Kluwer Competition Law Blog

The New EU Horizontal Cooperation Antitrust Rules

Katarzyna Czapracka, Marika Harjula, Tilman Kuhn (White & Case) and Peter Citron (Editor) (White & Case, Belgium) · Tuesday, June 27th, 2023

The European Commission ("EC") has published its final revised Horizontal Cooperation Guidelines and adopted new R&D and Specialisation Block Exemption Regulations (HBERs). The EC's aim is to provide more guidance for competitors wishing to cooperate in areas such as R&D and production, but also in sustainability initiatives.

What are the EU rules on horizontal cooperation?

Article 101(1) TFEU captures any form of co-operation agreement concluded between actual or potential competitors that have the object or effect of restricting competition. The HBERs provide a safe harbour from the application of Article 101(1) TFEU by block exempting certain types of R&D and specialisation agreements.

To complement the HBERs, the EC has published guidelines on the application of Article 101 TFEU to horizontal cooperation agreements. These provide guidance on how to self-assess, including with additional safe harbours, the compatibility with EU competition law of different types of agreements entered into between companies operating at the same level in the market (e.g. R&D, production, joint purchasing, commercialisation, and standardisation). It also provides guidance on the assessment of information exchanges between competitors.

What is the revised horizontal package?

The revised HBERs and guidelines replace instruments that have been in force since 2011. The revised package follows a long period of evaluation that began in July 2019 (see our previous alert here), and included the publication in March 2022 of draft texts for consultation (see our previous alert here). The EC delayed publication of the texts by six months to allow time to digest the extensive feedback provided to its consultation, in particular on the new rules relating to cooperation pursuing sustainability objectives and on network sharing agreements concluded by mobile network operators.

The revised guidelines have been extended from 72 pages to 167 pages. They seek to make the EU rules clearer and easier to apply, support the green and digital transitions by making certain co-

operation easier, and reflect the latest case law and decisional practice.

Key revisions to the horizontal guidelines

Sustainability	· New 21-page chapter on how to self-assess sustainability agreements. · "Sustainability" is broadly defined and includes not just environmental initiatives, but also social objectives (e.g. labour and human rights). · Guidance on sustainability agreements that fall outside the scope of Article 101(1): o Examples include the creation of databases — for the purposes of fulfilling sustainability due diligence obligations — on the (un)sustainability of supply chain partners, provided there is no obligation/prohibition on parties to purchase/sell; and the organisation of industry-wide awareness campaigns (provided that these do not amount to joint advertising of specific products). · Broad view of consumer 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 wider part of society not just consumers in the relevant market). o Note: The EC's view of benefits is not as broad as that taken by the UK and Dutch competition authorities who may consider benefits for wider society as a whole – rather than only those for the consumers of the products in the relevant markets. · A new "*soft safe harbour*" for sustainability standards, subject to six conditions: (i) transparency and all interested competitors must be able to participate, (ii) voluntary participation, (iii) freedom to adopt a higher standard (although minimum standard can be imposed), (iv) no exchange of commercially sensitive information (v) open and non-discriminatory access; (vi) the sustainability standard must not lead to a "significant" increase in price or "significant" reduction in quality of the products, or the combined market share of the participants must not exceed 20% on any relevant market affected by the standard. · Sustainability considerations also relevant for the assessment of efficiencies (e.g. those generated by joint production agreements) under Article 101(3) TFEU.

Information exchange	· Additional guidance on concepts relevant for self-assessment, e.g. commercially sensitive information; aggregated versus individualised information; age of information; unilateral disclosure (including anti-competitive signalling through public announcements); and indirect information exchanges (including hub-and-spoke scenarios and third-party facilitators). · Guidance on information exchange in the context of other types of horizontal cooperation agreements (e.g. joint purchasing, joint production, or joint commercialisation agreement). · Updated overview of the types of information exchange that are considered as restrictions of competition "by object". · Guidance on the use of algorithms. · Limited guidance on exchanges of information in the context of M&A and stemming from regulatory initiatives. · Practical measures that companies can take to avoid infringements, with limited guidance on clean teams and public distancing. · Dual distribution – statement that certain information exchanges in the context of dual distribution may be covered by the Vertical Block Exemption Regulation. Please see our previous alert on the VBER.
Purchasing	· A new section describing the difference between legitimate joint purchasing alliances and buyer cartels. Buyer cartels have been identified as a key area of enforcement by the EC (see our previous alert). The distinction is primarily based on form and transparency. o Buyer cartels, which are a restriction of competition "by object", are agreements or concerted practices between purchasers that, without engaging in joint negotiations with the supplier, coordinate the purchasers' individual competitive behaviour in the purchasing market or the individual negotiations amongst suppliers and buyers. A buyer cartel may also exist where purchasers agree to exchange commercially sensitive information outside any genuine joint purchasing agreement. o Joint negotiation of purchasing conditions by buyers in genuine purchasing agreements, i.e. where buyers make it clear to suppliers that the negotiations are conducted jointly on behalf of participating buyers, is not considered a restriction by object, but the effects on competition need to be assessed on a case-by-case basis. · Expanded description of the risk of harm to competition on the supply side where parties to a purchasing agreement have a significant degree of buying power on the purchasing market. · Clarification of circumstances in which it is less likely that lower prices will be passed onto consumers, e.g. joint purchasing arrangements that limit or disincentivise the ability of its members to purchase additional volumes from a given supplier, as these have the effect of limiting the volume of sales in the selling market.
Commercialisation	· A new section on bidding consortia, clarifying when companies may form consortia to submit joint tenders. o E.g. when they allow parties to execute projects that they would not be able to undertake individually (e.g. due to complexity or size of project).

