European Commission

Evaluation support study on the EU competition rules applicable to horizontal cooperation agreements in the HBERs and the Guidelines

Final Report

Prepared by

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European Commission
B-1049 Brussels

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Luxembourg: Publications Office of the European Union, 2021

Catalogue number: KD-02-21-603-EN-N
ISBN: 978-92-76-37534-0
DOI: 10.2763/414394

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1. Executive summary

The purpose of the evaluation of the Horizontal Block Exemption Regulations and the Horizontal Guidelines

In 2019, the Commission launched the evaluation of 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 categories of research and development agreements (the 'R&D Block Exemption Regulation') and 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 categories of specialisation agreements Regulations (the 'Specialisation Block Exemption Regulation'), (together hereinafter 'Horizontal Block Exemption Regulations' or 'HBERs'), and of the Commission's Guidelines on the Applicability of Article 101 of the Treaty to Horizontal Cooperation Agreements (hereinafter 'Horizontal Guidelines' or simply the 'Guidelines').

The purpose of this evaluation is to gather evidence on the functioning of the HBERs, together with the Horizontal Guidelines, which will serve as a basis for the Commission to decide whether it should let the HBERs lapse, prolong their duration or revise them.

The evaluation examines whether the objectives of the HBERs and the Horizontal Guidelines were met during the period of its application (effectiveness) and continue to be appropriate (relevance), and whether the HBERs and the Horizontal Guidelines, taking account of the costs and benefits associated with applying them, were efficient in achieving their objectives (efficiency). It also considers whether the HBERs, together with the Horizontal Guidelines, provide EU value added (EU added value) and are consistent with other Commission documents providing guidance on the application of Article 101 of the Treaty and related legislation (coherence).

The purpose of the study

This study is part of the Commission's evaluation of the HBERs and the Horizontal Guidelines. The objective of the study is to provide qualitative and quantitative evidence on the effectiveness, efficiency and relevance of the HBERs and the Horizontal Guidelines. In particular, the study aims at assessing whether and to what extent the HBERs and the Horizontal Guidelines are in line with recent developments.

Introduction

This report replies to specific questions of the evaluation related to the 'effectiveness', 'relevance' and 'efficiency' of the HBERs and the Horizontal Guidelines. This report presents the results of the analysis of all the data collected from the various data sources throughout this study.

Relevant stakeholders whose views were sought for the study are National Competition Authorities ('NCAs'), national courts competent to enforce EU competition rules, companies that participate in various forms of horizontal cooperation, retailers, trade associations, consumer organizations, and academics with an expertise in EU competition law. The analysis of the responses given by NCAs to a dedicated survey has allowed for a comprehensive mapping and assessment of the types of horizontal cooperation agreements that have been identified and analysed by these authorities and reviewed by national courts since 1st January 2011.

Cooperation is of a 'horizontal nature' if an agreement is entered into between actual or potential competitors. The forms of horizontal cooperation covered by this study are, research and development ('R&D') agreements, specialisation/production agreements, purchasing agreements, agreements on commercialisation, information exchange and standardisation agreements.

The next paragraphs provide a summary of the main findings of the study.

Effectiveness

The evidence collected for this study points to an overall adequate degree of legal certainty afforded by the HBERs, together with the Horizontal Guidelines, especially for R&D and specialisation agreements. This overall view emerges from the analysis of the responses given by NCAs[1] to a dedicated survey organized by DG Competition and the responses of SMEs to the *Computer Assisted Telephone Interviews* (hereafter referred as 'CATI'). Large businesses and trade associations also seem to acknowledge an overall satisfaction with the HBERs and Horizontal Guidelines, but in addition, they expressed several suggestions and some criticism, notably on the guidance on information exchange, standardisation, joint purchasing and other types of agreements non-covered by the current Horizontal Guidelines (e.g. sustainability agreements).

Where respondents pointed to some lack of clarity, especially in the Horizontal Guidelines, this was attributed to a few factors which apply to all types of agreements: (i) challenges in defining the relevant markets, (ii) challenges in the calculation of the parties' market shares; (iii) the current safe harbour market share thresholds (either considered too low or not provided for all types of horizontal cooperation agreements) and (iv) the nature of the examples given in the Horizontal Guidelines, which are sometimes characterised as 'generic', 'abstract' or 'obsolete', despite their generally recognised usefulness in ensuring a high degree of legal certainty.

The **definition of the relevant market** is one of the aspects that was mentioned most frequently by stakeholders as causing uncertainty. In particular, in R&D agreements, large companies mentioned that it is quite hard to define product and technology markets due to the nature of these agreements, which often 'create' a product or a market that did not exist at the time of the R&D agreement. According to those stakeholders participating in the semi-structured interviews having R&D agreements in place, the R&D Block Exemption Regulation was written with relatively stable markets in mind, while in practice the research activity covered by such agreements is more dynamic.

Another source of legal uncertainty concerns market definition in digital markets. The latter are often 'zero price markets'; the lack of prices complicates the market definition and the application of the market share thresholds. Similarly, stakeholders commented that the application of the conditions for exemption based on market share thresholds (Article 4), for instance in the telecommunication market, might be misleading: it might be difficult to fall under an exemption (defined only through market shares), as there are only a few big players that retain significant market shares. Finally, stakeholders argued that in investment-intensive industries, the critical mass to achieve long-term competitive outcomes might be achieved only

[1] *Overall, 195 cases concerning horizontal cooperation agreements were reported by the NCAs, out of which 126 were assessed as falling within the scope of this study (i.e. non-cartel horizontal cooperation agreements reviewed since January 2011). In addition, 5 court cases were identified and analysed.*

through horizontal cooperation between competitors: for instance, stakeholders argued that the assessment of network sharing agreements should not be based only on market shares, but rather on pro-competitive aspects related to this type of cooperation (e.g. better quality of service, faster deployment of new technologies, consumer benefits connected to innovation).

The Horizontal Guidelines are also considered very useful in supporting businesses in the self-assessment of the agreements they want to conclude with their competitors. However, the high risk of penalties in case of agreements considered anticompetitive generates a tendency to limit horizontal cooperation agreements to cases where the **examples** provided in the Horizontal Guidelines are particularly clear and fitting. This is further exacerbated by a lack of relevant jurisprudence by the Court of Justice of the European Union (CJEU), as a number of law firms have pointed out. This is why several stakeholders argued that the examples provided in the Horizontal Guidelines do not provide sufficient guidance; they are considered obsolescent (in comparison to recent market developments), excessively generic or abstract. In several cases, businesses flagged as an issue the absence of a mechanism that would allow companies to (informally) consult the Commission and NCAs ahead of concluding horizontal cooperation agreements.

In addition to the four above-mentioned 'cross-cutting' issues (i.e. technical challenges in defining relevant markets, calculating market shares, the current safe harbour thresholds, and the lack of updated examples in the Guidelines), the study identifies other critical agreement-specific points of the HBERs and the Horizontal Guidelines.

Regarding *R&D agreements*, while acknowledging that the R&D Block Exemption Regulation and the corresponding chapter in the Horizontal Guidelines provide an adequate level of legal certainty, some stakeholders highlighted that their technicality and complexity may lead to misunderstandings and cases of misinterpretation. Concerns and issues related to the self-assessment of the conditions for exemption for R&D agreements are mostly due to the administrative burden and to the lack of technical skills (especially for SMEs) to define markets and to calculate the relevant market shares as mentioned above. The R&D Block Exemption Regulation is also perceived by some large companies as too strict on requirements for access to intellectual property under Article 3, and lacking clarity on the conditions for joint exploitation to meet the requirements.

Concerning *specialisation agreements*, the overall level of legal certainty provided by the Specialisation BER and corresponding chapter in the Horizontal Guidelines is considered high. Nevertheless, specific aspects remain unclear, namely the definitions applicable to specialisation agreements and the relationship between the Specialisation BER and other EU competition law regulations (such as the Merger Regulation[2], the Technology Transfer Block Exemption Regulation[3] and the Vertical Block Exemption Regulation[4]). Stakeholders engaged in specialisation agreements mentioned that one of the causes of legal uncertainty is the definition of potential

[2] *Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation). OJ L-24/1, 29.1.2004.*
[3] *Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements. OJ L-93/1, 28.3.2014.*
[4] *Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices. OJ L-102/1, 23.4.2010.*

competition. This definition is considered too generic and it does not allow to understand the requirements for a competitor to be considered 'actual' or 'potential'. For example, a manufacturer willing to start distributing in a certain national market might want to establish a specialisation agreement with a distributor already active in that market. The question of whether this distributor could be considered a potential competitor triggers uncertainty.

Based on the input collected from certain stakeholders, the Horizontal Guidelines do not seem to provide sufficient legal certainty as regards *information exchange*: this might have a negative impact on creating efficiencies and procompetitive effects and may hamper cooperation between undertakings. Stakeholders highlighted some concerns in relation to the treatment of information exchanges under the Horizontal Guidelines. They pointed in particular to unclarity regarding the nature of the information exchanged that can lead to anticompetitive effects, the level of data aggregation, the age of the shared information/data and its frequency. Some stakeholders also voiced concerns with regard to information exchanges between non-full function joint ventures and their parent companies. They consider that the Horizontal Guidelines do not provide sufficient clarity on the type of information that a parent company is allowed to exchange with the joint venture: in order to monitor their investment and within the boundaries of competition law, parent companies have a natural need and interest to access certain strategic information concerning the joint venture. According to stakeholders, such ambiguity leads to increased costs and inefficiencies by establishing unnecessary cautious information exchange protocols.

Similarly, stakeholders mentioned a lack of clarity regarding the degree and nature of information exchanges covered by the Guidelines in the context of corporate restructurings. The exchange of information between the main stakeholder(s) and the company in crisis is essential to the success of the restructuring process: this allows preventing insolvency and might thus have pro-competitive effects, for example by helping a competitor to stay on the market. Restructurings, however, imply a complex coordination between several stakeholders interested in the transaction and necessitate information exchanges that could benefit from clearer guidance or even a number of examples in the Horizontal Guidelines.

A last point emerging from the discussions with stakeholders is linked to the conditions under which the Guidelines qualify an information exchange as a 'by object' infringement. Stakeholders consider that in cases of 'simple' information exchange (i.e. not combined with other forms of horizontal cooperation) the assessment should be done on a case-by-case basis – i.e. as a restriction 'by effect' –, while cases of information exchange among competitors concerning future market behaviour should be qualified as a restriction 'by object'. Although the Horizontal Guidelines clarify that information exchanges between competitors of "individualised data regarding intended future prices or quantities" should be considered a restriction of competition 'by object' (paragraph 74), a number of stakeholders (especially large companies) argued that it remains unclear what types of information exchange should be considered as a 'restriction by object'.

Many of the interviewed stakeholders indicated that the Horizontal Guidelines ensure an overall adequate level of legal certainty for *joint purchasing agreements* but still lack some clarity on some aspects. The Horizontal Guidelines do not distinguish with sufficient clarity between a legitimate joint purchasing agreement and a buyer cartel, as both can involve an agreement concerning the purchase price. According to some

stakeholders, the Horizontal Guidelines also do not sufficiently take into account the possible harmful effects caused by certain practices of retail alliances such as so-called collective fee extraction mechanisms and collective delisting. Similarly, they would not sufficiently tackle the possible negative effects of joint purchasing agreements on suppliers and competitors.

As regards *commercialisation agreements*, the findings of the study show that the Horizontal Guidelines offer a certain degree of legal certainty. However, the perception by stakeholders is that the rules in the Horizontal Guidelines are rather complex. The main points of uncertainty highlighted by stakeholders refer to the definition of 'potential competition' in the Horizontal Guidelines and to the possible use of new technologies in the context of commercialisation agreements, such as the use of pricing algorithms. Finally, a number of stakeholders argued that the Horizontal Guidelines lack clarity in relation to the assessment of joint bidding between competitors (i.e. the creation of a consortium to bid on a public tender). In particular, the Guidelines currently do not clarify the anti- and pro-competitive effects of such joint bidding.

When it comes to *standardisation agreements*, there is a general view that the Horizontal Guidelines appropriately address this type of cooperation and they provide sufficient legal certainty, especially because their treatment has not changed in comparison to the previous version of the Horizontal Guidelines. This ensure stability and certainty for market operators. However, several stakeholders pointed out the increasingly diverging interests between the holders of Standard Essential Patents ('SEPs') and implementers of standards. On the one hand, the implementers argue that the SEP holder is required to license its SEP to every willing licensee on the basis of fair, reasonable and non-discriminatory ('FRAND') terms. On the other hand, the SEP holders claim that the FRAND commitment does not affect their freedom to decide at what level of the supply chain they can license their SEP. In particular, SEP holders prefer licensing their SEPs to the manufacturers of end-users' products, rather than to components manufacturers. The debate concerning the level in the supply chain where a license should be granted is particularly intense in the information and communication technology ('ICT') and automotive industries. Both sides (SEP holders and implementers) claimed that the current wording of the Horizontal Guidelines lacks clarity.[5]

Relevance

The digitalisation of the economy and the increased importance of sustainability objectives are the two major trends identified by stakeholders as having an impact on the relevance of the objectives of the current regulatory framework on horizontal cooperation agreements.

According to the interviewed stakeholders (especially large companies), **new digital trends** reduce the relevance of the Horizontal Guidelines in the treatment of *commercialisation agreements*. New forms of cooperation, such as infrastructure sharing, data sharing and data pooling are currently not addressed in the Chapter of the Horizontal Guidelines on commercialisation agreements. Additionally, as pointed out by a broadcasting industry association, partnerships for the provision of media

[5] *The lack of clarity stems from the wording in Para 285 of the Horizontal Guidelines: (…) the IPR policy would need to require participants wishing to have their IPR included in the standard to provide an irrevocable commitment in writing to offer to license their essential IPR* ***to all third parties*** *on fair, reasonable and non-discriminatory terms ('FRAND commitment') (…). (Emphasis added.)*

content (e.g. partnerships for the creation of joint Video-On-Demand platforms) could be mentioned as new types of commercialisation agreements, promoting innovation and quality content.

According to a number of stakeholders, the digitalisation of the economy also affects the relevance of the Horizontal Guidelines concerning *information exchange* practices. The increasing relevance gained by data over the past decade gives rise to uncertainty. In particular, stakeholders mentioned the lack of clarity in cases of information exchange in digital business models such as platforms, ecosystems and hybrid cooperation models; combinations of horizontal and vertical relations for the exchange of information in digital ecosystems and data pooling. For example, some stakeholders questioned to what extent the market share of the competitors sharing the data determines whether the pool would be subject to an obligation to grant access to data to third parties. In other words, would a group of smaller competitors pooling their data to gain a competitive advantage be obliged to give access to their data to larger competitors? These new trends pose new questions, such as how to determine whether a data pool has market power. An additional question is whether and to what extent a safe harbour market share threshold would be appropriate for a data pool. In such a case, the question also arises as to how the Commission would be able to define the relevant market in cases concerning data pools.

The digitalisation of the economy is also creating more intertwined business models that no longer fit within established classifications (i.e. vertical agreements versus horizontal cooperation agreements). Digital disruption changes the clear separation between horizontal and vertical relations in case of integrated business models: this is especially relevant for hybrid platforms, such as online marketplaces. According to a number of stakeholders, due to the development of digital ecosystems, the distinction between horizontal and vertical agreements is becoming less clear: the Horizontal Guidelines currently lack specific examples about intra-ecosystem and platform-based information exchanges; such examples would assist companies by increasing legal certainty.

In the last 10 years, the pursuit of **sustainability** objectives has gained increasing importance for authorities, businesses and consumers[6]. As pointed out by several stakeholders, one of the main gaps in the Horizontal Guidelines is the lack of guidance on agreements aiming at achieving sustainability goals. This grey area is twofold. On the one hand, the question is what types of agreements qualify as a horizontal cooperation agreement pursuing a sustainability goal, bearing in mind that a too broad definition would allow for the phenomenon of 'greenwashing'[7]. On the other hand, uncertainty exists as to the competitive assessment of sustainability agreements between competitors. They are currently assessed under one of the types of agreements mentioned in the Horizontal Guidelines, such as standardisation agreements. Finally, a number of stakeholders argued that the Horizontal Guidelines do not provide guidance on the assessment of societal benefits and economic efficiencies generated by sustainability agreements (e.g. reduction in gas emissions, animal welfare, etc.). At the moment, 'non-monetary' outcomes of such agreements would not be properly weighted: the focus on the short-term (e.g. the impact on

[6] *In this study, meaning social, environmental and animal welfare objectives although a definition is not currently given in the Horizontal Guidelines.*
[7] *'Greenwashing' is the process of conveying either a false impression or providing misleading information about how a company's products are more environmentally sound.*

product prices) does not capture future, longer term environmental efficiencies (e.g. reduction in CO2 emissions).

Efficiency

Regulatory uncertainty concerning horizontal cooperation agreements represents a risk for businesses: this risk can be translated into increased direct costs of legal and economic advice and/or into potential indirect costs, such as missed opportunities, changes in company strategy or potential fines. These costs are not directly generated by specific provisions of the HBERs or the Horizontal Guidelines but they are rather a consequence of the perceived lack of legal certainty.

While almost all stakeholders considered that the HBERs and the Horizontal Guidelines are a source of cost reduction by providing increased legal certainty, they also identified room for improvement.

Neither businesses nor NCAs were able to quantify the costs of applying the HBERs and the Guidelines. However, more than half of the NCAs (17 out of 29) and several other stakeholders estimated that the costs are proportionate to the benefits.

Furthermore, some NCAs considered that costs would increase if the combination of the HBERs and the Horizontal Guidelines were not in place, since companies would face additional expenses for legal advice. The lack of harmonisation and subsequent need to comply with requirements in the different national jurisdictions would also increase costs.

Most stakeholders were not able to assess how the costs generated by assessing horizontal cooperation agreements under the HBERs and the Horizontal Guidelines have evolved in comparison to the previous regulatory framework. Some NCAs and stakeholders, nevertheless, considered that costs for companies have decreased, due to the increased legal certainty provided by the HBERs and Guidelines, and increased ease of application of the current framework.

2. Résumé analytique

L'objectif de l'évaluation des règlements horizontaux d'exemption par catégorie et des lignes directrices horizontales.

En 2019, la Commission a lancé l'évaluation du règlement (UE) No 1217/2010 de la Commission du 14 décembre 2010 concernant l'application de l'article 101(3) du Traité sur le Fonctionnement de l'Union Européenne à des catégories d'accords de recherche et de développement (le "règlement d'exemption par catégorie en matière de R&D") et du règlement (UE) No 1218/2010 de la Commission du 14 décembre 2010 concernant l'application de l'article 101(3) du Traité sur le Fonctionnement de l'Union Européenne à des catégories d'accords de spécialisation (le "règlement d'exemption par catégorie en matière de spécialisation"), (ci-après dénommés ensemble "règlements horizontaux d'exemption par catégorie" ou "REC"), et des lignes directrices de la Commission sur l'applicabilité de l'article 101 du Traité aux accords de coopération horizontale (ci-après dénommées "lignes directrices horizontales" ou simplement "lignes directrices").

L'objectif de cette évaluation est de rassembler des éléments de preuve sur le fonctionnement des REC, ainsi que sur les lignes directrices horizontales, qui serviront de base à la Commission pour décider si elle doit laisser les REC expirer, prolonger leur durée ou les réviser.

L'évaluation examine si les objectifs des REC et des lignes directrices horizontales ont été atteints pendant la période d'application (efficacité) et restent appropriés (pertinence), et si les REC et les lignes directrices horizontales, compte tenu des coûts et des avantages liés à leur application, ont permis d'atteindre leurs objectifs de manière efficace (efficience). Elle examine également si les REC, ainsi que les lignes directrices horizontales, apportent une valeur ajoutée à l'UE (valeur ajoutée à l'UE) et sont cohérents avec les autres documents de la Commission fournissant des orientations sur l'application de l'article 101 du Traité et de la législation connexe (cohérence).

L'objectif de l'étude

Cette étude fait partie de l'évaluation par la Commission des REC et des lignes directrices horizontales. L'objectif de l'étude est de fournir des preuves qualitatives et quantitatives de l'efficacité, de l'efficience et de la pertinence des REC et des lignes directrices. En particulier, l'étude vise à évaluer si et dans quelle mesure les REC et les lignes directrices sont conformes aux développements récents.

Introduction

Ce rapport répond aux questions spécifiques de l'évaluation relatives à "l'efficacité", la "pertinence" et "l'efficience" des REC et des lignes directrices. Ce rapport présente les résultats de l'analyse de toutes les sources de données collectées tout au long de cette étude.

Les parties prenantes dont l'avis a été sollicité dans le cadre de cette étude sont les Autorités Nationales de la Concurrence (ANC), les tribunaux nationaux compétents pour appliquer les règles de concurrence de l'UE, les entreprises qui mènent des activités conjointes de R&D, ainsi que la production et la distribution conjointes de biens, les détaillants, les associations commerciales, les organisations de consommateurs et les universitaires spécialisés dans le droit européen de la concurrence. L'analyse des réponses données par les ANC à un sondage spécifique a

permis d'établir une cartographie et une évaluation complètes des types d'accords de coopération horizontale qui ont été identifiés et analysés par ces autorités et examinés par les juridictions nationales depuis le 1er janvier 2011.

La coopération est de "nature horizontale" si un accord est conclu entre des concurrents réels ou potentiels. La coopération horizontale peut couvrir, par exemple, des accords conjoints de recherche et développement ("R&D"), de production, d'achat, de commercialisation, d'échange d'informations, et de normalisation.

Les paragraphes suivants présentent un résumé des principales conclusions de l'étude.

Efficacité

Les éléments recueillis dans le cadre de la présente étude indiquent que le degré de sécurité juridique offert par les règlements d'exemption par catégorie et les lignes directrices horizontales est globalement adéquat, en particulier pour les accords de R&D et de spécialisation. Cette opinion générale se dégage de l'analyse des réponses données par les ANC à une enquête spécifique organisée par la DG Concurrence et des réponses des PME aux entretiens téléphoniques assistés par ordinateur (ci-après dénommés "CATI"). Les grandes entreprises et les associations professionnelles semblent également reconnaître une satisfaction générale à l'égard des REC et des lignes directrices horizontales, mais elles ont en outre exprimé plusieurs suggestions et quelques critiques, notamment sur les conseils relatifs à l'échange d'informations, à la normalisation, aux achats groupés et à d'autres types d'accords non couverts par les lignes directrices horizontales actuelles (par exemple, les accords de durabilité).

Lorsque les répondants ont signalé un certain manque de clarté, en particulier dans les lignes directrices horizontales, cela a été attribué à quelques facteurs qui s'appliquent à tous les types d'accords : (i) les difficultés à définir les marchés pertinents, (ii) les difficultés à calculer les parts de marché des parties, (iii) les seuils de parts de marché actuels de la sphère de sécurité (considérés comme trop bas ou non prévus pour tous les types d'accords de coopération horizontale) et (iv) la nature des exemples donnés dans les lignes directrices horizontales, qui sont parfois qualifiés de "génériques", "abstraits" ou "obsolètes", malgré leur utilité généralement reconnue pour assurer un degré élevé de sécurité juridique.

La **définition du marché en cause** est l'un des aspects les plus fréquemment cités par les parties prenantes comme étant source d'incertitude. En particulier, dans les accords de R&D, les grandes entreprises ont indiqué qu'il était assez difficile de définir les marchés de produits et de technologies en raison de la nature de ces accords, qui ‘créent’ souvent un produit ou un marché qui n'existait pas au moment de la conclusion de l'accord de R&D. Selon les parties prenantes qui ont participé aux entretiens semi-structurés et qui ont conclu des accords de R&D, le règlement d'exemption par catégorie en faveur de la R&D a été rédigé dans l'optique de marchés relativement stables, alors qu'en pratique, l'activité de recherche couverte par ces accords est plus dynamique.

