

Horizontal cooperation agreements between companies

Consultation of the European Commission on its draft R&D and Specialization Regulations and Guidelines

AFEP would like to thank the European Commission for the opportunity to comment on these draft texts which, following the various consultations carried out by the Commission, help to clarify, specify and introduce new points on a tool essential to business life.

Two subjects mainly hold their attention and are developed below by type of text concerned.

1/ The draft R&D Regulation

While companies appreciate the editorial and structural clarifications brought to the text, they strongly **regret the restrictive approach** kept by the Commission's Competition DG on the legal framework of horizontal cooperation agreements in R&D (a). In addition, despite the comments made in the draft guidelines to clarify the regulation, they do not understand the additional restrictions of competition made by the Commission in article 6.3 of this draft Regulation (b).

- a) Exemption remains **conditional on the full access of all parties to the final result of the research** (IP and know-how, art 1, 3, 4¹); sharing with all parties (including with non-European research institutes or university centres) is no longer appropriate in the context of strong global competition.

This exemption Regulation is too often invoked by research institutes/organizations and partners claiming that the secret know-how of companies or IPR (pre-existing or resulting from joint research) could be shared with third parties (competitors or not) for the purposes of research and development and exploitation. Requiring that IPRs and know-how be shared with all parties as a general rule (Article 3) is **no longer suited to the current context of competition between different global geographical areas**. There is indeed a risk that the result of this joint research will quickly flee to competition from third countries. Companies must have an economic interest in sharing their intellectual property; it cannot be a precondition for obtaining the agreement of the Commission.

In practice, this also discourages companies, including small ones, from participating in joint research and technology (R&T) and R&D activities, when both will be the cornerstone of the competitiveness of European companies in the face of environmental and digital challenges.

This obligation is therefore proving to be counterproductive insofar as **European ambition in terms of environment, digital and resilience requires an increased effort in terms of collective R&D, within and even beyond ecosystems**. The extent of the necessary cooperation increases the risk of disseminating effects induced by the regulation and the guidelines. As such, competition law must **provide the legal certainty and incentives essential to the success of European ambition**.

- b) Article 6§3 of the draft Regulation specifies that, when the parties to the agreement are competing undertakings, the exemption applies for the duration of the R&D work if, **"at the time the R&D agreement is entered into, there are three or more competing R&D efforts in addition to and comparable with those of the parties to the R&D agreement"**.

Regarding the draft guidelines, they invite, in order to establish the competing effort, to observe whether there are **third parties to the agreement pursuing substantially the same aim or objective** as of the agreement or **whether the R&D efforts are identical or capable of being substituted**.

This project thus recommends taking into consideration the "reliable information" of competing efforts, such as "the size, stage and timing of the R&D efforts, third parties' (access to) financial and human resources, their intellectual property, know-how or other specialised assets, their previous R&D efforts and the third parties' capability and likelihood to exploit directly or indirectly possible results of their R&D efforts on the internal market".

¹ Art 1: reformulates the 2010 R&D text without modifying the conditions of access to the results

Art 3: confirms full access by all parties to the final result to continue the R&D and for its exploitation

Art 4: always provides for access to pre-existing know-how for joint or remunerated R&D activities

This theoretical approach to efforts in the field of R&D calls for the following comments:

- this additional condition requiring “three competing efforts” *de facto* leads to the exclusion from the benefit of the block exemption of all joint research projects aimed at **breakthrough innovations or even other projects**. In any case, the first three competing projects should, strictly speaking, be excluded from that requirement. In addition, the definition of “competing” efforts with a same aim or objective is very imprecise, whether the objective is defined narrowly or broadly. For example, in one of the sectors where research is essential such as the pharmaceutical sector, should the objective be defined at the level of the mode of treatment, the pathology, the therapeutic area, or the more general “cure”?
- in practice, when concluding the agreement, the parties are not necessarily in a position to **have information on the R&D work carried out by their competitors**, nor to determine the comparability, reliability, probability, etc., concepts all subject to interpretation.
- the choice of a threshold of “three” competing efforts listed in the project raises questions as to its relevance. This threshold seems doubly unsuitable (i) because too difficult to reach for agreements concluded on concentrated markets (ii) within the framework of an already restrictive text by targeting “undertaking competing in innovation”.

