

Revised rules for the assessment of horizontal cooperation agreements under EU competition law

RESPONSE

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EuroCommerce welcomes the opportunity of giving its comment on the Commission's draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union (TFEU) to horizontal cooperation agreements.

For the commerce sector, it is vital to have legal certainty to be able to apply legislation correctly and consistently. The comments below will focus mostly on the novelties introduced in the new draft guidelines.

As defined in the first paragraph of the draft guidelines under consultation Cooperation agreements are "entered into" between actual or potential competitors. In addition, these guidelines also cover "horizontal co-operation agreements between non-competitors, e.g., between two companies active in the same product markets but active in different geographic markets without being potential competitors". For this reason, the revision of the current regime is of particular importance for groups of independent retailers as well as for many other forms of cooperation between retailers.

With regard to groups of independents, it has to be pointed out that over the past years the usual forms of cooperation have undergone great changes. As a result, groups of independent retailers cannot be merely referred to as just buying-platforms. Many "vertical relations" also characterise the relationships between the buying-platform and its members, generally aiming to promote a common commercial policy. As a result, it is important to bear in mind that, in the framework of groups of independent retailers, the horizontal aspects of the relationships between the members has more often become accessory to other forms of vertical relationships as they pursue different kinds of objectives. Nevertheless, as we consider that horizontal and vertical agreements are different in nature and aim to achieve different goals, EuroCommerce members consider that the assessment of the competitive effects of one sort of agreements should not influence the outcome of the assessment of the competitive effects of the other sort of agreements, because they are intrinsically different. For this reason, EuroCommerce considers that the position of the Commission expressed in point 191 is inappropriate and should be redrafted to introduce criteria of assessment adapted to the nature of each form of relationships.

1. Information exchange – Guidelines chapter II

This chapter represents one of the most innovative aspects of the draft guidelines on horizontal agreements. EuroCommerce agrees with the Commission (see point 58) that "information exchange is very often pro-competitive as it can lead to, for example, an intensification of competition or significant efficiency gains". EuroCommerce also agrees that, in some cases, exchange of information between competitors can also lead to anti-competitive. For EuroCommerce members, it is therefore necessary to clearly distinguish between these situations, and especially as regards their possible positive effects which are for the moment not sufficiently raised in the Commission paper in comparison to these negative ones. Consequently, it is important for the Commission to bring more clarity and a better definition of the situations at stake to allow operators to differentiate those practices that lead to improve competition (and therefore have a positive) and those that should be systematically considered as anti-competitive. This lack of clarity is a source of legal uncertainty for companies, all the more because it allows national competition authorities wide room for manoeuvre in their approach.

Furthermore, it is important to read these sections of Chapter II in connection with other pieces of EU competition legislation and in particular the recently adopted Regulation 330/2010 on vertical agreements and relevant guidelines. It is our opinion that these texts contain a number of provisions that should be considered in the framework of the revision of the guidelines on horizontal agreements in order to ensure consistency and coherence in the EU competition legal framework.

EuroCommerce members consider, for example, that agreements based on a transfer of know-how for which the new legal framework admits that IPR-related obligations are generally considered necessary to protect the franchiser's know-how and are, where the obligation fall under Article 101(1), also covered by the block exemption regulation. This regulation also exempts obligations on the franchisee to communicate to the franchise any experience gained in exploiting the franchise and to grant the franchise, and other franchisees, a non-exclusive licence for the know-how resulting from that experience. Under this perspective, this exchange of information between potential competitors is likely to be considered as a horizontal agreement in the Guidelines on horizontal agreements under revision because the information exchanged may concern the commercial policy, the marketing of a good and/or service, prices when it comes to organise a promotional campaign. It would therefore be necessary to clarify the situations at stake, in particular by providing examples and further explanations on the way to assess situations where exchange of information in connection with the transfer of know-how and/or IPR takes place (as laid down in point 45 of the Guidelines on vertical agreements). We consider, in particular, that there should be a clear indication of the exchange of information, even related to prices, in these cases.

