new market developments, more specifically on horizontal agreements resulting from digitalization such as data pooling and cooperations data sharing arrangements between competitors, and on horizontal agreements that pursue sustainability goals. Supplementing its responses to the Commission's electronic Questionnaire as part of this consultation, BRAK will focus in this submission on these two types of horizontal cooperation agreements and the related revisions to the current rules (see B. and C. above).

In addition and herewith supplementing its latest submission to the draft Vertical Block Exemption Regulation and Vertical Guidelines published by the Commission in July 2021, BRAK will make some initial comments on exchange of information in the dual distribution context, a (vertical) topic in relation to which the Commission has only recently announced its intention to also cover in the new Horizontal Guidelines (see C. above).

A. Horizontal Cooperation Agreements with Sustainability Objectives

I. General Remarks

1. Sustainability considerations as a competition parameter

Sustainability considerations play a growing role for consumers and companies in modern society. They appear to increasingly influence the demand side and more specifically consumers' purchasing decisions and, consequently, have an impact on the business decisions of companies offering goods and services in the market, such as their research and development, production, supply chain and marketing strategies. Sustainability considerations supplement pure economic considerations. In fact, the more important they are for consumers, the more relevant they become for the economic success of companies offering goods and services in the market. For the same reasons, sustainability considerations can be considered as an integral part of the public welfare. This in turn means that sustainability aspects qualify as a competition parameter relevant in assessing whether a certain conduct complies with applicable competition law rules.

In many instances to reach such sustainability goals, companies are required to cooperate. Such cooperation between companies that may or may not be competitors, can occur, *inter alia*, in the context of the production of goods or provision of services, the sourcing of materials and the marketing of goods. At the same time, due to their growing importance for consumers, sustainability criteria could be defined by industry or standard setting bodies as requirements alongside quality and technical requirements that need to be fulfilled for goods or services to comply with the set standards. For such cooperations to be set up and work in practice, a certain related exchange of competitively sensitive information between the cooperations partners may also be required.

2. Scope

The notion of sustainability has many facets. The German Federal Government, for example, has committed itself to a total of 17 sustainability goals as part of the *Agenda 2030 for sustainable development of the United Nations*. Therefore, sustainability is not limited to purely environmental and climate-related considerations along the lines of the European Green Deal. Equally important and also to be taken into account are social sustainability considerations, that is fair trade and all types of related human rights considerations, as well as animal welfare. By contrast, limiting the sustainability argument to ecological aspects in the context of assessing cooperations between competitors would fall short of the actual relevance of sustainability from the consumer's perspective.

3. Status quo

Sustainability considerations are currently not expressly addressed in the Commission's regulatory framework for cooperation agreements between competitors, even if the general guidance on the assessment of cooperation agreements, in particular the justification of

restrictive agreements under the exemption of Article 101(3) TFEU provided for in the existing Horizontal Guidelines as well as the Commission's Guidelines on the application of Art. 81 (3) EC ("Art. 81(3)-Guidelines") can also be applied to sustainability agreements. Such general guidance is however not specific enough to provide adequate and practical assistance in assessing sustainability aspects of any given cooperation. The lack of specific guidance for sustainability agreements in the Commission's legal framework currently results in legal uncertainty for companies and their legal advisers which BRAK represents. With the current Horizontal Reform this deficiency within the Commission's legal framework can be overcome.

II. BRAK's Reform Proposals for Sustainability Agreements

In light of the above considerations, BRAK proposes the following measures to be taken by the Commission:

1. Changes to the Horizontal Guidelines

Cooperation Agreements that pursue sustainability goals deserve a separate chapter in the new Horizontal Guidelines alongside the other individual chapters on specific types of cooperation. This is because sustainability considerations may be relevant across all types of specific cooperation agreements, but they may also form the sole purpose for a cooperation in which case they do not fall into any of specific cooperation agreements currently covered in the Horizontal Guidelines. The latter type of cooperation should be referred to as sustainability agreements for the purpose of this new chapter in the Horizontal Guidelines. In this regard, sustainability agreements are comparable with the assessment of the exchange of information between competitors, a topic to which the Commission has also allocated a separate chapter in the Horizontal Guidelines, even if an information exchange may be ancillary to the specific types of cooperation agreements discussed in individual chapters of the current Horizontal Guidelines. Like with information exchange, appropriate references to the new chapter on sustainability agreements can be included in the individual chapters on the other specific types of cooperation agreements.