Une autre source d'incertitude juridique concerne la définition du marché sur les marchés numériques. Ces derniers sont souvent des ‘marchés à prix zéro’ ; l'absence de prix complique la définition du marché et l'application des seuils de parts de marché. En ce sens, les parties prenantes ont fait remarquer que l'application des conditions d'exemption basées sur les seuils de parts de marché (article 4), par exemple sur le marché des télécommunications, pourrait être trompeuse : il pourrait

être difficile de bénéficier d'une exemption (définie uniquement par les parts de marché), car seuls quelques grands acteurs conservent des parts de marché importantes. Finalement, les parties prenantes ont fait valoir que, dans les secteurs à forte intensité d'investissement, la masse critique nécessaire pour obtenir des résultats concurrentiels à long terme pourrait n'être atteinte que par une coopération horizontale entre concurrents : par exemple, les parties prenantes ont fait valoir que l'évaluation des accords de partage de réseau ne devrait pas se fonder uniquement sur les parts de marché, mais plutôt sur les aspects pro-concurrentiels liés à ce type de coopération (par exemple, une meilleure qualité de service, un déploiement plus rapide des nouvelles technologies, des avantages pour le consommateur liés à l'innovation).

Les lignes directrices horizontales sont également considérées comme très utiles pour aider les entreprises dans l'auto-évaluation des accords qu'elles souhaitent conclure avec leurs concurrents. Toutefois, le risque élevé de sanctions en cas d'accords considérés comme anticoncurrentiels génère une tendance à limiter les accords de coopération horizontale aux cas où les **exemples** fournis dans les lignes directrices horizontales sont particulièrement clairs et adaptés. Cette tendance est encore exacerbée par l'absence de jurisprudence pertinente de la Cour de justice de l'Union européenne (CJUE), comme l'ont souligné un certain nombre de cabinets d'avocats. C'est pourquoi plusieurs parties prenantes ont fait valoir que les exemples fournis dans les lignes directrices horizontales ne donnent pas suffisamment d'indications ; ils sont considérés comme obsolètes (par rapport aux évolutions récentes du marché), excessivement génériques ou abstraits. Dans plusieurs cas, les entreprises ont signalé comme un problème l'absence d'un mécanisme qui leur permettrait de consulter (de manière informelle) la Commission et les ANC avant de conclure des accords de coopération horizontale.

Outre les quatre problèmes "transversaux" susmentionnés (à savoir les difficultés techniques liées à la définition des marchés pertinents, le calcul des parts de marché, les seuils actuels de la sphère de sécurité et le manque d'exemples actualisés dans les lignes directrices), l'étude identifie d'autres points critiques spécifiques aux accords dans les REC et les lignes directrices horizontales.

En ce qui concerne *les accords de R&D*, tout en reconnaissant que le règlement d'exemption par catégorie en matière de R&D et la section correspondante des lignes directrices horizontales offrent un niveau adéquat de sécurité juridique, certaines parties prenantes ont souligné que leur technicité et leur complexité pouvaient entraîner des malentendus et des cas d'interprétation erronée. Les préoccupations et les problèmes liés à l'auto-évaluation des conditions d'exemption pour les accords de R&D sont principalement dus à la charge administrative et au manque de compétences techniques (en particulier pour les PME) pour définir les marchés et calculer les parts de marché pertinentes, comme indiqué ci-dessus. Le règlement d'exemption par catégorie en faveur de la R&D est également perçu par certaines grandes entreprises comme trop strict en ce qui concerne les conditions d'accès à la propriété intellectuelle au titre de l'article 3, et comme manquant de clarté quant aux conditions d'exploitation conjointe permettant de satisfaire à ces exigences.

En ce qui concerne *les accords de spécialisation*, le niveau global de sécurité juridique fourni par le REC sur la spécialisation et la section correspondante des lignes directrices horizontales est considéré comme élevé. Néanmoins, certains aspects spécifiques restent peu clairs, à savoir les définitions applicables aux accords de spécialisation et la relation entre le REC sur la spécialisation et d'autres règlements

de l'UE en matière de concurrence (tels que le règlement sur les concentrations[8], le règlement sur le transfert de technologie[9] et le règlement sur les exemptions par catégorie des accords verticaux[10]). Les parties prenantes engagées dans des accords de spécialisation ont mentionné que l'une des causes de l'incertitude juridique est la définition de la concurrence potentielle. Cette définition est considérée comme trop générique et ne permet pas de comprendre les conditions requises pour qu'un concurrent soit considéré comme "réel" ou "potentiel". Par exemple, un fabricant souhaitant commencer à distribuer sur un certain marché national pourrait vouloir établir un accord de spécialisation avec un distributeur déjà actif sur ce marché. La question de savoir si ce distributeur peut être considéré comme un concurrent potentiel est source d'incertitude.

D'après les informations recueillies auprès de certaines parties prenantes, les lignes directrices horizontales ne semblent pas offrir une sécurité juridique suffisante en ce qui concerne *l'échange d'informations* : cela pourrait avoir un impact négatif sur la création de gains d'efficacité et d'effets pro-concurrentiels et pourrait entraver la coopération entre les entreprises. Les parties prenantes ont fait part de certaines préoccupations concernant le traitement des échanges d'informations dans le cadre des lignes directrices horizontales. Elles ont notamment souligné le manque de clarté concernant la nature des informations échangées qui peuvent entraîner des effets anticoncurrentiels, le niveau d'agrégation des données, l'ancienneté des informations/données partagées et leur fréquence. Certaines parties prenantes ont également fait part de leurs préoccupations concernant les échanges d'informations entre les entreprises communes qui ne sont pas de plein exercice et leurs sociétés mères. Elles considèrent que les lignes directrices horizontales ne fournissent pas suffisamment de clarté sur le type d'informations qu'une société mère est autorisée à échanger avec l'entreprise commune : afin de surveiller leur investissement et dans les limites du droit de la concurrence, les sociétés mères ont un besoin et un intérêt naturels d'accéder à certaines informations stratégiques concernant l'entreprise commune. Selon les parties prenantes, une telle ambiguïté entraîne une augmentation des coûts et des inefficacités en établissant des protocoles d'échange d'informations inutilement prudents.

De même, les parties prenantes ont mentionné un manque de clarté concernant le degré et la nature des échanges d'informations couverts par les lignes directrices dans le contexte des restructurations d'entreprises. L'échange d'informations entre la ou les principales parties prenantes et l'entreprise en crise est essentiel au succès du processus de restructuration: il permet d'éviter l'insolvabilité et peut donc avoir des effets pro-concurrentiels, par exemple en aidant un concurrent à rester sur le marché. Les restructurations impliquent toutefois une coordination complexe entre plusieurs parties prenantes intéressées par la transaction et nécessitent des échanges d'informations qui pourraient bénéficier d'orientations plus claires, voire d'un certain nombre d'exemples dans les lignes directrices horizontales.

[8] Règlement (CE) n° 139/2004 du Conseil du 20 janvier 2004 relatif au contrôle des concentrations entre entreprises ("le règlement CE sur les concentrations"). OJ L-24/1, 29.1.2004.
[9] Règlement (UE) n ° 316/2014 de la Commission du 21 mars 2014 relatif à l'application de l'article 101, paragraphe 3, du traité sur le fonctionnement de l'Union européenne à des catégories d'accords de transfert de technologie. OJ L 102, 23.4.2010.
[10] Règlement (UE) n° 330/2010 de la Commission du 20 avril 2010 concernant l'application de l'article 101, paragraphe 3, du traité sur le fonctionnement de l'Union européenne à des catégories d'accords verticaux et de pratiques concertées. OJ L 102, 23.4.2010.

Un dernier point ressortant des discussions avec les parties prenantes est lié aux conditions dans lesquelles les lignes directrices qualifient un échange d'informations d'infraction ‘par objet’. Les parties prenantes considèrent que dans les cas d'échange d'informations "simple" (c'est-à-dire non combiné à d'autres formes de coopération horizontale), l'évaluation devrait être faite au cas par cas - c'est-à-dire comme une restriction ‘par effet’ -, tandis que les cas d'échange d'informations entre concurrents concernant le comportement futur sur le marché devraient être qualifiés de restriction ‘par objet’. Bien que les lignes directrices horizontales précisent que les échanges d'informations entre concurrents portant sur des "données individualisées concernant les prix ou les quantités futurs envisagés" doivent être considérés comme une restriction de la concurrence "par objet" (paragraphe 74), un certain nombre de parties prenantes (en particulier les grandes entreprises) ont fait valoir qu'il n'était pas clair quels types d'échanges d'informations devaient être considérés comme une ‘restriction par objet’.

Un grand nombre des parties prenantes interrogées ont indiqué que les lignes directrices horizontales garantissent un niveau globalement adéquat de sécurité juridique pour les *accords d'achat groupé*, mais qu’elles manquent encore de clarté sur certains aspects. Les lignes directrices horizontales ne font pas une distinction suffisamment claire entre un accord d'achat groupé légitime et une entente d'acheteurs, car tous deux peuvent impliquer un accord sur le prix d'achat. Selon certaines parties prenantes, les lignes directrices horizontales ne prennent pas non plus suffisamment en compte les éventuels effets néfastes causés par certaines pratiques des alliances de détaillants, telles que les mécanismes dits d'extraction collective de frais et de radiation collective. De même, elles ne s'attaqueraient pas suffisamment aux éventuels effets négatifs des accords d'achat groupé sur les fournisseurs et les concurrents.

En ce qui concerne les *accords de commercialisation*, les résultats montrent que les lignes directrices horizontales offrent un certain degré de sécurité juridique. Toutefois, les parties prenantes ont l'impression que les règles des lignes directrices horizontales sont plutôt complexes. Les principaux points d'incertitude soulignés par les parties prenantes concernent la définition de la ‘concurrence potentielle’ dans les lignes directrices horizontales et l'utilisation possible de nouvelles technologies dans le contexte des accords de commercialisation, comme l'utilisation d'algorithmes de tarification. Enfin, un certain nombre de parties prenantes ont fait valoir que les lignes directrices horizontales manquent de clarté en ce qui concerne l'évaluation des offres conjointes entre concurrents (c'est-à-dire la création d'un consortium pour répondre à un appel d'offres public). En particulier, les lignes directrices ne clarifient pas actuellement les effets anti et pro-concurrentiels de ces offres conjointes.

En ce qui concerne les *accords de normalisation*, l'opinion générale est que les lignes directrices horizontales traitent de manière appropriée ce type de coopération et offrent une sécurité juridique suffisante, notamment parce que leur traitement n'a pas changé par rapport à la version précédente des lignes directrices. Cela garantit la stabilité et la certitude pour les opérateurs du marché. Toutefois, les parties prenantes ont soulevé la question des intérêts de plus en plus divergents entre les titulaires de brevets essentiels de normes (‘SEP’) et les exécutants de normes. D'une part, les responsables de la mise en œuvre font valoir que le titulaire d'un SEP est tenu d'accorder une licence pour son SEP à tout preneur de licence consentant, sur la base de conditions équitables, raisonnables et non discriminatoires (‘FRAND’). D'autre part, les titulaires de SEP affirment que l'engagement FRAND n'affecte pas leur liberté de décider à quel niveau de la chaîne d'approvisionnement ils accordent

une licence pour leur SEP. En particulier, les titulaires de SEP préfèrent accorder des licences pour leurs SEP aux fabricants de produits d'utilisateurs finaux, plutôt qu'aux fabricants de composants. Le débat concernant le niveau de la chaîne d'approvisionnement auquel une licence devrait être accordée est particulièrement intense dans les industries des technologies de l'information et de la communication ('TIC') et de l'automobile. Les deux parties (titulaires de SEP et exécutants) ont affirmé que la formulation actuelle des lignes directrices horizontales manque de clarté[11].

Pertinence

La numérisation de l'économie et l'importance accrue des objectifs de durabilité sont les deux grandes tendances identifiées par les parties prenantes comme ayant un impact sur la pertinence des objectifs du cadre réglementaire actuel sur les accords de coopération horizontale.

Selon les parties prenantes interrogées (notamment les grandes entreprises), **les nouvelles tendances numériques** réduisent la pertinence des lignes directrices horizontales dans le traitement des *accords de commercialisation*. Les nouvelles formes de coopération, telles que le partage d'infrastructures, le partage de données et la mise en commun de données, ne sont actuellement pas abordées dans la section des lignes directrices horizontales consacrée aux accords de commercialisation. En outre, comme l'a souligné une association du secteur de la radiodiffusion, les partenariats pour la fourniture de contenu médiatique (par exemple, les partenariats pour la création de plateformes communes de vidéo à la demande) pourraient être mentionnés comme de nouveaux types d'accords de commercialisation, favorisant l'innovation et le contenu de qualité.

Selon un certain nombre de parties prenantes, la numérisation de l'économie affecte également la pertinence des lignes directrices horizontales concernant les pratiques *d'échange d'informations.* L'importance croissante des données au cours de la dernière décennie est source d'incertitude. Les parties prenantes ont notamment mentionné le manque de clarté dans les cas d'échange d'informations dans les modèles commerciaux numériques tels que les plateformes, les écosystèmes et les modèles de coopération hybrides; les combinaisons de relations horizontales et verticales pour l'échange d'informations dans les écosystèmes numériques et la mise en commun des données. Par exemple, certaines parties prenantes se sont demandé dans quelle mesure la part de marché des concurrents qui partagent les données détermine si le groupement serait soumis à l'obligation d'accorder l'accès aux données à des tiers. En d'autres termes, un groupe de petits concurrents mettant en commun leurs données pour obtenir un avantage concurrentiel serait-il obligé de donner accès à leurs données à des concurrents plus importants ? Ces nouvelles tendances posent de nouvelles questions, comme celle de savoir comment déterminer si un groupement de données dispose d'un pouvoir de marché. Une autre question est de savoir si et dans quelle mesure un seuil de part de marché de la sphère de sécurité serait approprié pour une réserve de données. Dans ce cas, la question se pose également de savoir comment la Commission serait en mesure de définir le marché pertinent dans les affaires concernant les réserves de données.

[11] *Le manque de clarté découle de la formulation du paragraphe 285 des lignes directrices horizontales : (…) la politique en matière de DPI devrait exiger des participants souhaitant que leurs DPI soient inclus dans la norme qu'ils fournissent un engagement irrévocable par écrit d'offrir une licence pour leurs DPI essentiels* ***à tous les tiers*** *à des conditions équitables, raisonnables et non discriminatoires ("engagement FRAND") (…). (Soulignement ajouté).*

La numérisation de l'économie crée également des modèles commerciaux plus imbriqués qui ne correspondent plus aux classifications établies (c'est-à-dire les accords verticaux par rapport aux accords de coopération horizontale). La perturbation numérique modifie la séparation claire entre les relations horizontales et verticales dans le cas de modèles commerciaux intégrés: cela est particulièrement pertinent pour les plateformes hybrides, telles que les places de marché en ligne. Selon un certain nombre de parties prenantes, en raison de la progression des écosystèmes numériques, la distinction entre accords horizontaux et verticaux devient moins claire: les lignes directrices horizontales manquent actuellement d'exemples spécifiques concernant les échanges d'informations au sein d'un écosystème et entre plateformes; de tels exemples aideraient les entreprises en renforçant la sécurité juridique.

Au cours des dix dernières années, la poursuite d'objectifs de **durabilité** a gagné en importance pour les autorités, les entreprises et les consommateurs[12]. Comme l'ont souligné plusieurs parties prenantes, l'une des principales lacunes des lignes directrices horizontales est l'absence d'indications sur les accords visant à atteindre des objectifs de durabilité. Cette zone d'ombre est double. D'une part, il s'agit de savoir quel type d'accord peut être considéré comme un accord de coopération horizontale poursuivant un objectif de durabilité, sachant qu'une définition trop large pourrait donner lieu à un phénomène 'd'écoblanchiment'[13]. D'autre part, il existe une incertitude quant à l'évaluation concurrentielle des accords de durabilité entre concurrents. Ils sont actuellement évalués dans le cadre de l'un des types d'accords mentionnés dans les lignes directrices horizontales, tels que les accords de normalisation. Enfin, un certain nombre de parties prenantes ont fait valoir que les lignes directrices horizontales ne fournissent pas d'orientations sur l'évaluation des avantages sociétaux et des gains d'efficacité économique générés par les accords de durabilité (par exemple, la réduction des émissions de gaz, le bien-être des animaux, etc.). À l'heure actuelle, les résultats 'non monétaires' de ces accords ne seraient pas correctement pondérés: l'accent mis sur le court terme (par exemple, l'impact sur les prix des produits) ne tient pas compte des gains d'efficacité environnementale futurs, à plus long terme (par exemple, la réduction des émissions de CO2).

Efficacité

L'incertitude réglementaire concernant les accords de coopération horizontale représente un risque pour les entreprises: ce risque peut se traduire par une augmentation des coûts directs de conseil juridique et économique et/ou par des coûts indirects potentiels, tels que des opportunités manquées, des changements de stratégie d'entreprise ou des amendes potentielles. Ces coûts ne sont pas directement générés par des dispositions spécifiques des REC ou des lignes directrices horizontales, mais ils sont plutôt une conséquence du manque de sécurité juridique perçu.

Si presque toutes les parties prenantes considèrent que les REC et les lignes directrices horizontales sont une source de réduction des coûts en offrant une sécurité juridique accrue, elles ont également identifié des possibilités d'amélioration.

[12] *Dans cette étude, cela signifie des objectifs sociaux, environnementaux et de bien-être animal, bien qu'une définition ne soit pas donnée actuellement dans les lignes directrices horizontales.*
[13] *L'écoblanchiment est le processus qui consiste à donner une fausse impression ou à fournir des informations trompeuses sur la manière dont les produits d'une entreprise sont plus respectueux de l'environnement.*

Ni les entreprises ni les ANC n'ont été en mesure de quantifier les coûts d'application des REC et des lignes directrices. Cependant, plus de la moitié des ANC (17 sur 29) et plusieurs autres parties prenantes ont estimé que les coûts étaient proportionnels aux avantages.

En outre, certaines ANC ont estimé que les coûts augmenteraient si la combinaison des REC et des lignes directrices horizontales n'était pas en place, car les entreprises auraient des dépenses supplémentaires pour des conseils juridiques. L'absence d'harmonisation et la nécessité subséquente de se conformer aux exigences des différentes juridictions nationales augmenteraient également les coûts.

La plupart des parties prenantes n'ont pas été en mesure d'évaluer l'évolution des coûts générés par l'évaluation des accords de coopération horizontale en vertu des REC et des lignes directrices horizontales par rapport au cadre réglementaire précédent. Certaines ANC et parties prenantes ont néanmoins estimé que les coûts pour les entreprises ont diminué, en raison de la sécurité juridique accrue apportée par les REC et les lignes directrices, et de la plus grande facilité d'application du cadre actuel.

3. Zusammenfassung

Zweck der Evaluierung der horizontalen Gruppenfreistellungsverordnungen und der Horizontalleitlinien

Im Jahr 2019 startete die Kommission die Evaluierung der Verordnung (EU) Nr. 1217/2010 der Kommission vom 14. Dezember 2010 über die Anwendung von Artikel 101 Absatz 3 des Vertrags über die Arbeitsweise der Europäischen Union auf Gruppen von Vereinbarungen über Forschung und Entwicklung (die "FuE-Gruppenfreistellungsverordnung") und der Verordnung (EU) Nr. 1218/2010 der Kommission vom 14. Dezember 2010 über die Anwendung von Artikel 101 Absatz 3 des Vertrags über die Arbeitsweise der Europäischen Union auf Gruppen von Spezialisierungsvereinbarungen (die "Spezialisierungs-Gruppenfreistellungsverordnung"), (zusammen im Folgenden "Horizontal-Gruppenfreistellungsverordnungen" oder " HBER"), und der Leitlinien der Kommission zur Anwendbarkeit von Artikel 101 des Vertrags auf Vereinbarungen über horizontale Zusammenarbeit (im Folgenden "Horizontalleitlinien" oder einfach die "Leitlinien").

Zweck dieser Evaluierung ist es, Erkenntnisse über die Funktionsweise der HBER zusammen mit den Horizontalleitlinien zu gewinnen, die der Kommission als Grundlage für die Entscheidung dienen sollen, ob sie die HBER auslaufen lassen, ihre Laufzeit verlängern oder sie überarbeiten soll.

In der Evaluierung wird untersucht, ob die Ziele der HBER und der Horizontalleitlinien während ihrer Geltungsdauer erreicht wurden (Wirksamkeit) und weiterhin angemessen sind (Relevanz) und ob die HBER und die Horizontalleitlinien unter Berücksichtigung der mit ihrer Anwendung verbundenen Kosten und Vorteile ihre Ziele effizient erreicht haben (Effizienz). Ferner wird untersucht, ob die HBER zusammen mit den Horizontalleitlinien einen EU-Mehrwert erbringen (EU-Mehrwert) und mit anderen Kommissionsdokumenten, welche Leitlinien für die Anwendung von Artikel 101 AEUV und damit zusammenhängenden Rechtsvorschriften enthalten, in Einklang stehen (Kohärenz).

Der Zweck der Studie

Diese Studie ist Teil der von der Kommission durchgeführten Evaluierung der HBER und der Horizontalleitlinien. Ziel der Studie ist es, qualitative und quantitative Belege für die Wirksamkeit, Effizienz und Relevanz der HBER und der Horizontalleitlinien zu liefern. Insbesondere soll mit der Studie bewertet werden, ob und inwieweit die HBER und die Horizontalleitlinien mit den jüngsten Entwicklungen übereinstimmen.

Einleitung

Dieser Bericht beantwortet spezifische Fragen der Evaluierung, die sich auf die "Effektivität", "Relevanz" und "Effizienz" der HBERs und der Horizontalleitlinien beziehen. Der Bericht präsentiert die Ergebnisse der Analyse aller Daten, die im Rahmen dieser Studie aus den verschiedenen Datenquellen gesammelt wurden.

Relevante Stakeholder, deren Ansichten für die Studie eingeholt wurden, sind nationale Wettbewerbsbehörden ("NWB"), nationale Gerichte, die für die Durchsetzung der EU-Wettbewerbsregeln zuständig sind, Unternehmen, die an verschiedenen Formen der horizontalen Zusammenarbeit beteiligt sind, Einzelhändler, Handelsverbände, Verbraucherorganisationen und Akademiker mit Fachwissen im EU-Wettbewerbsrecht. Die Analyse der Antworten, die von den

nationalen Wettbewerbsbehörden auf eine spezielle Umfrage gegeben wurden, ermöglichte eine umfassende Kartierung und Bewertung der Arten von horizontalen Kooperationsvereinbarungen, die seit dem 1. Januar 2011 von diesen Behörden identifiziert und analysiert und von den nationalen Gerichten überprüft wurden.

Eine Zusammenarbeit ist "horizontaler Natur", wenn eine Vereinbarung zwischen tatsächlichen oder potenziellen Wettbewerbern geschlossen wird. Die in dieser Studie untersuchten Formen der horizontalen Zusammenarbeit sind Forschungs- und Entwicklungsvereinbarungen ("FuE-Vereinbarungen"), Produktionsvereinbarungen, Einkaufsvereinbarungen, Vereinbarungen über die Vermarktung, den Informationsaustausch und Normungsvereinbarungen.

Die folgenden Absätze enthalten eine Zusammenfassung der wichtigsten Ergebnisse der Studie.

