ALLEN & OVERY

Revised EU rules on horizontal cooperation agreements include guidance on sustainability initiatives, information exchange and mobile telecom network sharing

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On 1 June 2023, the European Commission (EC) adopted revised Horizontal Block Exemption Regulations on **research & development agreements** (R&D BER) and **specialisation agreements** (Specialisation BER) (jointly referred to as HBERs), as well as revised **Guidelines on Horizontal Cooperation Agreements** (Horizontal Guidelines).

The main aim of the update – which has taken nearly four years to finalise – is to adapt the HBERs and Horizontal Guidelines to economic and societal developments. Executive Vice-President Margrethe Vestager notes that the revised guidance is “a key tool to push forward the green and digital transitions”.

The HBERs exempt R&D and specialisation agreements fulfilling certain conditions from the EU prohibition on anti-competitive agreements (under Article 101(1) TFEU). The Horizontal Guidelines set out how businesses should interpret and apply the HBERs. They also give guidance on other types of cooperation agreements between competitors, such as joint purchasing, standardisation, production and commercialisation.

The updated rules clarify and expand on existing provisions, including a substantial rewrite of the guidance on information exchange with a greater focus on data sharing and algorithms. They also contain long-awaited new guidance on sustainability initiatives between rivals and mobile telecommunications infrastructure sharing agreements.

In this alert we give you five headline points from the revised rules.

1. Sustainability cooperation encouraged with details of exclusions, safe harbour and exemptions

One of the most significant revisions in the Horizontal Guidelines is the new chapter on sustainability agreements.

Reflecting the EC's desire for EU competition law to more effectively support and complement environmental and climate policies (including the European Green Deal), the guidelines now set out, with detailed examples, how businesses can legitimately pursue green cooperation.

Following the approach set out in the consultation draft, "sustainability agreements" are defined broadly as any horizontal cooperation agreement that pursues a sustainability objective, irrespective of the form of the cooperation. The Horizontal Guidelines do not focus on or distinguish between objectives, but give a non-exhaustive list of what could be covered. This includes climate change, reducing pollution, upholding human rights, ensuring a living income, reducing food waste, fostering resilient infrastructure and innovation and ensuring animal welfare.

The new chapter sets out that sustainability agreements will avoid breaching EU competition law if they fall into one of three camps.

a) Sustainability agreements that are unlikely to raise competition concerns

Sustainability agreements only raise competition law concerns where they negatively affect competition parameters such as price, quantity, quality, choice or innovation. The Horizontal Guidelines explain that agreements concerning, for example, internal corporate conduct or focusing on the organisation of industry-wide awareness campaigns will not be considered as restricting competition.

Interestingly, the final version of the revised Horizontal Guidelines now contains an additional exclusion. Agreements aimed solely at ensuring compliance with requirements or prohibitions in legally binding international treaties, agreements or conventions will fall outside the EU prohibition on anti-competitive agreements if the agreement provides that parties, their suppliers and/or their distributors must comply with those requirements or prohibitions. The EC gives as examples rules on fundamental social rights or prohibitions on the use of child labour or the use of certain pollutants.

The EC underlines that "such agreements may be an appropriate measure to enable undertakings to implement their sustainability due diligence obligations under national or EU law". The idea to include this provision was raised during the consultation process by the **Dutch Authority for Consumers & Markets** (ACM). The UK Competition and Markets Authority, in its draft guidelines on environmental sustainability agreements (**see our alert**), also excludes cooperation that is required by law.

b) Sustainability standards that fall in a "soft safe harbour"

The EC will treat agreements setting sustainability standards (eg harmonising packaging materials to facilitate recycling) as distinct from other standardisation agreements and provides specific guidance for assessing them. It notes that this does not include agreements limiting the output of the products concerned, as these do not qualify as sustainability standardisation agreements.

The EC acknowledges that some sustainability standardisation agreements could amount to a restriction of competition by object, for example if they are used to disguise price fixing, market or customer allocation, or limitations of output/quality or innovation.

