

EXPLANATORY NOTE ON THE MAIN CHANGES PROPOSED FOR THE HORIZONTAL BLOCK EXEMPTION REGULATIONS AND HORIZONTAL GUIDELINES

1. INTRODUCTION

- (1) This note summarizes the main changes proposed for the new Specialisation Block Exemption Regulation (“Specialisation BER”) and new R&D Block Exemption Regulation (“R&D BER”) (together, the “HBERs”), compared with the current versions of those Regulations, which will expire on 30 June 2023¹. It also summarises the changes proposed for the new Guidelines on the applicability of Article 101 of the Treaty to horizontal cooperation agreements (“Horizontal Guidelines”).
- (2) Horizontal cooperation agreements are agreements between competing undertakings. Pro-competitive horizontal cooperation in the form of R&D and specialisation in production is essential for the digital and green transitions and can contribute to the resilience of the internal market. The HBERs exempt R&D and specialisation agreements that fulfil certain conditions from the application of Article 101(1) of the Treaty because they are presumed to fulfil the conditions of the Article 101(3) exception. The HBERs therefore create a safe harbour for those categories of agreements.
- (3) The Horizontal Guidelines provide guidance on how to interpret and apply the HBERs and more broadly on how to assess various common types of horizontal cooperation agreements under Article 101(1) and Article 101(3) of the Treaty. This includes R&D and specialisation agreements that do not meet the conditions of the HBERs, but also purchasing, commercialisation, standardisation and standard terms agreements, as well as exchanges of information.
- (4) The proposed changes are the result of a four year review process. They address issues identified in the evaluation² phase of the review and take into account further evidence and feedback gathered during the impact assessment phase.
- (5) The evaluation showed that the HBERs and Horizontal Guidelines make it easier for companies to cooperate in ways which are economically desirable and without adverse effects from the point of view of competition policy. They promote competition and offer legal certainty to companies in the conception and implementation of their horizontal cooperation agreements. The HBERs and Horizontal Guidelines also meet their objective of simplifying administrative supervision by the Commission, the national competition authorities (‘NCAs’) and national courts.

¹ Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, OJ L 335, 18.12.2010, p. 43 and Commission Regulation (EU) No 1217/2010 of 14 December 2010 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, OJ L 335, 18.12.2010, p. 36. On 8 December 2022, the Commission adopted two regulations extending the period of validity of the HBERs. The HBERs were due to expire on 31 December 2022, and the Commission prolonged them by six months, until 30 June 2023, to allow adequate time to complete the review process and take full account of the feedback to the public consultation on the draft regulations published on 1 March 2022.

² See Commission Staff Working Document, Evaluation of the Horizontal Block Exemption Regulations, SWD(2021)103 final of 6 May 2021, https://ec.europa.eu/competition-policy/system/files/2021-05/HBERs_evaluation_SWD_en.pdf

- (6) However, the evaluation also showed that the current HBERs and Horizontal Guidelines are not fully adapted to the economic and societal developments of the last ten years, such as digitisation and the pursuit of sustainability goals. Some provisions of the HBERs were considered rigid and complex, while other provisions were considered unclear and difficult to interpret by companies. The level of legal certainty provided by the Horizontal Guidelines was found to be uneven for the different types of horizontal cooperation agreements covered.
- (7) The Commission gathered further evidence on areas for improvement in the impact assessment phase of the review. It notably conducted a public consultation on policy options, as well as several targeted consultations on specific types of horizontal cooperation agreements. It also organised stakeholder workshops and commissioned five impact assessment support studies. Further evidence was collected through discussions with stakeholders and the NCAs. Finally, it conducted an open public consultation on draft revised texts³.
- (8) This explanatory note sets out the main changes proposed in the new HBERs and Horizontal Guidelines for each type of agreement and explains how these changes aim to address the issues identified in the evaluation and thereby contribute to meeting the objectives of the HBERs and Horizontal Guidelines.