Effektivität

Die für diese Studie gesammelten Erkenntnisse deuten darauf hin, dass die HBER zusammen mit den Horizontalleitlinien insgesamt ein angemessenes Maß an Rechtssicherheit bieten, insbesondere für FuE- und Spezialisierungsvereinbarungen. Diese Gesamteinschätzung ergibt sich aus der Analyse der Antworten der nationalen Wettbewerbsbehörden auf eine von der GD Wettbewerb organisierte Umfrage und der Antworten von KMU auf die *computergestützten Telefoninterviews* ("Computer Assisted Telephone Interviews"; im Folgendenlet "CATI" genannt). Auch Großunternehmen und Wirtschaftsverbände scheinen mit den HBER und den Horizontalleitlinien insgesamt zufrieden zu sein, äußerten aber auch einige Anregungen und Kritik, insbesondere zu den Leitlinien für den Informationsaustausch, die Vereinbarungen über Normen, den gemeinsamen Einkauf und andere Arten von Vereinbarungen, die von den derzeitigen Horizontalleitlinien nicht erfasst werden (z.B. Nachhaltigkeitsvereinbarungen).

Wo die Befragten auf eine gewisse Unklarheit, insbesondere in den Horizontalen Leitlinien, hinwiesen, wurde dies auf einige Faktoren zurückgeführt, die für alle Arten von Vereinbarungen gelten: (i) Herausforderungen bei der Definition der relevanten Märkte, (ii) Herausforderungen bei der Berechnung der Marktanteile der Parteien, (iii) die derzeitigen Safe-Harbour-Marktanteilsschwellen (die entweder als zu niedrig angesehen werden oder nicht für alle Arten von horizontalen Kooperationsvereinbarungen vorgesehen sind) und (iv) die Art der in den Horizontal-Leitlinien angeführten Beispiele, die manchmal als "allgemein", "abstrakt" oder "veraltet" bezeichnet werden, obwohl sie allgemein als nützlich für die Gewährleistung eines hohen Maßes an Rechtssicherheit anerkannt werden.

Die **Definition des relevanten Marktes** ist einer der Aspekte, der von den Beteiligten am häufigsten als Unsicherheitsfaktor genannt wurde. Insbesondere bei FuE-Vereinbarungen erwähnten große Unternehmen, dass es aufgrund der Art dieser Vereinbarungen, die häufig ein Produkt oder einen Markt "schaffen", der zum Zeitpunkt der FuE-Vereinbarung noch nicht existierte, recht schwierig ist, Produkt- und Technologiemärkte zu definieren. Nach Aussage der an den halbstrukturierten Interviews beteiligten Akteure, die FuE-Vereinbarungen geschlossen haben, wurde die FuE-Gruppenfreistellungsverordnung mit Blick auf relativ stabile Märkte verfasst, während die von solchen Vereinbarungen erfasste Forschungstätigkeit in der Praxis dynamischer ist.

Eine weitere Quelle der Rechtsunsicherheit betrifft die Marktdefinition in digitalen Märkten. Letztere sind häufig "Nullpreismärkte"; das Fehlen von Preisen erschwert

die Marktdefinition und die Anwendung der Marktanteilsschwellen. Ebenso merkten die Beteiligten an, dass die Anwendung der Bedingungen für eine Freistellung auf der Grundlage von Marktanteilsschwellen (Artikel 4), z.B. auf dem Telekommunikationsmarkt, irreführend sein könnte: Es könnte schwierig sein, unter eine Freistellung (die nur über Marktanteile definiert wird) zu fallen, da es nur wenige große Akteure gibt, die erhebliche Marktanteile halten. Schließlich argumentierten die Beteiligten, dass in investitionsintensiven Branchen die kritische Masse zur Erzielung langfristiger Wettbewerbsergebnisse möglicherweise nur durch eine horizontale Zusammenarbeit zwischen Wettbewerbern erreicht werden kann: So argumentierten die Beteiligten, dass die Bewertung von Vereinbarungen über die gemeinsame Nutzung von Netzen nicht nur auf der Grundlage von Marktanteilen erfolgen sollte, sondern vielmehr auf wettbewerbsfördernde Aspekte im Zusammenhang mit dieser Art der Zusammenarbeit (z.B. bessere Dienstqualität, schnellere Einführung neuer Technologien, Vorteile für die Verbraucher im Zusammenhang mit Innovationen).

Die Horizontalleitlinien werden auch als sehr nützlich angesehen, um Unternehmen bei der Selbsteinschätzung der Vereinbarungen zu unterstützen, die sie mit ihren Wettbewerbern schließen wollen. Das hohe Risiko von Sanktionen im Falle von Vereinbarungen, die als wettbewerbswidrig angesehen werden, führt jedoch zu einer Tendenz, Vereinbarungen über horizontale Zusammenarbeit auf Fälle zu beschränken, in denen die in den Horizontalleitlinien aufgeführten **Beispiele** besonders klar und passend sind. Dies wird durch einen Mangel an einschlägiger Rechtsprechung des Gerichtshofs der Europäischen Union (EuGH) noch verstärkt, wie einige Anwaltskanzleien anmerkten. Aus diesem Grund argumentierten mehrere Beteiligte, dass die in den Horizontalleitlinien angeführten Beispiele keine ausreichende Orientierungshilfe bieten; sie werden als veraltet (im Vergleich zu den jüngsten Marktentwicklungen), zu allgemein oder zu abstrakt angesehen. In mehreren Fällen wiesen die Unternehmen auf das Fehlen eines Mechanismus hin, der es den Unternehmen ermöglicht, die Kommission und die nationalen Wettbewerbsbehörden vor dem Abschluss von Vereinbarungen über horizontale Zusammenarbeit (informell) zu konsultieren.

Neben den vier oben erwähnten "Querschnittsfragen" (d. h. technische Herausforderungen bei der Definition relevanter Märkte, der Berechnung von Marktanteilen, den derzeitigen Safe-Harbour-Schwellenwerten und dem Fehlen aktualisierter Beispiele in den Leitlinien) werden in der Studie weitere kritische vereinbarungsspezifische Punkte der HBER und der Horizontalleitlinien genannt.

In Bezug auf *FuE-Vereinbarungen* räumten einige Beteiligte zwar ein, dass die FuE-Gruppenfreistellungsverordnung und das entsprechende Kapitel in den Horizontalleitlinien ein angemessenes Maß an Rechtssicherheit bieten, wiesen aber darauf hin, dass ihr technischer Charakter und ihre Komplexität zu Missverständnissen und Fehlinterpretationen führen können. Bedenken und Probleme im Zusammenhang mit der Selbsteinschätzung der Freistellungsvoraussetzungen für FuE-Vereinbarungen sind vor allem auf den Verwaltungsaufwand und den Mangel an technischen Kenntnissen (insbesondere bei KMU) zur Definition von Märkten und zur Berechnung der relevanten Marktanteile zurückzuführen, wie oben beschrieben. Die FuE-Gruppenfreistellungsverordnung wird von einigen Großunternehmen auch als zu streng in Bezug auf die Anforderungen für den Zugang zu geistigem Eigentum nach Artikel 3 und als unklar in Bezug auf die Bedingungen für die gemeinsame Verwertung zur Erfüllung der Anforderungen empfunden.

Was *Spezialisierungsvereinbarungen* betrifft, so wird das Gesamtniveau der Rechtssicherheit, das die Spezialisierungs-Gruppenfreistellungsverordnung (Spezialisierungs-GVO) und das entsprechende Kapitel in den Horizontalleitlinien bieten, als hoch angesehen. Dennoch bleiben bestimmte Aspekte unklar, nämlich die auf Spezialisierungsvereinbarungen anwendbaren Definitionen und das Verhältnis zwischen der Spezialisierungs-GVO und anderen EU-Wettbewerbsrechtsvorschriften (wie der Fusionskontrollverordnung[14], der Technologietransfer-Gruppenfreistellungsverordnung[15] und der Vertikal-Gruppenfreistellungsverordnung[16]). Interessenvertreter, die mit Spezialisierungsvereinbarungen befasst sind, erwähnten, dass eine der Ursachen für die Rechtsunsicherheit die Definition des potenziellen Wettbewerbs ist. Diese Definition wird als zu allgemein angesehen und erlaubt es nicht, die Voraussetzungen zu verstehen, unter denen ein Wettbewerber als "tatsächlich" oder "potenziell" anzusehen ist. Beispielsweise könnte ein Hersteller, der in einem bestimmten nationalen Markt mit dem Vertrieb beginnen möchte, eine Spezialisierungsvereinbarung mit einem bereits in diesem Markt tätigen Vertriebshändler schließen wollen. Die Frage, ob dieser Vertriebshändler als potenzieller Wettbewerber angesehen werden kann, löst Unsicherheit aus.

Ausgehend von den Beiträgen einiger Interessengruppen scheinen die Horizontalleitlinien keine ausreichende Rechtssicherheit in Bezug auf den *Informationsaustausch* zu bieten: Dies könnte sich negativ auf die Schaffung von Effizienzgewinnen und wettbewerbsfördernden Wirkungen auswirken und die Zusammenarbeit zwischen Unternehmen behindern. Die Beteiligten äußerten einige Bedenken in Bezug auf die Behandlung des Informationsaustauschs im Rahmen der Horizontalleitlinien. Sie verwiesen insbesondere auf Unklarheiten hinsichtlich der Art der ausgetauschten Informationen, die zu wettbewerbswidrigen Auswirkungen führen können, des Grades der Datenaggregation, des Alters der ausgetauschten Informationen/Daten und ihrer Häufigkeit. Einige Beteiligte äußerten auch Bedenken hinsichtlich des Informationsaustauschs zwischen Nicht-Vollfunktions-Gemeinschaftsunternehmen und ihren Muttergesellschaften. Sie sind der Ansicht, dass die Horizontalleitlinien keine ausreichende Klarheit über die Art der Informationen schaffen, die eine Muttergesellschaft mit dem Gemeinschaftsunternehmen austauschen darf: Um ihre Investitionen zu überwachen und innerhalb der Grenzen des Wettbewerbsrechts haben Muttergesellschaften ein natürliches Bedürfnis und Interesse, Zugang zu bestimmten strategischen Informationen über das Gemeinschaftsunternehmen zu erhalten. Nach Ansicht der Beteiligten führt eine solche Unklarheit zu erhöhten Kosten und Ineffizienzen, da unnötig vorsichtige Protokolle für den Informationsaustausch erstellt werden.

In ähnlicher Weise erwähnten die Stakeholder einen Mangel an Klarheit bezüglich des Ausmaßes und der Art des Informationsaustausches, der von den Leitlinien im Zusammenhang mit Unternehmensumstrukturierungen abgedeckt wird. Der

[14] *Verordnung (EG) Nr. 139/2004 des Rates vom 20. Januar 2004 über die Kontrolle von Unternehmenszusammenschlüssen ("EG-Fusionskontrollverordnung"), ABl. L 24 vom 29.1.2004, S. 1–22.*
[15] *Verordnung (EU) Nr. 316/2014 der Kommission vom 21. März 2014 über die Anwendung von Artikel 101 Absatz 3 des Vertrags über die Arbeitsweise der Europäischen Union auf Gruppen von Technologietransfer-Vereinbarungen Text von Bedeutung für den EWR, ABl. L 93 vom 28.3.2014, S. 17–23.*
[16] *Verordnung (EU) Nr. 330/2010 der Kommission vom 20. April 2010 über die Anwendung von Artikel 101 Absatz 3 des Vertrags über die Arbeitsweise der Europäischen Union auf Gruppen von vertikalen Vereinbarungen und abgestimmten Verhaltensweisen (Text von Bedeutung für den EWR), ABl. L 102 vom 23.4.2010, S. 1–7.*

Informationsaustausch zwischen dem/den Hauptbeteiligten und dem Unternehmen in der Krise ist für den Erfolg des Umstrukturierungsprozesses von entscheidender Bedeutung: Er ermöglicht die Abwendung einer Insolvenz und kann somit wettbewerbsfördernde Auswirkungen haben, indem er z.B. einem Wettbewerber hilft, auf dem Markt zu bleiben. Umstrukturierungen implizieren jedoch eine komplexe Koordinierung zwischen mehreren an der Transaktion interessierten Akteuren und erfordern einen Informationsaustausch, der von klareren Leitlinien oder sogar einer Reihe von Beispielen in den Horizontalleitlinien profitieren könnte.

Ein letzter Punkt, der sich aus den Diskussionen mit den Interessengruppen ergab, betrifft die Bedingungen, unter denen die Leitlinien einen Informationsaustausch als "bezweckten" Verstoß qualifizieren. Die Interessengruppen sind der Auffassung, dass in Fällen eines "einfachen" Informationsaustauschs (d. h. nicht in Verbindung mit anderen Formen der horizontalen Zusammenarbeit) die Bewertung auf Einzelfallbasis - d. h. als Beschränkung "nach den Auswirkungen" - erfolgen sollte, während Fälle eines Informationsaustauschs zwischen Wettbewerbern über künftiges Marktverhalten als Beschränkung "nach dem Zweck" eingestuft werden sollten. Obwohl in den Horizontalleitlinien klargestellt wird, dass der Informationsaustausch zwischen Wettbewerbern über "individualisierte Daten über beabsichtigte künftige Preise oder Mengen" als "bezweckte" Wettbewerbsbeschränkung anzusehen ist (Rdnr. 74), wurde von einer Reihe von Interessengruppen (insbesondere von Großunternehmen) vorgebracht, dass unklar bleibt, welche Arten von Informationsaustausch als "bezweckte" Beschränkung anzusehen sind.

Viele der befragten Interessengruppen gaben an, dass die Horizontalleitlinien insgesamt ein angemessenes Maß an Rechtssicherheit für *Vereinbarungen über den gemeinsamen Einkauf* gewährleisten, es ihnen aber in einigen Punkten noch an Klarheit mangelt. Die Horizontalleitlinien unterscheiden nicht klar genug zwischen einer rechtmäßigen gemeinsamen Einkaufsvereinbarung und einem Einkäuferkartell, da beide eine Vereinbarung über den Einkaufspreis beinhalten können. Nach Ansicht einiger Beteiligter berücksichtigen die Horizontalleitlinien auch nicht ausreichend die möglichen schädlichen Auswirkungen bestimmter Praktiken von Einzelhandelsallianzen, wie z.B. so genannte kollektive Gebührenextraktionsmechanismen und kollektive Auslistungen. Ebenso würden sie nicht ausreichend auf die möglichen negativen Auswirkungen von Vereinbarungen über den gemeinsamen Einkauf auf Lieferanten und Wettbewerber eingehen.

Was *Vermarktungsvereinbarungen* betrifft, so zeigen die Ergebnisse der Studie, dass die Horizontalleitlinien ein gewisses Maß an Rechtssicherheit bieten. Allerdings werden die Regeln der Horizontalleitlinien von den Beteiligten als recht komplex empfunden. Die von den Interessengruppen hervorgehobenen Hauptunsicherheiten beziehen sich auf die Definition des Begriffs "potenzieller Wettbewerb" in den Horizontalleitlinien und auf den möglichen Einsatz neuer Technologien im Rahmen von Vermarktungsvereinbarungen, z.B. die Verwendung von Preisalgorithmen. Schließlich brachten einige Interessengruppen vor, dass es den Horizontalleitlinien an Klarheit in Bezug auf die Bewertung gemeinsamer Angebote von Wettbewerbern (d. h. die Bildung eines Konsortiums zur Teilnahme an einer öffentlichen Ausschreibung) fehle. Insbesondere wird in den Leitlinien derzeit nicht geklärt, welche wettbewerbswidrigen und welche wettbewerbsfördernden Auswirkungen ein solches gemeinsames Bieten hat.

In Bezug auf *Standardisierungsvereinbarungen* besteht die allgemeine Auffassung, dass die Horizontalleitlinien diese Art der Zusammenarbeit angemessen behandeln

und ausreichende Rechtssicherheit bieten, insbesondere weil sich ihre Behandlung im Vergleich zur vorherigen Fassung der Horizontalleitlinien nicht geändert hat. Dies gewährleistet Stabilität und Sicherheit für die Marktteilnehmer. Mehrere Beteiligte wiesen jedoch auf die zunehmend divergierenden Interessen zwischen den Inhabern von standardessenziellen Patenten ("SEPs") und den Implementierern von Normen hin. Auf der einen Seite argumentieren die Implementierer, dass der SEP-Inhaber verpflichtet ist, sein SEP an jeden willigen Lizenznehmer zu fairen, angemessenen und nichtdiskriminierenden ("fair, reasonable and non-discriminatory - FRAND") Bedingungen zu lizenzieren. Auf der anderen Seite behaupten die SEP-Inhaber, dass die FRAND-Verpflichtung nicht ihre Freiheit beeinträchtigt, zu entscheiden, auf welcher Ebene der Lieferkette sie ihr SEP lizenzieren können. Insbesondere ziehen es die SEP-Inhaber vor, ihre SEPs an die Hersteller der Produkte der Endnutzer zu lizenzieren und nicht an die Hersteller von Komponenten. Die Debatte über die Ebene in der Lieferkette, auf der eine Lizenz erteilt werden sollte, ist in der Informations- und Kommunikationstechnologie ("IKT") und der Automobilindustrie besonders intensiv. Beide Seiten (SEP-Inhaber und Umsetzer) machten geltend, dass es dem derzeitigen Wortlaut der Horizontalleitlinien an Klarheit mangelt.[17]

Relevanz

Die Digitalisierung der Wirtschaft und die zunehmende Bedeutung von Nachhaltigkeitszielen sind die beiden wichtigsten Trends, die von den Interessenträgern als Auswirkungen auf die Relevanz der Ziele des aktuellen Rechtsrahmens für horizontale Kooperationsvereinbarungen genannt wurden.

Laut den befragten Interessenvertretern (insbesondere Großunternehmen) verringern **neue digitale Trends** die Relevanz der Horizontalleitlinien bei der Behandlung von *Kommerzialisierungsvereinbarungen*. Neue Formen der Zusammenarbeit wie die gemeinsame Nutzung von Infrastrukturen, die gemeinsame Nutzung von Daten und das Daten-Pooling werden derzeit in dem Kapitel der Horizontalleitlinien über Kommerzialisierungsvereinbarungen nicht behandelt. Außerdem könnten, wie von einem Verband der Rundfunkindustrie angemerkt, Partnerschaften für die Bereitstellung von Medieninhalten (z.B. Partnerschaften für die Schaffung gemeinsamer Video-On-Demand-Plattformen) als neue Arten von Vermarktungsvereinbarungen genannt werden, die Innovation und Qualitätsinhalte fördern.

Nach Ansicht einer Reihe von Interessenvertretern wirkt sich die Digitalisierung der Wirtschaft auch auf die Relevanz der Horizontalleitlinien in Bezug auf die Praktiken des *Informationsaustauschs* aus. Die zunehmende Bedeutung, die Daten im letzten Jahrzehnt gewonnen haben, führt zu Unsicherheiten. Insbesondere erwähnten die Interessengruppen den Mangel an Klarheit in Fällen von Informationsaustausch in digitalen Geschäftsmodellen wie Plattformen, Ökosystemen und hybriden Kooperationsmodellen; Kombinationen von horizontalen und vertikalen Beziehungen für den Informationsaustausch in digitalen Ökosystemen und Datenpooling. So fragten einige Interessengruppen, inwieweit der Marktanteil der Wettbewerber, die die Daten gemeinsam nutzen, darüber entscheidet, ob der Pool einer Verpflichtung

[17] *Der Mangel an Klarheit resultiert aus der Formulierung in Absatz 285 der Horizontalleitlinien: (...) Zur Gewährleistung eines tatsächlichen Zugangs zu der Norm müsste das Konzept für Rechte des geistigen Eigentums auch vorsehen, dass die Beteiligten (wenn ihre Rechte des geistigen Eigentums Bestandteil der Norm werden sollen) eine unwiderrufliche schriftliche Verpflichtung abgeben müssen,* ***Dritten*** *zu fairen, zumutbaren und diskriminierungsfreien Bedingungen Lizenzen für diese Rechte zu erteilen („FRAND-Selbstverpflichtung") (...). (Hervorhebung hinzugefügt.*

unterliegt, Dritten Zugang zu den Daten zu gewähren. Mit anderen Worten: Wäre eine Gruppe kleinerer Wettbewerber, die ihre Daten zusammenlegen, um einen Wettbewerbsvorteil zu erlangen, verpflichtet, größeren Wettbewerbern Zugang zu ihren Daten zu gewähren? Diese neuen Trends werfen neue Fragen auf, z.B. wie festgestellt werden kann, ob ein Datenpool über Marktmacht verfügt. Eine weitere Frage ist, ob und inwieweit eine Safe-Harbour-Marktanteilsschwelle für einen Datenpool angemessen wäre. In einem solchen Fall stellt sich auch die Frage, wie die Kommission in Fällen, die Datenpools betreffen, den relevanten Markt definieren kann.

Die Digitalisierung der Wirtschaft führt auch zu stärker verflochtenen Geschäftsmodellen, die nicht mehr in die etablierten Klassifizierungen passen (d. h. vertikale Vereinbarungen versus horizontale Kooperationsvereinbarungen). Die digitale Disruption verändert die klare Trennung zwischen horizontalen und vertikalen Beziehungen im Falle von integrierten Geschäftsmodellen: Dies ist besonders relevant für hybride Plattformen, wie z.B. Online-Marktplätze. Laut einer Reihe von Stakeholdern wird die Unterscheidung zwischen horizontalen und vertikalen Vereinbarungen aufgrund der Entwicklung digitaler Ökosysteme immer unschärfer: In den Horizontalleitlinien fehlen derzeit konkrete Beispiele für den Informationsaustausch innerhalb von Ökosystemen und Plattformen; solche Beispiele würden Unternehmen helfen, indem sie die Rechtssicherheit erhöhen.

In den letzten 10 Jahren hat die Verfolgung von **Nachhaltigkeitszielen** für Behörden, Unternehmen und Verbraucher zunehmend an Bedeutung gewonnen[18]. Wie von mehreren Stakeholdern angemerkt, ist eine der größten Lücken in den Horizontalleitlinien das Fehlen von Leitlinien für Vereinbarungen, die auf die Erreichung von Nachhaltigkeitszielen abzielen. Diese Grauzone hat zwei Aspekte. Einerseits stellt sich die Frage, welche Arten von Vereinbarungen als horizontale Kooperationsvereinbarungen mit Nachhaltigkeitszielen gelten, wobei zu bedenken ist, dass eine zu weit gefasste Definition das Phänomen des "Greenwashing"[19] ermöglichen würde. Andererseits besteht Unsicherheit über die wettbewerbsrechtliche Beurteilung von Nachhaltigkeitsvereinbarungen zwischen Wettbewerbern. Derzeit werden sie unter einer der in den Horizontalleitlinien genannten Arten von Vereinbarungen, wie z.B. Standardisierungsvereinbarungen, bewertet. Schließlich wurde von einer Reihe von Interessengruppen vorgebracht, dass die Horizontalleitlinien keine Anhaltspunkte für die Bewertung des gesellschaftlichen Nutzens und der wirtschaftlichen Effizienzgewinne bieten, die durch Nachhaltigkeitsvereinbarungen entstehen (z.B. Verringerung der Gasemissionen, Tierschutz usw.). Derzeit würden "nicht-monetäre" Ergebnisse solcher Vereinbarungen nicht angemessen gewichtet: Der Fokus auf das Kurzfristige (z.B. die Auswirkungen auf die Produktpreise) erfasst nicht die zukünftigen, längerfristigen Umwelteffizienzen (z.B. die Reduzierung der CO2-Emissionen).

