European Commission consults on new rules for horizontal cooperation agreements featuring sustainability agreements and data sharing

March 2022

On 1 March 2022, the European Commission (EC) **published for consultation** draft revised Horizontal Block Exemption Regulations on **research & development** (R&D BER) and **specialisation agreements** (Specialisation BER) (jointly referred as HBERs), as well as draft revised **Guidelines on Horizontal Cooperation Agreements** (Horizontal Guidelines).

Most significantly, the drafts aim to adapt the rules to account for economic and societal developments, in particular the digital and green transition. There are now long-awaited provisions on, for example, sustainability collaborations and the exchange of information in data pooling.

The role of the EC's rules on horizontal cooperation

Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) prohibits agreements between potential and actual competitors that may affect trade between Member States and that have the object or effect of restricting competition.

In certain circumstances, however, cooperation between rivals may be pro-competitive and might bring about some efficiency gains. To reflect this, the HBERs provide that R&D agreements and specialisation agreements fulfilling certain conditions are exempted from the prohibition under Article 101(3) TFEU.

The Horizontal Guidelines set out how businesses should interpret and apply the HBERs. They also cover agreements on purchasing, standardisation, production and commercialisation as well as information exchange, setting out when such arrangements may raise competition concerns.

The HBERs and Horizontal Guidelines are now over ten years old and will lapse on 31 December 2022. The EC's evaluation of the rules, launched in September 2019, has identified a number of areas for improvement. The published consultation drafts of the revised HBERs and Horizontal Guidelines aim to address these issues.

Proposed guidelines on sustainability agreements

One of the most significant revisions in the draft 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.

"Sustainability agreements" are defined broadly, as any type of horizontal cooperation agreement that genuinely pursues one or more sustainability objectives, irrespective of the form of cooperation. The draft does not focus on or distinguish between objectives, but gives a non-exhaustive list of what could be covered. This includes climate change, eliminating pollution, respecting human rights, 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 in one of three camps.

1. Sustainability agreements that do not raise competition concerns

Sustainability agreements only raise competition law concerns where they 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.

2. Sustainability standards which fall in a "soft safe harbour"

The EC is proposing to 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.

The EC acknowledges that some sustainability standardisation agreements could amount to a restriction of competition by object, for example if they are a cover for 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” and fall outside Article 101(1) 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 is transparent and open to all
ii) participation/compliance with the standard is voluntary
iii) participants are free to adopt a higher standard
iv) commercially sensitive information that is not necessary for the development, adoption or modification of the standard is not exchanged
v) access to the outcome of the standardisation procedure is effective and non-discriminatory
vi) there is no resulting significant increase in price or significant reduction in the choice of products
vii) a monitoring system or mechanism verifies compliance with the standard by companies who adopt it

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.

3. 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 Article 101(1).

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

The draft 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 proposes 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 on separate markets can be taken into account provided the group of consumers affected by the restriction and benefitting from the efficiency gains is substantially the same (eg drivers purchasing less polluting fuel benefit from cleaner air as a consumer and citizen). Interestingly, we have seen some jurisdictions take a less conservative approach to this point. **The Dutch Authority for Consumers and Markets**, for example, considers that 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.

New focus on data sharing

The draft Horizontal Guidelines include an expanded and restructured chapter on information exchange. This puts focus on increasingly common forms of information exchange such as data sharing and use of algorithms.

Data sharing concerns all possible forms and models supporting data access and transfer between companies, including data pooling where data holders get together to share data resources. The EC appreciates that in recent years data sharing has become extremely important and may generate certain efficiency gains. In some circumstances, however, it may lead to anti-competitive foreclosure. This may happen, for example, when the data shared is of strategic importance, it represents a large part of the market and third parties' access is prevented.

The EC is clear that the exchange of strategic data should take place on a non-discriminatory basis for all players on the relevant market. If the data represents a large part of the market, the assessment of whether any data sharing initiative could breach Article 101(1) should consider the nature of the data shared, the conditions of the data sharing agreement and the access requirements, as well as the market position of the parties. The likelihood of anti-competitive foreclosure will decrease if access to the data pool is open.

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 third party to manage a data pool and ensure that competition law risks are addressed.

Planned guidance on use of algorithms

The draft indicates that the use of algorithms by competitors may increase the risk of a collusive outcome in the market. It could enable rivals to increase transparency, detect price deviations in real time and make punishment mechanisms more effective. But this would only be the case where certain structural market conditions are present, eg a high frequency of interactions, limited buyer power and the presence of homogenous products/services.

