

REVOLUTION OR EVOLUTION?

THE EUROPEAN COMMISSION CONSULTS ON REVISED HORIZONTAL GUIDELINES AND BLOCK EXEMPTIONS

The European Commission has **published** draft texts of the revised Horizontal Block Exemption Regulations (the Draft HBERs) and accompanying Guidelines on Horizontal Cooperation Agreements (the Draft Guidelines) for public consultation. The Commission's review process aims to update these texts to reflect economic and societal developments that have occurred since the instruments were adopted in 2010 - in particular, the ongoing digital and green transformation of the single market.

Once finalised, the Draft Guidelines in particular will be a key resource for businesses seeking to ensure they stay on the right side of competition rules when working with competitors. Their latest iteration includes a number of key changes, including a new chapter on sustainability agreements, updated guidance on information exchange, and clarifications around the treatment of buying alliances.

Why do the horizontal block exemptions and guidelines matter?

Horizontal cooperation between two or more competitors can lead to substantial economic and wider social policy benefits. It can allow competitors to combine complementary activities and develop innovative solutions to issues which each competitor alone may be unable to solve. Pro-competitive cooperation in areas such as R&D, for instance, is likely to be vital in achieving sustainability goals associated with the green transition.

However, collaborating with competitors can also raise compliance risks; straying from permissible cooperation into anti-competitive collusion carries the risk of significant penalties. [The Horizontal Block Exemption Regulations \(HBERs\) and Guidelines](#) aim to clarify where the line between acceptable and unacceptable forms of collaboration should be drawn.

The HBERs comprise the R&D block exemption regulation and the specialisation block exemption regulation. They

recognise that some specific forms of cooperation in the areas of R&D and "specialisation" (including outsourcing) should be encouraged, and therefore block exempted from the restriction on anti-competitive agreements contained in Article 101(1) of the Treaty on the Functioning of the European Union (TFEU).

However, the scope of the HBERs is relatively narrow. For most businesses, the Horizontal Guidelines are the key source of guidance when collaborating with competitors on a wide range of initiatives. The Guidelines contain guidance on how to interpret and apply the HBERs, as well as providing important information on self-assessment under Articles 101(1) and 101(3) TFEU more generally. The Guidelines are relevant to a wide range of horizontal issues, including information exchange and joint purchasing, production and commercialisation agreements.

Sustainability agreements take centre stage

The Commission's revisions to the HBERs and Horizontal Guidelines seek to address feedback that the existing rules fail to give sufficient weight to the benefits of pro-competitive cooperation and lack legal certainty. It has been claimed that the lack of clear guidance, coupled with the significant penalties levied for antitrust infringements, has led many companies to adopt a risk-averse approach and has deterred potential beneficial collaboration with rivals.

So-called "sustainability agreements" have been central to this debate. In the Draft Guidelines, the Commission has acknowledged that cooperation between companies can play an important role in tackling far-reaching environmental and sustainability concerns, consistent with the ambitious targets laid out in the European Union's "Green Deal" initiative. To this end the new sustainability chapter explains when agreements that genuinely pursue sustainability objectives would fall outside of the scope of Article 101(1) altogether. For example, this would be the case where the agreements do not affect parameters of competition such as price,

quantity, quality, choice or innovation. In practice, it is likely that many sustainability agreements will affect at least one of these parameters and so further consideration under the competition rules will be necessary.

As regards sustainability agreements that do fall within Article 101(1), the Draft Guidelines focus on "sustainability standardisation agreements" as the most "typical" arrangements likely to require cooperation between undertakings to achieve their wider objectives. The Commission explains that these agreements, which establish specific sustainability requirements or standards, are unlikely to produce appreciable negative effects provided that the standards fulfil certain criteria.

Where a sustainability agreement does restrict competition within the meaning of Article 101(1), it remains possible to benefit from an individual exemption under Article 101(3) TFEU. Of the criteria for individual exemption under Article 101(3), particular debate has surrounded the requirement that consumers receive a "fair share" of the benefits generated by an agreement. The challenge posed to this approach is that sustainability agreements may give rise to collective benefits for society (e.g. less air pollution), while the costs are borne by only a sub-set of consumers (e.g. motorists), and that such agreements therefore do not qualify for individual exemption notwithstanding the significant potential benefits they bring. The Draft Guidelines provide more guidance on the assessment of collective benefits, but crucially still require there to be a substantial overlap between the consumers affected by an agreement and any beneficiaries outside of the relevant market. This is likely to remain a crucial area of debate in the public consultation.