Effizienz

Rechtsunsicherheit in Bezug auf Vereinbarungen über horizontale Zusammenarbeit stellt ein Risiko für Unternehmen dar: Dieses Risiko kann sich in erhöhten direkten Kosten für rechtliche und wirtschaftliche Beratung und/oder in potenziellen indirekten Kosten, wie verpassten Chancen, Änderungen der Unternehmensstrategie oder

[18] *In dieser Studie sind damit soziale, ökologische und tierschutzbezogene Ziele gemeint, obwohl eine Definition in den Horizontalleitlinien derzeit nicht gegeben ist.*

[19] *"Greenwashing" ist der Vorgang, bei dem entweder ein falscher Eindruck vermittelt oder irreführende Informationen darüber gegeben werden, dass die Produkte eines Unternehmens umweltfreundlicher sind.*

potenziellen Geldbußen, niederschlagen. Diese Kosten werden nicht direkt durch spezifische Bestimmungen der HBER oder der Horizontalleitlinien verursacht, sondern sind vielmehr eine Folge der wahrgenommenen mangelnden Rechtssicherheit.

Zwar waren fast alle Beteiligten der Ansicht, dass die HBER und die Horizontalleitlinien eine Quelle der Kostensenkung sind, da sie für mehr Rechtssicherheit sorgen, doch sie sahen auch Raum für Verbesserungen.

Weder die Unternehmen noch die nationalen Wettbewerbsbehörden waren in der Lage, die Kosten für die Anwendung der HBER und der Leitlinien zu beziffern. Mehr als die Hälfte der NWB (17 von 29) und mehrere andere Stakeholder schätzten jedoch, dass die Kosten in einem angemessenen Verhältnis zum Nutzen stehen.

Darüber hinaus waren einige NWBs der Ansicht, dass die Kosten steigen würden, wenn die Kombination aus den HBER und den Horizontalleitlinien nicht vorhanden wäre, da den Unternehmen zusätzliche Ausgaben für Rechtsberatung entstehen würden. Auch die fehlende Harmonisierung und die daraus resultierende Notwendigkeit, die Anforderungen in den verschiedenen nationalen Rechtsordnungen zu erfüllen, würde die Kosten erhöhen.

Die meisten Stakeholder waren nicht in der Lage zu beurteilen, wie sich die Kosten, die durch die Prüfung von Vereinbarungen über horizontale Zusammenarbeit im Rahmen der HBER und der Horizontalleitlinien entstehen, im Vergleich zum vorherigen Rechtsrahmen entwickelt haben. Einige nationale Wettbewerbsbehörden und Interessenvertreter waren jedoch der Ansicht, dass die Kosten für Unternehmen aufgrund der größeren Rechtssicherheit, die die HBER und die Leitlinien bieten, und der einfacheren Anwendung des aktuellen Rechtsrahmens gesunken sind.

Part 1: Introduction and study activities

4. Introduction and objectives

4.1. Structure of this report

This final report provides answers to the proposed evaluation questions as specified in the Term of Reference for this study, namely whether the objectives of the HBERs and the Horizontal Guidelines were met during the period of its application (effectiveness) and continue to be appropriate (relevance), and whether the HBERs and the Horizontal Guidelines, taking account of the costs and benefits associated with applying them, were efficient in achieving their objectives (efficiency).

These results aim at supporting the Commission's evaluation of Regulations (EC) No 1217/2010[20] and 1218/2010[21] (hereinafter 'Horizontal Block Exemption Regulations' or 'HBERs'), and of the Commission's Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union (hereafter 'TFUE') to Horizontal Cooperation Agreements (hereinafter 'Horizontal Guidelines').[22]

The structure of the present report is the following:

Part 1 – Methodology: in this section, the research team briefly presents the methodology adopted to conduct the five tasks foreseen for the implementation of the study, namely:

- Task 1: Analysis of cases of NCAs, national judgments and NCA guidelines;
- Task 2: (analysis on the) Incidence of horizontal cooperation;
- Task 3: (analysis of) Cost savings generated by the HBERs and the Horizontal Guidelines;
- Task 4: (views of) Consumer organisations;
- Task 5: (analysis of) Specific types of horizontal cooperation agreements.

After describing the objectives and the intervention logic of the regulations, this section presents the evaluation matrix, the core of the methodology that guided the analysis and explains how the activities conducted under the five tasks informed the answers to the proposed evaluation questions.

The sources for this study were multiple: a literature review of most relevant legal and economic papers on horizontal cooperation agreements, grey literature (e.g. relevant reports and articles); desk research, which included the analysis of the responses by NCAs to a survey launched by DG Competition[23], the analysis of the

[20] *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-335/36, 18.12.2010.*
[21] *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 335/43, 18.12.2010.*
[22] *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. OJ C-11/1, 14.1.2011.*
[23] *Summary of the contributions of National Competition Authorities to the evaluation of the R&D and the Specialisation Block Exemption Regulations and the Commission Guidelines on Horizontal Cooperation Agreements. Results available at: https://ec.europa.eu/competition/consultations/2019_hbers/NCA_summary.pdf*

most relevant cases by NCAs and of national court proceedings on horizontal cooperation agreements.

The study included also extensive primary data collection through interviews with stakeholders (enterprises, businesses associations, law firms and consumer organisation) and a Computer Assisted Telephone Interview ('CATI') survey conducted in 6 Member States targeting SMEs and large enterprises. Additional information was collected through the analysis of the position papers and contributions provided by participants to the Open Public Consultation (hereafter 'OPC') launched in November 2019 by the European Commission for the evaluation of the R&D and Specialisation Block Exemption Regulations and related Horizontal Guidelines.[24] This section also provides some statistics on participation in the primary data collection activities.

Part 2 – Evaluation questions: this section addresses the evaluation questions of the study. The first part is dedicated to the effectiveness and relevance criteria; the second part is dedicated to efficiency. When possible, the sections provide an overall answer to the evaluation questions with a summary of the findings covering all types of agreements (explicitly mentioned or not in the Horizontal Guidelines) followed by a focus on the different types of horizontal cooperation agreements (explicitly mentioned or not).

Annexes: the annexes include a statistical summary of the responses provided by participants in the CATI survey, the case studies, the questionnaires used for the primary data collection activities (i.e. CATI and semi-structured interviews) and the list of relevant NCA and national courts cases.

Box 1: Description of the topics covered by the project tasks.

The overall study was structured into five main Tasks. The topics covered by each task are presented in this box. The evaluation matrix presented in Table 1 shows the link between the tasks, topics and how these feed into the study evaluation questions.

Task 1: Analysis of cases of NCAs, national judgments and NCA guidelines

Topic 1: Based on replies received to Commission's questionnaire, analysis of the competition cases concerning horizontal cooperation agreements that NCAs are dealing or have dealt with (for example, prohibitions, commitments, rejections of complaints, discontinued cases, ongoing investigations, …) since 1 January 2011 (referred to as 'NCA cases').

Topic 2: Analysis of competition cases concerning horizontal cooperation agreements that were the topic of judgments by the national courts on infringement, commitment, rejection or other decisions of NCAs since 1 January 2011 (referred to as 'national judgments on NCA decisions').

Topic 3: Analysis of horizontal cooperation agreements that were the topic of judgments by the national courts not listed above that related to the application of the HBERs since 1 January 2011 (referred to as 'other national judgments').

Topic 4: Analysis of the assessment of the horizontal cooperation agreements in the above cases.

[24] *Review of the two Horizontal Block Exemption Regulations, Public consultation launched on 6 November 2019 and concluded on the 12 February 2020. Results available at: https://ec.europa.eu/competition/consultations/2019_hbers/index_en.html*

Topic 5: Based on replies received from NCAs to the Commission's questionnaire, assessment of the costs and benefits of the application of the HBERs for the NCAs.

Topic 6: Analysis of national guidelines issued by NCAs on horizontal cooperation agreements (referred to as 'NCA guidelines').

Topic 7: Identification of elements of the NCA cases, national judgments and NCA guidelines that are currently not addressed in the HBERs or in the Horizontal Guidelines.

Topic 8: Assessment of the consistency across the decisions by NCAs, judgments by national courts on these decisions and NCA guidelines in the interpretation of the current rules (in the HBERs and the Horizontal Guidelines).

Task 2: Incidence of horizontal cooperation

Topic 1: Analysis of the types of horizontal cooperation agreements that are concluded.

Topic 2: Analysis of typical combinations of different forms of horizontal cooperation agreements.

Topic 3: Analysis on how the prevalence of different types of horizontal cooperation agreements has evolved since 1 January 2011 and across different sectors.

Task 3: Cost savings generated by the HBERs and the Horizontal Guidelines

Topic 1: As a complement to the public consultation and Task 1, does the assessment of whether the HBERs, together with the Horizontal Guidelines, is applicable to certain horizontal cooperation agreements, generate costs proportionate to the benefits they bring?

Topic 2: Analysis of the extent to which the HBERs and the Horizontal Guidelines result in cost savings for companies when assessing compliance with Article 101 of the Treaty as compared to a counterfactual without the HBERs and only the Horizontal Guidelines in place.

Topic 3: Analysis of the costs incurred by companies when assessing compliance of their horizontal cooperation agreements with Article 101 of the Treaty, including whether they are lower under the current legal regime as compared with the previous legislative framework (Commission Regulations (EC) No 2658-2659/2000 and related Horizontal Guidelines).

Task 4: Consumer organisations

Topic 1: Ask different consumer organisations, including specialised consumer organisations about their views on the HBERs and the Horizontal Guidelines.

Task 5: Specific types of horizontal cooperation agreements

Topic 1: Joint purchasing agreements: Describe European retail alliances (different supermarkets purchasing together) and their effect on retail prices, product portfolios, profit margins and, ultimately, consumers.

Topic 2: Sustainability agreements: analyse whether the current Horizontal Guidelines offer sufficient guidance to assess consumer benefits resulting from the agreements.

Topic 3: Information exchange: Analyse whether data sharing is common in industries beyond banking and insurance; Analyse whether the current focus of the Horizontal Guidelines on the potential by object nature of information exchange concerning future conduct (paras 73-74) is still relevant.

4.2. Objectives of the study

The HBERs and the Horizontal Guidelines recognise that horizontal cooperation "*can be a means to share risk, save costs, increase investments, pool know-how, enhance*

product quality and variety, and launch innovation faster". The purpose of the HBERs and the related Guidelines is to make it easier for undertakings to cooperate in ways that are economically desirable and without adverse effects from the point of view of competition policy.

The objective of this study is to examine the cases and market practices where horizontal cooperation agreements (e.g. for joint R&D, production, information exchange, purchasing, commercialisation or standardisation) occur and provide support to the Directorate General for Competition ('DG COMP') in assessing if the legislation still meets its objectives and remains in line with market developments.

The study provides findings that are valid for all EU Member States. The proposed methodology to select a geographically balanced sample of relevant stakeholders (national competition authorities, national courts competent to apply EU competition law, companies that carry out research and development activities, companies that engage in production of goods, companies that engage in the delivery of services, retailers, other relevant stakeholders that are parties to horizontal cooperation agreements, trade associations, consumer organizations, and academics with a focus on EU competition law and notably on horizontal cooperation agreements) is tailored to each task and it is presented accordingly in the task-specific sections of this document.

4.3. Intervention logic

The evaluation looks at the functioning of the HBERs, together with the Horizontal Guidelines, as a whole (i.e. the **Intervention**).

Figure 1: Intervention logic for the HBERs, together with the Horizontal Guidelines

Needs

Extension of the scope of the Horizontal Guidelines to different, not currently covered, types of cooperation and greater guidance for specific issues (e.g. standardisation and information exchange).

▼

General objective of the Intervention (The HBERs and the Horizontal Guidelines)

The Intervention's **general objective is to make it easier for undertakings to co-operate in ways that are economically desirable and without adverse effects from the point of view of competition policy.**

Specific objectives:

- Ensure effective protection of competition;
- Provide adequate legal certainty for undertakings regarding horizontal cooperation agreements;
- Simplify the application by public authorities.

▼

Tools

- Commission's Council-enabled regulatory power to block exempt horizontal cooperation agreements when it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty (i.e. where the benefits to consumers outweigh any harm to consumers).
- Commission's general power to issue guidelines interpreting competition law.

▼

Activities / Inputs

The update of the HBERs and Guidelines on horizontal cooperation agreements from 2010/2011.

▼

Output

Companies self-assessing and concluding or desisting from concluding horizontal cooperation agreements.

▼

Results

- No anti-competitive horizontal cooperation agreements
- Adequate legal certainty for horizontal cooperation agreements
- Simplified application by public authorities

▼

Impacts

Increased competition in the internal market through pro-competitive horizontal cooperation agreements for the benefit of European consumers (i.e. where beneficial horizontal cooperation agreements take place and the harmful ones do not happen)

▲

External Factors

- Other regulatory interventions of the Commission on the Single Market;
- New market trends and technological development can negatively affect the impact of the Intervention, e.g. if the definitions and conditions of the HBERs and of the Horizontal Guidelines are not capable of properly capturing new business models and market realities.

4.4. Evaluation matrix

The evaluation matrix presented in Table 1 summarises the approach used to answer the evaluation questions of this study.

Table 1: Evaluation matrix

Evaluation question	Evaluation sub-questions	Judgment criteria	Evidence and analysis required	Main Task / Topic[25]	Data sources and triangulation
Effectiveness	EQ1. What type of horizontal cooperation agreements have been identified by NCAs and national courts since 1 January 2011, and how were they assessed?	The provisions of the HBERs and Horizontal Guidelines have provided adequate legal certainty for undertakings regarding horizontal cooperation agreements and facilitate enforcement by NCAs.	• Analysis of replies by NCAs to the DG COMP questionnaire, list of competition cases on horizontal cooperation agreements provided by NCAs and selected by research team. • Analysis of the judgments. • Analysis of national guidelines issued by NCAs on horizontal cooperation agreements.	• Task 1 / Topics 1, 2, 3, 4, 6	• NCAs' replies to DG COMP questionnaire; • Follow-up telephone interviews where required; • Desk research of available sources reporting on NCA cases, NCA guidelines and national court judgments.
	EQ2. What is the level of legal certainty that the HBERs and the Horizontal Guidelines provide for the purpose of assessing whether horizontal cooperation agreements are compliant with Article 101 of the Treaty (i.e. are the rules clear and comprehensible, and do they allow undertakings to understand and predict the legal consequences)?	The HBERs and the Horizontal Guidelines provide a higher degree of legal certainty (clarity of rules which allows undertakings to take appropriate business decisions on the horizontal cooperation agreements). Consistency on interpretation by NCAs, judgments by national courts and NCA guidelines.	• Analysis of the consistency across the decisions by NCAs, judgments by national courts and the NCA guidelines in the interpretation of current rules. • List and analysis of the types of horizontal cooperation agreements emerging from the stakeholders' consultation, the OPC and Task 1 analysis. • Analysis of the typical combinations of different horizontal cooperation agreements. • Analysis of the views of consumer organisations on the HBERs and the Horizontal Guidelines. • Analysis of joint purchasing agreements and their effects on retail prices, product portfolios, profit margins and effects on consumers. • Analysis of sustainability agreements and assessment of the	• Task 1 / Topic 8 • Task 2 / Topics 1, 2 • Task 4 / Topic 1 • Task 5 / Topics 1, 2, 3 (3.1,3.2)	• Desk research on relevant literature and empirical research; • Desk research of available sources reporting on NCA cases, NCA guidelines and national court judgments; • Desk research on market practices on horizontal cooperation agreements; • NCAs' replies to DG COMP questionnaire; • Follow-up telephone interviews when required; • Interviews in six Member States with relevant stakeholders; • CAT Interviews with SMEs; • Interviews with consumer organisations (including specialised ones);

[25] *The topics, as provided in the Terms of Reference of the present study, are described in Box 1.*

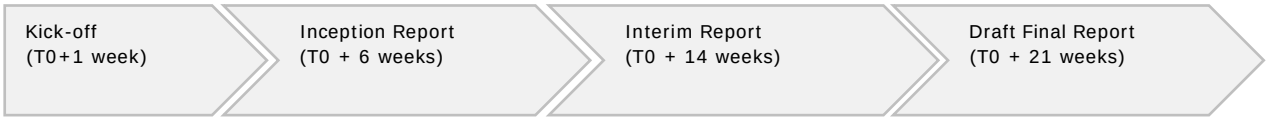
Evaluation question	Evaluation sub-questions	Judgment criteria	Evidence and analysis required	Main Task / Topic[25]	Data sources and triangulation
			guidance provided by HBERs to assess consumer benefits resulting from agreements. • Analysis of information exchange and assessment of the relevance of paragraphs 73-74 of the Horizontal Guidelines.		• Interviews with stakeholders party in sustainable agreements; • Interviews with stakeholders party in information exchange agreements.
Efficiency	EQ3. Does the assessment of whether the HBERs, together with the Horizontal Guidelines, are applicable to certain horizontal cooperation agreements, generate costs proportionate to the benefits they bring?	The HBERs and the Horizontal Guidelines are perceived by businesses, practitioners, experts and NCAs as having a positive balance between generated costs and benefits.	• Analysis of NCAs' replies to DG COMP questionnaire on costs generated and the related benefits generated by HBERs and the Horizontal Guidelines. • Assessment on whether the HBERs and the Horizontal Guidelines generate costs proportionate to the benefits they bring. • Analysis of the views of consumer organisations on the HBERs and the Horizontal Guidelines.	• Task 1 / Topic 5 • Task 3 / Topic 1 • Task 4 / Topic 1	• NCAs' replies to DG COMP questionnaire; • Follow-up telephone interviews when required; • Desk research of available sources reporting on NCA cases, NCA guidelines and national court judgments; • Case studies; • Interviews with businesses and business associations; • CAT Interviews with SMEs.
	EQ4. Would the costs of ensuring compliance of horizontal cooperation agreements with Article 101 of the Treaty have increased if no HBERs and Horizontal Guidelines had been in place?	The HBERs and the Horizontal Guidelines have generated an overall positive effect on costs (either cost reduction or benefits greater than costs) in comparison to the counterfactual hypothesis of absence of the regulations and guidelines.	• Analysis of NCA replies on questions related to costs in case of absence of HBERs and related horizontal guidelines. • Evaluation of the costs incurred by operators when assessing compliance to Article 101 of the Treaty under the hypothesis of non-existence of HBERs and Horizontal Guidelines. • Analysis of the views of consumer organisations on the HBERs and the Horizontal Guidelines.	• Task 1 / Topic 5.1 • Task 3 / Topic 2 • Task 4 / Topic 1	• NCAs' replies to DG COMP questionnaire; • Follow-up telephone interviews when required; • Desk research of available sources reporting on NCA cases, NCA guidelines and national court judgments; • Case studies; • Interviews with businesses and business associations; • CAT Interviews with SMEs.
	EQ5. Have the costs generated by the application of the HBERs	The HBERs and the Horizontal Guidelines have improved the legal	• Analysis of NCA replies on questions related to costs in	• Task 1 / Topic 5.2	• NCAs' replies to DG COMP questionnaire;

Evaluation question	Evaluation sub-questions	Judgment criteria	Evidence and analysis required	Main Task / Topic[25]	Data sources and triangulation
	and the Horizontal Guidelines increased as compared to the previous legislative framework (Commission Regulations (EC) No 2658-2659/2000 and related horizontal guidelines)?	framework since their introduction generating larger benefits than costs in comparison to the previous legal framework.	comparison to previous legislative framework. • Evaluation of the costs incurred by operators when assessing compliance to Article101 of the Treaty under the previous legal framework. • Analysis of the views of consumer organisations on the HBERs and the Horizontal Guidelines.	• Task 3 / Topic 3 • Task 4 / Topic 1	• Follow-up telephone interviews where required; • Desk research of available sources reporting on NCA cases, NCA guidelines and national court judgments. • Case studies; • Interviews with businesses and business associations; • CAT Interviews with SMEs.
Relevance	EQ6. How has the prevalence of different types of horizontal cooperation agreements evolved since 1st January 2011?	Degree to which the HBERs and the Horizontal Guidelines have been applicable to the evolution of the types of horizontal cooperation agreements since 2011.	• Analyse how the prevalence of different types of horizontal cooperation agreements has evolved since 1st January 2011 and across different sectors. • Analysis of the views of consumer organisations on the HBERs and the Horizontal Guidelines.	• Task 2 / Topic 1 • Task 2 / Topic 3 • Task 4 / Topic 1	• Interviews in 6 MS with relevant stakeholders; • CAT Interviews with SMEs; • Interviews with consumer organisations.
	EQ7. Are there specific types of horizontal cooperation agreements that are not covered by the Horizontal Guidelines, but where more legal certainty would be required?	Degree to which the HBERs and the Horizontal Guidelines have covered market practices on horizontal cooperation agreements. Assessment of the legal certainty needed for those agreements not covered.	• Elements of the NCA cases, national court judgments and NCA guidelines currently not addressed in the HBERs or Horizontal Guidelines. • Analysis of the views of consumer organisations on the HBERs and the Horizontal Guidelines.	• Task 1 / Topic 7 • Task 2 / Topic 1 • Task 4 / Topic 1 • Task 5 / Topic 2	• NCAs' replies to DG COMP questionnaire; • Follow-up telephone interviews where required; • Desk research of available sources reporting on NCA cases, NCA guidelines and national court judgments; • Interviews in six Member States with relevant stakeholders; • CAT Interviews with SMEs, • Interviews with consumer organisations.

5. Summary of the activities performed for this study

The Final Report presents all the results of the study and the responses to the evaluation questions. Figure 2 below shows the project roadmap that led to this report.

Figure 2 - Project roadmap



	PHASE 0: KICK-OFF	PHASE 1: DESK RESEARCH	PHASE 2: TOOLS' DEVELOPMENT	PHASE 3: DATA COLLECTION	PHASE 4: DATA ANALYSIS	PHASE 5: TRIANGULATION	PHASE 6: RESPONSE TO EQs
PHASE DESCRIPTION	Discussion on the methodology, the stakeholders' consultation strategy, the approach to the evaluation plan and the data sources.	Literature review on HBER and related horizontal guidelines and mapping of the relevant data sources.	Analysis of the HBERs and the Horizontal Guidelines, development of the questionnaires needed to collect the additional information required to answer the specific evaluation questions.	CATI fieldwork In-depth interviews Finalisation of database for legal analysis with responses by NCAs. Identification of relevant court cases.	Analysis of CATI responses Analysis of in-depth interviews Analysis of the responses provided by the NCAs and of the relevant court cases	During this phase the data collected from different sources are analysed in conjunction (triangulation of evidence). This allows for a consistent response to the evaluation questions.	The final phase in which the actual evaluation questions are answered based on the output of the triangulation phase.
Deliverables	Minutes of the kick-off meeting and related review of the methodology.	Desk research presented and literature review presented in the inception report.	Surveys for CAT and in-depth interviews presented in Annex II of the inception report	Preliminary insights by task and by type of activity as presented in the interim report.		Answer to the evaluation questions presented in this Final Report.	

5.1. Analysis of NCA decisions, national court judgments and NCA guidelines

5.1.1. Description of the activities

The focus of the analysis was to assess the approach followed by the NCAs and by national courts of the EU27, the UK[26] and Norway in dealing with horizontal cooperation agreements. In particular, the research team has analysed NCA cases, appeals against NCA decisions before the competent national courts and independent private enforcement actions concerning horizontal cooperation agreements that occurred in the time period between 1 January 2011 and 21 March 2020 - i.e. the period of enforcement of the HBERs and the Horizontal Guidelines.

