
Kluwer Competition Law Blog

The new draft EU horizontal antitrust rules – A snapshot overview

Tilman Kuhn, Strati Sakellariou-Witt (White & Case) and Peter Citron (Editor) (White & Case, Belgium) · Tuesday, March 22nd, 2022

On 1 March 2022, the European Commission (“EC”) published for consultation two draft revised horizontal block exemption regulations (“HBERs”) on **research & development (“R&D”) and specialisation agreements**, as well as draft revised **horizontal cooperation guidelines** (“Horizontal Guidelines”).

The EC’s stated aim is to make it easier for companies to cooperate in areas such as R&D and production, but also in activity such as sustainability initiatives. The EC is aware that competitor collaboration may be key to reaching green targets, and that the current lack of legal certainty may be deterring companies from introducing sustainability initiatives. The revised horizontal guidelines provide new guidance on sustainability agreements, information sharing, mobile infrastructure sharing agreements, and bidding consortia.

The EC is inviting views on the drafts by 26 April 2022. The new EC horizontal rules and guidelines will enter into force on 1 January 2023. The EC is also currently reviewing its vertical rules, with new rules due to enter into force on 1 June 2022.

Key revisions

General issues

Horizontal Guidelines have been restructured with the aim of a more logical flow
Additional guidance on restrictions by object and by effect to capture the developments in the case law, although the lines remain blurred

Sustainability

A new 19-page chapter in the revised Horizontal Guidelines on how to self-assess sustainability agreements

Broader scope of the definition of “sustainability” that includes not just environmental initiatives, but also social objectives (e.g., labour and human rights)

Broad view of benefits that are relevant to the competitive analysis, including: (i) individual use value (e.g., improved product quality or variety); (ii) individual non-use value (where the consumers’ use experience with the product is not directly improved, but consumers value the impact of their sustainable consumption on others); and (iii) collective benefits (where, irrespective of the consumers’ individual appreciation of the product, objective benefits accrue to a larger group of which the consumer is part)

A “soft safe harbour” for sustainability standards. A sustainability standardisation agreement is unlikely to raise concerns where it secures transparency, open and non-discriminatory access, voluntary participation, freedom to adopt a higher standard and no exchange of commercially sensitive information. But the sustainability standard should not lead to a “significant” increase in price or “significant” reduction in choice

Agreements on the creation of a database containing suppliers’ sustainability credentials are permissible, provided that this does not entail requirements to purchase from, or sell to, specific companies

Additional guidance on concepts relevant for self-assessment, e.g., genuinely public information/data, aggregation of information/data, the age of information, unilateral disclosure, and indirect information exchanges (including hub-and-spoke scenarios and third party facilitators)

Guidance on the use of algorithms

Limited guidance on exchanges of information in the context of M&A and stemming from regulatory initiatives

Information exchange

Guidance on measures to limit/control how data is used and access to information

The Horizontal Guidelines do not deal with information exchange in the context of dual distribution. This is governed by the EC’s vertical block exemption regulation and accompanying guidelines. The EC has published for consultation a draft new section of its Vertical Guidelines, which contains proposed guidance on information exchange in dual distribution relationships.

R&D agreements Agreements for the development of new products, technologies and processes and for R&D efforts directed primarily towards a specific aim or objective (so-called “R&D poles”) – exempt if there are at least three competing R&D efforts, in addition to and comparable with those of the parties to the R&D agreement

Specialisation agreements Slightly expands the scope of the Specialisation BER by amending the definition of “unilateral specialisation agreements” to cover more than two parties (the current specialisation block exemption only refers to agreements between two parties)
Horizontal subcontracting agreements in general – and not only those with a view to expanding production – can benefit from the safe harbour of the Horizontal Guidelines

Purchasing agreements A new section in the Horizontal Guidelines explaining the distinction between joint purchasing and buyer cartels. Buyer cartels have been identified as a key area of enforcement by the EC
Clarification of the scenario of potential upstream harm to suppliers
Clarification of circumstances in which it is less likely that lower prices will be passed onto consumers
Further explanations on the assessment under Article 101 (3) of pass-on to consumers

Agreements on commercialisation A new section on bidding consortia, including how to assess consortium agreements between parties that would be able to take part individually in tenders
Additional guidance on the main risks of output limitation
Additional guidance on the specific rules for commercialisation agreements in agricultural products

Standardisation agreements Greater flexibility in the effects analysis by allowing, under certain circumstances, more limited participation in the development of a standard
More elements for conducting the assessment of whether a proposed licensee fee is FRAND

Mobile infrastructure sharing agreements Inclusion of a new section providing broad principles for self-assessment

Reform timetable

6 May 2021 Staff Working Document and Evaluation Study published, setting out results of the EC’s evaluation of the current HBERs and Horizontal Guidelines

June 2021 Launch of impact assessment, during which the EC gathered further evidence through an open public consultation, several targeted questionnaires and workshops, and a consultation of the national competition authorities within the EU

Launch of public consultation on draft revised HBERs and Horizontal Guidelines

1 March 2022	Publication of 5 expert studies on specific topics regarding the HBERs, joint purchasing and sustainability agreements, which are available on the EC's dedicated webpage
26 April 2022	Deadline for comments on draft revised HBERs and Horizontal Guidelines
January 2023	New HBERs and Horizontal Guidelines expected to enter into force

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe [here](#).

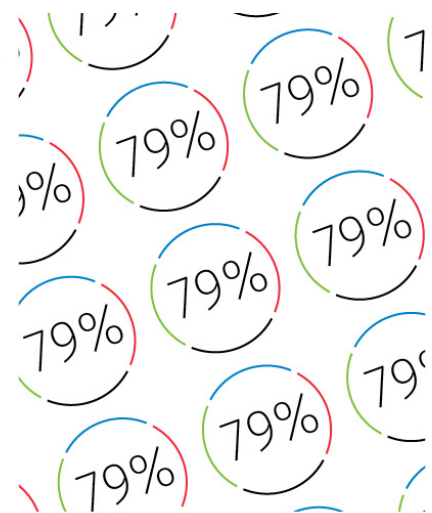
Kluwer Competition Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers are coping with increased volume & complexity of information. Kluwer Competition Law enables you to make more informed decisions, more quickly from every preferred location. Are you, as a competition lawyer, ready for the future?

Learn how **Kluwer Competition Law** can support you.

79% of the lawyers experience significant impact on their work as they are coping with increased volume & complexity of information.

Discover how Kluwer Competition Law can help you.
Speed, Accuracy & Superior advice all in one.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change

This entry was posted on Tuesday, March 22nd, 2022 at 4:20 pm and is filed under [European Commission](#), [HBER](#), [Horizontal](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.