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EU Horizontal Rules Under Review - European Commission Publishes Staff Working Document

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On 6 May 2021, the European Commission (“Commission”) published a [staff working document](#) (“SWD”) on its evaluation of the horizontal block exemption regulations on research & development and specialisation agreements (“H-BERs”) and the horizontal guidelines. The SWD is accompanied by an [evaluation study](#), commissioned to provide qualitative and quantitative evidence to support the Commission’s evaluation.

The findings show that while the H-BERs and Horizontal Guidelines have been valuable tools for businesses, they need to be revised in order to address a few important areas where they are not fit for purpose, including to give guidance on collaborations pursuing sustainability goals and new cooperation models that have appeared as a result of digitalisation. Some provisions of the H-BERs and the Horizontal Guidelines are considered unclear, overly strict and difficult to interpret. This applies in particular to the research & development block exemption and provisions in the Horizontal Guidelines on information exchange, R&D, production and commercialisation agreements.

The SWD does not indicate the policy options that the Commission is considering and specifically does not say whether companies will gain more leeway under the H-BERs in the future. In the coming weeks, the Commission will publish its inception impact assessment on possible revisions that should provide greater insight into the potential options on the table.

The Horizontal Block Exemptions and Horizontal Guidelines

Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) captures any form of co-operation agreement concluded between actual or potential competitors that have the object or effect of restricting competition.

Horizontal cooperation agreements are agreements entered into between companies operating at the same level in the market.

Horizontal co-operation agreements can lead to significant economic benefits, in

particular where competitors combine complementary activities, skills or assets, thereby sharing risk, saving costs, enhancing product quality and variety, and innovating more and better. Such potentially pro-competitive horizontal co-operations include research and development (R&D) agreements, production agreements, purchasing agreements, commercialisation agreements, standardisation agreements, joint venture arrangements and “pure” information exchanges.

Two Commission Regulations block exempt certain types of co-operation agreements from Article 101(1) TFEU, namely Commission Regulation (EU) 1217/2010 for research and development agreements (R&D BER), and Commission Regulation (EU) 1218/2010 for specialisation agreements (Specialisation BER; together referred to as Horizontal Block Exemption Regulations or H-BERs). To complement the H-BERs, which are binding law in the EU, subject to final interpretation by the EU Courts, the Commission issued guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements (Horizontal Guidelines), which help analyse the competitive effects and benefits of these and other types of co-operation, and provide the Commission’s views on some additional “safe harbours”. The Horizontal Guidelines are binding on the Commission, but do not bind national competition authorities or national courts (although they typically take them into account), and are without prejudice to judgments of the EU Courts.

Review of the Block Exemptions

The two H-BERs, which came into force in 2011, are due to expire on 31 December 2022.

The Commission has conducted the following review of the H-BERs and Horizontal Guidelines.

19 July 2019	Start of evaluation
6 November 2019	Launch of public consultation
30 March 2020	Publication of responses to public consultation
7 April 2020	Publication of summary report of public consultation
October 2020	Launch of public consultation on how competition policy can support European Green Deal
6 May 2021	Staff Working Document and Evaluation Study published

Key findings of the Staff Working Document

The Staff Working Document responds to feedback that the Commission has received in consultations to date, and concludes that the H-BERs and the Horizontal Guidelines are useful instruments and remain relevant for stakeholders, but that they require revision in certain areas.

The key feedback identified by the Commission includes:

<p>General issues</p>	<ul style="list-style-type: none"> • Terms and definitions lack clarity • Discrepancies in definitions compared to other EU legislation (e.g., non-full functionality joint ventures, potential competitors) • Insufficient clarity on the centre of gravity of horizontal cooperation agreements (when cooperation involves a combination of different types of horizontal agreement) • Guidance solely aimed at horizontal cooperation may be insufficient, as cooperation agreements often include some vertical elements • Focus is too much on the by-object nature of restrictions of competition that leads to an overly cautious approach in self-assessment • Lacking guidance on elements required to fulfil Article 101 (3) • There should be the possibility of voluntary ex-ante consultations with the Commission or a voluntary fast-track notification procedure • Guidance is lacking for additional types of horizontal cooperation agreements, including agreements with sustainability goals, joint bidding, joint production and distribution agreements, new forms of cooperation in the telecom/digital sector, infrastructure sharing, data pooling/sharing/data access between small and medium-sized enterprises and collective bargaining, industry alliances, industry-wide cooperation agreements, and insolvency restructuring agreements
<p>Sustainability</p>	<ul style="list-style-type: none"> • Guidance on agreements pursuing sustainability goals is insufficient • Clarity is desired to enable business to engage in large scale co-operation agreements • Clarity is sought on what type of benefits (such as out-of-market efficiencies, including CO2 reductions and animal welfare) can be taken into account to outweigh the possible restrictive effects on competition • The SWP specifically acknowledges the contribution of national competition authorities in creating guidelines for sustainability goals, such as the Dutch Competition Authority's draft guidelines on sustainability agreements published in January 2020, and notes that these have been considered as part of the evaluation