By contrast, BRAK does not see the need to adopt a separate block exemption regulation for sustainability agreements. Specific guidance on the assessment of sustainability considerations in the context of Art. 101 (1) and (3) TFEU in the Horizontal Guidelines, comparable to that for, e.g., information exchange and standardization agreements for which block exemption regulations do not exist either, would be sufficient to secure more legal certainty for companies and their legal advisers.

2. Wide notion of sustainability

BRAK takes the view that – different from the Commission's tendency expressed in the Horizontal Reform process – the Commission's guidance on assessing sustainability considerations in the context of horizontal cooperation agreements should not be limited to those contributing to the European Green Deal, i.e. contributing to a better climate and environmental protection within the EU, but, in the BRAK's view, should equally take into account social or ethical standards, such as human rights, labor conditions and animal welfare. Having regard to all types of sustainability aspects in the competition law assessment of cooperation agreements is also fully in line with the Union's objectives set out in the Treaty: In describing the aim of a "sustainable development of Europe", Art. 101 (3) TFEU makes reference to a number of values that are to be safeguarded and improved, not only the quality of the environment, but also, *inter alia*, the social market economy aiming at full employment

and social progress, social justice, equality between women and men and the rights of the child, at the same time explicitly condemning social exclusion and discrimination, as well as Europe's cultural heritage.

BRAK appreciates that in applying this wide notion of sustainability in the competition law assessment, there is an imminent risk that public policy objectives may dilute the competition law assessment, jeopardizing the ultimate goal of the competition law rules to safeguard consumer welfare. The Commission's guidance on taking into account sustainability arguments in the overall competition law analysis, in particular as regards the efficiency assessment under Art. 101 (3) TFEU, must therefore be precise and clear to prevent any misuse by mere politically driven considerations that have no place in the competition law assessment of any cooperation, including, among all other factors to be considered, the assessment of its sustainability aspects.

BRAK understand that at this point the Commission intends to limit any additional guidance on sustainability to environmental and climate considerations as captured by the European Green Deal. Also, in its latest publication the Commission continues to focus on these aspects (cf. Commission's Competition Policy Brief "Competition Policy in Support of Europe's Green Ambition" of September 2021). However, in view of the above considerations, BRAK takes the view that the Commission should reconsider this narrow approach in the context of the Horizontal Reform.

3. Assessment of competitive effects

The Horizontal Guidelines' new chapter on sustainability agreements should begin by clarifying that, in the majority of cases, cooperation agreements pursuing sustainability goals do not restrict competition and thus do not fall within the scope of Art. 101 (1) TFEU. This includes, *inter alia*, any cooperation between companies that are neither actual nor potential competitors, as well as non-binding, voluntary agreements between competitors that define certain sustainability standards for the production/provision and marketing of goods and services in a transparent process and do not prevent parallel marketing of "conventional" (i.e. non-sustainable) products.

To increase legal certainty, the new Horizontal Guidelines should specify categories of sustainability agreements that do not restrict competition within the meaning of Art. 101 (1) TFEU, in other words the Commission should make use of positive decisions, finding non-applicability of the EU competition rules). The existing case law of the European Courts, even if not recent (e.g. AT-36.494 – EACEM; AT.36.178 – CEDEC) should be taken into account.