Another point of interaction between the new regime on vertical agreements and the current revision of horizontal co-operation agreements relate to the new possibility for groups of retailers to organise a coordinated short-term low price campaign with fixed prices. It is evident that the organisation of such campaigns requires a minimum level of exchange of information; even on the question of prices. Since it appears from the current draft guidelines that such a behaviour could constitute a prohibited practice under the horizontal agreements regime - EuroCommerce urges the Commission to clarify its position and specify that in the framework of such practices (short term campaign), the exchange of information has to be assessed under the regime of point (225) of the guidelines on vertical agreements rather than in the light of Chapter II of the draft guidelines on horizontal agreements.

2. Purchasing agreements – Guidelines chapter V

In the context of the current guidelines, point 116 states that Purchasing agreements are often concluded by small and medium-sized enterprises to achieve volumes and discounts similar to their bigger competitors. EuroCommerce regrets that this statement no longer appears in the current version of the draft guidelines and underlines that this is contrary to the spirit of the Small Business Act. Insofar as groups of independent retailers are generally composed of small entities, they also represent the most credible possibility for them to combine their efforts to be able to obtain purchasing conditions similar to those from which integrated groups may benefit. Equally, for integrated groups, such forms of cooperation represent the only possibility to counterbalance the bargaining power of manufacturers of international dimension.

EuroCommerce first notes, once again that, in the conception of the Commission, the fact of a group of retailers having an accumulated market share (both at the purchasing level or selling level) above 15% may give rise to restrictive effects on competition. Although the Commission states the contrary in point 204, it is also clear that above this threshold it is necessary to undertake a "detailed assessment" of the effect of the agreement on the market involving "but not limited to, factors such as market concentration and possible countervailing power of strong suppliers".

Secondly EuroCommerce members would like to stress that it is inappropriate for the safe harbour not to apply when the parties to a co-operation agreement have a market share of more than 15% only in one (narrowly defined) geographic (downstream) market. In the wholesale and retail sector, downstream markets are generally narrowly defined. In our view, the Commission should envisage the possibility for the safe harbour not to apply only in cases where 15% threshold is exceeded in a "substantial" number of relevant geographic markets.

Last but not least, EuroCommerce still questions the way in which the 15% threshold has been defined. We would like to remind that the Commission, in the recently adopted guidelines on vertical agreements, consider that a threshold of 30% is appropriate. By providing for an identical threshold for both horizontal and vertical agreements the EU Commission will indeed create a higher level of legal certainty in particular for groups of independent retailers that, in some cases will have to assess their agreements under both regimes. The simple fact that horizontal agreements are by nature undertaken between competitors cannot explain, in itself and in economical terms, such a choice. Against this background, we would like to remind the Commission that in the United States, the threshold applicable to co-operation horizontal agreements is 20%¹. Furthermore, in an economic study commissioned by the OFT in 2007, the appropriate threshold for a safe harbour was set at 25%.

EuroCommerce fully supports point 207 and considers that it must be maintained as such. It is important for both groups of independent retailers as well as for international buying alliances between integrated companies. In both cases, it has to be recalled that as foreseen in point 210, an exchange of commercially sensitive information is connatural to this form of cooperation. It is the case for example, when the exchange of information concerns buying prices considered legitimate under the conditions laid down in paragraph 201. For this reason, EuroCommerce fully supports what is stated in paragraph 211, i.e. "if the information exchange does not exceed the sharing of data necessary for the joint purchasing of the goods subject to the purchasing agreement, then even if the information exchange had restrictive effects on competition within the meaning of article 101(1), the agreement would be more likely to meet the criteria of article 101(3) than if the exchange went beyond what was necessary for the joint purchasing".

3. Agreements on commercialisation – Guidelines chapter VI

As rightly stated by the Commission, the commercialisation agreements involve co-operation between competitors in a wide range of activities (see point 220) in order to determine, in common, all the commercial aspects in relation to the selling and distribution of products; including information exchange on price. In this specific context, price fixing is necessary to allow the integration of all the other commercial aspects and the achievement of the economic advantage sought.

EuroCommerce is also of the opinion that, in order to enhance the competition on the market and to provide with additional benefit for consumers, a coordinated short term low price campaign (2 to 6 weeks in most cases) may be possible to organise in a franchise system or similar distribution system applying a uniform distribution format. This positive assessment has been already done by the Commission for vertical agreements and EuroCommerce calls for the same solution when only some of members of above-mentioned distribution systems wish to offer these short promotional actions to their clients.