Information exchange	<ul style="list-style-type: none"> • Insufficient legal certainty, in particular in new business models that have developed as a consequences of digitisation, e.g., in scenarios whereby parties are at the same time in a horizontal and vertical relationship • Insufficient legal certainty concerning types of information exchange that may be considered pro-competitive, e.g., information exchanged in M&A projects or the initial stages of horizontal cooperation, in restructuring scenarios, for the purposes of the compilation of industry statistics, in the context of eco-systems and in areas where interoperability is needed • No account taken of developments in Court of Justice of the European Union/national case law in last 10 years • Individual sector-specific guidance would be beneficial (e.g., for banking, automotive, insurance and agricultural sectors, and carbon emissions trading) • Legal certainty is lacking due to the absence of a market share threshold or other safe harbour
R&D agreements	<ul style="list-style-type: none"> • Certain provisions lack clarity, are difficult to apply, and are no longer adapted to recent market developments • Several definitions require clarification, e.g., notions of “joint exploitation”, “field of use”, “R&D poles”, and “competition in innovation” • Conditions for exemption regarding access to the final results of the R&D, access to pre-existing know-how and joint exploitation do not allow the correct identification of R&D agreements compliant with Article 101 TFEU • Scope of exemption should be extended to cover early stages of R&D • Application of the market share thresholds is challenging (e.g., hard to define technology markets) • 25% market share threshold should be increased • Inclusion of practical and more up-to-date examples and references to case law could increase legal certainty
Specialisation agreements	<ul style="list-style-type: none"> • 20% market share could be increased • Need to expand scope to include other types of specialisation and production agreements (e.g., tolling agreements) • Certain definitions could be clarified, e.g., the notions of unilateral and reciprocal specialisation, joint production, or joint distribution • More guidance needed on the relationship between the Specialisation Block Exemption and other Regulations, such as the Merger Regulation, Technology Transfer Block Exemption and Vertical Agreements Block Exemption

<p>Purchasing agreements</p>	<ul style="list-style-type: none"> • Lack of clarity on the distinction between joint purchasing agreements and buyer cartels, and between joint purchasing and joint bidding • Not adapted to recent developments, such as the increased importance of joint purchasing agreements between retailers in the EU (retail alliances) • Certain specific practices should be addressed, such as retailer cooperation where retailer alliances do not purchase any products but aggregate their buyer power to extract fees for services; collective delisting; and exchange of information • The position of retailers as regards their dual role as both customers and as competitors with their own private label products should be clarified • Too focussed on positive downstream effects on consumers without sufficient consideration for potential negative effects on suppliers and competitors • Market share threshold of 15% should be increased by raising the market share thresholds in line with other areas of EU competition law
<p>Agreements on commercialisation</p>	<ul style="list-style-type: none"> • Further guidance needed on the assessment of joint bidding and non-indispensable consortia (those in which parties can compete or are able to meet the tender requirements on their own) • Need to take into account the recent ECJ case law and market developments (e.g., digital markets and new forms of co-operation such as digital infrastructure sharing) • Market share threshold of 15% is too low
<p>Standardisation agreements</p>	<ul style="list-style-type: none"> • Certain provisions lack clarity or are difficult to apply, e.g., the requirement to license Standard Essential Patents (SEPs) on FRAND (fair, reasonable, and non-discriminatory terms) and the meaning of unrestricted participation in the standard-setting process • Legal certainty is lacking due to the absence of a market share threshold or other safe harbour
<p>Data pooling, data sharing, network sharing agreements</p>	<ul style="list-style-type: none"> • Not included or not sufficiently addressed

Next steps

In the coming weeks, the Commission should publish its inception impact assessment, which will set out more concretely the policy options for a revision of the rules, and stakeholders will be given the opportunity to provide comments. The Commission is currently intending to publish a draft of the revised rules for stakeholder comments at the start of 2022, with a view to having the new rules and guidance in place before the end of 2022.

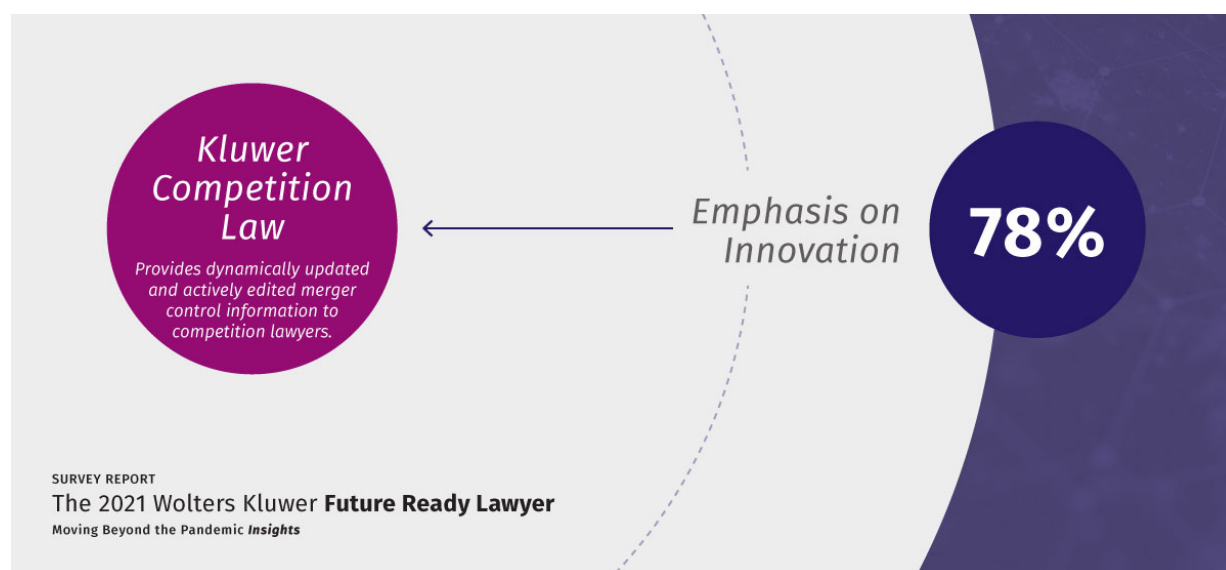
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