2. R&D AGREEMENTS - CHANGES TO THE R&D BER AND CHAPTER 2 OF THE HORIZONTAL GUIDELINES

- (9) Concerns were raised during the impact assessment phase that innovation competition might not be sufficiently protected by the R&D BER in certain cases in which it is not possible to apply the R&D BER's market share threshold. To address this, the recitals and operative provisions of the proposed new R&D BER and Chapter 2 of the new Horizontal Guidelines have been modified to make clearer that parties to an R&D agreement that do not compete on markets for existing products or technologies may nonetheless be competitors in innovation. In addition, new articles have been introduced in the new R&D BER referring to the powers of the Commission and the NCAs to withdraw the benefit of the block exemption in individual cases, pursuant to Article 29 of Regulation 1/2003⁴, including in cases where an R&D agreement would substantially restrict innovation competition.
- (10) To make it easier for companies to cooperate in R&D, to provide adequate legal certainty and to simplify administrative supervision, the proposed new R&D BER also:
 - a. simplifies the grace period that applies if the parties' market shares increase above the threshold for exemption;
 - b. provides that market shares may be calculated based on an average of the three preceding calendar years if data for the preceding calendar year is not representative (for example, in markets with lumpy demand).
- (11) In addition, the proposed new Horizontal Guidelines contain a new section explaining how to apply the R&D BER.

³ Public consultation of 1 March 2022: https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en

⁴ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1

3. SPECIALISATION AGREEMENTS - CHANGES TO THE SPECIALISATION BER AND CHAPTER 3 OF THE HORIZONTAL GUIDELINES

- (12) To address an uncertainty identified during the evaluation relating to the scope of the Specialisation BER, the proposed new Specialisation BER expands the definition of ‘unilateral specialisation agreements’ to cover agreements that include more than two parties. This change is particularly relevant for SMEs, since, due to their size and limited resources, an effective specialisation may require the cooperation of more than two parties. In addition, Chapter 3 of the proposed new Horizontal Guidelines now makes clear that the guidance covers all types of horizontal subcontracting agreements, not just those that aim to expand production.
- (13) Additional changes in the proposed new Specialisation BER and Horizontal Guidelines aim to make it easier for companies to cooperate in specialisation agreements, to provide adequate legal certainty and to simplify administrative supervision. To this end, the proposed new Specialisation BER:
- a. simplifies the grace period that applies if the parties’ market shares increase above the threshold for exemption;
 - b. adds some new definitions and clarifies the wording of existing ones;
 - c. provides that market shares may be calculated based on an average of the three preceding calendar years if data for the preceding calendar year is not representative (for example, in markets with lumpy demand);
 - d. clarifies how the market share threshold applies if the agreement concerns intermediary products;
 - e. introduces articles referring to the powers of the Commission and NCAs to withdraw the benefit of the block exemption in individual cases, pursuant to Article 29 of Regulation 1/2003.
- (14) In addition, the proposed new Horizontal Guidelines contain:
- a. a new section explaining how to apply the Specialisation BER;
 - b. a new section on mobile telecommunications network sharing agreements, as a specific illustration of production agreements where services are involved.

4. MAIN CHANGES IN THE OTHER CHAPTERS OF THE HORIZONTAL GUIDELINES

4.1. Introductory Chapter

- (15) The introductory Chapter of the Horizontal Guidelines explains various basic concepts used in the application of Article 101 of the Treaty, including the notions of undertaking, agreement, concerted practice, actual and potential competition, restrictions by object and by effect, and ancillary restraints. Since 2010, the Court of Justice of the European Union has re-interpreted some of these concepts and the guidance in this chapter has therefore been adapted accordingly. The chapter has also been restructured into a more logical sequence and aligned with the recently revised Guidelines on Vertical Agreements to ensure coherence.
- (16) In addition, new or expanded guidance has also been added on the following:

- a. the determination of the centre of gravity for horizontal agreements which involve cooperation on more than one type of activity, for example both production and commercialisation;
- b. the application of Article 101 to joint ventures and their parents, reflecting developments in the case law;
- c. cooperation agreements that generally fall outside the scope of Article 101(1) because they are not capable of appreciably affecting trade between Member States or because they have no appreciable effect on competition (*De Minimis*). The guidance highlights that these exceptions are likely to be particularly relevant for agreements between SMEs, thereby addressing the problem identified during the evaluation that SMEs find it difficult to apply the HBERs.

