ETNO response to the public consultation on the Informal Guidance Notice for businesses – anti-competitive agreements and abuse of a dominant market position

June 2022

I. General comments

ETNO welcomes the update of the Commission Notice on informal guidance and appreciates the intent of the revision.

Indeed, *ad hoc* guidance letters, that are also publicly accessible, are a very important complement to the other existing competition tools. In particular, wider and more flexible criteria for providing individual businesses with guidance letters could significantly improve legal certainty. Therefore, a review that will enable companies and the Commission to use this tool more often and in a more flexible way would benefit the businesses, but also the market (and, in the end, the consumers too).

In this sense, ETNO is pleased that the explicit purpose of the review is to change the current criteria that narrowly interpreted the circumstances in which the Commission could provide informal guidance pursuant to Recital 38 of Regulation 1/2003, and that the Commission has affirmed that *"such a very strict approach is no longer justified"*.

Therefore, we welcome that the draft of the Notice has explicitly extended – also in the title itself – the scope of application of the Notice, which is now more in line with recital 38 of Regulation 1/2003; enabling the Commission to provide informal guidance to businesses in cases of «*unresolved*» questions, and not only in the case of new questions (as per the current Notice). This way, the Notice would cover cases in which businesses are genuinely uncertain about the application of antitrust rules. Thus, the main positive achievement in the draft is that cases where there is no «*sufficient clarity*» (instead of «*no clarification*») in the existing Union legal framework, nor «*sufficient*» (the term "sufficient" has been added in the draft) publicly available general guidance at Union level in decision-making practice or previous guidance letters could now fall within the scope of the Note (par. 7(a) of the draft Notice).

However, in our vision, the relevant purposes and objectives mentioned above cannot be better achieved without some revisions of the draft, as suggested in the next two paragraphs of this paper. These revisions are necessary to ensure that the objective of making guidance more accessible to applicants, and thereby to obtain sufficient legal certainty, can be met without imposing further burdensome obligations on companies. Without these changes, applicants may be dissuaded from seeking guidance and no progress in use of the tool would be achieved.

II. Critical aspects and provisions

In order to improve the Notice's effectiveness, ETNO suggests the following changes of the draft:

a) Par. 7(b), Section II: «*Interest in providing guidance: The prima facie assessment of the agreement or unilateral practice suggests that a public clarification of the applicability of Articles 101 or 102 TFEU through a guidance letter would provide ~~significant~~ added value, taking into account one or more of the following elements*».

Reason: The test for whether there is an interest in providing guidance should be defined in a reasonably permissive manner, so as to allow applicants to have confidence in their applications being considered where this is merited on grounds of novelty or lack of existing resolution. This will be the case where the provision of guidance provides additional value relative to guidance already available to applicants. We therefore ask the Commission to amend the proposed standard in a manner similar to the current wording – "useful" – so as to maximize the possibility of obtaining relevant guidance.

b) Par. 12, Section III: «*In the request for guidance letter, the applicant(s) should include: (…) - ~~the applicant(s)' own preliminary assessment of the application of Articles 101 or 102 TFEU to the novel or unresolved question(s) raised by the agreement or unilateral practice~~*».

Reason: It is in the applicant(s) interest to provide its preliminary antitrust assessment. However, since the new draft states that the Commission will not process applications which do not fulfil the requirements set out in point 12 of the Notice, we think that this new burden for undertakings, added in the draft, should be at least withdrawn from the list provided in par. 12. Actually, the purpose of the guidance letters tool, which is legal certainty, is already adequately guaranteed by the preceding sentence of the same paragraph: *«In the request for guidance letter, the applicant(s) should include: (…) the applicant(s)' own preliminary assessment, having regard to point 7 (a)…»*. After all, this last provision has been specified and enlarged in the new draft Notice.

c) Par. 20, Section V: A guidance letter may be limited to part of the question(s) raised in the request. It may also include additional aspects to those set out in the request. If appropriate, the Commission may ~~set out in a guidance letter a time limit for its application or~~ specify that the guidance letter is premised on the existence or absence of certain factual circumstances.

Reason: Temporal limitation of the guidance provided should be removed: guidance letters should not be restricted by any limited time period and should apply during the lifetime of the agreement or the unilateral practice, otherwise it does not provide legal

certainty to the applicants. If the Commission imposes time limits to a given guidance letter, the Commission should be under an obligation to set out the rationale for limiting the application of it, in order to provide full transparency to the applicants.

d) Section VI, on the effects of guidance letters:

- «*22. Guidance letters are in the first place intended to help undertakings carry out themselves an informed assessment of their agreements or unilateral practices. Guidance letters will not be binding on the applicant(s) or any third party.* ~~*In that respect, the applicant(s) remain(s) responsible to carry out their own self assessment of the applicability of Articles 101 or 102 TFEU*~~*. ». (…)*
- «*25.* ***Guidance letters will be binding for the Commission with respect to the principles and the rules that the Commission has found to be applicable, as well as to the interpretation and application given on the specific case, as illustrated and documented by the applicant(s).*** *The clarifications on the applicability of Articles 101 or 102 TFEU included in a guidance letter will be expressly conditioned on the accuracy and truthfulness of information provided by the applicant(s) and any material divergence from the information provided by the applicant(s)* ***may*** ~~*will*~~ *render the guidance letter* ***subject to reversal*** ~~*inoperative*~~*.* ***However, the principle of preservation of the part(s) of the guidance letter that remain valid after any factual changes to the specific case should apply****».*

  Reason: Guidance letters should be binding for the Commission at least under the principles and rules deemed to be applicable by the Commission, as well as with respect to the interpretation and application given on the specific case, provided that the factual circumstances of the specific case remain unchanged and the applicant(s) have correctly documented it. In addition, the principle of preservation of the part(s) of the guidance letter that remain valid after any factual changes to the specific case should apply. This is key to ensure legal certainty and not to have a deterrent effect on the applicant's willingness to ask for such advice in which case this new tool will not be used and will fail to serve its objective.

- *<<23. A guidance letter cannot prejudge the assessment of the same question by the Court of Justice of the European Union, Member States' competition authorities or Member States' courts.*

  Comment: Assessment of guidance letters by National Competition Authorities (NCAs): para 23 suggests that NCAs might take a contrary view to what the Commission sets out in the guidance letter. We are of the view that both the Commission and NCAs should work closely to achieve uniformity and alignment in the assessment of a given case by all competition authorities. This is key to ensure full legal certainty for the applicants.

III. Provisions we would like to be introduced in the Notice

Finally, the purpose of increasing legal certainty cannot be achieved without the following additions:

a) The introduction of a timeline for the Commission:

- first step: a timeline to assess the request and inform the applicant(s) of whether the request is accepted or not (for instance, 30 days);
- and then, if this is the case, second step: a timeline for issuing the guidance letter (for instance, another 60 days).

Without a certainty on timing, the companies will not be willing to use this tool and thus the end result will finally be the same as with the current guidance, i.e. it not being used by companies to clarify issues where sufficient legal certainty cannot be achieved based on existing texts and case law.

b) The Notice should provide that the Commission gives explicit reasons for not issuing a guidance letter, in relation to the specific "framework for assessing whether to issue a guidance letter" provided in Section II. The provision introducing the reasons for the rejection of the request could be added at the end of Section II.

c) Guidance letters should be binding for the Commission, at least to the extent indicated in par. II, d) of this paper.

For questions and clarifications regarding this paper, please contact **Maarit Palovirta**, Senior Director of Regulatory Affairs (palovirta@etno.eu).