

Alert | Antitrust Litigation & Competition Regulation



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The EU's New Horizontal Block Exemption Regulations and Guidelines

Go-To Guide:

- Revised HBERs and Guidelines adopted by the EC
- Revisions aim to provide companies with more clear and up-to-date guidance on assessing the compatibility of their horizontal cooperation agreements with EU competition rules

Introduction

On 1 June 2023, the European Commission (EC) adopted revised (a) Horizontal Block Exemption Regulations (**HBERs**)¹, and (b) accompanying **Horizontal Guidelines (Guidelines)**. Simply put, the HBERs exempt certain research & development (R&D) and specialization agreements from the EU cartel prohibition provision (Article 101(1) TFEU). The HBERs and the Guidelines are expected to take effect in

¹ EC Regulation (EU) 2023/1066 of 1 June 2023 on the application of Article 101(3) of the Treaty on the Functioning of the European Union (TFEU) to certain categories of research and development (**R&D**) agreements (**R&D BER**), and EC Regulation (EU) 2023/1067 of 1 June 2023 on the application of Article 101(3) TFEU to certain categories of specialization agreements (**Specialization BER**).

July 2023. However, for pre-existing agreements the HBERs provide a two-year transitional period to align with the new regulation.

The purpose of the revisions includes, *inter alia*, providing more legal certainty to companies in their self-assessment of horizontal agreements;² and supporting the green and digital transition by making it easier for companies to cooperate in economically desirable and mutually beneficial ways.

In this GT Alert, we highlight some of the key updates.³

R&D and Specialization Agreements

The HBERs aim to enhance clarity and user-friendliness for companies by including, among other things, clarifications on how to calculate market share thresholds, as well as guidance on how to apply the block exemption.

The R&D BER focuses on protecting competition in innovation.

The scope of the Specialization BER has been expanded to cover agreements concluded by more than two parties for all types of covered specialization and production agreements.

Mobile Telecommunications Infrastructure Sharing Agreements

As part of Chapter 3 on production agreements, newly introduced Section 3.6 of the Guidelines deals with mobile telecommunications infrastructure sharing agreements, also known as network sharing agreements (**NSAs**).⁴ The Guidelines recognize the potential benefits of such agreements in relation to cost reductions and quality improvements. Relevant factors for assessing such agreements for their possible effect on competition in this regard are listed, and include, *e.g.*, the characteristics of mobile infrastructure sharing, market coverage, market characteristics, and the participating operators.

The Guidelines also set out some general guidance for various types of mobile infrastructure sharing arrangements, namely passive sharing agreements, active sharing agreements, and spectrum sharing agreements.

Information Exchange

The HBERs and the Guidelines do not include a safe harbor for information exchange, but Chapter 6 of the Guidelines sets out expanded and revised guidance on the competitive assessment of information exchange. In doing so, the EC provides more precise and up-to-date practical guidance that aligns with EU case law. The Guidelines include additional guidance on concepts such as genuinely public information, aggregating information/data, unilateral disclosure, and indirect exchanges.

Moreover, the Guidelines provide (in paras. 434 respectively 435) a helpful self-assessment flow chart and an indicative table to assist companies in self-assessing liability for exchanges of information.

² A horizontal agreement is one between or among parties at the same level of the supply chain (*e.g.*, two or more actual or potential competing manufacturers, distributors, or retailers).

³ Although not discussed in this GT Alert, the EC has also eased EU competition rules for some joint buying alliances.

⁴ Pursuant to the Guidelines, NSAs “(...) are agreements under which mobile telecommunications network operators share the use of parts of their network infrastructure, operating costs and the cost of subsequent upgrades and maintenance.”

Sustainability Agreements

For the first time, the EC includes guidance on sustainability agreements at a European level. A new Chapter 9 of the Guidelines provides a framework for companies to self-assess the compatibility of their joint sustainability initiatives with EU competition rules. Sustainability standardization agreements that comply with certain conditions may now benefit from a specific safe harbor.

Please see our June 2023 GT blog post for further details: [European Commission guidance for EU competition-compliant possibilities for cooperation between competitors in realizing sustainability objectives](#).

No-poaching or wage fixing agreements

In the past, Commissioner for Competition Margrethe Vestager during her public speeches announced plans to devote more attention to agreements restricting competition on the labor market. The Guidelines for the first time formally confirm the EC approach. In a revised chapter on purchasing agreements, wage fixing agreements are added to the non-exhaustive list of agreements restricting competition by object.

Bidding consortia

Another change is the addition of practical tips to distinguish a bidding consortium (where bidders legally cooperate in a public or private procurement tender) from a bid rigging cartel in a form of joint bidding by competitors. A bidding consortium agreement will not restrict competition within the meaning of Article 101 TFEU if it allows the parties to participate in projects that they would not be able to undertake individually. The Guidelines discuss in detail different scenarios of cooperation and the risk of illegal integration of resources and activities by the bidders.

Conclusion

The revisions and additions to the HBERs and Guidelines provide clearer, more extensive and up-to-date guidance to companies on cooperating and interacting with competitors while adhering to EU competition laws.

Companies should consider adjusting any existing horizontal cooperation arrangement to ensure compliance and take advantage of the new regime before the end of the transition period. When entering into a new arrangement, it is prudent to ensure the HBERs' exemption is available to the cooperation.

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