The introduction of Article 6.3 considering competition in innovation and the exemption of agreements for the development of new products, technologies and processes and R&D efforts directed towards a specific aim or objective brings a new restrictive condition since the **only cases potentially exempted are cases bringing together at least three competing R&D efforts comparable to those of the agreement**.

This article 6.3 could thus dissuade or complicate the conclusion of these agreements to the detriment of the innovation efforts necessary in Europe.

This draft Regulation, therefore, runs counter to European ambitions in terms of environment, digital and resilience; it ignores the current competitive reality and does not contribute to supporting the R&D efforts of European companies. A better understanding of the issues of sovereignty is all the more necessary since it is by no means proven that an agreement which does not allow each party full access to the results would in itself lead to a restriction of competition.

2/ “Sustainability agreements” in the draft Guidelines

In general, AFEP **appreciates the changes added by the Commission on common principles set out in the Guidelines**. It offers companies a more detailed analysis framework which helps to improve their visibility on this type of agreement.

Companies also appreciate the integration of a new point 9 on sustainability agreements, an essential area for European strategic autonomy.

However, they believe that this approach needs to be reinforced based on numerous recent positions, from the Commission in particular.

These guidelines on horizontal agreements will further contribute to European ambition as long as developments on sustainability agreements are deepened and clarified on the aspects of resilience and digital, in particular with regard to efficiencies. The aim is to **provide companies with the incentives and legal certainty that will encourage the deployment of projects in support of European objectives**.

- In this regard, the **new European growth model advocated in March 2022 by the Commission²**, and taken over by the Council, places equal emphasis on the environmental, digital and resilience priorities. It relevantly underlines the need for private efforts and initiatives and for an essential collective dynamic, within and beyond ecosystems, for example within the framework of alliances or IPCEIs.

The entire European framework and rules must be put at the service of this ambition to support the efforts required to move towards strategic autonomy.

Companies, therefore, note with interest the **link between sustainability, efficiency gains and resilience** (cf in this sense § 578). Considering the Green Deal as an opportunity to allow Europe to strengthen its research and, ultimately, its technological and

² See https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1467

strategic autonomy, AFEP had already put forward this approach at the end of 2020 in its response to the EC consultation on the contribution of competition policy to the achievement of the objectives of the Green Deal³.

Virtuous cooperation can indeed lead to sectoral improvements, particularly in environmental matters. In its guidelines published in January 2021 on competition law and environmental protection⁴, the Dutch Authority for Consumers and Markets (Autoriteit Consument & Markt) provides a concrete example: waste collection companies exchange information to optimize the route taken by trucks, reducing their mileage by 20% and resulting in lower costs, emissions of pollutants, vehicle wear and road congestion. In this case and from an environmental point of view, cooperation between economic actors proves to be more effective than free competition and responds to the well-being of the consumer and society in general.

In this context, AFEP considers that **DG Competition's analysis of horizontal agreements should more clearly support the extent of industrial cooperation required to achieve European environmental, digital and resilience objectives.**

The March Communication reinforces a transversal approach by the Commission. Thus, see in particular:

P.1: *"There is a broad consensus on the priorities for the European economic growth model, including the green and digital transitions, and the need to enhance the Union's economic and social resilience. These priorities jointly contribute to the objective of competitive sustainability. Achieving our objectives implies structural changes to the EU economy, including at national and regional level. The shift towards a sustainable, resilient and inclusive economic model, enabled by a broader diffusion and uptake of digital and green technologies and skills, will help address key challenges Europe faces, improve its position as a global leader and strengthen its open strategic autonomy."*

P. 9: *"The transition towards a greener, more digital and more resilient economy and business models is taking root in Europe. Important investment pipelines are emerging that can promote Europe's industrial leadership in the technologies of the future."*

"Industrial alliances can play an important role in mobilising actors and investment in strategic areas, identifying regulatory barriers and enablers and building a suitable project pipeline. Existing industrial alliances, as shown in the graph below, have proved instrumental to strengthening European capacities (e.g. batteries). They are bringing tangible results by aligning European, national and private sector reform and investment priorities."



Source: Commission services, figure 11 of SWD(2022) 40 final.