BRAK submits that the Dutch competition authority (ACM)'s draft guidelines (second draft of February 2021; <https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-opportunities-within-competition-law.pdf>), published in the process of its national initiative, contain a helpful description of certain categories of sustainability agreements which do not raise any competition law concerns and therefore fall outside the scope of Art. 101 (1) TFEU (cf. para. 23-27 of the ACM's draft guidelines). They include lawful types of cooperation between competitors justified by sustainability considerations and should also be considered by the Commission in the Horizontal Review as well. One example are joint purchasing arrangements between competitors where the goods are transported by large container ships from e.g. Asia or South America into the EU and a cooperation would considerably contribute to a reduction of CO2 emissions (para. 23). Other examples are joint standards and certification labels for the production of goods based on environmentally-/climate-conscious but also socially responsible practices, as well as joint

packaging material standards (para. 24 et seq.). Joint efforts to use alternative energies in the production process of products should also fall into these categories.

4. Safe harbour

If sustainability agreements could affect competition within the meaning of Art. 101 (1) TFEU, a safe harbour rule should be provided for in the Horizontal Guidelines, i.e. a market share threshold based on the parties' combined market shares in the relevant markets up to which it is deemed likely that the conditions of Art. 101 (3) TFEU are met by the respective sustainability agreement. Therefore, only those agreements which do not fall within the safe harbour would require a detailed assessment of the pro- and anti-competitive effects. Such safe harbour rule would further facilitate the companies' self-assessment. In line with the Commission's approach with respect to other cooperation agreements within the Horizontal Guidelines (and outside any specific block exemption regulations), e.g. purchasing agreements and information exchange, such combined market share threshold should be at least 15%.

5. Assessment of efficiencies

The Horizontal Guidelines should provide specific guidance on the circumstances under which sustainability agreements that potentially restricting competition could be exempted pursuant to the statutory exemption of Art. 101 (3) TFEU. This will provide legal certainty for companies which have to self-assess whether a (potentially) restrictive agreement meets the known four cumulative conditions of Art. 101 (3) TFEU to qualify for an exemption from the cartel prohibition.

Also, in order to take due account of sustainability benefits of co-operations between competitors certain changes need to be introduced in the assessment under Art. 101 (3) TFEU, more specifically the application of its conditions.

It is understood that sustainability agreements must offer efficiency gains, namely in improving the production or distribution of goods or prompting technical or economic progress, while "allowing consumers a fair share of the resulting benefits". However, the positive effects of the production of sustainable products do not necessarily benefit the consumers on the relevant market, but consumers in other product, geographic or economically even not tangible markets, or citizens and society as a whole.

BRAK therefore submits that external efficiencies should also be taken into account in the assessment of sustainability benefits. The current Horizontal Guidelines as well as the Art. 81 (3)-Guidelines are very restrictive as regards out-of-market efficiencies – only allowing them to be taken into account when they are achieved on separate markets as long as the group of customers which are affected by the restriction and which benefit from the efficiency gains are substantially the same (Art. 81 (3)-Guidelines, para. 43) -, even though they have already been taken into account by the European Courts in some cases (e.g. *Compagnie Generale Maritime v. Commission*, T-86/95; *Mastercard*, C-382/12 P; *Meca-Medina* C-519/04 P).

At the same time, while the consumer welfare standard is certainly to be maintained, an assessment of the consumer benefits under Art. 101 (3) TFEU should also allow to take into account that the group of customers benefiting from the efficiencies might not be the same as the ones being affected by the negative effects of the sustainability agreement.

6. Burden of proof

In addition, the legal requirement of allowing consumers a “fair share” of the resulting benefits should be interpreted in a more flexible way than the current interpretation of this notion which requires that the pass-on of benefits at least compensates consumers for any negative impact caused by the restriction of competition to them. In practice, this means that companies that want to rely on the exemption of Art. 101 (3) TFEU are required to substantiate the pass-on rate by providing estimates and other quantifying data (cf. Art. 81(3)-Guidelines, para. 94 et seq.). This burden of proof is already high for more general types of efficiencies. For sustainability benefits, however, it risks to be impossible to meet.