The draft distinguishes algorithmic collusion from so-called "collusion by code", which is the deliberate application of coordination algorithms by competitors and typically constitutes a by-object restriction.

According to the EC, a shared algorithm may also facilitate indirect information exchange, which in certain circumstances may lead to collusion. For example, competitors may rely on shared optimisation algorithms that would take business decisions based on commercially sensitive data-feeds from various competitors, or implementation in the relevant automated tools. While using publicly available data does not raise competition law concerns, the draft notes 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.

Finally, the draft makes it clear that disclosing commercially sensitive information as an input in a shared algorithmic tool (eg a pricing rule) may infringe Article 101(1), even if there is no explicit agreement on aligning market behaviour. There is a presumption that companies receiving such information take it into account and align their market conduct with this information. In such a scenario, the company should clearly reject the information.

Further proposed guidance and amendments

On top of new guidance on sustainability, data sharing and use of algorithms there are plenty of other changes.

It is worth highlighting the following additions to the Horizontal Guidelines:

- In relation to production agreements, there is new guidance on mobile infrastructure sharing agreements, which provides principles for assessing the effects of such agreements.

- On joint purchasing agreements, there is a new section describing the difference between buyer cartels and joint purchasing agreements, which provides a list of example factors that may be helpful in assessing whether an agreement can be considered as a buyer cartel.
- Regarding commercialisation agreements, the draft provides a new section on bidding consortia, indicating 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. The draft also provides some guidance on assessing consortia agreements between participants that would be able to undertake the project individually.
- In relation to standardisation agreements, there are additional elements to be taken into account in the assessment of whether a proposed licence fee is FRAND.

The draft revised R&D BER proposes a number of changes to enhance its effectiveness. It provides that the exemption 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) will only be available if there are three or more comparable competing R&D efforts.

In the revised Specialisation BER, the EC proposes to expand the definition of "unilateral specialisation agreements" to cover more than two parties.

The draft HBERs also propose a number of clarifications, eg in some of the definitions and simplifications, such as in market share calculations.

Where does the EC's position sit with industry and other authorities?

The revised drafts provide some welcome clarity. They will, for example, be of particular interest to the telecom and e-commerce sectors since they provide new guidance on assessing common business practices such as data pooling and mobile network sharing agreements. The expanded guidance on joint purchasing agreements will be useful for the retail sector, especially supermarkets.

The revised Horizontal Guidelines also constitute an important step 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. Although it remains to be seen whether the guidance goes far enough. Interestingly, the Dutch authority has reportedly commented that more leeway may be needed in order to encourage companies to enter meaningful sustainability initiatives.

It is also worth noting that on 28 February 2022 the EC launched a separate **consultation concerning special rules on sustainability agreements in agriculture**. These may be relevant for market players in the agriculture sector operating at different levels of production and trade, including manufacturers, wholesalers, retailers, processors and input providers.

In terms of next steps on the revised draft horizontal rules, the EC wants to hear stakeholders' views. Interested parties can submit their comments until 26 April 2022. The new rules will come into force on 1 January 2023.

Contacts

Dirk Arts
Partner - Brussels
Tel +32 2 780 2924
Dirk.Arts@allenovery.com

Kristina Nordlander
Partner – London/Brussels
Tel +44 20 3088 1280
Kristina.Nordlander@allenovery.com

Francesca Miotto
Counsel - Brussels
Tel +32 499 999 724
Francesca.Miotto@allenovery.com

Charles Pommies
Counsel - Brussels
Tel +32 2 780 2936
Charles.Pommies@allenovery.com

Agnieszka Kolasinska
Senior PSL - Warsaw
Tel +48 608 426 865
Agnieszka.Kolasinska@allenovery.com

Allen & Overy means Allen & Overy LLP and/or its affiliated undertakings. Allen & Overy LLP is a limited liability partnership registered in England and Wales with registered number OC306763. Allen & Overy (Holdings) Limited is a limited company registered in England and Wales with registered number 07462870. Allen & Overy LLP and Allen & Overy (Holdings) Limited are authorised and regulated by the Solicitors Regulation Authority of England and Wales. The term partner is used to refer to a member of Allen & Overy LLP or a director of Allen & Overy (Holdings) Limited or, in either case, an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Allen & Overy LLP's affiliated undertakings. A list of the members of Allen & Overy LLP and of the non-members who are designated as partners, and a list of the directors of Allen & Overy (Holdings) Limited, is open to inspection at our registered office at One Bishops Square, London E1 6AD.

© Allen & Overy LLP 2022. This document is for general information purposes only and is not intended to provide legal or other professional advice.