"Important Projects of Common European Interest (IPCEI) can help stimulate public and private investments by supporting research, innovation and first industrial deployment across the Union"

P.12: *"In order to master such a massive transformation of the European economy, an enabling policy framework must support innovation and accompany change. Tackling the challenges in the post-pandemic world will require innovative products and*

³ See <https://afep.com/en/publications-en/european-commissions-call-for-contribution-competition-policy-role-in-achieving-the-objectives-of-the-green-deal/>

⁴ Voir <https://www.acm.nl/en/publications/second-draft-version-guidelines-sustainability-agreements-opportunities-within-competition-law>

services as well as new business models and a well-prepared and adaptable workforce. The investments needed in order to complete the twin transition and to enhance resilience will need to come primarily from the private sector.”

“Cross-cutting policies, such as taxation, trade, and competition policy, also support Union’s favourable business environment and help attract investment”.

P.13 “EU competition policy has a key role to play in this respect, as well as in maintaining a level playing field and supporting companies to innovate and grow”.

Similarly, the recent Versailles Declaration (March 2022) of the European Council underlines how the inclusion of multiple policies and criteria contributes to strengthening European autonomy⁵ :

“Building on the strengths of the Single Market, which we will continue to complete, we will make Europe’s economic base more resilient, competitive and fit for the green and digital transitions, while leaving no one behind”.

Based on these encouraging and pragmatic orientations, AFEP proposes that clear support for **broad industrial cooperation be provided to achieve European environmental, digital and resilience objectives** by:

- Innovating in the interpretation of Article 101-1 TFEU to reinforce a **more positive approach to this cooperation**, particularly in the field of research, which should not be considered restrictive and (i) lead companies to have to demonstrate in a complex manner the merits of cooperation or (ii) to renounce cooperation because of the risks perceived in the tense industrial agenda imposed on them;
- Including the **criteria of sustainability, digital and resilience in the definition of the notion of efficiency**, at a **sufficient level of priority and in a sufficiently long-time frame**, beyond the sole criterion of short-term price, quality or innovation. Major European priorities – in particular the transformation of entire industries towards a greener economy – must indeed be able to be integrated into the concept of efficiency;

*In this sense, it is proposed to affirm this objective in § 559 by drafting the beginning of the sentence as follows: « The fact that an agreement genuinely pursues a sustainability objective ~~may~~**must** be taken into account... »*

- Revising the approach to **sustainability standardization agreements** which, in order not to produce "appreciable negative effect on competition" and not to infringe Article 101 (1) TFEU, must fulfil a list of **seven cumulative conditions** (paragraph 572 of the draft guidelines); among these, the sixth condition prohibits significant price increases.

*Condition 6 of § 572 relating to a significant price increase should make it possible to **reconcile efficiency gains and price increases** insofar as:*
(i) it is impossible to determine ab initio the price variability induced by research efforts to produce more competitive products, (ii) an ex ante assessment of the potential impact of this research on a future price creates legal uncertainty for businesses, holding back the incentive to launch new research.

- Supporting, under **sustainability agreements that do not raise competition issues** (§ 9.2), sectoral initiatives of **vigilance plans allowing the pooling**, at sectoral or sector level, of external approaches (consultants) to analyse the value chain (supply/industry...);

See in this sense:

- the guidelines for multinationals of the OECD - 2011 – “Recommendations for responsible business conduct in the international context”

⁵ See <https://www.consilium.europa.eu/media/54773/20220311-versailles-declaration-en.pdf>

- the proposal for a directive on corporate sustainability due diligence:: article 14 (accompanying measures) which proposes to **facilitate joint initiatives by the parties** aimed at helping companies to fulfil their obligations (§ 3) or to **facilitate multi-stakeholder initiatives** (§ 4).

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ABOUT AFEP

Since 1982, AFEP brings together large companies operating in France. The Association, based in Paris and Brussels, aims to foster a business-friendly environment and to present the company members' vision to French public authorities, European institutions and international organisations. Restoring business competitiveness to achieve growth and sustainable employment in Europe and tackle the challenges of globalisation is AFEP's core priority. AFEP has over 110 members. More than 8 million people are employed by AFEP companies and their annual combined turnover amounts to €2,600 billion. AFEP is involved in drafting cross-sectoral legislation, at French and European level, in the following areas: economy, taxation, company law and corporate governance, corporate finance and financial markets, competition, intellectual property and consumer affairs, labour law and social protection, environment and energy, corporate social responsibility and trade.

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