Updating the rules on information exchange

The Draft Guidelines seek to bring the Commission's guidance on information exchange up to date with the EU courts' jurisprudence. The Commission's expanded guidance seeks to help businesses identify when information is commercially sensitive and when it may be legitimately shared with a competitor.

The Commission underlines that companies should be particularly cautious where data is of strategic importance, represents a "large part" of the market, or where third parties' access is limited. The Draft Guidelines also note that distinctions should be drawn regarding the acceptable level of information exchange in different contexts - the level of acceptable information exchange in an M&A context, for example, will be different to that in a regulatory or a commercial context. The Commission has also sought to provide

further clarity to the assessment of data pooling under Article 101(1), and has introduced an additional section with guidance on how companies can limit how data is used and collected.

While the expanded guidance is intended to provide greater clarity to companies, it has been criticised by several stakeholders as overly strict for certain types of information exchange. It will be interesting to see if the Commission makes changes to the Draft Guidelines in order to address these objections.

A nuanced approach to purchasing alliances

One feature of the European retail landscape that has emerged prominently in the last decade has been the rise and expansion of "European retail alliances": pan-European buying groups formed by some of the largest grocery retailers in the single market. The merits of these alliances, from a competition law perspective, have been fiercely debated by retailers and European brands in recent years, with the Commission and several national competition authorities also launching investigations into the alliances' activities.

Against that backdrop, the Draft Guidelines adopt a nuanced approach and acknowledge that joint purchasing agreements can give rise to significant benefits, including increased buying power and economies of scale, but can also give rise to anticompetitive effects. The Draft Guidelines include clarifications on the types of joint purchasing agreements that can constitute beneficial cooperation and provide information on the distinction between permissible joint purchasing arrangements and impermissible forms of collusion, such as buyer cartels.

Evolution of the HBERs

The Commission has suggested several refinements to the existing block exemptions:

- Research and development: With a view to encouraging greater R&D cooperation, the draft R&D block exemption regulation proposes to, among other things: (i) simplify the grace period which applies if market shares increase above the threshold for exemption; and (ii) provide greater flexibility when calculating market shares. These changes sit alongside more general clarifications of the definitions and the underlying text of the regulation. Importantly, the revised text proposes to limit the application of the R&D exemption to scenarios in which more than three competing R&D efforts will remain in the market. Some stakeholders have criticised some aspects of the new draft as likely to lead to considerable uncertainty and pointed out that

this may in fact have a dampening impact on some types of R&D cooperation.

- **Specialisation:** In response to feedback from the Commission's evaluation, the draft specialisation block exemption regulation seeks to expand the definition of "unilateral specialisation agreements". As highlighted in our June 2021 [briefing](#), the current regulation is arguably too narrow, failing to capture potentially pro-competitive agreements involving more than two parties. The revised text addresses this issue and also proposes that horizontal subcontracting agreements can benefit from the safe harbour. This applies to horizontal subcontracting in general and is not limited to arrangements increasing production as previously envisaged.

Next steps

In general, the changes proposed by the Commission in the Draft Guidelines and Draft HBERs include some welcome developments, which will help to ensure that the instruments continue to be relevant and useful for businesses seeking to ensure their competition law compliance. However, while the instruments take some significant steps forward, the debate about whether the changes go far enough on issues like sustainability, information exchange and R&D is likely to be far from over.

Interested parties are invited to submit comments by 26 April 2022. Once finalised, the new regulations and guidelines will enter into force on 1 January 2023.

CONTACT



LISA WRIGHT
PARTNER
T: +44 (0)20 7090 3548
E: Lisa.Wright@slaughterandmay.com



ALEX BULFIN
ASSOCIATE
T: +32 (0)2 737 9405
E: Alex.Bulfin@Slaughterandmay.com

London

T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels

T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong

T +852 2521 0551
F +852 2845 2125

Beijing

T +86 10 5965 0600
F +86 10 5965 0650

Published to provide general information and not as legal advice. © Slaughter and May, 2022.
For further information, please speak to your usual Slaughter and May contact.

www.slaughterandmay.com