WILMERHALE

EC Issues Revised Guidelines on Agreements Between Competitors: 10 Key Takeaways

JULY 7, 2023

On June 1, 2023, the European Commission (EC) adopted revised Horizontal Guidelines (HGs) and two updated block exemption regulations (BERs) on research and development (R&D) and "specialisation" agreements. These materials provide valuable guidance on how European Union (EU) competition law applies to agreements between competitors. The BERs apply from July 1, 2023. The documents are intended to remain in force until June 2035.

The revised HGs are almost 170 pages long, and the BERs, while short, are complex at times. With the dust having settled a little since the EC issued these materials, **here are 10 of our main takeaways**:

1. The previous HGs date from 2011. The new HGs reflect case law since then and clarify the EC's approach in various areas such as concerted practices, potential competition, restrictions by object and ancillary restraints. The new rules also attempt to account for newer societal developments, such as digital transformation and climate change.
2. The impact of recent case law is striking in a **much-expanded chapter on information exchange** between competitors:
   - The HGs provide guidance on information exchange in the context of mergers and acquisitions and when information is shared or exchanged in response to regulatory initiatives. The HGs notably recognize the possibility of using clean teams when processing sensitive information.
   - The HGs provide useful clarification regarding specific issues, such as when unilateral disclosure may lead to an infringement of Article 101 of the Treaty on the Functioning of the European Union (Article 101), aggregation of data, publicly available data, indirect ("hub and spoke") data exchange and algorithms. Notably, on

algorithms, they state that "firms involved in illegal pricing practices cannot avoid liability on the ground that their prices were determined by **algorithms**. Just like an employee or an outside consultant working under a firm's 'direction or control,' an algorithm remains under the firm's control, and therefore the firm is liable even if its actions were informed by algorithms."

- The HGs also contain some **sensible, practical advice** on how best to minimize the risk of competition infringements. For example, they state that the risk of infringement is reduced if a competition lawyer attends trade association meetings and if there are clear agendas and minutes.

3. A new chapter in the HGs clarifies how the EC will assess **joint sustainability agreements**:

   - The HGs **define sustainability broadly**, so in addition to measures to tackle climate change, they include protecting human rights, ensuring a living wage and encouraging consumption of healthier food.
   - They contain a **"soft safe harbour"** for sustainability standards meeting six cumulative conditions: transparent access to the development of the standard; voluntary rather than mandatory compliance with the standard; freedom for any individual firm to implement higher sustainability specifications; limits on information exchange to what is necessary and proportionate; non-discriminatory access to the standard; and absence of a significant increase in price or reduction in quality of the relevant product or where the combined market shares of the participating companies do not exceed 20% on any relevant market. It will be interesting to see how robust and relevant this so-called soft safe harbor will prove in practice. It may be difficult for many initiatives to meet the safe harbor requirements; in particular, the non-binding requirement and the 20% combined market share threshold are likely to significantly limit the safe harbor's potential applicability, especially since companies are naturally reluctant to increase their sustainability efforts if this will disadvantage them competitively compared to competitors who are slower to market more sustainable products—the "first-mover disadvantage."
   - In key paragraphs, the HGs explain that when an agreement infringes Article 101(1), it will qualify for an exemption under Article 101(3) only if the sustainability benefits of the agreement can be demonstrated and if they accrue to **consumers of the products affected by the relevant agreement**. It will be **much more difficult to qualify for an exemption if the agreement mainly benefits consumers or the environment more generally**.
   - In many ways, the HGs represent a **missed opportunity** because they have not gone as far as they might have to enable cooperation that would foster sustainability and create legal certainty for industry players.

4. The HGs now contain a more detailed chapter on **purchasing agreements**:

   - They provide guidance on the distinction between **joint purchasing agreements** (JPAs) and buyer cartels. Notably, they state that an agreement will more likely be deemed a JPA than a cartel if suppliers are explicitly told that negotiations are being conducted jointly by purchasers and if there is a written agreement outlining the JPA's scope. The HGs state, however, that the existence of a written JPA will not, by itself, shield parties from enforcement.
   - The HGs clarify that they apply to agreements that are limited to joint negotiation and not only to agreements that encompass joint purchasing.
   - They state that threats by JPA members to abandon joint negotiation will generally not automatically infringe competition law. Rather, the effect of such threats will be assessed on a case-by-case basis, taking into account market conditions.
   - While the HGs observe that JPAs are less likely to infringe competition law when the members collectively **lack market power** and that market power is unlikely if members' combined market shares are below 15% on all relevant purchasing and selling markets, they also say that "[t]here is **no absolute threshold** above which it can be presumed that the members of a joint purchasing arrangement have market power such that the joint purchasing arrangement is likely to give rise to restrictive effects on competition within the meaning of Article 101(1)" (our emphasis).