The objectives of this assessment were two-fold:

- to assess how NCAs and national courts have enforced EU competition rules *vis-à-vis* horizontal cooperation agreements; and
- to identify cases involving types of horizontal cooperation agreements that are currently not dealt with by the HBERs and/or the Horizontal Guidelines.

The activities performed were the following:

- processing the NCAs' replies to the European Commission's questionnaires that were submitted by 8 April 2020;
- analysis of the NCAs' cases and national court judgments, supported by the analysis of NCA guidelines on horizontal cooperation agreements;

[26] *The UK was an EU Member State until 31 January 2020, i.e. most of the reporting period for this evaluation study.*

- identification of conclusions based on the analysis of the NCAs' cases and national court judgments, supported by data on the costs and benefits that the HBERs and the Horizontal Guidelines generate for the NCAs, as well as data on legal certainty reported by the NCAs.

5.1.2. Processing of the NCAs' replies to the European Commission's questionnaire and identification of national courts' rulings

The research team collected information concerning 202 NCA and national court cases. This number includes investigations reported by the NCAs from 29 countries (i.e. EU27, the UK and Norway) to the survey as well as additional court rulings identified through desk research. The reported investigations include both proceedings leading to a formal NCA decision, but also NCA investigations that were discontinued (e.g. for lack of evidence) and also agreements the NCAs looked into informally, without launching formal proceedings.

After receiving responses to the surveys from all NCAs, the research team conducted complementary desk research to identify national court rulings concerning horizontal cooperation agreements. In particular, the team conducted a thorough research of court case summaries from the PaRR legal database (7 relevant cases were identified in the given time period),[27] as well as a case reported by the German NCA (1 out of 12 reported cases was identified as an appeal of an already reported NCA decision). Finally, the research team identified 16 additional rulings, based on the case summaries prepared by national judges who attended the past editions of the European Networking and Training for National Competition Enforcers (ENTraNCE)[28].

5.1.3. Selection of the relevant NCAs and national courts cases

According to the instructions given to the NCAs by the European Commission in the case questionnaire, the NCAs were asked to report all NCA/court cases concerning horizontal cooperation agreements that occurred in their country since 1 January 2011 until 21 March 2020, excluding ongoing cases and cartel cases. In line with these instructions, the research team reviewed the reported cases to sort out any horizontal anti-competitive agreement that could not be considered a 'cooperation' agreement and thus it was outside the scope of the present study (e.g. price fixing cartel, bid rigging agreement).

Similarly, out of the national court rulings reported by the NCAs, as well as the rulings identified via PaRR and ENTraNCE databases, five national court rulings were considered 'relevant' for the scope of the present study. Most of the identified rulings, in fact, were assessed as being out of scope of the study either due to their cartel or primarily vertical nature, or because they did not fall within the temporal scope of the study. Consequently, only five German private enforcement proceedings were considered relevant for the present study.

As a result of the selection process, out of the 202 NCA and court cases initially identified, 131 cases were considered 'relevant' for the scope of the present study. In particular, 126 NCA investigations and 5 national court rulings were considered relevant and thus further analysed in the present study.

It is worth to bear in mind that a single NCA investigation or a national court ruling can deal with several types of horizontal cooperation agreements, if the parties have agreed on multiple forms of horizontal cooperation within the same agreement. Therefore, the number of individual agreements analysed in this study is actually higher than the number of NCA/court cases. In particular, the 126 relevant NCA cases identified in the present study covered 174 horizontal cooperation agreements.

[27] *https://www.parr-global.com/ (10.09.2020).*
[28] *ENTraNCE is a training programme for national judges of the Member States in EU competition law. During the past 10 years, the programme has been organised by the European University Institute (EUI) in Florence and co-funded by DG Competition. In the context of the training, every participant writes a case note, summarising a national ruling dealing with EU competition law. The case notes are later published in a EUI working paper at the end of each edition of the training programme. See: http://fcp.eui.eu/entrance-judges/ (10.09.2020).*

5.1.4. Categorising the relevant NCAs and national courts cases

After having filtered the 'relevant' NCAs and court cases, the research team processed the collected data using a centralised Excel database and categorised the NCAs' decisions and courts' rulings according to different types of horizontal cooperation agreements, economic sectors, procedures and outcomes of the cases. The database served as:

- an overview of the investigations concerning horizontal cooperation agreements dealt with by NCAs and national courts in the past ten years. On the basis of such overview, statistics have been developed in Section 3.1. of the present study. In particular, the analysis allowed the team to map the types of horizontal cooperation agreements mostly dealt with by the NCAs;
- an analytical tool for the assessment of these cases, which enabled the research team to reorganise, reassess and group the cases in different categories, in order to identify the relevant elements of the horizontal cooperation agreements and the way they were assessed by the NCAs and competent national courts. The cases included in the database were categorised by:
  - grouping the cases by Member State, in order to assess which types of horizontal cooperation agreements were more common in different countries;
  - grouping the cases by type of horizontal cooperation agreement, in order to see what categories of agreements are mostly subject to scrutiny by NCAs throughout the 29 countries analysed;
  - grouping the cases by economic sector, in order to assess what type of horizontal cooperation agreement is most prevalent in each industry;
  - grouping the cases by outcome of the NCA proceedings (i.e. commitment decision, prohibition decision, rejection decision and dismissal of proceedings);
  - grouping the cases by type of proceedings (e.g. NCA proceedings, appeal proceedings of an NCA decision, private enforcement action before a national civil court).

The investigations have been classified in accordance with categories of agreements explicitly mentioned in the Horizontal Guidelines[29], given that the majority of the NCA cases and court rulings fell into one of the categories of horizontal cooperation agreements currently mentioned in the Guidelines. The remaining NCA cases and court rulings not falling under any of these categories were classified as "Other horizontal cooperation agreements". The research team has generally followed the categorisation provided by the NCAs in their answers to the Commission questionnaire. On a number of occasions, however, the NCA did not assign a reported case to a specific category mentioned in the Guidelines; the authorities reported a number of cases as 'other'. In the latter situation, the research team analysed the 'centre of gravity' of the agreement: the team analysed the objectives and the focus of the agreement, on the basis of the information provided by the NCA, in order to determine if the reported case could actually be classified under one of the categories of the Horizontal Guidelines. For all the cases where the research team identified new features, not currently addressed in the Horizontal Guidelines, the research team conducted a legal assessment of those issues and grouped the cases as 'new' types of horizontal cooperation agreements, based on the common features of these agreements. Finally, the 'centre of gravity' approach has also been followed to classify the 5 court rulings identified via desk research.

Besides being 'categorised', the relevant cases have also been 'coded'. An identification code, including the country identification and an individual number, has been assigned to

[29] *In particular, Commercialisation agreements (Chapter 6, paragraphs 225 - 256 of the Horizontal Guidelines), Information Exchange agreements (Chapter 2, paragraphs 55 - 110 of the Horizontal Guidelines), Purchasing agreements (Chapter 5, paragraphs 194 – 224 of the Horizontal Guidelines), R&D agreements (Chapter 3, paragraphs 111 – 149 of the Horizontal Guidelines), Production/Specialisation agreements (Chapter 4, paragraphs 150 - 193 of the Horizontal Guidelines), Standardisation agreements (Chapter 7, paragraphs 257 – 335 of the Horizontal Guidelines).*

each relevant case included in Annex VI – List of NCA and national court cases. By coding the relevant cases, the reader might connect the relevant cases reported in Annex VI – List of NCA and national court cases with the qualitative analysis of the relevant cases carried out in Section 3.1.

5.1.5. Analysis of the NCAs and national court cases

The analysis of the cases focused on two key questions: (i) how NCAs and national courts have enforced EU competition rules on horizontal cooperation agreements during the past decade; and (ii) which types of horizontal cooperation agreements identified by NCAs are currently not explicitly dealt with by the HBERs and the Horizontal Guidelines.

The cases have been analysed in accordance both with a 'quantitative' and a 'qualitative' approach. In terms of 'quantitative' analysis, the research team has relied on the 126 NCA cases in Annex VI – List of NCA and national court cases, in order to elaborate a number of statistics included in Section 3.1 of the present study. The statistics provide information on the categories of horizontal cooperation agreements divided per Member State, types of industry as well as the result of the NCAs and national court proceedings. In particular, Section 3.1. includes both aggregated statistics covering all the countries covered by the present study, as well as specific graphics for each category of horizontal cooperation agreement.

In terms of 'qualitative' analysis, Section 3.1. includes a detailed analysis of the most important NCAs and national court cases. In selecting the 'most' important cases to be analysed, the research team relied on the NCAs' answers to the Commission questionnaire. In particular, the research team has analysed the cases concluded via the adoption of an NCA prohibition/commitment decision, rather than via a discontinuation/rejection decision. In the first two categories of proceedings, in fact, the NCA usually adopts the decision at the end of a second phase of investigations, analysing more in detail the anti-competitive aspect(s) of the horizontal cooperation agreement(s). The further assessment by the NCA is an indication of the particular relevance and/or complexity of the case in the context of the qualitative analysis.

The case studies included in Section 3.1 provide detailed information about the parties, the type of horizontal cooperation agreements, the NCA and national court assessment of the case and the outcome of the proceedings, as well as the result of the eventual court appeal. In addition, the case studies point out if the NCAs and national court has relied on the Horizontal Guidelines and HBERs in its analysis. The case studies, therefore, do not aim at assessing whether and to what extent the NCAs' and/or national courts' assessment was 'correct', but rather to analyse the most important cases of horizontal cooperation agreements dealt with by NCAs and national courts, as well as the importance of the Horizontal Guidelines and HBERs for the NCAs' and national courts' assessment. Finally, a number of cases focussed on typologies of horizontal cooperation agreements currently not explicitly dealt by the Horizontal Guidelines, such as sustainability agreements (Section 3.1.8) and joint bidding agreements (Section 3.1.9). The latter sub-sections aim at providing an overview of the enforcement trends at national level, pointing out the types of horizontal cooperation agreements that are currently not explicitly mentioned in the Horizontal Guidelines.

Besides the case studies, Section 3.1. also includes an analysis of whether and to what extent national courts and NCAs have followed the same approach in the analysis of horizontal cooperation agreements (Section 3.1.10). On the basis of the NCAs' answers to the Commission questionnaire, the research team has identified the NCAs' prohibition decisions appealed before a national court. Besides calculating the percentage of NCAs' decisions upheld by national courts, the research team has carried out a qualitative assessment of the rulings where the court did not uphold the previous NCA decision, in order to understand the reasons of the divergent assessment by the NCA and the national court (i.e. based on procedural grounds or a different legal assessment of the case), in order to analyse whether and to what extent national courts and NCAs are aligned in their assessment of horizontal cooperation agreements.

Finally, Section 3.1. provides an analysis of the NCAs' guidelines concerning horizontal cooperation agreements (Section 3.1.11). The research team has analysed whether and

to what extent the national guidelines diverge from the Horizontal Guidelines. In particular, the research team has assessed whether the national guidelines cover categories of horizontal cooperation agreements that are currently not explicitly mentioned by the Horizontal Guidelines.

5.2. Incidence and specific types of horizontal cooperation agreements

5.2.1. Description of the activities

Tasks 2 and 5 of this study address multiple evaluation questions through a common set of methodologies and tools: namely the literature review, the CATI survey and the interviews. The information gathered under these tasks supported the evaluation of the following aspects:

- the level of legal certainty that the HBERs and the Horizontal Guidelines provide for the purpose of assessing whether horizontal cooperation agreements comply with Article 101 of the Treaty[30];
- how the prevalence of different types of horizontal cooperation agreements has evolved since 1 January 2011;
- the identification of specific types of horizontal cooperation agreements that are not covered by the Horizontal Guidelines, but where more legal certainty would be required.

The activities that were entailed by Task 2 address the following three intertwined objectives:

- a list and an analysis of the types of horizontal cooperation agreements that are concluded in practice on the market;
- an analysis of whether there are typical combinations of different forms of horizontal cooperation agreements;
- an analysis of how the prevalence of different types of horizontal cooperation agreements has evolved since 1 January 2011 and across different sectors.

The scope of Task 5 covers three topics, focusing on the current treatment of specific forms of horizontal cooperation in the Horizontal Guidelines. More specifically, the objectives of this task are:

- an in-depth analysis of joint purchasing agreements. In particular, the task requires to describe European retail alliances (e.g. different supermarkets purchasing together) and their effect on retail prices, product portfolios, profit margins and, ultimately, consumers;
- a focus on sustainability agreements. In particular, the task analyses whether the current Horizontal Guidelines offer sufficient guidance, even if sustainability agreements are not explicitly mentioned, to establish Article 101 compliant agreements and assess consumer benefits resulting from these;
- finally, the third topic is focused on information exchange. For this type of horizontal cooperation our analysis investigates whether data sharing is common in industries beyond banking and insurance and it assesses whether the current focus of the Horizontal Guidelines on the potential "by object" nature of information exchange concerning future conduct (paras 73-74) is still relevant.

[30] *Article 101 of the Consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) [2020] OJ C202/1.*

5.2.2. Literature review and desk research

A preliminary literature review on horizontal cooperation agreements was conducted by the research team to prepare the data collection tools (interview guides and CATI survey). A more in-depth literature review on information exchange agreements and joint purchasing agreements has been implemented to provide an overview of the most updated economic and legal thinking on horizontal cooperation agreements. In addition, the research team combined the desk research with the analysis of the contributions to the OPC. This activity allowed the research team to identify the most debated issues with a focus on the evolution of market trends, to achieve a better theoretical understanding of the pro-competitive and anti-competitive effects of the different types of horizontal cooperation agreements.

5.2.3. Primary data collection

The research team carried out the data collection exercise in line with the sampling strategy and the stakeholder consultation strategy agreed with the Commission. This includes a combination of CATI and in-depth interviews conducted directly by the members of the core research team.

Once the questionnaires for the CATI and the in-depth interviews had been approved, the research team started the fieldwork activities in parallel:

- the team dedicated to the CATI proceeded with the translation of the CATI questionnaire into the local languages of the countries within the scope of the research, proceeded with the selection of the list of interviewees according to the methodology presented in the inception phase and, after a pilot phase with no relevant issues, proceeded with a full roll-out;
- the core team proceeded with the organisation of a webinar which took place on 2 July 2020 with trade associations and consumer organisations. During the webinar, the research team explained the objectives of the study, its role within the broader roadmap of DG Competition's strategy, and the importance of the contributions of companies, trade associations and consumer organisations to our evaluation;
- after the webinar, participants were contacted individually to set up ad-hoc interviews and to provide contact details of member companies interested in participating in individual interviews, provide insights about practices related to horizontal cooperation agreements and their view on the current regulatory framework composed by the HBERs and the Guidelines.

Computer Assisted Telephone Interviews

On 22 July 2020, the CATI fieldwork was completed. The fieldwork involved a total of 300 individual companies with one or more horizontal cooperation agreements: these are mostly SMEs (44,7% are Small enterprises, 27,3% are Micro enterprises, 24,3% are Medium enterprises and only 3,7% are Large enterprises). The overall number of agreements discussed were 482, and the frequency by country of the type of horizontal cooperation agreements is provided in the table below.

Table 2: Summary of CATI by type of agreement and country

Type of agreement	Austria	France	Italy	Poland	Slovakia	Sweden	Grand Total
Research and development agreements	13	11	11	14	7	11	***67***
Production/specialisation agreements (any form of joint production cooperation)	12	11	15	11	10	11	***70***
Information exchange practices	13	12	18	10	5	15	***73***

Type of agreement	Austria	France	Italy	Poland	Slovakia	Sweden	Grand Total
Commercialisation agreements (cooperation in the selling, distribution or promotion of products)	12	14	14	13	5	10	***68***
Standardisation agreements (agreements aimed at developing technical standards in the industry)	6	10	9	9	3	8	***45***
Joint purchasing agreements	9	10	7	13	15	10	***64***
Agreements concerning environmental aspects or other sustainability goals	8	10	10	9	6	9	***52***
Others, non-covered	5	6	7	10	6	5	***39***
Grand Total	**78**	**84**	**94**	**89**	**57**	**80**	**482**

Out of 300 individually interviewed companies, 167 discussed more than one horizontal cooperation agreement and 107 had a combination of agreements. The table below reports the number of interviews with companies that had as centre of gravity one of the following agreements combined with others.

Table 3: Number of individual respondents with combination of agreements by centre of gravity[31] and country

Type of agreement	Austria	France	Italy	Poland	Slovakia	Sweden	Grand Total
Research and development agreements	4	7	1	5	1	5	**23**
Production/specialisation agreements (any form of joint production cooperation)	2	3		3	3	3	**14**
Information exchange practices	2	3	3	1			**9**
Commercialisation agreements (cooperation in the selling, distribution or promotion of products)	1	1	6	3	1	2	**14**
Standardisation agreements (agreements aimed at developing technical standards in the industry)	1	1	2	6	2	1	**13**
Joint purchasing agreements	4	2	1	3	1	3	**14**
Agreements concerning environmental aspects or other sustainability goals	2	1	3	1	3	3	**13**
Others, non-covered	1	1	3	1	1		**7**
Grand Total	**17**	**19**	**19**	**23**	**12**	**17**	**107**

Below are provided some descriptive statistics of the dataset used for the analysis presented in this report.

[31] *With the aim of capturing the centre of gravity of the combination of agreements, respondents were asked if they had a specific type of agreement (e.g. R&D agreement) combined with another type. As an example, the question for R&D agreements was phrased "Do you have research and development agreements that are combined with other types of horizontal cooperation (cooperation with the same parties serving the same business objectives)?" and in an open question respondents were asked to provide a description of the other type of agreements that the R&D agreement was usually combined with.*

Table 4: Summary of CATI interviews conducted – Type of agreement

Count of CATI interviews	Task	#	Share
Research and development agreements	2	66	14%
Production/specialisation agreements (any form of joint production cooperation)	2	72	15%
Information exchange practices	5	76	16%
Commercialisation agreements (cooperation in the selling, distribution or promotion of products)	2	69	14%
Standardisation agreements (agreements aimed at developing technical standards in the industry)	2	45	9%
Joint purchasing agreements	5	64	13%
Agreements concerning environmental aspects or other sustainability goals	5	51	11%
Others, non-covered	5	39	8%
Total		**482**	**100%**

In Table 5 and Table 6, the grand total of the interviewed companies does not match the grand total of the agreements presented in Table 2 above: this can be explained by the fact that several companies reported to have in place more than one type of horizontal cooperation agreement at a time.

Table 5 Summary of CATI interviews conducted – Value chain position (multiple choice)

Value chain position	#	Share
Retail	99	33,0%
Wholesale distribution	103	34,3%
Production/Manufacturing	137	45,7%
Research centres	39	13,0%

Table 6: Summary of CATI interviews conducted – Company size

Size	#	Share
Micro enterprise - 9 or less employees	82	27,3%
Small enterprise - Between 10 and 49 employees	134	44,7%
Medium enterprise - Between 50 and 249 employees	73	24,3%
Large enterprise - More than 250 employees	11	3,7%
Total	**300**	**100%**

In line with expectations, the approach followed in this study ensured a complete coverage of different types of companies: while the CATI methodology was able to involve a large majority of SMEs (96% of the sample) with only 4% of respondents being large enterprises, large companies were mainly involved in the 67 semi-structured interviews of the study through direct contact or through trade associations.

Regarding the industries represented in the sample, a large number of companies operate in the agricultural sector (42), followed by clothing, apparel and footwear (26), food and beverage (24) and energy (22).

Table 7: Summary of CATI interviews conducted - Industry

Industry	#	Share
Accommodation and food service activities	9	3,0%
Agriculture	42	14,0%
Arts, entertainment and recreation	7	2,3%
Clothing, apparel & footwear	26	8,7%
Construction	19	6,3%
Consumer electronics	16	5,3%
Energy	22	7,3%
Financial and insurance activities	2	0,7%
Food and beverage	24	8,0%
Furniture	15	5,0%
Household appliance	21	7,0%
Human health	15	5,0%
Information and communication	12	4,0%
Pharmaceutical	20	6,7%
Professional and technical activities	14	4,7%
Real estate activities	8	2,7%
Telecommunications	5	1,7%
Transportation and storage	11	3,7%
Other industry, please specify	12	4,0%
Total	**300**	**100,0%**

The table below lists the types of agreements reported by the sample of 300 companies (which in several cases reported having more than one horizontal cooperation agreement). Statistics show some patterns: for example a large presence of specialisation agreements in the agriculture sector (18), information exchange in the clothing, apparel and footwear sector (13), research and development in the energy sector (10) and in the pharmaceutical industry (11) and joint purchasing agreements in the food and beverage industry (14).

Table 8: Types of agreements by industry

	R&D	Specialisation	Commercialisation	Information exchange	Joint Purchasing	Standardisation	Sustainability	Others, non-covered
Accommodation and food service activities	0	0	3	3	1	5	3	1
Agriculture	7	18	9	5	4	5	11	2
Arts, entertainment and recreation	0	0	2	2	3	0	0	2
Clothing, apparel & footwear	2	5	9	13	9	1	6	3
Construction	3	8	1	4	3	4	5	2

	R&D	Specialisation	Commercialisation	Information exchange	Joint Purchasing	Standardisation	Sustainability	Others, non-covered
Consumer electronics	1	4	8	4	3	2	2	1
Energy	10	5	3	4	0	4	8	5
Financial and insurance activities	1	0	1	0	0	0	0	0
Food and beverage	3	2	4	5	14	3	3	2
Furniture	0	3	7	4	2	2	2	1
Household appliance	3	7	8	0	9	5	2	4
Human health	10	3	0	4	3	1	1	0
Information and communication	5	0	4	4	1	1	2	0
Pharmaceutical	11	5	1	4	4	1	3	3
Professional and technical activities	3	2	1	4	4	4	0	5
Real estate activities	0	0	0	5	3	2	0	0
Telecommunications	1	2	0	2	0	0	2	1
Transportation and storage	0	0	4	4	0	5	2	3
Other industry, please specify	7	6	3	2	1	0	0	4
	67	**70**	**68**	**73**	**64**	**45**	**52**	**39**

During the CATI data-collection, 926 enterprises across the six countries in scope agreed to participate in the fieldwork: however only 300 (32,6% of the total) reported having in place or had in the last 10 years a horizontal cooperation agreement and thus they were interviewed. Based on these values, it is possible to infer an estimate of the frequency of horizontal cooperation agreements across industries[32].

Table 9: Estimate of frequency of horizontal cooperation agreements based on CATI survey responses

Agreement type	#	Share (sample)	Share of 926
Research and development	66	22.0%	7.1%
Production/specialisation	72	24.0%	7.8%
Information exchange	76	25.3%	8.2%
Commercialisation	69	23.0%	7.5%
Standardisation	45	15.0%	4.9%
Joint purchasing	64	21.3%	6.9%
Sustainability	51	17.0%	5.5%
Others, non-covered	39	13.0%	4.2%

[32] *These values are based on the responses to the question "Has your company been involved in horizontal cooperation with other companies in the last ten years?": if the response was negative, the interview was still accounted amongst the 926 companies that begun the interview. However, since interviewers mentioned the purpose of the study at the beginning of the interview specifying that the topic of the interview were horizontal cooperation agreements, some respondents may have declined to participate because they did not have any and thus not being accounted for. As a result, these values might be an overestimation of the actual frequency of these agreements on the market.*

Semi-structured interviews

During the study, the core research team organised semi-structured interviews with 67 individual stakeholders and discussed a total of 155 types of agreements since, in most cases, interviewed stakeholders decided to discuss more than one type of horizontal cooperation agreement they had in place. Table 10 below presents the summary of the in-depth interview programme, per type of agreement.