However, it notes that other sustainability standards may benefit from a so-called "soft safe harbour" on the basis that they are unlikely to produce "appreciable" negative effects on competition. The Horizontal Guidelines set out that this will be the case where each of the following conditions are met:

i) the procedure for setting the standard must be transparent and open to all
ii) compliance with the standard is voluntary for non-participants
iii) while binding requirements can be imposed on participants, they must be free to adopt a higher standard
iv) commercially sensitive information that is not objectively necessary and proportionate for the development, implementation, adoption or modification of the standard is not exchanged
v) access to the outcome of the standard setting process (including the agreed label, logo or brand name) is effective and non-discriminatory, including for future participants
vi) the sustainability standard satisfies at least one of the following two conditions:
   - the standard does not result in a significant increase in price or significant reduction in the quality of products, or
   - the combined market share of the participants does not exceed 20% on any relevant market affected by the standard (this threshold was added following consultation on the draft Horizontal Guidelines)

Even outside the soft safe harbour, the EC notes that a sustainability standard may lack appreciable anti-competitive effects. This may be the case, for example, where there is sufficient competition from alternative labels/standards and/or conventional products.

c) Sustainability agreements that benefit from individual exemption

Sustainability agreements that do not fall within either of the categories above may give rise to competition concerns and fall within the scope of the Article 101(1) prohibition.

However, like all agreements, sustainability agreements can benefit from an individual exemption under Article 101(3) TFEU when they meet four cumulative criteria, ie: (i) they generate sufficient and substantiated efficiencies; (ii) consumers get a fair share of the resulting benefits; (iii) the restrictions are indispensable to the attainment of the benefits; and (iv) they do not eliminate competition.

The Horizontal Guidelines give extensive guidance on the second criterion in particular. They strongly highlight the need for clear evidence that any benefits arising from the agreement are passed on to consumers. The EC indicates that consumer pass-on could take three forms, individually or in combination:

- Individual use value benefits, ie derived from the consumption/use of the product and directly improving the consumers' experience with the product (eg organically-grown vegetables may taste better and be healthier).
- Individual non-use value benefits, ie derived indirectly from the consumers' appreciation of the impact of their sustainable consumption on others (eg sustainably-grown wooden furniture which could help stop de-forestation).
- Collective benefits, ie occurring irrespective of the consumers' individual appreciation of the product and objectively accruing to consumers in the relevant market if they are part of a larger group of beneficiaries.

The EC considers that efficiencies achieved in separate markets can be taken into account provided the group of consumers affected by the restriction and benefiting from the efficiency gains is substantially the same (eg drivers purchasing less polluting fuel benefit from cleaner air as a consumer and citizen). Notably, the EC has not changed its mind on this point following the consultation, despite the fact there are some jurisdictions which take a less conservative approach to this point. **The Dutch ACM in its draft guidelines**, for example, considers that in relation to certain categories of environmental agreements, out of market efficiencies benefiting other consumers can also be taken into account when applying this criterion, with no requirement for the negatively affected consumers to be fully compensated. In the UK, the CMA's draft guidance proposes a similar approach, although it limits this to "climate change agreements" rather than environmental sustainability agreements as a whole. While we do not expect the CMA to alter its position in light of the final EC guidelines, the ACM has already promised to bring its draft guidelines in line with the EU approach.

2. New framework for analysing data sharing (and information exchange more generally)

The Horizontal Guidelines include a significantly expanded and restructured chapter on information exchange.

There is more detail on what amounts to commercially sensitive information, and a framework (including a self-assessment flowchart) to enable businesses to assess the risk of exchanging information in various contexts, including benchmarking, hub-and-spoke arrangements and public announcements. Notably, the new rules have been adapted to cover digitalisation and put greater focus on increasingly common forms of information exchange such as data sharing and use of algorithms.

Data sharing concerns all possible forms and models of data access and transfer between companies, including data pools where data holders get together to share data. The EC appreciates that in recent years data sharing has become extremely important and may generate certain efficiency gains.

But the EC acknowledges that data sharing may result in collusion. It may also lead to anti-competitive foreclosure, for example, when the data shared is of strategic importance, represents a large share of the market and competitors' access is prevented.