4.2. Joint Purchasing agreements (Chapter 4)

(17) To reflect market developments and enforcement experience, the guidance on joint purchasing agreements has been modified as follows:

- a. clarification that the guidance applies to all types of sectors and covers not only actual joint purchasing but also the joint negotiation of purchasing conditions;
- b. expanded guidance on the distinction between buyer cartels ('by object' restrictions) and joint purchasing agreements (generally assessed as restrictions 'by effect');
- c. expanded guidance on the circumstances in which joint purchasing agreements may cause upstream harm to suppliers and the circumstances in which it is less likely that lower purchasing prices will be passed on to consumers;
- d. guidance on the assessment of negotiating threats and temporary suspensions of purchase orders;
- e. additional explanations in the section on Article 101(3) regarding the pass-on of the benefits of joint purchasing to consumers.

4.3. Commercialisation agreements (Chapter 5)

(18) In order to continue to meet its objectives, Chapter 5 of the proposed new Horizontal Guidelines concerning commercialisation agreements contains:

- a. additional guidance on the main risks of output limitation in commercialisation agreements;
- b. further clarifications on the affected markets and on anti-competitive effects;
- c. a specific section on bidding consortia, and, in particular, on the assessment of consortia agreements between undertakings that would be capable of making independent bids.

4.4. Information exchange (Chapter 6)

(19) In order to continue to meet its objectives, Chapter 6 of the proposed new Horizontal Guidelines concerning information exchange contains:

- a. a new structure, to facilitate self-assessment;

- b. additional guidance on the different types of information exchanges, including different types of data sharing;
- c. additional guidance on exchanges stemming from (EU) regulatory initiatives;
- d. guidance on what constitutes commercially sensitive information, including references to recent case law on by object infringements;
- e. additional guidance on various concepts relevant for the assessment, notably on 'genuinely public information', aggregation of information, the age of information, unilateral disclosure and indirect information exchanges (including hub-and-spoke scenarios and third party facilitators), including references to recent case law;
- f. new guidance on precautions that undertakings can take to avoid infringements, including measures to limit/control how data is used, such as the use of clean teams or independent trustees, as well as measures by which undertakings can distance themselves from information exchanges.

4.5. Standardisation agreements and standard terms (Chapters 7 and 8)

(20) In order to continue to meet its objectives, Chapter 7 of the proposed new Horizontal Guidelines concerning standardisation agreements has been amended as follows:

- a. the guidance now states that in certain circumstances restricting certain undertakings from participating in the development of a standard may not restrict competition, for example where there is competition between several standards or where the restrictions are time-limited and aimed at speeding up the standard-setting process;
- b. to ensure that industries makes an informed choice about the technology to be included in a standard and to ensure effective access to the standard, the guidance now states that participants in the development of a standard should be required to make specific disclosures of any intellectual property rights (IPRs) that may be essential for the implementation of the standard, including, for example, patent or patent application numbers. So-called blanket disclosure (where the participant simply declares that it is likely to have IPR claims over a particular technology) should only be permitted where such specific information is not yet publicly available, and, in that case, participants should be encouraged to update their disclosures before the standard is adopted;
- c. the guidance states that standardisation agreements that provide for the ex-ante disclosure by participating IPR holders of a maximum cumulated royalty rate do not, as such, restrict competition within the meaning of Article 101(1).

(21) Agreements on the use of standard contract terms are now covered in a separate chapter (Chapter 8). Minimal changes have been made to the guidance, mainly for the purpose of clarification.

4.6. Sustainability agreements (Chapter 9)

(22) The introduction of a new chapter on sustainability agreements is intended to show that competition policy does not stand in the way of horizontal cooperation agreements that pursue genuine sustainability objectives. The new chapter includes:

- a. a broad definition of sustainability agreements, based on the [UN Sustainable Development Goals](#);
- b. examples of types of sustainability agreements that fall outside the scope of Article 101(1);
- c. a soft safe harbour for sustainability standardisation agreements that meet certain conditions;
- d. guidance on the factors to be taken into account to determine whether a sustainability agreement is to be assessed as a restriction by object or by effect;
- e. guidance on types of benefits that can be taken into account for the purpose of assessing whether a sustainability agreement fulfils the conditions of the Article 101(3) exception, including individual use benefits, individual non-use benefits and certain collective benefits;
- f. guidance on the relationship between Chapter 9 and the other chapters of the Guidelines, since many sustainability agreements will also be covered by other chapters, for example, because they may involve joint production, commercialization or purchasing.