Nevertheless, in practice, mixed situations could occur, i.e. situations combining joint purchase agreements and buying obligations, exchange of information on maximum price and price fixing for short promotional campaigns etc. In such a perspective, EuroCommerce considers that the Commission should further clarify how to assess the commercialisation agreements that include a complex set of agreements of co-operation.

¹ See "Antitrust guidelines for collaborations among competitors", Federal Trade Commission and Department of Justice; April 2000; section 4.2.

EuroCommerce is concerned about the negative approach followed by the Commission with regard to co-operation agreements on commercialisation between operators not active in the same geographical markets. Contrary to its position with regard to buying agreements that the guidelines consider, first, as having potential positive effects on competition, and, only in some cases as having possible anticompetitive effects, points 222 and 231 of the guidelines follow a totally different approach. Indeed, the Commission considers these types of agreements, at first, as potentially anti-competitive and only under certain circumstances as potentially pro-competitive. For EuroCommerce, agreements on commercialisation between competitors active in different geographical markets should not therefore be seen as containing a restriction by object. On the contrary, EuroCommerce is of the opinion that these types of agreements should be assessed in the light of all the kinds of obligations contained as well as of the “most upstream indispensable building block”.

4. Standardisation agreements – Guidelines chapter VII

As far as the commerce sector is concerned, this chapter covers forms of co-operation such as safety, quality, environmental or social certification or audit schemes which have been developed by many retailers around the world to ensure that the legal requirements are respected or that products and/or suppliers conform with supplementary quality, environmental and/or social requirements.. This is particularly important for own brand products for which retailers engage their own reputation and legal responsibility. (for own brand products and for products directly imported from third countries, the retailer is legally seen as being the “producer” although he doesn’t produce the products).

Globally, two types of certification or audit schemes have to be distinguished:

1. Schemes verifying and ensuring that own brand and directly imported products are legal and safe:
In this case, retailers have legally the obligation to verify and to ensure that the products are legal and safe. They can do this through individual audits or, to avoid duplication or multiplication of similar audits of one company supplying several retailers, collective audit or certification schemes. These schemes are a direct consequence of EU law.
2. Schemes going further than simply ensuring that legal requirements are met by verifying the implementation or environmental, social or quality requirements. These schemes are supported by public and private stakeholders (NGOs, consumer associations, industry) for different reasons :
 - to avoid a proliferation of individual initiatives coming from each company, each being more or less different from all the others, which would result in an important burden for the audited companies and, in case of communication, be misleading for consumers,
 - to support public policies and priorities : to increase the take up of higher social standards for imported products, the sustainability of products (e.g. sustainable fishing and agriculture), the greening of the supply chain, etc.

It is clear that common audit or certification schemes can be considered as co-operation agreements between competitors. Nevertheless, their primary aim is to guarantee the quality and the safety and the legality of the products bought or to support public policies and, in no case, to limit the offer of a given (legal and safe) product or to partition off markets between competitors.

From a purely competition perspective, EuroCommerce members agree that the requirements and rules of the audit or certification schemes should be decided after consultation or with the participation of the concerned stakeholders, that they should be transparent, public and available across borders. They should not result in barriers to the trade of goods in the Internal market, nor lead to abuse of market power or to foreclose other competitors.

EuroCommerce and the commerce sector

EuroCommerce represents the retail, wholesale and international trade sectors in Europe. Its membership includes commerce federations and companies in 31 European countries.

Commerce plays a unique role in the European economy, acting as the link between manufacturers and the nearly 500 million consumers across Europe over a billion times a day. It is a dynamic and labour-intensive sector, generating 11% of the EU's GDP. One company out of three in Europe is active in the commerce sector. Over 95% of the 6 million companies in commerce are small and medium-sized enterprises. It also includes some of Europe's most successful companies. The sector is a major source of employment creation: 31 million Europeans work in commerce, which is one of the few remaining job-creating activities in Europe. It also supports millions of dependent jobs throughout the supply chain from small local suppliers to international businesses.