The Horizontal Guidelines offer some comfort: in principle, data sharing does not amount to a by-object restriction of EU competition rules if it is established that it has genuine pro-competitive effects. Such pro-competitive effects must be demonstrated, relevant, specifically related to the exchange of information and sufficiently significant to justify a reasonable doubt as to whether the exchange causes a sufficient degree of harm to competition.

The EC also sets out how data sharing arrangements which have restrictive effects on competition (based on an assessment of the economic conditions on the relevant market(s) and the specific characteristics of the arrangement such as the purpose of the initiative, conditions of access and participation and type of information exchanged) may benefit from the Article 101(3) exemption. For example, it notes that data sharing may be essential for the development of new products, services and technologies, and that pooling data on producers supplying sustainable products may help companies fulfil their sustainability obligations under EU or national law.

Importantly, the EC draws attention to preventative measures, such as the use of clean teams to receive and process information. The EC emphasises that data pool participants should only have access to their own information and the final and aggregated information of other participants. The parties may decide to appoint, under strict confidentiality rules, a trustee to manage a data pool and ensure that competition law risks are addressed.

3. Use of algorithms may raise competition concerns in a number of ways

Although the Horizontal Guidelines acknowledge that algorithms may generate efficiencies, they note that algorithms may also be used to achieve (or increase the stability of) a collusive outcome. For example, algorithms can monitor (pre-existing) anti-competitive agreements or facilitate collusion by increasing market transparency, detecting price deviations in real time and making punishment mechanisms more effective.

The EC specifically mentions so-called “collusion by code”, ie when competitors use behavioural coordination algorithms to agree on essential competition parameters (eg price). Such collusion typically amounts to a cartel.

The EC goes on to draw out two principles for assessing pricing algorithms under EU competition law: (i) pricing practices deemed to be illegal in the offline environment will also likely be illegal if implemented online and, significantly, (ii) companies cannot avoid liability on the grounds that their prices were determined by algorithms given that an algorithm (just like an employee) remains under the firm’s control.

According to the EC, a shared algorithm may also facilitate indirect information exchange. For example, information could be exchanged via a shared optimisation algorithm that takes commercial decisions based on commercially sensitive data-feeds from various competitors. While using publicly available data does not raise competition law concerns, the Horizontal Guidelines note that the aggregation of sensitive data into a pricing tool offered by a single IT company, to which certain competitors have access, may constitute collusion. Depending on the facts of the case, the participating competitors and the third party may all be held liable.

Finally, the guidelines make it clear that introducing a pricing rule in a shared algorithmic tool (for example, a rule to match the lowest price on a particular online platform or to match the price of a particular competitor) may infringe the Article 101(1) prohibition, even if there is no explicit agreement on aligning market behaviour.

4. Minimum conditions reduce risks for mobile telecom network sharing agreements

The Horizontal Guidelines set out conditions under which mobile telecommunications operators may enter into network sharing agreements (referred to in the guidelines as “mobile telecommunications infrastructure sharing agreements”) (NSAs). These cover agreements where operators share the use of parts of their network infrastructure (eg basic site infrastructure, Radio Access Network equipment or spectrum), operating costs and the cost of subsequent upgrades and maintenance.

In principle, NSAs are not considered as by-object restrictions (“unless they serve as a tool to engage in a cartel”). However, they may have restrictive effects on competition, eg, by reducing infrastructure competition and in turn limiting competition in the wholesale and retail supply of mobile telecoms services. Therefore, NSAs require assessment on a case-by-case basis, potentially taking into account a number of factors such as the type and depth of sharing, the geographic scope and market coverage of the NSA and the market structure and characteristics.

Helpfully, the EC also provides a number of minimum conditions that operators must comply with to minimise the risk of anti-competitive effects. These include requiring operators to each control and manage their own core network, maintain independent retail and wholesale operations, maintain the ability to follow independent spectrum strategies, and refrain from exchanging commercially sensitive information beyond that which is strictly necessary for the mobile infrastructure sharing to function (potentially with barriers to information exchange in place).