Therefore, in order for sustainability to constitute a meaningful and viable argument in the overall assessment of Art. 101 (3) TFEU the burden of proof needs to be modified in an appropriate manner. More specifically, lacking the possibility of quantification, the Commission should acknowledge in the Horizontal Guidelines that also qualitative efficiencies such as sustainability requirement are equally to be taken into account. The Commission should further provide guidance and examples in which instances sustainability aspects are likely to be justified under Art. 101 (3) TFEU.

7. Ancillary information exchange

Given that sustainability agreements should regularly require a certain exchange of information between the cooperating competitors the Commission should specify for these types of agreements under which circumstances an exchange of information is likely to restrict competition and unlikely to benefit from the exemption of Art. 101 (3) TFEU. Based on the existing case law (e.g. Commission decision AT.39.579), examples should also be included. Notwithstanding, the general guidance in the (new) Horizontal Guidelines on exchange of information between competitors should equally apply to sustainability agreements unless specified otherwise.

III. Summary

BRAK supports the Commission’s plan to include guidance for sustainability agreements in the new Horizontal Guidelines. The guidance should be as concrete as possible, complemented by practical examples when sustainability agreements are outside the scope of Art. 101 (1) TFEU and under which circumstances they will be/will not be exempted under Art. 101 (3) TFEU. As regards the applicability of Art. 101 (1) TFEU BRAK proposes a safe harbour as for other horizontal agreements covered by the Horizontal Guidelines but not by any specific block exemption regulation. Within the assessment of Art. 101 (3) TFEU, the Commission should allow for more flexibility as regards the acceptance of external efficiencies as well as the burden of proof requirements for qualitative benefits. At the same time, it must be ensured that the exemption of Art. 101 (3) TFEU cannot be misused by mere political considerations, including national/regional protectionism, beyond actual sustainability goals.

B. Horizontal Cooperation Agreements in the context of Digitalization

I. Introduction

In its current consultation, the Commission included a number of questions on data pooling and data sharing (questions 85 – 88). The Commission is asking for empirical information in order to establish to which extent undertakings do pool and share data and whether or not they use

intermediaries to manage databases. The questions are part of the survey's section on information exchange and apparently serve to determine whether there is a need to introduce specific rules, and potentially a safe harbor, for data pooling and data sharing between competitors.

As the Commission had already acknowledged when evaluating the horizontal block exemption regulation, stakeholders have expressed a lack of specific guidance on data pooling, sharing and data access agreements between competitors.¹ BRAK confirms that data pooling and data sharing are relevant to a large number of undertakings and that many of its members are advising on such practices. Our members would welcome a higher degree of legal certainty in this area, in particular more detailed EU Commission guidance on its approach to data pooling and sharing practices between competitors, i.e. under Art. 101 (1) and Art. 101 (3) TFEU.

BRAK would therefore support² the inclusion of a section on data pooling and data sharing in the revised Horizontal Guidelines providing a safe harbor up to certain combined market shares as well as key criteria by which the EU Commission would assess market effects, and accordingly competition law compliance, in case the relevant market share threshold is surpassed.

II. The need for legal guidance for data pooling and data sharing

1. An example: the exchange of real time traffic data for navigation systems

Data pooling and data sharing are relevant for many digital services, but also for more traditional industries employing automated manufacturing ("industry 4.0"), household goods communicating amongst another in pursuit of the "smart home" (also dubbed "Internet of Things") and more advanced applications based on machine-to-machine communication (e.g. self-driving cars).

The data used for operating a navigation system as used in cars or as available on handheld devices may serve as an example for digital B2C services based on the use of voluminous data.³ Navigation systems include static information on the layout of streets as well as dynamic information on the current traffic situation. This information is used to calculate the best route for the user under the current traffic conditions. The quality of the system with regard to the calculation of the best routes depends primarily on the accuracy of the data on the current traffic situation. Systems with a high user number rely on real time data of their own users travelling on certain routes. If users advance only slowly this may indicate a traffic congestion. This type of real time data will only be statistically reliable if there is a sufficient number of users.