Table 10: Summary of semi-structured interviews conducted – Type of agreement

Count of in-depth interviews	Task	#	Share
Research and development agreements	2	18	12%
Production/specialisation agreements (any form of joint production cooperation)	2	10	6%
Information exchange practices	5	35	23%
Joint purchasing agreements	5	25	16%
Commercialisation agreements (cooperation in the selling, distribution or promotion of products)	2	9	6%
Standardisation agreements (agreements aimed at developing technical standards in the industry)	2	28	18%
Agreements concerning environmental aspects or other sustainability goals	5	19	12%
Others, non-covered	5	11	7%
Total # of agreements discussed during in-depth interviews		**155**	**100%**

Regarding the type of interviewed stakeholders, the majority were large enterprises operating across Europe and in several cases worldwide. A second group of interviewed stakeholders were business associations which were particularly useful in reporting the position of their members (both large enterprises and SMEs). The research team also conducted interviews with other types of stakeholders such as law firms which were able to provide insightful contributions based on their experience as practitioners.

Table 11: Type of stakeholders interviewed in semi-structured interviews

Type	#	Share
Enterprises	34	51%
Business associations	25	37%
Law firms	6	9%
Others (standardisation bodies,non-governmental organisations)	2	3%
Total	**67**	**100%**

For the purposes of this study there was no pre-defined industry scope, thus participants to the semi-structured interviews belong to several sectors and, in most cases, they are multi-businesses enterprises covering more than one sector.

5.3. Cost savings generated by the HBERs and the Horizontal Guidelines

5.3.1. Description of the activities

The research team has conducted six additional interviews focussing on costs and benefits for enterprises with a variety of different companies and organisations in order to analyse:

- the proportionality of costs and benefits for economic agents in the assessment of whether the HBERs are applicable to certain horizontal cooperation agreements and in conducting their self-assessment using the HBERs and/or the Horizontal Guidelines;

- the extent to which the HBERs and the Horizontal Guidelines result in cost savings for companies when assessing compliance with Article 101 of the Treaty as compared to a hypothetical scenario in which the legal framework did not include the HBERs and only the Horizontal Guidelines were in place;
- the costs incurred by companies when assessing compliance of their horizontal cooperation agreements with Article 101 of the Treaty, including whether they are lower under the current legal regime as compared to the previous legislative framework.

The companies and associations interviewed varied in size, country of origin, sector and the types of agreements in which they engage. The interviews have partially followed the questions outlined in the inception report, whilst allowing for flexibility to get the most from the interviews. In this sense, the research team allowed interviewees to explain the issues, challenges and costs most pertinent to their business.

For the sixth case study, the research team focused on covering commercialisation agreements, due to the lack of coverage in the other five case studies. In order to ensure that interviews would involve discussion on commercialisation, the research team contacted a number of organisations that had shown to have experience with commercialisation agreements. In light of this, two interviews were conducted with business associations whose members frequently engage in these types of agreements to form the basis of the sixth case study.

A short interview guide, which was sent ahead to respondents, is detailed below:

- introduction – for representative to discuss main features of the agreements the company participate in;
- for a selection of the above, an identification of cost/benefit categories and respective quantification;
- comparison of the costs and benefits of HBERS and Horizontal Guidelines with a hypothetical counterfactual where only the Horizontal Guidelines existed;
- comparison of the costs and benefits of HBERs and Horizontal Guidelines with costs and benefits under the previous legal regime;
- accepting that a pure quantification may be difficult to make, respondents were invited to “zoom in” on the type of agreements that are most relevant for their company and discuss their perception of costs and benefits of using the Horizontal Guidelines and the HBERs when making competition assessments of those agreements. They were invited to select 2 or 3 from the six categories of agreements explicitly mentioned in the Horizontal Guidelines
    - Standardisation agreements
    - Joint purchasing agreements
    - Information exchanges
    - Commercialisation agreements
    - R&D cooperation
    - Joint production / specialisation agreements

Then for each of these agreements, the research team analysed more in depth the elements in the guidance that would lead to higher cost savings – in the sense that they offer appropriate guidance; and elements that work less well and either do not really contribute to saving any costs or instead even increase the business’s self-assessment costs. The interviews for the case studies covered the following topics:

- Definition and scope of a particular category of agreement
- Defining the relevant markets

- Assessment under Article 101(1) of the Treaty
- Main competition concerns
- Restrictions of competition by object
- Restrictions of competition by effects
- Assessment under Article 101(3) of the Treaty
- Efficiency gains
- Indispensability
- Pass-on to consumers effects (benefits and/or costs)
- No elimination of competition

- As well as other elements of the HBERs that where relevant:
  - Definitions
  - Conditions for exemption
  - Market share thresholds
  - Hardcore restrictions
  - Excluded restrictions

The research team encountered some problems with the quantification of the costs derived from the assessment of compliance because in most cases, interviewed companies could not provide specific estimates. For many companies their costs are internalised through the use of their in-house legal team. To address this problem, the research team enquired about the typical time period for internal lawyers to spend on such matters. Respondents also raised concerns about confidentiality, including information of a commercially sensitive nature. In some cases, the team was asked not to report the name of the company or the economic sector in which they operate.

All the respondents that the research team spoke to found it difficult to make comparisons between the proposed counterfactual scenarios. Respondents explained that, in practice, they will usually look at both the HBERs and the Horizontal Guidelines simultaneously, in which case it is difficult for them to compare the current regime to a scenario without HBERs present. Also, it is difficult for respondents to identify the added value of the HBERs as they do not see them as a separate entity in compliance assessments. The majority of respondents were not able to compare the current legal framework with the previous regime, as they had no experience under the previous regime.

5.4. Consumer organisations

5.4.1. Description of the activities

The analysis of the views of consumer organisations on the HBERs and the Horizontal Guidelines contributes to answering the research questions on effectiveness, efficiency and relevance as described in the evaluation matrix proposed in the inception report.

We developed a detailed questionnaire and identified relevant consumer organizations. We mapped consumer organizations at national and European level during the inception phase. Desk research was conducted to identify those organizations with competition policy reference persons or departments. Particular attention was devoted to engaging consumer organizations at EU level, to find relevant national organizations and contact persons/departments. EU-organizations were also invited to the online webinar organised on 2 July 2020. During the webinar, the organisations were informed about the purpose and the content of the study and they were invited to participate in ad-hoc interviews with the research team. EU-wide organisations and specialised organisations, were invited to forward the invitation to their national members with the objective of maximising reach.

Most of the consumer organisations at EU level were not interested in participating in the study and some declined the invitation. Having acknowledged this, the research team extended the list of potential stakeholders and refined the list of contacts.

Out of the 76 stakeholders identified, after multiple follow-up emails, the team received only a few replies.

This negative response is due mainly to two factors:

- lack of interest in the topic (a perception by the respondents that there are more pressing topics on the agenda);
- no experience with the HBERs and Horizontal Guidelines: even if the effects are relevant for consumers, in practice most of consumer organisation at European and national level do not have the appropriate means or dedicated expertise at this level of competition policy.

The few consumer organisations that were available for an interview provided, in most cases, generic feedback on legal certainty, efficiency and prevalence of the agreements under analysis. This is due to the fact that since they are not market operators, they are not involved directly in the application of EU competition law. The consumers organisations interviewed were mainly concerned with a subset of agreements that are seen as more directly related with consumer welfare namely sustainability agreements, joint purchasing agreements and agreements involving information exchange.

As of 4 September 2020, only six organizations were able to participate in the interviews and the research team received a negative explicit response from nine organisations.

Part 2: Evaluation Questions

6. Effectiveness and Relevance Evaluation Questions

6.1. What types of horizontal cooperation agreements have been identified by national competition authorities ("NCAs") and national courts since 1 January 2011, and how were they assessed?

6.1.1. Summary and overall answer to the evaluation question

In total, 126 NCA investigations and 5 national court rulings dealing with horizontal cooperation agreements between 1 January 2011 and 31 March 2020 were identified, and consequently analysed in the present study. The sample analysed includes both proceedings leading to a formal NCA decision, but also NCA investigations that were discontinued (e.g. for lack of evidence) and also agreements the NCAs looked into informally, without launching formal proceedings.

A single NCA/court case can cover several types of horizontal cooperation agreements, if the parties agreed on multiple forms of horizontal cooperation within the same agreement. In the sample of 126 relevant NCAs investigations identified in the present study, the NCAs dealt in total with 174 horizontal cooperation agreements. In particular, one national court case and 39 NCA investigations dealt with more than one typology of horizontal cooperation agreements.

Tables 12-14 reflect the number of NCA investigations included in the analysis, without the court cases concerning horizontal cooperation agreements.

Table 12 provides an overview of the different types of horizontal cooperation agreements subject to scrutiny by NCAs of the EU Member States, Norway and the UK. For 11 out of these 29 countries, the NCAs did not report any relevant decisions/investigations for the requested time period; these countries are therefore not represented in the table.[33]

By far, most NCA cases assessed in this study occurred in Germany (40), followed by Denmark (18), Sweden (14) and the Netherlands (12). The most common type of horizontal cooperation agreement subject to NCAs investigations were commercialisation agreements (i.e. 50 out of 174 investigated agreements), followed by information exchange agreements (36) and specialisation/production agreements (33). Least common were R&D agreements and environmental/sustainability agreements, with six and five occurrences respectively. Depending on the traditional degree of cooperation among economic actors, some forms of horizontal cooperation agreements might be more common in certain countries than in others.

Table 12: Horizontal cooperation agreements by Member State and type of agreement[34]

Country	Number of NCA investigations	Number of horizontal cooperation agreements								
		R&D agreements	Specialisation / production agreements	Information exchange agreements	Purchasing agreements	Commercialisation agreements	Standardisation agreements	Environmental / sustainability agreements	Others, non-covered	Total number of agreements
BG	2		1		1					**2**
DE	40	4	11	10	9	18	2	2	2	**58**
DK	18		2	4	5	8	5		1	**25**
EL	3		1			2				**3**
ES	8		1	2	2	4	1			**10**

[33] *Austria, Belgium, Croatia, Cyprus, Czech Rep., Estonia, Lithuania, Luxembourg, Malta, Poland, Slovakia.*
[34] *Explanation of the methodological approach: The national competition authorities in the 27 EU Member States, the UK and Norway completed a European Commission survey where they indicated the number of horizontal cooperation agreements they dealt with in the period between 1 January 2011 and 21 March 2020.*

Country	Number of NCA investigations	Number of horizontal cooperation agreements								
		R&D agreements	Specialisation / production agreements	Information exchange agreements	Purchasing agreements	Commercialisation agreements	Standardisation agreements	Environmental / sustainability agreements	Others, non-covered	Total number of agreements
FI	5		3			3				**6**
FR	4			3			1			**4**
HU	1			1						**1**
IT	6	1	3	1	1	4			1	**11**
LT	1				1					**1**
LV	2					2				**2**
NL	12		4	3	3	2	1	1		**14**
NO	3			2	1				2	**5**
PT	1				1					**1**
RO	1					1				**1**
SE	14	1	5	7		5	3	2	1	**24**
SI	1								1	**1**
UK	4			3		1	1			**5**
Total	**126**	**6**	**33**	**36**	**24**	**50**	**12**	**5**	**8**	**174**

Table 13 shows in which economic sectors the horizontal cooperation agreements subject to the NCAs scrutiny were more common. Most of the NCAs investigations concerned horizontal cooperation agreements in the construction sector (31), followed closely by the arts, entertainment and recreation sector (23), the financial and insurance sector (21) and the information and communication sector (18). However, the remaining horizontal cooperation agreements investigated by NCAs are spread across different economic sectors. Table 13 thus shows that the NCAs did not target any specific industry in their investigations. Likewise, no type of horizontal cooperation agreement can be singled out as being typical for any economic sector.

Table 13: Horizontal cooperation agreements by economic sector and type of agreement

Economic sector	Number of investigations	Number of horizontal cooperation agreements								
		R&D agreements	Specialisation / production agreements	Information exchange agreements	Purchasing agreements	Commercialisation agreements	Standardisation agreements	Environmental / sustainability agreements	Others, non-covered	Total number of agreements
Accommodation and food service activities	3		1	1	1	1				**4**
Agriculture, forestry and fishing	9			4	1	3		3		**11**
Arts, entertainment and recreation	17		3	3	3	10	2		2	**23**
Construction	20	3	7	5	3	7	4		2	**31**
Financial and insurance activities	16		6	3	1	9	2			**21**
Furniture	3			1	2	1				**4**

Economic sector	Number of investigations	Number of horizontal cooperation agreements								
		R&D agreements	Specialisation / production agreements	Information exchange agreements	Purchasing agreements	Commercialisation agreements	Standardisation agreements	Environmental / sustainability agreements	Others, non-covered	Total number of agreements
Human health and social work activities	10	2	1	6	3	2			1	**14**
Information and communication	13		8	2	1	6	1			**18**
Other service activities	12		5	2	2	5	1	2	1	**18**
Transportation and storage	7	1	2	4		3			1	**11**
Other	16	1		5	7	3	2		1	**19**
Total	**126**	**6**	**33**	**36**	**24**	**50**	**12**	**5**	**8**	**174**

Table 14 provides an overview of the outcome of the NCAs investigations. 41 out of the 126 NCA investigations were discontinued without adopting a formal decision, which was the most common type of outcome in terms of proceedings. Most common reasons for discontinuing an investigation were lack of evidence, the fact that the parties to the agreement had already changed the agreement due to a change of external circumstances, or a change in the internal priority-setting of the NCAs. Complaints were formally rejected in 14 proceedings, usually for lack of evidence or because a restriction of competition under Article 101(1) of the Treaty could not be established. When proceedings were discontinued or concluded via a rejection decision, the NCAs often did not carry out a detailed legal assessment of the horizontal cooperation agreement. On the other hand, NCAs issued 25 prohibition and 20 commitment decisions. The remaining 26 NCA investigations had different outcomes: the NCA often provided an informal opinion following a request from the parties without starting a formal investigation. Ongoing proceedings were also counted as 'other' outcomes.

Table 14 also shows that the NCAs' assessment varied on the basis of the category of horizontal cooperation agreement. In particular, while rejection/discontinuation decisions prevailed in the case of specialisation, purchasing and standardisation agreements, prohibition or commitment decisions concluded an important part of the cases concerning information exchange agreements.

In addition, 12 of the 25 NCA prohibition decisions have been appealed before national courts. The appeal courts upheld eight of the decisions and annulled three decisions. One appeal proceeding was still pending as of 31 March 2020.

Table 14: Horizontal cooperation agreement investigations by type of outcome

Type of agreement	Discontinued proceedings	Rejection of complaint	Prohibition decision	Commitment decision	Other outcome	Total
Multiple agreements[35]	11	5	9	9	5	**39**

[35] *A category of agreements including the elements of more than one type of horizontal cooperation agreement under the Horizontal Guidelines.*

Type of agreement	Discontinued proceedings	Rejection of complaint	Prohibition decision	Commitment decision	Other outcome	Total
Specialisation agreements	4	3		3	2	**12**
Information exchange agreements	7	1	7	1	5	**20**
Purchasing agreements	4	2	2		4	**12**
Commercialisation agreements	10		4	6	6	**26**
Standardisation agreements	4	2	2	1	1	**10**
Environmental agreements		1			3	**4**
Others, non-covered	1		2			**3**
Total	**41**	**14**	**25**	**20**	**26**	**126**

The Horizontal Guidelines were explicitly relied on by the NCAs in their assessment in 90 of the 126 NCAs investigations. In the investigations where the NCA did not rely on the Horizontal Guidelines, this was mostly due to the fact that the investigations were discontinued without a detailed legal assessment or because they lacked a cross-border dimension and thus were assessed under national competition law only. NCAs generally do not publish information concerning investigations that are discontinued. Hence, it is not possible to elaborate reliable figures on the number of cases where the NCAs relied on the HBERs and Horizontal Guidelines in their assessment.

The following sections discuss the NCA and national court cases in more detail, analysing the relevant cases by type of agreement explicitly mentioned in the Horizontal Guidelines.

6.1.2. Research & Development Agreements

The European Commission adopted a block exemption from the requirements of Article 101(1) of the Treaty in the form of a Regulation on R&D agreements on 14 December 2010. Its objective is to encourage innovation and emergence of new technologies, while preserving a level playing field within the EU internal market. The R&D BER entered into force on 1 January 2011 and will expire on 31 December 2022.[36] The R&D BER provides comprehensive definitions of what constitutes an R&D agreement,[37] provisions on exemptions,[38] and a list of hardcore restrictions that are prohibited.[39] Moreover, the R&D BER, in conjunction with Regulation (EC) No 1/2003,[40] grants the power to the Commission to withdraw the benefit of the block exemption in exceptional circumstances.[41]

Chapter 3 of the Horizontal Guidelines also deals with R&D agreements.[42] In comparison to the R&D BER, this section provides undertakings with more details concerning the market definition in R&D cases in relation to existing products and technology markets, as well as markets for innovation (so called 'R&D efforts').[43] Furthermore, it discusses the assessment of R&D agreements under Articles 101(1)[44] and 101(3)[45] of the Treaty. It also provides five illustrative examples of how Article 101 would apply to different types of R&D agreements.[46]

[36] *Supra, Regulation (EC) No 1217/2010, Article 9 s*
[37] *Supra, Regulation (EC) No 1217/2010, Article 1.*
[38] *Supra, Regulation (EC) No 1217/2010, Arts. 2, 3, 4.*
[39] *Supra, Regulation (EC) No 1217/2010, Article 5.*
[40] *Article 29 of 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-1/1, 4.1.2003.*
[41] *Supra, Regulation (EC) No 1217/2010, Recital 21.*
[42] *Supra, Horizontal Guidelines. Paras. 111-149.*
[43] *Supra, Horizontal Guidelines. Chapter 3.2.*
[44] *Supra, Chapter 3.3 of the Horizontal Guidelines.*
[45] *Supra, Chapter 3.4 of the Horizontal Guidelines.*
[46] *Supra, Chapter 3.5 of the Horizontal Guidelines.*

In the present study, out of the 126 relevant NCA cases analysed, only six horizontal cooperation agreements included provisions on R&D; four of these investigations occurred in Germany, one in Italy and one in Sweden. Therefore, only a limited number of NCAs have investigated cases concerning R&D agreements.

Figure 3: NCA investigations (R&D agreements) by MS

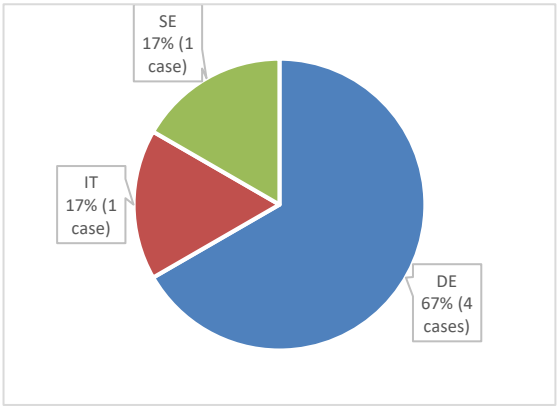
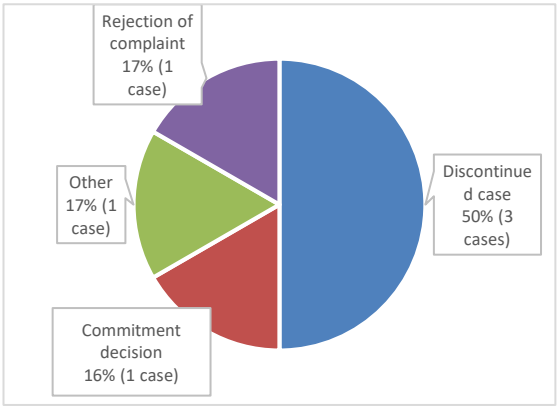


Figure 4: Outcome of NCA investigations (R&D agreements)



These six NCA investigations concerned agreements that covered different forms of horizontal cooperation. In other words, joint R&D was one of the different aspects of the agreements concluded by the parties but it was not the centre of gravity of the agreement. In the six relevant cases, the NCAs did not investigate the anti-competitive effects of the R&D provisions of the agreement. The authority rather focussed its investigations on the potentially anti-competitive behaviour linked to commercialisation, specialisation or information exchange.

Only one investigation, by the Italian NCA (IT06), led to a formal decision including R&D aspects. However, since the case was concluded via a commitment decision, the authority did not ascertain whether the R&D agreement caused a restriction of competition in the market.

Box 1: Italy - IT06

Country:	Italy
Year:	2015
Parties:	Novartis Farma S.p.A. and Italfarmaco S.p.A
Sector:	Human health and social work activities
Outcome:	Commitment decision
Description of the agreement	An agreement for the co-marketing of drugs based on the active ingredient Octreotide produced by both parties. The agreement included exchange of sensitive information, Novartis' control over Italfarmaco's promotion strategy and a commitment by Italfarmaco to achieve a minimum market share.
Summary of the NCA's assessment	On 4 June 2015, the Italian NCA adopted a final decision making the commitments proposed by the Parties binding and terminating the proceeding without ascertaining the alleged violation. All the clauses identified as potentially anticompetitive were eliminated or revised with a view to: (1) removing the exchange of information on R&D and costs as well as reducing existing exchanges of information on product orders to the minimum level imposed by production planning needs; (2) eliminating Novartis Farma's power of supervision and authorization on the promotional strategy of Italfarmaco; (3) suppressing the minimum market share clause.
Horizontal Guidelines relied on by NCA	Yes, Chapters 2, 3 and 6 of the Horizontal Guidelines

HBERs relied on by the NCA	Yes, R&D BER
Appealed	No
Appeal ruling	Not applicable
Summary of the appeal court's assessment	Not applicable

The other five investigations were either discontinued or the complaint was rejected without a formal legal assessment.

In addition to the NCA investigations, a private enforcement case (DE45) in the manufacturing sector was litigated in Germany before a civil court. The court found that the agreement potentially included anti-competitive elements, but that the part about R&D cooperation subject of the complaint could not be considered anti-competitive. The parties were thus obliged to fulfil the (financial) obligations to each other under the agreement. The case resulted in a partial rejection of the complaint in relation to the R&D cooperation and was assessed under national competition law, rather than under Article 101 of the Treaty.

6.1.3. Specialisation Agreements

The Specialisation BER was adopted on 14 December 2010 and it has the same date of entry into force and expiration as the R&D BER. The objective of the Specialisation BER is to enable parties to operate more efficiently and supply cheaper products,[47] while not substantially limiting competition in the market.[48] The Specialisation BER defines the scope of "specialisation agreements" as covering both unilateral and reciprocal specialisation agreements, as well as joint production agreements[49]. The Specialisation BER exempts specialisation agreements under certain conditions[50], sets a market share threshold[51] and a list of hardcore restrictions,[52] which exclude the application of the block exemption. Similarly to the R&D BER, the Specialisation BER in conjunction with Regulation (EC) No 1/2003,[53] enables the Commission to withdraw the benefits of the block exemption in certain circumstances[54].

Specialisation/production agreements are also covered under Chapter 4 of the Horizontal Guidelines. This Chapter applies to all forms of production agreements, including production agreements concerning jointly controlled companies and horizontal sub-contracting agreements (irrespective of whether the parties to such agreements are actual or potential competitors).[55]

Out of 126 relevant cases identified in the present study, 33 NCA investigations concerned specialisation agreements. Among the NCA investigations, 11 proceedings were discontinued by the NCA without any formal legal assessment, 7 concerned a complaint that was rejected by the authority, 6 investigations were concluded with a commitment decision and 4 were concluded with a prohibition decision. The remaining investigations either had a different outcome (3), such as informal analysis or informal opinion by an NCA or resulted in multiple outcomes (2) - e.g. partial rejection of the complaint while commitments with respect to another part of the horizontal cooperation agreement were undertaken.

