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COMMENTS ON THE REVISED RULES FOR THE ASSESSMENT OF HORIZONTAL COOPERATION AGREEMENTS

Confederation of Finnish Industries EK (hereinafter "EK") appreciates the opportunity to give a contribution to the revised rules for the assessment of horizontal cooperation agreements under EU competition law and takes note with great interest of the draft regulations on R&D and specialisation agreements, and on the draft guidelines on the applicability of Article 101 of the Treaty on the functioning of the European union to horizontal cooperation agreements.

As said in our comments on regulation and draft guidelines on vertical restraints, EK considers block exemptions very important to business, as they remove the legal uncertainty which companies would otherwise have when entering into agreements covered by block exemptions under this consultation. The safe harbour offered by them benefits companies as well as consumers and competition authorities. EK welcomes every effort from the Commission to help business in its self-assessment in considering if it can proceed to cooperation planned.

At the same time it has to be born in mind that not all agreements, which do not fall under these block exemptions, are forbidden restrictive business practices.

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As an organisation representing companies at many areas of business, EK does not go very deep into specific issues, but rather raises general questions concerning the most significant issues of the Commission's proposals.

Draft guidelines

EK warmly welcomes the Commission´s efforts to give several concrete examples of applying the rules in various situations. Having said that, EK still urges the Commission to give more examples of certain borderline questions.

The relevance of government authorities´acts

In section 21 of the draft guidelines, the Commission states that the acts of government authorities to encourage, endorse or sponsor a horizontal co-operation agreement does not mean that it is permissible under Article 101. The result would perhaps be opposite if a national legislation compelled companies to co-operation.

EK urges the Commission to give more relevance to the acts of national authorities. A company should never be in a situation where it has to decide whether to act against the will of national authority or legislation, or against Article 101. Companies should never face negative consequences when complying with national legislation. They should not face negative consequences, either, in a situation where they "de facto" have to obey the orders of a national authority.

The degree of market power

In section 40 of the draft guidelines, the Commission states that the degree of market power required for the finding of an infringement under Article 101(1) in the case of agreements that are restrictive of competition by effect is less than the degree of market power required for a finding of dominance under Article 102.

While EK understands this outlook, it trusts that the degree of market power has a significant relevance when considering whether the agreement is an infringement under Article 101(1).

The Commission recognizes this in section 42, where it however unfortunately states that it is hardly possible to give a general market share threshold above which the sufficient market power for causing restrictive effects on competition can be assumed. EK still urges the Commission to try to find at least some thresholds. This would be highly important, for example, in the field of information exchange.

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Information exchange

EK welcomes the Commission´s efforts to give more guidance than the present guidelines give concerning information exchange. However, more information and examples would be needed.

EK invites the Commission to give a clearer statement on information exchange under trade associations. The difference between the information exchange between competitors, as they operate under trade association, compared to a situation where they change information directly between each other, is very unclear.

EK would also like to see examples on information exchange in mergers and acquisitions. A buyer candidate needs to have a lot of information, sensitive details also, and in due diligence process it may receive such information it should not normally get. The Commission should underline that information exchange in these situations is treated differently.

Furthermore, EK invites the commission to clarify when information exchange is treated as a concerted practice. The Commission should give examples on the relevance of the behaviour of the receiver. It should count if the receiver does not change its earlier behaviour on the market or if it does not take advantage on the information in any way.

Production agreements

EK is afraid that the guidelines do not provide enough information related to production agreements and especially to subcontracting. More examples would be welcomed.

The Commission refers to its notice concerning its assessment of certain subcontracting agreements in relation to Article 85(1) of the EEC Treaty. EK points out that the notice has been given in 1979 and is worried about the accuracy with which it answers to all questions arising today. EK would at least welcome a renewal of that notice.

EK would also like to see the Commission’s position to situations where subcontracting is operated by a transfer of business, as described in the EC merger regulation (139/2004), but not reaching its thresholds and thus the regulation would not be applied.

Standardisation agreements

As the Commission recognizes in the guidelines, standardisation provides benefits for consumers. It creates innovation, makes it easier to compare products, increases product safety etc. It should be underlined that the pro-competitive effects of standardisation almost always exceed

its possible negative effects, and thus it should be treated with understanding.

EK regrets the Commission´s way of seeing standard terms only in a situation where companies use them against consumers. EK would like to see the Commission also paying attention to standard terms made by public authorities and used against private companies. Public contractors have a lot of co-operation in formulating standard terms, which they all will apply when purchasing goods or services from the market. Those terms may be unreasonable from the companies' point of view, and yet they are de facto forced to accept them.

Moreover, EK invites the Commission to give some examples concerning situations where a trade association, together with its member companies, makes standard terms to be applied between them and other companies (business to business). This kind of co-operation is very tempting especially to small and medium size companies, which do not always have enough resources to formulate their own terms.

R&D and specialisation block exemptions

The guidelines commented above are a fundamental instrument which makes it easier for companies to use the block exemptions.

Sometimes it is difficult to know which block exemption to apply. The agreement may partly fall under the block exemption of R&D, specialisation or some other block exemption. In addition to that, the guidelines concerning example information exchange may have to be applied. The terminology varies between different regulations and they have been renewed in different time.

EK especially regrets that two block exemptions under consultation are renewed separately from technology transfer block exemption (Commission Regulation (EC) No 772/2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements). These three block exemptions should be evaluated at the same time and have a common terminology.

As regards the degree of market power, the maximum of a market share to get under the block exemption would be 25 % in R&D agreements and 20 % in specialisation agreements. While EK considers these thresholds reasonable, it encourages the Commission to consider the situations where a large company makes an agreement with a very small company. Those kind of agreements cannot reach the block exemption in the present formula.

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Conclusion

EK welcomes the Commission's approach to evaluate the agreements as a whole, considering restrictive effects to competition as well as pro-competitive effects. The list of "hard core-restrictions" is narrow, as it should be.

The drafts for new guidelines and block exemptions appear to be more detailed and practical as the present ones. The Commission should still try to find a way to make them even more practical and extensive.

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The Confederation of Finnish Industries EK is the leading business organisation in Finland. It represents the entire private sector, both industry and services, and companies of all sizes. EK's member companies represent more than 70 percent of Finland's gross domestic product and over 95 percent of exports from Finland. EK has 35 different branch federations with a membership of 16.000 companies in all, which employ about 950 000 employees.