Market entrants for this type of service will face the difficulty that they may have sufficient data on the layout of streets etc. but not enough users generating real time data on the traffic situation. Accordingly, the service of a newcomer will be less attractive for users as the calculation of best routes under the current traffic situation will be less reliable. Cooperation

¹ Staff Working Document, Evaluation of the Horizontal Block Exemption Regulation, 6 May 2021, SWD(2021) 103 final, p. 115.

² BRAK notes that the Cremer/de Montjoye/Schweitzer Report to the EU Commission "*Competition policy for the digital era*" (2019), pages 9 and 93, already suggested to include such guidance as part of "... the next review of the Guidelines on horizontal cooperation".

³ See also the examples listed in the Commission Staff Working Document "*Guidance on sharing private sector data in the European data economy*", 25 April 2018, SWD(2018) 125 final, pages 8-18, i.a. the navigation data TomTom assembles and licenses to third parties, page 9.

through data sharing may help to overcome this competitive disadvantage. If competing providers of navigation systems were allowed to share real time data on the traffic situation, the quality of their services would improve and they would be able to attract more users and to gain market share. More importantly, they may innovate such services best on the shared data and so bring new features to the market (e.g. *Waze*' added user functions as compared to *Google* or *Apple Maps*).

2. Lack of guidance under the Horizontal Guidelines

Under the current Horizontal Guidelines, this type of data sharing between competitors would have to be assessed under the rules for information exchange. These rules do not specifically address the exchange of user data which form the basis of services offered on B2B and B2C markets. The Horizontal Guidelines to-date only cover the exchange of information directly related to the market conduct of an undertaking such as price setting intentions, plans to reduce capacity or production cost. The exchange of user data of the nature described in the example above does not fall into this category since it is not directly relevant to the market conduct of the relevant undertakings. Nonetheless, it is relevant for competition between the providers of these services. Better data provide a competitive edge and sharing such data may enhance or eliminate competition, depending on the context.⁴ This fact shows that market effects will need to be assessed and so far guidance can be derived only from the very broad frameworks enshrined in Art. 101 (1) and Art. 101 (3) TFEU. Application of both frameworks requires expert adviser input and may thus slow down or even impede pro-competitive data pooling and sharing, especially by start-ups or SME companies, and thus reduce innovation.

Additionally⁵, assuming that data pooling and sharing may be pro-competitive in many circumstances, similar situated third parties may wish to access such data pools on non-discriminatory terms, for which the current Horizontal Guidelines would not offer any guidance either (except where such data would be part of a standard setting cooperation⁶).

III. Outline of a possible section of the revised Horizontal Guidelines on data collection and data sharing

A new section on data collection and data sharing could easily be integrated into the revised Horizontal Guidelines. The Commission's general approach to the current six types of horizontal co-operations covered would be suitable also for data pooling and data sharing agreements. The Commission usually defines a safe harbor by exempting the relevant types of horizontal cooperation from Art. 101 (1) TFEU up to certain market share thresholds provided that they do not include any restrictions which are not indispensable for the efficiencies to be generated by the cooperation. These so-called "safe harbors" allow small and medium sized companies to reduce their transaction cost if they wish to compete with their larger rivals by cooperating amongst themselves. Companies with higher market shares, i.e. above the threshold, will then

⁴ The German FCO has pointed to the fact that competition rules do not prevent data pooling, but its market effects would have to be weighed carefully where such cooperation would take place between direct competitors. See *Big Data und Wettbewerb*, Schriftenreihe Digitales, Beitrag 1, Oktober 2017, page 9.

⁵ Schweitzer; GRUR 2019, 569, 576, identifies these two core competition issues: data pooling/sharing between competitors and subsequent access to such data pools.

