



EUROPEAN COMMISSION

Brussels, 6.01.2023
SEC(2023) 212 final

REGULATORY SCRUTINY BOARD OPINION

COMMUNICATION FROM THE COMMISSION

**Approval of the content of a draft for a Communication from the Commission –
Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the
European Union to horizontal co-operation agreements**

**COMMISSION REGULATION (EU) .../... on the application of Article 101(3) of the
Treaty on the Functioning of the European Union to certain categories of specialisation
agreements**

**COMMISSION REGULATION (EU) .../... on the application of Article 101(3) of the
Treaty on the Functioning of the European Union to certain categories of research and
development agreements**

{SWD(2023) 167 final} {SWD(2023) 168 final}



Brussels,
RSB/

Opinion

Title: Impact assessment / Revision of the EU competition rules on horizontal agreements

Overall 2nd opinion: POSITIVE

(A) Policy context

EU Competition Law restricts firms from making agreements that harm competition. Firms follow a self-assessment process to make sure that they comply with the rules. Horizontal cooperation agreements, entered into between companies operating at the same level in the market, relate in most cases to cooperation between actual or potential competitors in areas such as research and development (R&D), production, purchasing, commercialisation or standardisation but can also involve information exchange. Such agreements are allowed under certain clear conditions that are specified in the Horizontal Guidelines and in two Block Exemption Regulations, one on research and development agreements and one on specialisation agreements.

The evaluation, completed in 2021, identified some areas for improvement in the legal framework for horizontal agreements concerning the clarity of the rules and their ability to address new market developments, as well as the need to update them to include guidance from relevant case law.

(B) Summary of findings

The Board notes the improvements of the report.

The Board gives a positive opinion. The Board also considers that the report should further improve with respect to the following aspects:

- (1) The scale of the problem regarding competition in innovation is not sufficiently clear.**
- (2) The report is not clear how the preferred policy option for competition in innovation differs from the dynamic baseline.**

This opinion concerns a draft impact assessment which may differ from the final version.

(C) What to improve

(1) The report should clarify how it draws information from various sources regarding the existence and scale of the problem on competition in innovation. It should better explain how information from merger cases and input from stakeholders (in particular the most recent workshop) is combined to draw the conclusions. In particular, it should clarify to what extent the evidence collected in structural merger cases is directly relevant and useful for the identification and assessment of potential negative effects on competition in innovation resulting from agreements between undertakings. The report should also better highlight the uncertainty surrounding its conclusions.

(2) For competition in innovation, the report should better explain how the preferred policy option in practice differs from the dynamic baseline. It should better assess whether the threat of withdrawal is credible in the light of past experience and whether it has a deterrence effect.

The Board notes the estimated costs and benefits of the preferred options in this initiative, as summarised in the attached quantification tables.

(D) Conclusion

The DG must take these recommendations into account before launching the interservice consultation.

Full title	Revision of the EU competition rules for horizontal agreements
Reference number	PLAN/2021/11110 and PLAN/2021/11180
Submitted to RSB on	30 November 2022
Date of RSB meeting	Written procedure

ANNEX: Quantification tables extracted from the draft impact assessment report

The following tables contain information on the costs and benefits of the initiative on which the Board has given its opinion, as presented above.

If the draft report has been revised in line with the Board's recommendations, the content of these tables may be different from those in the final version of the impact assessment report, as published by the Commission.

<i>I. Overview of Benefits (total for all provisions)</i>		
<i>Description</i>	<i>Amount</i>	<i>Comments</i>
<i>Direct benefits</i>		
Compliance costs reduction re. the new sections on the application of the HBERs	Not possible to quantify	Businesses will better be able to self-assess their compliance with the HBERs and are likely to require less (extensive) external advice
Enforcement cost reduction re. the new sections on the application of the HBERs	Not possible to quantify	The Commission, NCAs and national courts will better be able to interpret the provisions of the HBERs which may help in rejection of complaints and general enforcement
Compliance costs reduction re. the expansion of the scope of the Specialisation BER	Not possible to quantify	The conclusion of unilateral specialisation agreements is facilitated and businesses will require less (external) advice
Enforcement costs reduction re. the expansion of the scope of the Specialisation BER	Not possible to quantify	The enforcement of unilateral specialisation agreements by the Commission, the NCAs and national courts is facilitated now these agreements can be concluded with more than one party
Increased flexibility for businesses in concluding specialisation agreements		The conclusion of unilateral specialisation agreements will become a further alternative from the range of specialisation agreements exempted by the Specialisation BER

