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Draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines

The Danish Chamber of Commerce welcomes the opportunity offered by the European Commission to comment on the draft Horizontal Block Exemptions Regulations ("HBERs") and Horizontal Guidelines ('"HGL"), the R&D Block Exemption Regulation ("R&D Regulation") and the Specialisation Block Exemption Regulation ("Specialisation Regulation") published on 1 March 2021.

The Danish Chamber of Commerce represents the retail and wholesale sector in Denmark Retailers and wholesalers are involved in several types of horizontal cooperation agreements covered by the existing HGL and therefore the new HGL will be the key instrument to ensure legal certainty and compliance with competition rules.

In the below comments, we have chosen to only address a few points in the revised Guidelines, since the issues of purchasing agreements, information exchange and sustainability cooperation are covered by Eurocommerce to which we refer.

Commercialisation agreements (paragraphs 398-402)

We are positive that paragraphs 398-402 contain examples illustrating that not all horizontal commercialisation agreements automatically are a breach of Article 101, where the participants' overall market share is low.

However, as there are a number of retail chains which are not operated by a single owner in the form of a capital company, but where the stores are owned by individuals (franchisees for example), we find it important that the EU Commission tries to describe and illustrate the legal situations where it is still legal for such chains to dictate a weekly maximum price for certain products they want to offer for sale, even where the company itself has a collective market share above 15%. In practice, this is of great importance, and these entities need a safe harbor.

For the sake of clarity, we would like to stress, that we are not necessarily are talking about price fixing for a certain period (typically maximum between a couple of days and 1 month), but instead of the question of, to which extend the chain office is able and permitted to set a *maximum* price, which the individual stores may, not exceed when selling the goods during the offer period (the individual stores may however still choose to sell at a lower price).

Non poaching clauses (paragraph 403)

The Danish Chamber of Commerce appreciates that the EU Commission addresses this topic. We discussed it with the Commission some years ago and received positive feedback, that a "non - poaching clause" – not only while the outsourcing agreement is still valid but also for a period after the agreement has been finished – may in certain situations be allowed under EU competition rules. One such situation may be where Undertaking A needs a "non poaching clause" for typically 12 months after the end of the cooperation between Undertaking A and Undertaking B. We strongly

urge the Commission to address this is greater detail in the HGL.

Bidding consortia (paragraph 405)

In Denmark we currently have an ongoing case ("Vejstribe-sagen") which illustrates the problem with bidding consortias. In this case, which is now in its 10th year, the Danish Supreme Court ruled that two companies, which were bidding jointly to improve their chances to win the whole tender, were competitors because they could have competed individually in the tender by making a quote for a part of the task/sub-tender which they didn't. None of the two companies were able to carry out the entire task described in the tender documents alone. Now those companies are risking fines for several million DKK because their joint bid violated the Danish equivalent to article 101.

Since the EU rules for public procurements stipulate that a tender must be divided into smaller sub-tenders the current situation is, that SME's cannot submit joint bids if both SME's are able to compete separately on a sub-tender.

In our opinion this problem must be solved within competition law and not within the rules for public procurement.

Best regards

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