Standardisation	· Increased flexibility concerning the general principle that standard-setting processes should be open to all interested parties. o Restricting participation may be permitted in certain circumstances, e.g. where there is competition between several standards and standard development organisations, or where the restriction is limited in time and with a view to progressing quickly. · Clarification that disclosure of a maximum accumulated royalty rate by parties to a standardisation agreement is not generally anti-competitive. · Inclusion of more elements for conducting an assessment of whether a proposed licensee fee is FRAND (fair, reasonable, and non-discriminatory).
Mobile infrastructure sharing agreements (NSAs)	· New section on mobile network sharing agreements ("NSA") in the telecoms sector, which reflects the EC's decisional practice in this field. · Acknowledgment that NSAs do not restrict competition "by object", "*unless they serve as a tool to engage in a cartel*". However, according to the guidelines, NSAs may have an anti-competitive "effect", and "*will always require an individual assessment under Article 101*". · List of factors relevant to individual assessment under Article 101 (e.g. the type and depth of sharing, the geographic scope and market coverage of the NSA, and the market structure and characteristics). · List of minimum conditions required for NSAs not to be considered, prima facie, as likely to have restrictive effects (e.g. the participating operators must each control and manage their own core network, maintain independent retail and wholesale operations, maintain the ability to follow independent spectrum strategies, and not exchange commercially sensitive information beyond what is strictly necessary for the mobile infrastructure sharing to function). · Explanation of the pertinent factors for evaluating the anti-competitive effects of the main categories of agreements (passive, active, and spectrum sharing agreements).

Key changes to the draft guidelines following consultation

The EC made a number of changes to the text of the guidelines following the consultation of its draft text. Some of the most extensive amendments related to the sections on sustainability and information exchange are set out below.

Sustainability

· An explicit commitment to provide informal guidance regarding novel or unresolved questions on individual sustainability agreements.
· A new example of sustainability agreement relating to international treaties that falls outside the scope of Article 101: *"agreements that aim solely to ensure compliance with sufficiently precise requirements or prohibitions in legally binding international treaties, agreements or conventions, whether or not they have been implemented in national law (for example, compliance with fundamental social rights or prohibitions on the use of child labour, the logging of certain types of tropical wood or the use of certain pollutants) and which are not fully implemented or enforced by a signatory State"*.
· Confirmation that a price increase arising from a standard may be insignificant where *"the product covered by the sustainability standard represents only a small input cost for the product"*.
· Confirmation that there may be a time lag before benefits arise. This lag does not exclude the application of an exemption under Article 101(3), although the greater the time lag, the greater the efficiencies must be
· Confirmation that even in the presence of regulation, sustainability agreements may still be indispensable, for example by achieving the goal more quickly.
· A footnote that explains that "*even though consumers may be willing to pay for a sustainable product, a restrictive agreement may still be indispensable, for instance, to overcome a first-mover disadvantage or to achieve cost-reducing economies of scale*".
· A 20% market share threshold is included as one of the alternative conditions to qualify for the "*soft safe harbour*" exemption.
o This means that agreements that lead to a "*significant*" increase in price or "*significant*" reduction in quality of the products may still benefit from the soft safe harbour if the combined market share of the participants does not exceed 20% on any relevant market affected by the standard.
· Removed a requirement to have a mechanism or a monitoring system in place to ensure compliance with the sustainability standard.