<i>I. Overview of Benefits (total for all provisions)</i>		
<i>Description</i>	<i>Amount</i>	<i>Comments</i>
<i>Direct benefits</i>		
Market efficiency improvements re. the new sections on the application of the HBERs and the expansion of the scope of the Specialisation BER	Not possible to quantify	The introduction of a new section on the application of the HBERs and the expansion of the scope of the Specialisation BER will contribute to higher economic productivity, improved allocation of resources and more innovation
Compliance cost reduction re. the stricter enforcement of R&D agreements concerning new products or R&D poles	Not possible to quantify	Businesses will have more guidance in the R&D BER and the Horizontal Guidelines providing them with more legal certainty regarding R&D agreements concerning new products or R&D poles
Reduced negative impact re. the stricter enforcement of R&D agreements concerning new products or R&D poles	Not possible to quantify	Competition on innovation and new product markets are better protected
Enforcement cost reduction re. the stricter enforcement of R&D agreements concerning new products or R&D poles	Not possible to quantify	The Commission, NCAs and national courts will benefit from the fact that R&D agreements concerning new products or R&D poles will receive the same treatment in antitrust as in merger enforcement
Legal certainty	Not possible to quantify	Overall, the initiative is expected to increase the level of legal certainty as compared to the existent rules. During the evaluation, stakeholders explained that legal certainty in the application of the HBERs together with the Horizontal Guidelines can lead to less legal disputes between parties to an agreement.

<i>I. Overview of Benefits (total for all provisions)</i>		
<i>Description</i>	<i>Amount</i>	<i>Comments</i>
<i>Indirect benefits</i>		
Indirect compliance costs re. the new sections on the application of the HBERs and the expansion of the scope of the Specialisation BER	Not possible to quantify	All sectors can benefit from the fact that companies involved in R&D and specialisation agreements have more legal certainty.
An improved offer for businesses/consumers downstream re. the expansion of the scope of the Specialisation BER	Not possible to quantify	Businesses and consumers relying on businesses involved in unilateral specialisation agreements may receive the positive effects from the facilitation of the rules
Market efficiency improvements re. the expansion of the scope of the Specialisation BER		Improved allocation of resources now businesses can sort their needs from more than one counterpart
Wider economic benefits	Not possible to quantify	Businesses and consumers that rely on the results of R&D agreements concerning new products or R&D poles will have more choice also in the long run

<i>II. Overview of Costs – Preferred Options</i>							
		Citizens/Consumers		Businesses		Administrations	
		One-off	Recurrent	One-off	Recurrent	One-off	Recurrent
Expansion of the scope of the Specialisation BER	Direct adjustment costs			Companies already involved in production agreements may have to review their agreement			

<i>II. Overview of Costs – Preferred Options</i>							
		Citizens/Consumers		Businesses		Administrations	
		One-off	Recurrent	One-off	Recurrent	One-off	Recurrent
	Direct administrative costs						
	Direct regulatory fees and charges						
	Direct enforcement costs						Reduced enforcement costs (broader scope of the exemption)
	Indirect costs						
Treatment of R&D agreements for which it is not possible to calculate market shares	Direct adjustment costs			Companies already involved in this category of R&D agreements may have to review their agreement			
	Direct administrative costs				Increased compliance cost for companies participating in R&D Agreements for which it is not possible to calculate market shares		
	Direct regulatory fees and charges						
	Direct enforcement costs						Reduced enforcement costs (enforcement of antitrust)

<i>II. Overview of Costs – Preferred Options</i>							
		Citizens/Consumers		Businesses		Administrations	
		One-off	Recurrent	One-off	Recurrent	One-off	Recurrent
							and mergers more aligned)
	Indirect costs				Stricter approach may initially disincentivize businesses from entering into R&D agreements for which it is not possible to calculate market shares		



Brussels,
RSB/

Opinion

Title: Impact assessment / Revision of the EU competition rules on horizontal agreements

Overall opinion: NEGATIVE

(A) Policy context

EU Competition Law restricts firms from making agreements that harm competition. Firms follow a self-assessment process to make sure that they comply with the rules. Horizontal cooperation agreements, entered into between companies operating at the same level in the market, relate in most cases to cooperation between actual or potential competitors in areas such as research & development (R&D), production, purchasing, commercialisation or standardisation but can also involve information exchange. Such agreements are allowed under certain clear conditions that are specified in the Horizontal Guidelines and in two Block Exemption Regulations, one on research and development agreements and one on specialisation agreements.