[47] *Supra, Regulation (EC) No 1218/2010. Recitals 6 and 7.*
[48] *Supra, Regulation (EC) No 1218/2010. Recital 12.*
[49] *Supra, Regulation (EC) No 1218/2010. Article 1(1)(a).*
[50] *Supra, Regulation (EC) No 1218/2010. Article 2.*
[51] *Supra, Regulation (EC) No 1218/2010. Articles 3 and 5.*
[52] *Supra, Regulation (EC) No 1218/2010. Article 4.*
[53] *Supra, Regulation (EC) No 1/2003.*
[54] *Supra, Regulation (EC) No 1218/2010, Recital 15. See also Article 29 of Regulation 1/2003.*
[55] *Supra, Paras. 150 and 151 of the Horizontal Guidelines.*

Figure 5: NCA investigations (specialisation/production agreements) by MS

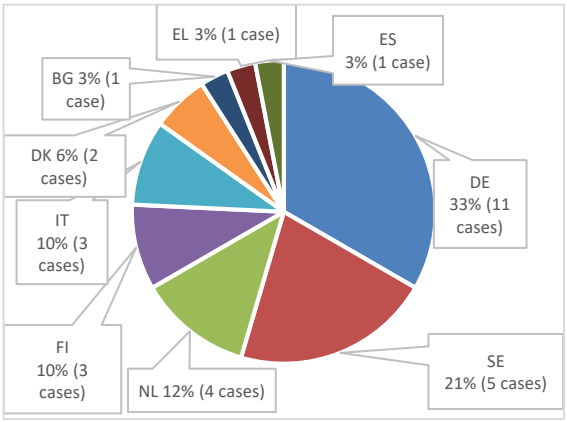
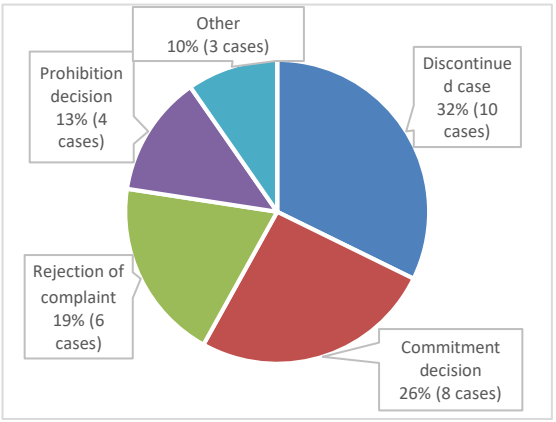


Figure 6: Outcome of NCA investigations (specialisation/production agreements)



Specialisation/production agreements occurred in most cases as part of 'mixed' agreements that included other types of horizontal cooperation, typically commercialisation or information exchange agreements (20 out of 33 relevant cases). This aspect has influenced the NCAs assessment: the NCAs assessed 13 'mixed' agreements as a purchasing or commercialisation agreement, rather than as specialisation agreement. Therefore, Chapter 4 of the Horizontal Guidelines, concerning production agreements, and the Specialisation BER were generally not relied on by the NCAs in their assessment of these 'mixed' agreements, as their centre of gravity was not specialisation. In particular, in two instances (SE13 and DE36), the NCA relied for the assessment of the agreements on chapters of the Horizontal Guidelines other than Chapter 4 on specialisation/production agreements. In particular, one NCA relied on Chapter 5 of the Horizontal Guidelines (i.e. purchasing agreements) as the agreement also concerned horizontal purchasing cooperation and involved market power, and the purchasing cooperation served as a tool for market allocation, while another NCA relied on Chapter 6 of the Horizontal Guidelines (i.e. commercialisation agreements) as the horizontal cooperation concerned was qualified as a distribution and commercialisation cooperation on specific commercialisation functions. Thus, the centre of gravity identified in these two agreements determined the basis of the assessment by the competent NCA.

About a third (12) of the relevant cases were reported by the German NCA and most of them (9) were discontinued for various reasons: advocacy proceedings,[56] change of the company structure, liquidation of a joint venture, evidence of efficiencies or the Corona crisis (i.e. time feasibility of envisaged commitments was uncertain in the relevant exploitation period).

Out of the investigations reported by the Swedish NCA under this category, 5 were included in the analysis with the majority (4) resulting in a rejection of the complaint and one investigation being discontinued due to insufficient evidence. In every reported decisions/investigation the Swedish NCA relied on the Horizontal Guidelines and the Specialisation BER.

Other NCAs also reported decisions and investigations: 4 in the Netherlands, 3 in Norway, Finland, and Italy respectively, 2 in Denmark, and 1 in Bulgaria, Greece and Spain respectively. These NCAs also relied on the Horizontal Guidelines and/or the Specialisation BER in their assessment.

One of the exceptions was the Greek NCA (EL03), which, in 2017, dealt with an agreement assessed on the basis of the 2001 Horizontal Guidelines, especially paragraph 24, since the agreement was concluded in 2005.[57] The agreement fixed indicative hourly rates for repair services of insured cars, in combination with specific number of the working hours

[56] *The German asphalt association (DAV) asked the Bundeskartellamt for help to set up guidelines for supplier consortia and they did so. After the DAV published the guidelines, the NCA closed the proceedings.*
[57] *Commission Notice, Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements. OJ C-3/2, 6.1.2001. Paragraph 24.*

of different types of repair services. According to the Greek NCA, the recommendations were directly related and necessary for the implementation and application of the Audatex system – i.e. a database commonly used by mechanics to assess the cost of reparation of cars involved in accidents. The Greek NCA found that the exchange of price information was an ancillary restraint under the 2001 Horizontal Guidelines.

The Dutch NCA investigated a specialisation agreement concerning electricity production (NL08), where environmental benefits generated by the agreement were believed to be rather insignificant to offset the anti-competitive nature of the agreement.

Box 2: Netherlands - NL08

Country:	Netherlands
Year:	2013
Parties:	Members of the trade association of the Dutch energy industry, Energie Nederland
Sector:	Other service activities (production of electricity)
Outcome:	Other: Informal analysis
Description of the agreement	The agreement proposes coordinated closings of five electricity plants, which were all built in the 1980s.
Summary of the NCA's assessment	By reducing production capacity, the undertakings involved had less capacity to produce energy than they would have had without the agreement. The production capacity that was to be closed under the agreement represented approximately 10% of total production capacity available in the Netherlands. As a result of closing these five plants, it became more likely that capacity with a higher cost price per unit of production must be utilised, given a certain level of demand. These were indications that the upward pressure on prices, which the agreement could have been expected to generate, may have been of real significance. The NCA found that, overall, the environmental benefits were too small to offset these drawbacks.
Horizontal Guidelines relied on by NCA	Yes
Appealed	No
Appeal ruling	Not applicable
Summary of the appeal courts assessment	Not applicable

In another decision issued by the Finnish NCA (FI06), the parties to the agreement planned to create a real-time mobile payment forwarding platform. The investigation was initiated because, after the parties had presented the plan to the NCA, some initial competition concerns were identified. The parties to the proceedings committed to make changes to the platform, i.e. to grant access to third parties to their services unless identification via an electronic tool was used in bad faith or could cause financial or non-pecuniary harm to the banks. Due to the commitments offered, the NCA did not consider it necessary to continue the investigation, and thus there was no need to make a final assessment of the agreement.

Box 2: Finland - FI06

Country:	Finland
Year:	2015
Parties:	Automatia Pankkiautomaatit Oy (hereinafter "Automatia") a company owned in equal shares by Danske Bank, Nordea Bank and the OP Group (three major banks in Finland)
Sector:	Financial and insurance activities
Outcome:	Commitment decision
Description of the agreement	Automatia planned to create a real-time mobile payment forwarding platform.

Summary of the NCA's assessment	The parties to the agreement planned to create a real-time mobile payment forwarding platform. Due to Automatia's ownership base, the payment forwarding platform was assessed as a cooperation between competitors. The initial view of the NCA was that the system may result in adverse competitive effects on the market of real-time payments. Automatia's system utilises a nationally customised technical standard in processing wire transfers. According to the NCA's assessment, this would reduce the incentives of foreign payment service providers to join Automatia's system and, consequently, the possibility of the customers joining the system to start using competing, Pan-European standards in the future. To avoid a potential problem with competition, Automatia committed to offer interfaces that conform to the Pan-European standard. Automatia also committed to offer all parties to the system the possibility to participate in decision-making and its preparation, with respect to the common policies and technical requirements. This ensures that Automatia and its shareholder banks or system vendor will not gain a production advantage over other companies operating on the market. In addition, Automatia undertook to remove the requirement in the system's rules that the identity of the user of the payment service is verified with so-called strong authentication, e.g., online banking credentials. According to the NCA's initial assessment, the requirement on strong authentication would have prevented the possibility of offering consumers the use of weak authentication in connection with low-risk payments. This weak authentication would have been a username and password the users would have created themselves. In its initial assessment, the NCA also noted the terms of joining Automatia's system, as they may influence the access to market of service providers that compete with the shareholder banks. Automatia committed to offer its services to all operators in the field unless refusal can be proven necessary after objective assessment. Automatia also committed to keep the payments related to the system reasonable, cost-based and non-discriminating.
Horizontal Guidelines relied on by the NCA	Yes
HBERs relied on by the NCA	No
Appealed	No
Appeal ruling	Not applicable
Summary of the appeal court's assessment	Not applicable

Prohibition decisions were issued in four cases, all of which were assessed under the Horizontal Guidelines and the Specialisation BER. The German NCA (DE40) dealt with a joint operation of an internet platform for online advertising, which was considered as a joint production cooperation within the meaning of Chapter 4 of the Horizontal Guidelines and the Specialisation BER. Although there were efficiencies to the joint operation of the platform, its restrictive nature was not indispensable, and a fair share of the resulting benefits for consumers was not ensured. Negotiations of commitments to open the platform to third parties and remove the content and technical restrictions failed, as the parties were not willing to remove certain anticompetitive clauses. The Higher Regional Court of Düsseldorf later upheld the prohibition decision of the NCA.

It appears that the majority (21) of the investigations concerning specialisation agreements were conducted as part of larger agreements involving commercialisation and information exchange. In the remaining 13 cases, the Horizontal Guidelines were not relied on by the NCA due to the temporal or geographical scope of the agreements, commitments offered by the undertakings or change in the factual circumstances, e.g. liquidation of the joint venture.

6.1.4. Information Exchange

The Horizontal Guidelines address information exchange in Chapter 2. Information exchange may take place in the form of direct or indirect exchange of information between competitors (through a common agency such as a trade association).[58] Information exchange may generate efficiency gains by removing information asymmetries between different actors in the supply chain,[59] but also lead to restrictions of competition if it enables

[58] *Supra, Horizontal Guidelines. Paragraph 55.*
[59] *Supra, Horizontal Guidelines. Paragraph 57.*

undertakings to get to know the market strategies of their competitors.[60] Where an information exchange takes place in the context of another type of horizontal cooperation agreement and does not go beyond what is necessary for its implementation, the market coverage[61] will usually not be large enough for the information exchange to give rise to restrictive effects on competition.[62]

Among the 126 relevant NCA cases identified in this study, there are 36 NCA investigations concerning information exchange agreements.[63]

Figure 7: NCA investigations (information exchange agreements) by MS

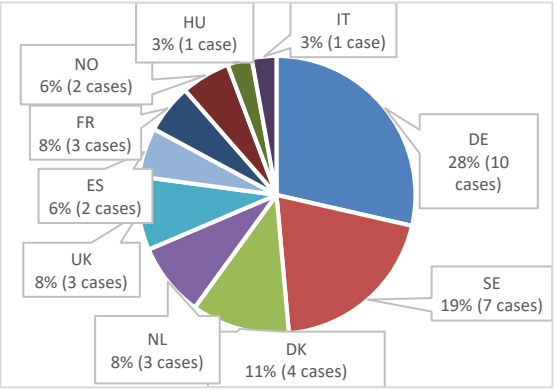
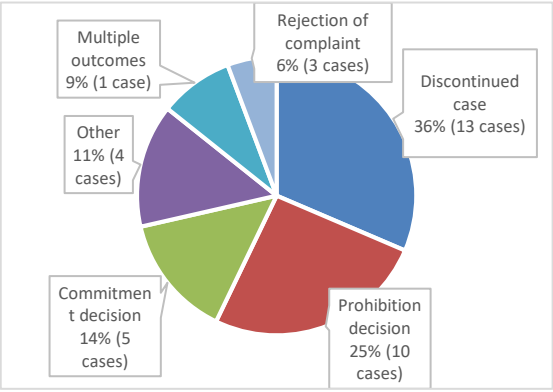


Figure 8: Outcome of NCA investigations (information exchange agreements)



In the car rental sector, two NCAs seemingly achieved diverging outcomes when assessing similar information exchange agreements (ES10 and FR01).

Box 3: Spain - ES10

Country:	Spain
Year:	2014
Parties:	Airport management company AENA and 11 car rental companies
Sector:	Transportation and storage
Outcome:	Prohibition decision
Description of the agreement	The airport management company AENA collected information from 11 car rental companies operating at airports about the companies' turnover, number of contracts and the contractual conditions offered by these companies to their customers. This information was then shared with all the car rental companies in monthly reports.
Summary of the NCA's assessment	In accordance with paragraph 60 of the Horizontal Guidelines, the information shared between the car rental companies via AENA was deemed sensitive and thus suitable to reduce independence in decision-making between the competitors and reduce uncertainty about the market behaviour of the competitors. The NCA also confirmed that AENA, though as an airport managing company not part of the relevant market for rental cars, can be considered part of the prohibited agreement and therefore liable in the role of 'Necessary Co-operator'. The defendants proposed a commitment, but the NCA rejected the request. As a consequence, the NCA issued a prohibition decision and imposed a fine of EUR 3.1 million.

[60] *Supra, Horizontal Guidelines. Paragraph 58.*
[61] *The market coverage below the market share thresholds set out in the relevant chapter of the Horizontal Guidelines, the relevant block exemption regulation (safe harbour of 25% for the R&D BER and 20% for the Specialisation BER) or the De Minimis Notice pertaining to the type of agreement in question.*
Communication from the Commission, Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice). OJ C-291/1, 30.8.2014.
[62] *Supra, para. 88 of the Horizontal Guidelines.*
[63] *36 out of 75 reported cases were included in the analysis, since the rest of the cases were assessed as cartel cases by the research team .*

Horizontal Guidelines relied on by the NCA	Yes
Appealed	No
Appeal ruling	Not applicable
Summary of the appeal court's assessment	Not applicable

Another car rental investigation by the French NCA (FR01) led to a different outcome.

Box 4: France - FR01

Country:	France
Year:	2017
Parties:	6 car rental companies (Europcar, Avis, Hertz, Milton, Sixt, ADA) and some of their franchisees, 12 French airports
Sector:	Transportation and storage
Outcome:	Rejection decision
Description of the agreement	The car rental firms exchanged precise, individual and confidential information on their monthly activity through airport management companies.
Summary of the NCA's assessment	According to the statement of objections, the car rental firms exchanged precise, individual, and confidential information on their monthly activity through airport management companies. The information exchange system was the following. First, car rental companies transmitted several data elements to airports in accordance with leases and agreements concluded with airport management companies. Then, airport management companies resent, on a monthly basis, individual data to each car rental company. This data generally related to turnover and to the number of agreements concluded (covering all markets segments - individuals and businesses). According to the NCA, it was necessary to determine whether the transmission of individual turnovers and the number of agreements concluded by each car rental company during the last month could sufficiently reduce uncertainty in the market, so that each car rental company was able to determine pricing and commercial strategies of their competitors with sufficient precision to adapt his behaviour. The NCA analysed the market structure and the strategic nature of the information exchanged and concluded the following: Regarding the characteristics of the two relevant markets, aggregated data relating to these markets (i.e., car rental for individuals and car rental for businesses) could not, in this case, reduce commercial autonomy of car rental companies by revealing the commercial strategy of their competitors in any relevant markets (car rental for individuals, car rental for businesses, or both markets). The non-strategic nature of information exchanged was confirmed by the evidence. The NCA considered that the evidence did not establish that monthly information provided by airport management companies gave to car rental companies a precise knowledge of the short-term strategy of their competitors, even if the car rental companies recognised that they took into account data from airport management companies, as well as other data, in order to assess the performance of their agencies at the airports. Therefore, it was not demonstrated that there was any potential anticompetitive effect resulting from the exchange of information, which would proof that the exchanged information have been used by companies to adjust their behaviours. The French NCA considered that the exchange of information did not reduce commercial autonomy of car rental companies regarding characteristics of the car rental activity in airports. It was not established that monthly exchange of information between car rental firms through airport management companies had a strategic nature, meaning that the transmission could have a potential restrictive effect on their autonomy by revealing, on a monthly basis, their positions and strategies on the affected markets. The NCA therefore rejected the claim that the rental agreements were anticompetitive.
Horizontal Guidelines relied on by the NCA	Yes
Appealed	No
Appeal ruling	Not applicable
Summary of the appeal courts assessment	Not applicable

The different outcome of the two cases seems to be motivated by a different factual assessment of the type of information exchanged by the two competition authorities. In particular, while the Spanish NCA considered that the parties exchanged 'strategic' information, in accordance with paragraph 86 of the Horizontal Guidelines (ES10), the French NCA concluded that the periodical exchange of the information concerning turnover among the car rental companies and the airport management authority was 'non-strategic' and thus unlikely to lead to a collusive outcome (FR01). The diverging interpretation by the Spanish and French NCAs in relation to the meaning of 'strategic' information in the car rental cases show the lack of clarity in the Horizontal Guidelines in this regard.

Out of the 11 information exchange agreements reported by the German NCA, 8 were assessed by relying on Chapter 2.2. of the Horizontal Guidelines.

In its (7) investigations concerning information exchange agreements the Swedish NCA relied on the Horizontal Guidelines; three of the cases were discontinued due to insufficient evidence. Complaints in two other cases were rejected and two cases dealt with by the NCA in the past 10 years resulted in commitments.

In the majority of the cases (13 out of 17) reported by other NCAs (4 in Denmark, 3 in the Netherlands and the UK respectively, 2 in France and Norway respectively, and 1 in Spain, Hungary, and Italy respectively), the authority explicitly relied on Chapter 2 of the Horizontal Guidelines.

Two investigations from 2015 by the Dutch NCA in the sector of human health aimed to define the potential competitors in a – what was believed to be – narrow product market. The first investigation (NL05) concerned information exchange with respect to an agreement on joint determination of treatment plans for individual patients in a multidisciplinary consultation, setting up a joint care process per tumour type, and sharing expertise between three Dutch hospitals. The other investigation (NL06) dealt with a cooperative association named PACT established by a group of pharmacists. The aim of PACT was to support independent pharmacies in the realisation of pharmaceutical care at appropriate business conditions and to conduct negotiations with health insurers on behalf of its members. No restriction of competition was established in either of the investigations. The informal decisions given by the Dutch NCA contain no reference to the Horizontal Guidelines.

In total, the NCAs issued 9 prohibition decisions (one of which is assessed in Section 3.1.5 on joint purchasing agreements and two in Section 3.1.8. on agreements not explicitly mentioned in the Horizontal Guidelines) concerning information exchange. For example, in 2019, the Spanish NCA (ES03) prohibited conduct arising from an agreement concerning a group of food producers which exchanged information about the dairy production market in Spain, in order to coordinate their strategies towards acquiring milk from dairy farmers. The exchanged information concerned the collection of raw cow's milk and the determination of its price. Relying on the Horizontal Guidelines, the competition authority concluded that the exchange of information between competitors of individualised data on future prices or quantities should be seen as a restriction of competition by object within the meaning of Article 101(1) of the Treaty. Moreover, the NCA found that the exchange of information on data other than prices, such as current and future customer lists, sales or volumes, could also reduce strategic market uncertainty. This type of exchange of strategic information was thus considered anticompetitive and the NCA issued a prohibition decision and imposed fines.

The French NCA (FR02) dealt with a case of regular exchange of confidential commercial information between undertakings operating in the meal voucher market. Between 2010 and 2015, Edenred France, Up, Natixis Intertitres and Sodexo Pass France exchanged confidential commercial information every month, through the so-called Securities Settlement Centre ('CRT'). The information concerned their respective market shares and allowed the companies to monitor their positions on the market and allocate customers. It appears from the facts of the case that the CRT had transmitted since 2010 monthly "dashboards" to the administrative and financial directors of its member-policyholders (Edenred France, Up, Natixis Intertitres and Sodexo Pass France). These monthly "dashboards" retraced the market shares of each of its member-policyholders. Moreover, these dashboards notably recorded the number of meal vouchers processed by the CRT in

the previous month, disaggregated at the issuer level, as well as the monthly market share of each issuer, calculated from the number of vouchers processed. Given the characteristics of the market, and notably the high concentration of the meal vouchers sector, its transparency, the monthly frequency of exchanges, the level of disaggregation of the data exchanged, their confidentiality, these data were of strategic use for issuers. This information allowed each issuer to detect any change in the pricing strategy of its competitors and therefore to dissuade it from adopting any aggressive pricing behaviour. Moreover, the regular exchange of information increased transparency and reduced uncertainty in the oligopolistic market, and thus reduced the commercial autonomy of the parties. The NCA relied on CJEU case law (in particular *John Deere*[64]) and paragraph 61 of the Horizontal Guidelines in concluding that the use of data by the parties is not required to prove distortion of competition.

The UK NCA dealt with the sharing of strategic information (UK08), on a bilateral basis, between competing asset management undertakings listed during one initial public offering and one placing shortly before the share prices were set. In its legal assessment, the NCA relied to the Horizontal Guidelines, in particular paras 61, 62, 72, 73, and 74.

Overall, the NCAs applied the Horizontal Guidelines in the majority (23 out of 36) of the cases concerning information exchange.

Finally, it is worth noticing that the majority of cases discussed above are examples of exchange of information concerning prices, turnover, volume etc. among the firms involved in the agreement. However, an increasing number of recent investigations concern the exchange of personal and non-personal data among the firms involved in the agreement (e.g. NL05). However, the Horizontal Guidelines do not currently refer to personal and non-personal data.

6.1.5. Joint Purchasing Agreements

Chapter 5 of the Horizontal Guidelines deals with joint purchasing agreements. Joint purchasing may be carried out by a jointly controlled company, by a company in which many other companies hold non-controlling stakes, by a contractual arrangement or by even looser forms of co-operation.[65] A common form of joint purchasing arrangement is an 'alliance', that is to say an association of undertakings formed by a group of retailers for the joint purchasing of products.[66] Alliances are independent organisations, which are cooperating and forming partnerships and coalitions based on mutual needs, most importantly relating to sourcing supplies.[67] The objective of these types of agreements is to increase the buyers' power in their relations with suppliers: retailers ally to negotiate lower prices with suppliers and are consequently able to offer lower prices to consumers.[68]

Out of the 126 relevant NCA cases identified in the present study, the NCAs reported 24 investigations concerning joint purchasing agreements. Only in 3 cases the NCAs adopted a prohibition decision and in 1 case a commitment decision, while 9 NCAs investigations were discontinued and in 3 cases the complaint was rejected. The remaining cases are either still ongoing (3 cases), or resulted in an informal opinion (3 cases) or a recommendation to the respective government (1 case). Finally, 2 private enforcement cases were also identified.