	· Inclusion of a self-assessment tree setting out steps to follow for companies wishing to engage in an exchange of information. · Inclusion of a table providing a framework for assessing the risk of liability for the exchange of commercially sensitive information in various contexts (e.g. direct or indirect exchange, or public disclosure). · Confirmation that the assessment of whether an exchange of information in the context of an acquisition process is subject to Article 101 "*depends on which stage the acquisition process is at*". · Expanded guidance on the use of algorithms, including warnings that: *"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"*.
Information exchange	· Confirmation that the exchange of raw data may be less commercially sensitive than the exchange of data that has already been processed, in particular where each party uses its own proprietary method of processing the raw data. · More detailed guidance on what constitutes anti-competitive signalling through public announcements. · A new example of when a shared database may raise antitrust issues. · New examples of self-assessment analysis (e.g. regarding public announcements and data sharing to combat counterfeiting). · Limited additional guidance on practical measures to reduce risk e.g. minute taking and public distancing. · Explanation of the potential pro-competitive effects of data pools. · Inclusion of a box containing specific examples of when efficiencies may be taken into account in an Article 101 (3) assessment.

Key revisions to the HBERs and changes from the drafts that were circulated for consultation

R&D Block Exemption and Specialisation Block Exemption	· In the R&D Block Exemption, **greater prominence to the protection of innovation competition**. The R&D Block Exemption clarifies that parties to an R&D agreement that do not compete on markets for existing products or technologies may still be competitors in innovation, although their cooperation will only eliminate innovation competition in exceptional circumstances. Article 10 states that the EC may withdraw the benefit of the exemption where "*the existence of the research and development agreement would substantially restrict innovation competition in a particular field*". · In both block exemptions: simplified grace periods if market shares increase above the threshold for exemption, and new methods of calculating market shares if the preceding calendar year is not representative. · Compared to the 2022 R&D Block Exemption draft, the EC has removed **an exclusion of R&D agreements where there would remain less than three competing R&D efforts in addition to and comparable to the parties, which appears to be helpful, in particular given that it may be difficult for the parties to assess how many competitors continue to engage in parallel R&D efforts.** · In the Specialisation Block Exemption, there is an expanded definition of "unilateral specialisation agreement" to cover more than two parties (the former exemption only referred to agreements between two parties).

Timetable

The HBERs enter into force on 1 July 2023 for 12 years. There is a transition period of two years, under which agreements that do not meet the conditions of the new HBERs but which meet the conditions of one of the previous HBER will remain block-exempted.

The guidelines will apply officially at some point in July when they are published in the Official Journal of the EU.

Impact

Much of the EC's reform is helpful with new guidance in important areas such as sustainability, joint purchasing, and bidding consortia.

The new chapter in the guidelines on sustainability provides opportunities for companies to come up with creative cooperation initiatives in the field of sustainability, although the guidelines focus, somewhat uninspiringly, on sustainability standards. The chapter also specifically invites companies to come forward to seek informal guidance on these initiatives. The aim is to deal with the "*chicken and egg*" problem of more specific guidance requiring more case experience.

The invitation to come forward to seek informal guidance is in line with the approach being adopted by other authorities in Europe (such as the Dutch, Greek, and UK authorities), but does not go as far as some authorities that have confirmed that they will not impose fines or take enforcement action concerning sustainability agreements in certain circumstances.

The guidelines indicate that sustainability considerations will be taken into account in the assessment of efficiencies (including those generated by joint production agreements) under Article 101(3). This opens the door to the possibility of taking into account "out of market efficiencies", i.e. efficiencies not directly and immediately benefitting only those consumers that may suffer from the cooperation's restrictive effects.

The true extent of the opportunities and limitations of the new sustainability framework will need to be tested by the practice, in particular the future publication of any comfort letters in relation to proposed initiatives. Given the narrow scope of assessment under Article 101(3) and the focus on economic efficiencies, it will also be interesting to see to what extent sustainability considerations will in fact play a role in the assessment of efficiencies going forward.

The guidelines also now include comprehensive guidance on information exchange based on case law and practice. There is no safe harbour for information exchange; rather, any exchange with a competitor is subject to an individual assessment. The guidance on what constitutes sensitive information is comprehensive and helpful, confirming the practice that aggregated and historical data is unlikely to be considered sensitive. The guidance on information exchange in the context on M&A on the other hand remains very thin, with the EC confirming that information exchange may be considered directly related and necessary for the implementation of a transaction and that whether this is the case may depend on the stage of the M&A process. Parties engaging in M&A would have benefitted from more detailed guidance in particular in relation to information exchange in the period between signing and closing where parties remain independent but a significant amount of information often needs to be exchanged in order to be prepared for Day 1 as

a combined company.

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