

EUROPEAN COMMISSION PUBLISHES UPDATES ON REVIEW OF HORIZONTAL BLOCK EXEMPTIONS AND GUIDELINES

On 7 June 2021 the European Commission published its [inception impact assessment](#) (IIA) proposing policy options to update the: (i) [R&D block exemption regulation \(R&D BER\)](#); (ii) [specialisation block exemption regulation \(Specialisation BER\)](#)¹; and (iii) [guidelines on horizontal cooperation agreements](#) (the Horizontal Guidelines). The IIA follows an evaluation of the existing rules applying to horizontal cooperation agreements, which resulted in a [Staff Working Document](#) (SWD). Together, these publications shed light on some of the key policy issues that the EC will have to work through in the next phase of the legislative process.

The 2010 block exemptions and the Horizontal Guidelines

Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) prohibits anti-competitive agreements between undertakings save where they contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, in accordance with Article 101(3) TFEU.

The R&D BER and Specialisation BER (together, the HBERs), provide that if their conditions are met, certain horizontal cooperation agreements will fall within the scope of Article 101(3) TFEU and will not infringe competition law. The HBERs are accompanied by the Horizontal Guidelines, which are an important source of guidance not only on the application of the HBERs but also on the assessment of a wide range of other horizontal issues, such as information exchange and joint purchasing arrangements, among others. Further information on the EU competition rules on horizontal agreements can be found in our recent [publication](#).

The HBERs are due to expire in December 2022, and as such the EC launched an evaluation of the HBERs and Horizontal Guidelines in July 2019. The results of the evaluation phase were published in the SWD of 6 May 2021, and some of the issues identified in the SWD are addressed further in the IIA published this month.

Simplifying and clarifying the scope of the HBERs

While the EC's evaluation found that the HBERs are useful for assessing whether particular agreements comply with competition law, it highlighted that they could go further in providing legal certainty to businesses and national competition authorities, in particular as regards the conditions for exemption.

For example, the EC considers that the conditions contained in the HBERs may discourage horizontal cooperation agreements involving small and medium enterprises (SMEs), academic bodies and research institutes, even in the absence of competition concerns. Accordingly, the IIA suggests clarifying complex definitions and modifying the conditions to benefit from the R&D BER insofar as they relate to such organisations. The EC also proposes to introduce specific exemptions for categories of R&D and/or specialisation agreements entered into by SMEs. Proposals are not just limited to agreements between SMEs, academic bodies and research institutes though; the EC also proposes to review the conditions for exemption in the HBERs as they apply to businesses more generally.

The EC's evaluation also found that many businesses view the scope of the Specialisation BER to be too narrow. One example is the definition of "*unilateral specialisation agreements*", which does not capture (potentially pro-competitive) agreements involving more than two parties, thereby depriving them of the benefits of block exemption. The EC proposes to reflect on whether the definition could be expanded to cover such agreements. The IIA also contains a proposal to verify whether horizontal subcontracting agreements which aim to increase production should fall within the scope of the Specialisation BER.

Sustainability, digitisation and retail alliances in the spotlight

As well as the need to update existing chapters of the Horizontal Guidelines to take account of recent case law (for example, in the area of information exchange) and to provide greater clarity, the EC recognises that

¹ The Specialisation BER applies to agreements whereby the parties seek to cooperate in the production of goods and services through either: (i) joint production; or (ii) unilateral or reciprocal specialisation. Unilateral specialisation involves one party ceasing to produce a product and purchase it from the other, while

reciprocal specialisation will arise where two or more parties agree to cease production of certain different products and source them from the other.

economic and policy developments in the last ten years may require the introduction or expansion of chapters to address new and emerging forms of cooperation.

There has been much recent debate on the role of sustainability objectives in the shaping and enforcement of competition policy, with some suggesting that competition rules may deter collaboration between businesses given the EC's traditional approach to efficiency claims under Article 101(3). The EC has now acknowledged that the Horizontal Guidelines need to be revised to provide greater clarity in this area, but has not yet provided any concrete indication as to how it may do so. The EC could draw inspiration from existing initiatives introduced by national competition authorities in Europe, notably the work of the Dutch competition authority, which [published](#) guidance on the treatment of sustainability agreements in January 2021.

Similarly, the EC notes in the SWD and IIA that the Horizontal Guidelines do not sufficiently reflect the impact of the digitisation of the economy. Aside from modernising the Horizontal Guidelines more generally, the EC is considering introducing specific guidance in new areas such as data sharing and data pooling initiatives.

Finally, while joint purchasing arrangements are discussed in the existing Horizontal Guidelines, the EC recognises in the SWD that the emergence of pan-European retail alliances in the last ten years has led to a

divergence of opinion as to whether the existing rules are fit for purpose. Retailers argue that such arrangements help to secure positive outcomes for consumers, and should therefore benefit from a wider margin of discretion than that currently provided under the guidelines. On the other hand, FMCG suppliers have expressed concerns regarding the possible harmful effects of purchasing alliances on upstream markets, and have noted that potentially harmful practices, such as collective fee extraction mechanisms and collective delisting, do not receive adequate attention in the Horizontal Guidelines as drafted.² More generally, respondents to the EC's consultation also pointed towards a lack of clarity in the distinction between (potentially pro-competitive) joint purchasing arrangements and anti-competitive purchasing cartel conduct. The EC has avoided taking a position on these questions in the IIA, but it seems unlikely that these issues can go unaddressed.

Next steps

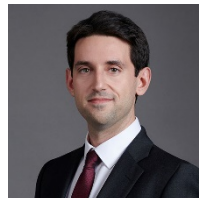
The EC will need to decide how it will revise the HBERs and Horizontal Guidelines by the time they are due to expire in December 2022.

In the meantime, stakeholders will be able to [comment](#) on the IIA until 5 July 2021. The EC will then launch a public consultation on the policy options and the revision of the HBERs and Horizontal Guidelines.

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² In its [annual competition policy report](#) published on 9 June 2021, the European Parliament has also called on the EC to continue its analysis of the extent and effect of buying alliances, with a particular focus on guaranteeing fair competition and greater

transparency in the practices of supermarket and hypermarket chains, to ensure that farmers receive fair conditions and prices for their products.