The evaluation, completed in 2021, identified some areas for improvement in the legal framework for horizontal agreements concerning the clarity of the rules and their ability to address new market developments, as well as the need to update them to include guidance from relevant case law.

(B) Summary of findings

The Board notes the additional information provided by the DG

However, the Board gives a negative opinion, because the report contains the following significant shortcomings:

- (1) The report does not clearly demonstrate that the current rules provide insufficient protection of innovation competition. It does not present evidence that SMEs engage with each other in anti-competitive “pre-market” cooperation.**
- (2) The report does not sufficiently define the content of the policy options, including possible combinations. It is not clear under which conditions pre-market cooperation, in particular between SMEs would fall under the competition rules or could benefit from exemptions or a lighter regime or under which conditions the Commission could withdraw the exemption for certain R&D agreements.**
- (3) The report does not sufficiently assess the impact and proportionality of the policy options concerning new products or specific R&D poles, especially regarding new compliance costs and legal uncertainty for SMEs. It does not assess thoroughly the risk that the new rules may discourage SMEs from engaging in pro-competitive cooperation on pre-market innovation.**

(C) What to improve

(1) The report should provide clear evidence underpinning the identified problems. In particular, it should demonstrate that the current horizontal competition rules insufficiently protected innovation competition and that, in particular, SMEs engaged in significant anti-competitive cooperation for “pre-market” innovation. This analysis should be informed by the antitrust enforcement experience and case law at EU and Member State level as well as views of affected stakeholders.

(2) The report should clearly define the content of the policy options. For each option, the report should explain the underlying logic and clarify how the option relates to the identified problems. Moreover, the report should clearly state what the option requires from the concerned stakeholders. It should clarify the criteria that businesses should apply for the self-assessment, based on available information, first to assess whether their agreement falls within the remit of competition rules, and second to determine whether they fulfil the conditions for exemption. It should provide clear links to any complementary or more detailed information that will be provided in the accompanying Horizontal Guidelines (or present the relevant parts in annex).

(3) Regarding the option that exempts SMEs from the application of the horizontal competition rules, the report should define under which verifiable conditions such exemptions would apply. Similarly, for the options on the treatment of R&D agreements on pre-market innovation, new products and specific R&D poles, the report should explain the conditions and procedures under which the Commission could withdraw the benefit of the exemption and how efficiently this could be done. It should also clearly define the changes in the Horizontal Guidelines that are supposed to provide additional assurances to the concerned businesses (in particular on the definition of the “market” and “market power” in the case of new products or technologies where it is not clear from the outset where these will be applied and who the potential users might be).

(4) The report should assess in greater detail the impact of the policy options on companies, especially on SMEs. It should assess whether SMEs can realistically be assumed to have access to the necessary information for the self-assessment under the new rules, in particular in the area of innovation when third party information is needed. It should assess the risk of unintended consequences, such as reaching out to potential competitors risking disclosing commercially sensitive information. It should identify and quantify the compliance costs and administrative costs for SMEs and assess whether these costs are proportionate to the risks of competition distortions from agreements involving (or concluded between) SMEs. The assessment should also verify stakeholders’ concerns that the new approach could discourage companies from pro-competitive cooperating in innovation.

(5) As the problem analysis refers to the complexity of the rules and how this affects SMEs, the report should consider having a clear simplification objective, in particular for SMEs. The impact analysis should assess in how far the proposed policy options meet the simplification objective, and if the proposed measures remain proportionate to the objectives of the initiative.

Some more technical comments have been sent directly to the author DG.

(D) Conclusion

The DG must revise the report in accordance with the Board's findings and resubmit it for a final RSB opinion.

Full title	Revision of the EU competition rules for horizontal agreements
Reference number	PLAN/2021/11110 and PLAN/2021/11180
Submitted to RSB on	08/06/2022
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