⁶ Some authors have suggested that similar criteria could apply, cf. e.g. Stellungnahme der Studienvereinigung Kartellrecht, 26 February 2020, page 29; Lundqvist, *Data Collaboration, Pooling and Hoarding under Competition Law*, Stockholm Faculty of Law Research Paper Series, no. 61, 2018, 26.

have to make their own assessment of market effects under Art. 101 (1) and (3) but may still benefit from the criteria set out in the proposed new chapter.

The effects on competition will depend on the type of data to be shared (strategic company, customer, supplier or other market data, technical or interoperability data, user data), data use (direct or further analysis to create more sophisticated data), data management (e.g. by a third party), the access and exit rules etc. For example, if the utilization of the pooled or shared data leads to a high degree of cost commonality between the participating data users (e.g. in offering a digital service) competition may be harmed. Accordingly, a set of criteria will have to be developed to assess market effects and the impact of (which degree of) market power through data pooling and sharing. To this end the EU Commission will be able to make use of prior analysis.⁷ Many digital markets are characterized by the presence of a market incumbent with high user numbers providing a broad portfolio of digital services. Under these conditions market entries by smaller rivals may often be particularly difficult. Facilitating cooperation between smaller rivals by making available clear legal guidance should therefore complement other efforts of the Commission to foster competition in digital markets.

IV. Conclusion

The inclusion of a section on data pooling and data sharing in the revised Horizontal Guidelines would appear strongly mandated. The structure of the safe harbors provided for other types of cooperation would be suitable for co-operations in this area as well. Providing clear legal guidance for co-operations of smaller undertakings based upon joint data pooling or data sharing, as well as third-party data pool access, would facilitate their market entry and complement the Commission's efforts to stimulate competition on digital markets.

C. Information Exchange in Dual Distribution Systems

As commented by BRAK in the context of the Commission's Vertical Review Process, more specifically in the context to its the public consultation regarding the published drafts of the Vertical Block Exemption Regulation and its accompanying Vertical Guidelines ending in September 2021, BRAK takes the view that guidance on horizontal aspects in dual distribution systems should be included in the revised Vertical Guidelines and not in the Horizontal Guidelines. In BRAK's view there is otherwise a considerable risk that if included in the Horizontal Guidelines which concentrate on competitor relations and related competition law concerns any guidance on information exchange in the context of dual distribution systems will focuses on horizontal aspects of the relation between the supplier and its buyers/distributors whereas their relation, including any related exchange of information between them is in fact of a fundamental vertical nature.

However, in case the Commission does not change its intention to include guidance on information exchange in the described vertical context in the Horizontal Guidelines, BRAK submits that it is imperative that such guidance is included in a separate section within the new Horizontal Guidelines to prevent the risk that identical considerations that may be applied in assessing an exchange of information under Art. 101 (1) and (3) TFEU in the typical/regular

⁷ See already the Cremer/de Montjoye/Schweitzer Report to the EU Commission "Competition policy for the digital era" (2019), pages 92,-98, in particular 96/97: type of data (leading to collusion?), restriction by effect (aligning competitors' cost or product features), degree of market power (duty to provide access), FRAND access fees; see also Lundqvist, *Data Collaboration, Pooling and Hoarding under Competition Law*, Stockholm Faculty of Law Research Paper Series, no. 61, 2018, 26: 11 criteria; Botnari, *EU Competition Law and Data Pooling*, 2020: seven criteria.

horizontal scenarios between competitors that are otherwise covered by the Horizontal Guidelines (e.g. joint production/specialization, joint purchasing, joint selling) are not mistakenly applied to information exchange in the vertical context of dual distribution. It is evident that any exchange of information between supplier and buyer (which happen to compete on the retail/distribution level) will in the majority of cases be necessary for the functioning and implementation of this supply/distribution relation and thus fall outside the scope Art. 101 (1) TFEU. Only if an exchange of information between the parties were unrelated to the vertical relation, thus, had the objective to restrict competition on the retail/distribution level the assessment would likely be similar to that of information exchange within the regular horizontal scenarios.