5. More flexibility to cooperate in R&D and specialisation agreements

The revised R&D BER provides a number of changes to enhance its effectiveness. First, it addresses concerns raised by some stakeholders during the evaluation process over the need to protect innovation competition. The EC makes it clear that where the parties to an R&D agreement do not compete in existing product or technology markets, they may nevertheless compete for innovation/new markets. The R&D BER and Horizontal Guidelines now emphasise that the benefit of the block exemption will be withdrawn in cases where an R&D agreement would substantially restrict innovation competition.

Surprisingly, the EC has abandoned another initial proposal in relation to innovation competition. It was considering only making the exemption available for R&D agreements concerning entirely new products, technologies and processes, as well as R&D efforts directed towards a specific objective but not yet specific in terms of the product or technology (so-called R&D poles), if there are three or more comparable competing R&D efforts.

This change in position is welcome – many had raised concerns that the proposed requirement would be difficult to assess and had introduced an unnecessary element of complexity. However, businesses that also have activities in the UK will still have to grapple with this requirement. The UK's **R&D Block Exemption Order**, which came into force on 1 January 2023, has already adopted the three or more comparable competing R&D efforts requirement.

In the revised Specialisation BER, the EC expands the definition of "unilateral specialisation agreements" to cover more than two parties. This will bring more agreements within the scope of the exemption.

The updated HBERs also contain a number of clarifications, eg in relation to some of the definitions and the market share calculations. They simplify other areas: the grace period (where the parties can continue to benefit from the block exemption even if the market share threshold is exceeded) is now two calendar years in all cases.

And that's not all…

In addition to the above there are plenty of other changes to the Horizontal Guidelines. For example:

- On joint purchasing agreements, new guidance describes the difference between joint purchasing and buyer cartels, and explains that joint purchasing extends to buyers who agree to negotiate purchase conditions jointly (and make this fact known to potential suppliers) but make the purchases independently.
- A new section on bidding consortia indicates that a joint bidding consortium does not restrict competition if it allows its participants to take on projects that they would not be able to undertake individually, eg due to the size or complexity of the project. It also provides guidance on assessing consortia agreements where one or more participants would be able to undertake the project individually.
- In relation to standardisation agreements, amendments clarify that disclosure of a maximum cumulated royalty rate is not anti-competitive and encourage good faith disclosure of intellectual property rights.

Timing and concluding remarks

The revised HBERs enter into force on 1 July 2023 and will remain valid for 12 years. There is a transitional period of two years, during which agreements that do not meet the conditions of the new HBERs but which meet the conditions of the previous HBERs can benefit from the block exemption. The Horizontal Guidelines will come into effect once they have been published in the EU's Official Journal (most likely in July).

The revised HBERs and Horizontal Guidelines provide some welcome clarity, at least for now.

They will, for example, be of particular interest to the telecom and e-commerce sectors given the inclusion of new guidance on assessing common business practices such as data pooling and mobile telecoms network

sharing agreements. The expanded guidance on joint purchasing agreements will be useful for the retail sector, especially supermarkets.

However, given the rapid development of various technologies eg 5G and 6G in telecoms, and artificial intelligence and algorithms, it remains to be seen whether the guidelines will remain fit for purpose for the next 12 years or whether more flexibility will be needed.

The revised Horizontal Guidelines also constitute an important marker in the wider debate on how competition law and policy can support the European Green Deal. The new chapter on sustainability agreements is without doubt a milestone in this regard and provides more clarity on how to assess such arrangements under Article 101.

Despite various requests during the consultation process for businesses to be given more leeway to enter into meaningful sustainability initiatives, the EC has remained resolute in its position. It has adopted a more conservative approach than certain other authorities, such as the UK CMA or the Dutch ACM (unless the latter aligns its guidance with the Horizontal Guidelines). The EC does, however, encourage companies to approach it for informal guidance on novel or unresolved questions on individual sustainability agreements. Time will tell whether the tools granted by the EC will in fact “push forward the green…transitions”, and whether any patchwork of approaches that might develop worldwide dampens sustainability initiatives by larger corporates.

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