5. There are small but important revisions to the HGs' chapter on industry **standardization** agreements:

   - To benefit from the HGs' safe harbor, a standard development organization should require a participant to **disclose specific patent or patent application numbers** if the participant is claiming that its patents or patent applications may be essential to the standard. This rule is stricter than the 2011 HGs, which allowed blanket disclosure that a participant holds patents that may be essential.
   - There is more guidance on the methods that can be used to assess what constitutes a fair, reasonable and non-discriminatory royalty, but the guidance is expressly said to be non-exhaustive.
   - The HGs state that rules requiring disclosure of individual intellectual property owners' most restrictive licensing terms or a maximum cumulated royalty rate before a standard is adopted will not, in principle, infringe Article 101.
   - The HG recognize that in some circumstances, it may be legitimate **to limit participation** in a standard-setting initiative. Notably, this may be permissible if it facilitates quicker development of the standard, provided that all affected parties can be involved in all major milestone events.

6. For the first time, the HGs include a section on a specific type of production agreement, namely, mobile telecommunications **network sharing agreements** (NSAs), which facilitate various carriers sharing a common network:

   - The HGs recognize that NSAs **can be pro-competitive** since they enable faster and less costly rollout of new networks and may improve quality and customer choice. However, reflecting a 2022 EC decision regarding network sharing in the Czech Republic, they also note that NSAs may **limit investment** in competing infrastructure and thereby **reduce innovation and consumer choice**.
   - The HGs contain a helpful list of factors that, if present, will—in principle—suggest that an NSA will not be viewed as infringing Article 101. These include that the participating operators each control and operate their own core networks and can unilaterally deploy upgrades as they wish; that the operators maintain independent retail and wholesale operations; that they are able to follow independent spectrum strategies; and that they do not exchange sensitive information beyond that which is strictly necessary.

7. Similarly, the HGs' chapter on commercialization agreements now contains specific guidance on **bidding consortia** in public and private tenders and seeks to distinguish legitimate consortia from bid rigging. The HGs recognize that a consortium that enables parties to participate in opportunities that they would not be able to participate in individually will not infringe Article 101. Conversely, if the parties (or even one of them) could have participated individually in the tender (or, depending on how the tender is structured, in parts thereof), the EC will deem them competitors and Article 101 may be infringed depending on the circumstances.

8. The new HGs provide additional guidance on when **agreements between joint ventures and their parent companies** may infringe competition law. The HGs now explain that the EC will, "in general," not apply Article 101 to agreements between parents and their joint ventures, provided that the agreement relates to the market in which the joint venture is active and that the parents exercise decisive influence over the joint venture. While the HGs state that Article 101 will generally not be applied to such agreements, this does not mean that Article 101 is always inapplicable. Therefore, some uncertainty remains, and these types of agreements must be evaluated based on their facts and effects and in accordance with the case law in this area.

9. There is a new **BER for R&D agreements**. The BER provides a statutory exemption from the Article 101 prohibition, provided the BER's conditions are fulfilled:

   - The HGs provide much more guidance on the BER than the 2011 HGs did.
   - The HGs and the BER place much emphasis on **competition in innovation**. They say that even if companies do not compete on the same product or technology

markets, agreements between them may still restrict innovation competition, although the BER says that this will be the case only in exceptional circumstances.

10. There is also **a new BER for "specialisation" agreements** (through which competitors agree that one of them will cease production or that they will produce jointly):

    - The BER now applies to unilateral "specialisation" agreements (namely, where one or more competitors agree to cease production rather than the specialization being reciprocal) involving more than two parties.
    - The HGs observe that all types of subcontracting agreements between competitors—and not only those relating to expanding production—can potentially benefit from the HGs' safe harbor.
    - The HGs also contain a **new subchapter on the "Specialisation" BER**.

WilmerHale has extensive experience in advising clients on cooperation agreements and on all other aspects of both EU and UK competition law. For further information on the developments discussed in this alert, please contact Fred Louis, Cormac O'Daly, Anne Vallery or another member of our Brussels team.

Contributors

Frédéric Louis
PARTNER

frederic.louis@wilmerhale.com
+32 2 285 49 53

Anne Vallery
PARTNER

anne.vallery@wilmerhale.com
+32 2 285 49 58

Cormac O'Daly
PARTNER

cormac.o'daly@wilmerhale.com
+44 (0)20 7872 1534