[64] *Case C-7/95 P, John Deere Ltd v Commission (1998) ECLI:EU:C:1998:256.*
[65] *Supra, para 194 of the Horizontal Guidelines.*
[66] *Supra, para 196 of the Horizontal Guidelines.*
[67] *JRC, 'Retail alliances in the agricultural and food supply chain' (2020). Available at: https://publications.jrc.ec.europa.eu/repository/bitstream/JRC120271/jrc120271_report_retail_alliances_final_pubsy_09052020.pdf (21.04.2021).*
[68] *Supra, para 194 of the Horizontal Guidelines.*

Figure 9: NCA investigations (joint purchasing agreements) by MS

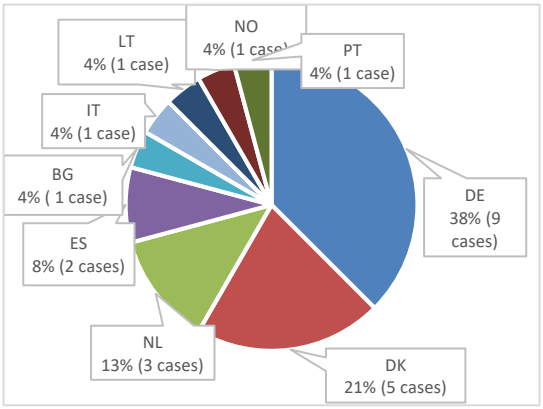
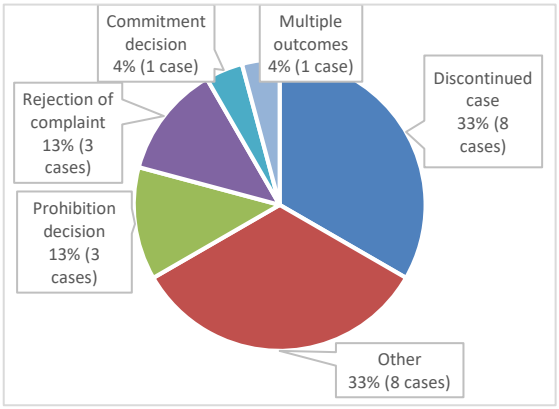


Figure 10: Outcome of NCA investigations (joint purchasing agreements)



Three prohibition decisions where the centre of gravity was determined to be joint purchasing were dealt with by the Lithuanian and Spanish NCAs respectively, and a regional court in Germany.

The case below concerning orthopaedic technical equipment was assessed by the Lithuanian NCA (LT01).

Box 5: Lithuania - LT01

Country:	Lithuania
Year:	2011
Parties:	National Health Insurance Fund, UAB 'Ortopagalba', UAB 'Ortopedijos centras', UAB 'Ortopedijos klinika' and others versus the Competition Council of the Republic of Lithuania
Sector:	Other: orthopaedic technical equipment
Outcome:	Prohibition decision
Description of the agreement	Prohibited agreements on the setting of price of orthopaedic technical means, the fixing of production volumes for certain goods, the sharing of the product market on a territorial basis, as well as non-compliance with the duty of entities of public administration to ensure the freedom of fair competition.
Summary of the NCA's assessment	The National Health Insurance Fund and the undertakings UAB 'Ortopagalba', UAB 'Ortopedijos centras', UAB 'Ortopedijos klinika' and others entered into an agreement to jointly calculate/decide upon and provide coordinated data based on which the purchasing terms and conditions for the orthopaedic technical equipment are set and approved by legal acts. After an assessment under the Horizontal Guidelines, the NCA concluded that only if the companies' anti-competitive behaviour is required by national legislation, or if it establishes a legal framework which prevents any companies' competitive processes, Article 101 of the Treaty is not applicable. However, in this case, the national legislation did not oblige economic operators to conclude the contested agreements, which did not allow companies to compete and decide independently on their behaviour within the market.
Horizontal Guidelines relied on by the NCA	Yes
Appealed	Yes
Appeal ruling	The prohibition decision was appealed by the parties and upheld by the Vilnius Regional Administrative Court.
Summary of the appeal court's assessment	In accordance with the decision of the Vilnius Regional Administrative Court, the complaints of the undertakings and the National Health Insurance Fund were dismissed by the court on appeal.

The Spanish NCA (ES08) dealt with boycott practices of the members of the Spanish Commercial Radio Broadcasting Association (AERC) dealing with music rights and music reproduction for radio stations in Spain. During the negotiations of AERC with the Association of Management of Intellectual Rights (AGEDI) to set the copyright fees to be paid by its members for the commercial broadcasting of phonograms, AERC made collective

recommendations to block payments by their members to AGEDI, in order to put pressure on the copyright association. The agreement/recommendation had the effect of conditioning the negotiations, resulting in a loss of income for AGEDI and potentially increasing the copyright fees for non-members of AERC. The NCA took into account the Horizontal Guidelines in its analysis of whether the conduct was an infringement of competition rules. The prohibition decision issued by the NCA was subsequently upheld by the Administrative Court.

An investigation by the German NCA (DE32) concerned a cooperation agreement in a bidding process for the purchase of Champions League broadcasting rights and the subsequent allocation of the broadcasting rights through sublicensing. The investigation gave rise to a discussion if the agreement was a hardcore restriction. It also gave rise to the question if paragraph 30 of the Horizontal Guidelines is applicable to joint purchasing and, if so, what principles apply. However, the agreement was mostly assessed as a joint purchasing agreements under Chapter 5 of the Horizontal Guidelines. The NCA concluded that the parties had market power and the purchasing cooperation served as a tool for market allocation. The NCA decided to discontinue the investigation due to the outbreak of the corona virus crisis, and thus the impossibility for the NCA to assess the need of a competition law intervention because of uncertain developments in the football sector in Europe.[69]

In the remaining cases concerning joint purchasing agreements (3 in the Netherlands, 2 in Spain, and 1 in Bulgaria, Italy, Lithuania, Norway, and Portugal respectively), the NCAs relied on the Horizontal Guidelines in their assessment, with the exception of two cases.

The Dutch NCA (NL14) dealt with an agreement to enter into a partnership between ABN AMRO Bank, Rabobank and ING Bank. In the NCA's view, the cooperation within the Geld Service Nederland (GSN) partnership aimed at the joint purchasing of cash processing and logistics services. The cooperation agreement did not relate to the commercial policy of the participating banks, such as the price that the banks charge their customers for depositing money. The NCA thus did not expect any adverse effects of the cooperation between the buyers of cash processing services. The NCA rejected the complaint; the decision was subsequently upheld by the court in the appeal procedure. The fact that on appeal the court upheld the NCA finding may be seen as a sign that the national court and the NCA assessed the horizontal cooperation agreement in the same way.

Another NCA investigation in Italy (IT05) concerned a buying alliance among retailers.

Box 6: Italy - IT05

Country:	Italy
Year:	2014
Parties:	CENTRALE ITALIANA S.c. a r.l.;COOP ITALIA S.c. a r.l; DESPAR SERVIZI Consorzio GARTICO a r.l.; DISCOVERDE S.r.l.; SIGMA.
Sector:	groceries and non-groceries trade sector
Outcome:	Commitment decision
Description of the agreement	The agreement concerned a buying alliance (called CENTRALE ITALIANA) between large distribution chains, involving trading conditions vis-à-vis suppliers, conditional discounts and conditions on other strategic variables such as the joint development of their respective sales network.
Summary of the NCA's assessment	It was alleged that belonging to CENTRALE ITALIANA can involve coordination of the commercial behaviour of the members and/or adjacent companies, both in the procurement negotiations and in the phase of setting up the localisation and sales strategies, with possible anti-competitive effects in the affected markets for the supply and distribution of products. The commitments presented by the parties provided for, inter alia, the dissolution of CENTRALE ITALIANA starting from 2015. According to the NCAs assessment, the dissolution of CENTRALE ITALIANA would have a significant pro-competitive effect in the Italian provinces where Coop Italia or Despar already held a significant position. In these geographic areas, CENTRALE

69 https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2020/15_04_2020_Champions_League.html;jsessionid=2A79400DE0410AED4F729FD1A856DD7F.1_cid390?nn=3591286 (30.10.2020).

	ITALIANA had a market share close to 50%, due to the sum of Coop Italia and Despare market shares. Dissolution of the alliance would thus cease the commercial coordination between the 5 parties to the agreement. On 17 September 2014, the NCA adopted a final decision making the commitments proposed by the parties binding and terminating the proceeding without ascertaining the alleged violation. The commitments involved the dissolution of CENTRALE ITALIANA and of any other cooperation agreement between the five supermarket chains.
Horizontal Guidelines relied on by the Court	No
HBERs relied on by the Court	No
Appealed	No
Appeal ruling	Not applicable
Summary of the appeal court's assessment	Not applicable

A case by the German Regional Court of Cologne (LG Köln) (DE44) also concerned joint purchasing agreement. However, the judgment was later annulled by the *Bundesgerichtshof*.

Box 7: Germany - DE44

Country:	Germany
Year:	2012
Parties:	Bundesverband Presse-Grosso and L Media Group
Sector:	Information and communication
Outcome:	Prohibition decision
Description of the agreement	The Bundesverband Pressegrosso represents press wholesalers, which distribute press products to retailers in a given territory. The Bundesverband negotiates conditions with press publishers like the Bauer Verlag which then apply to all its members, i.e. the press wholesalers. Bauer Verlag brought a legal action against this cooperation of wholesalers.
Summary of the Court's assessment	One of the press publishers brought a legal action against this cooperation of wholesalers for the alleged coordination of prices and conditions among the press wholesalers that breached Article 101 of the Treaty in conjunction with Section 33 (1) German competition act (GWB). The court considered the purchasing agreement a restriction of competition under Article 101(1), which did not meet the requirements of Article 101(3). The Horizontal Guidelines were not considered by the court in its ruling.
Horizontal Guidelines relied on by the Court	No
HBERs relied on by the Court	No
Appealed	Yes
Appeal ruling	The court of last instance (*Bundesgerichtshof*) subsequently annulled the decision of the court of first instance.
Summary of the appeal court's assessment	The activities of the press wholesalers were considered to be 'of general economic interest' according to Article 106(2) of the Treaty and they are therefore excluded from the application of Article 101 insofar as these rules affect their performance.

In the category of joint purchasing agreements, 20 out of 26 NCA/court cases explicitly relied on the Horizontal Guidelines. In three of these cases, national courts upheld NCAs' decisions. On the other hand, in one case the appeal court annulled the original decision of the court of first instance. As further discussed in Section 3.1.10, this data may indicate that, in spite of the very limited number of court cases identified in the study, national courts generally do not diverge from the NCA assessment in public enforcement cases.

6.1.6. Commercialisation Agreements

Cooperation in selling, distributing and promoting products between competitors is covered in Chapter 6 of the Horizontal Guidelines. It applies to agreements to distribute one another's products on a reciprocal basis, but also to non-reciprocal arrangements.[70] Where joint commercialisation is part of other types of cooperation, such as R&D or joint production, it is necessary to determine the centre of gravity of the cooperation.[71]

Out of the 126 relevant NCA cases identified in this study, commercialisation agreements were one of the most common types of horizontal cooperation agreements with 50 investigations by the NCAs. In addition, a private enforcement case was identified in the study.

Figure 11: NCA investigations (commercialisation agreements) by MS

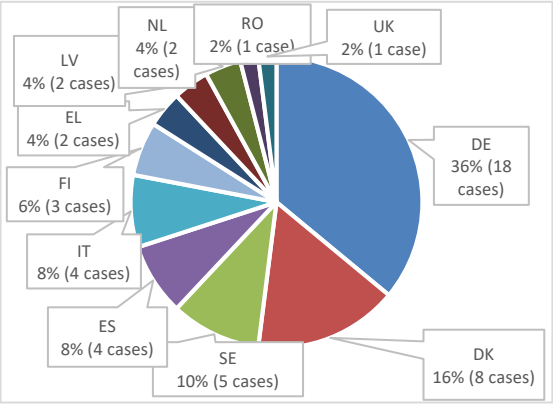
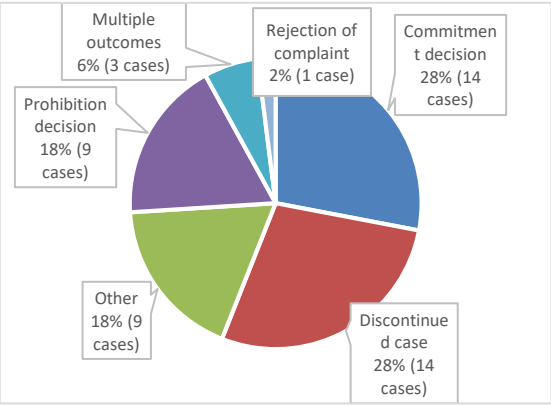


Figure 12: Outcome of NCA investigations (commercialisation agreements)



Nearly a third of the analysed NCAs investigations (18) were reported by the German NCA. The German NCA generally explicitly relied on Chapter 6 of the Horizontal Guidelines, with the exception of three decisions (DE12, DE14 and DE16) on the joint selling of football media rights by a football association. The 3 investigations concerned a recurring commercialisation agreement, concluded by the football association every 4 years. In the latter decisions, the German NCA did not rely on Chapter 6 of the Horizontal Guidelines, but rather on the Commission's Guidelines on the application of Article 101(3) of the Treaty and previous decisions of the European Commission. Nevertheless, joint selling of media rights is seen as a form of commercialisation agreement under Chapter 6 of the Horizontal Guidelines.[72] Commitment decisions were issued by the German NCA in the 3 cases.

Box 8: Germany - DE12, DE14, DE16

Country:	Germany
Year:	2012, 2016, 2020
Parties:	DFL Deutsche Fußball Liga e. V.; DFL Deutsche Fußball Liga GmbH (the association of German football clubs playing in the first or second national league)
Sector:	Sport media rights
Outcome:	Commitment decisions
Description of the agreement	The DFL regroups German football clubs and jointly negotiates broadcasting rights for football matches.
Summary of the NCA's assessment	The 36 German football clubs that play in the first or second national league are represented by the DFL ("German Football League"). Broadcasting rights for league matches are sold by the DFL on behalf of the clubs. Broadcasting rights are awarded periodically every four years, which

[70] *Supra, para 227 of the Horizontal Guidelines.*
[71] *Supra, para 228 of the Horizontal Guidelines.*
[72] *Supra, paras 225 and 234 of the Horizontal Guidelines.*

	is reflected by the fact that the NCA adopted three decisions in regular intervals dealing with the same horizontal cooperation agreement. The NCA defined the market as covering annual football competitions in which national league clubs participate (that is the first and second national league, the national cup and the UEFA Champions League and Europa League), as well as downstream distribution (including online and via pay tv). The DFL represents, according to the NCA, a market share of more than 50%. In its assessment, the NCA established that the horizontal agreement in question does restrict competition and assessed whether Article 101(3) of the Treaty applied. It concluded that centralised marketing by the DFL of matches of the football clubs does have efficiency gains compared to marketing of matches by individual clubs. This form of marketing notably corresponds to the demand of end consumers, who prefer a comprehensive league product. To offer such a league product, a minimal level of cooperation between the footballs club is required. The NCA did not refer to the Horizontal Guidelines, but it extensively referred to Guidelines on the application of Article 101(3) of the Treaty, notably while assessing whether consumers had a fair share of the benefit that resulted from the centralised selling practice. In addition, it referred to three previous decisions of the European Commission (Champions League[73], Bundesliga[74], Premier League[75]) in which the European Commission set out criteria for allowing the centralised marketing of football matches by national leagues. These criteria include, inter alia: a limited duration of the distribution contracts, a transparent and non-discriminatory award procedure, application of the 'no single buyer' rule, and selling of the distribution rights in packages for different distribution channels. Based on this assessment, the DFL committed in each of the three decisions to modify its horizontal cooperation agreements in order to meet the established criteria, for example by implementing an effective 'no single buyer' rule in its procedures.
Horizontal Guidelines relied on by NCA	No
HBERs relied on by NCA	No
Appealed	No
Appeal ruling	Not applicable
Summary of the appeal courts assessment	Not applicable

Similarly, the Danish NCA mostly explicitly relied on the Horizontal Guidelines in its decisions, as well as on previous European Commission decisions in relation to horizontal cooperation agreements[76] that preceded the 2010 Horizontal Guidelines. One investigation in Denmark (DK22) assessed whether two decisions made by the Danish umbrella organization "Campingrådet", on the subject of (1) price fixing in relation to the sale of Camping Key Europe cards (CKE Camping card) from 446 of the Danish campsites; and (2) that the campsites in question should only accept CKE as a valid camping card, had as their object the restrict of competition on the camping card market.

Box 9: Denmark - DK22

Country:	Denmark
Year:	2017
Parties:	The Camping Council, (Campingrådet) an organisation for associations representing campground owners and campground users, and DK-CAMP, which was a member of the Camping Council, and an association representing 300 camping businesses
Sector:	Arts, entertainment and recreation
Outcome:	Prohibition decision

[73] *Commission Decision of 23 July 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/C.2-37.398 — Joint selling of the commercial rights of the UEFA Champions League). OJ L-291/25, 8.11.2003.*
[74] *Commission Decision of 19 January 2005 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53(1) of the EEA Agreement (Case COMP/C.2/37.214 — Joint selling of the media rights to the German Bundesliga). OJ L-134/46, 27.5.2005.*
[75] *Commission Decision of 22 March 2006 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/38.173 — Joint selling of the media rights to the FA Premier League). OJ C-7/18, 12.1.2008.*
[76] *One decision referred to the Commission decision in relation to the joint selling of the commercial rights of the UEFA Champions League (supra).*

Description of the agreement	The Camping Council and its members had entered into an agreement fixing the price of the CKE-camping card in the period 2011-2016 and to *de facto* exclude competing camping cards in the period 2012-2016.
Summary of the NCA's assessment	The restrictive practice regarded agreements that fixed the price of the CKE-card. The CKE-card was administrated by the Camping Council and was sold by both the Camping Council and individually by, among others, DK-CAMP´s members. The restricted practice further included the *de facto* exclusion of competing camping card, such as ACSI Club ID. The relevant product market encompassed the market for sales of overnight stays at campsites, and the market for camping card sales. The relevant geographic market for the sale of overnight stays at campsites was limited to Denmark. The relevant geographical market for the sale of camping cards was (probably) national and not larger than the EU/EEA. The parties argued among other things that the agreement regarding the CKE-card was a legal vertical agreement on exclusivity and not a horizontal cooperation agreement, and further that the individual camping businesses (which were members of DK CAMP) acted as agents of the Camping Council. This was based on the argument that the companies were not independently active on the market for sale of camping cards, and that the campsites neither carried the financial nor the commercial risk associated with the sale of the CKE-card. DK-CAMP also argued that it did not sell camping cards and that DK-CAMP had no influence on the Camping Council. The parties further argued that the agreement was exempted under the Specialisation BER as a joint production agreement. The NCA firstly found that several campsites were indirect members of the Camping Council through their membership of DK-CAMP. Since both the Camping Council and the individual companies sold camping cards directly to end user, the NCA concluded that the parties were competitors and that the agreement was a horizontal cooperation agreement. The NCA secondly found that the agreement was not exempted under the Specialisation BER. The agreement could not be considered a joint production agreement, since such agreement requires an integrated cooperation on several steps such as e.g. joint production and marketing. In that regard, the NCA concluded that the agreement solely regarded a marketing cooperation, which could not be exempted under the Specialisation BER. The NCA further found that the agreement was not exempted under the vertical BER as a legal exclusivity agreement. The NCA further noted that the centre of gravity of the agreement was not the production of the CKE-card but instead how the CKE-card was marketed and sold in Denmark. The NCA thirdly found that, since the case at hand was of horizontal nature the agreement, could not constitute an agency agreement. The NCA finally concluded that the decision not to accept camping cards other than the CKE-card, including specifically rejecting other cards, such as the ACSI Club ID-card, could significantly affect trade between Member States. The object of the agreement was therefore to significantly restrict competition in the market for the sale of camping cards. Thus, neither the block exemptions nor the individual exemption of section 8(1) of the Danish Competition Act or Article 101(3) of the Treaty applied. As a consequence, the parties violated Section 6(2) of the Danish Competition Act and Article 101(1) of the Treaty.
Horizontal Guidelines relied on by NCA	Yes
HBERs relied on by NCA	Yes, Specialisation BER
Appealed	Yes
Appeal ruling	The NCA's decision was upheld by the Competition Appeal Tribunal.
Summary of the appeal courts assessment	The Competition Appeals Tribunal held that it was undisputed that the Camping Council, which included the representatives of the majority of the campsites in Denmark, and where DK-CAMP represented 300 out of 446 pitches, entered into agreements to fix prices for the sale of the CKE camping cards and to exclude other camping cards from members' campsites. The Competition Appeals Tribunal agreed that this was a horizontal cooperation agreement, as both the Camping Council and the individual campsites sold the camping cards directly to end users, which is why they must be considered competitors in the relevant market as established by the Competition Council. The Competition Appeals Tribunal further agreed that the agreements themselves intended to harm competition by a combined agreement on price and an exclusion of competitors from the market entered into by 90% of the campsites in Denmark. The Competition Appeals Tribunal did not find that the agreements met the conditions for individual exemption under section 8 of the Danish Competition Act and Article 101(3) of the Treaty. The Competition Appeals Tribunal thus concluded that DK-CAMP was in breach of competition rules.

The other NCAs reported fewer cases (5 in Sweden, Italy, and Spain respectively, 3 in Finland, 2 in Greece, Latvia and the Netherlands respectively, and 1 in Romania and the United Kingdom respectively) concerning commercialisation agreements. In the vast

majority of these cases (19 out of 23 cases), the NCAs explicitly relied on the Horizontal Guidelines and the relevant case law of the Court of Justice of the European Union (CJEU).[77]

The Italian NCA adopted a prohibition decision (IT03) concerning an agreement to implement Regulation (EU) No 260/2012[78] with particular reference to a SEPA Direct Debit ('SEPA DD') additional and optional service ('AOS'), named SEDA, setting the fees for such services.

Box 10: Italy - IT03

Country:	Italy
Year:	2012
Parties:	Italian Banking Association (ABI) and the banking groups: Unicredit, Intesa SanPaolo, ICCREA, ICBPI, BNL, MPS, UBI Banca, Cariparma, plus 3 others
Sector:	Financial and insurance activities
Outcome:	Prohibition decision
Description of the agreement	An agreement to implement Regulation (EU) No 260/2012 with particular reference to a SEPA Direct Debit (SEPA DD) additional and optional service (AOS), named SEDA, setting the fees for such services.
Summary of the NCA's assessment	On 28 April 2017, the NCA adopted a prohibition decision ascertaining the infringement of Article 101 of the Treaty by the parties. The agreement designing SEDA's service was qualified as a decision of association of undertakings fixing trading conditions, which has caused a significant increase in banking fees for undertakings (e.g. public utilities). SEDA is an informative service whose purpose is to exchange, process and route mandate-related information between two banks/financial institutions (banks chosen by Debtor and Creditor). SEDA's business rules have been designed by ABI and the banks. All the ABI members were required to adopt the SEDA basic version. The SEDA service was launched in October 2013. The remuneration mechanism designed by ABI for the AOS SEDA establishes that the fees for SEDA service had to be paid by the creditor directly to the debtor's bank on the basis of maximum fees set by each bank individually. In such a mechanism, the creditor had a very limited bargaining power. The assessment was consistent with the general principles for the assessment under Article 101 of the Treaty, as highlighted by the Horizontal Guidelines, in particular with those related to restrictions of competition by object involving price-fixing. The decision was appealed, and the Court ruling is still pending.
Horizontal Guidelines relied by NCA	No
HBERs relied on by NCA	No
Appealed	Yes
Appeal ruling	Pending
Summary of the appeal courts assessment	Not yet available

A NCA decision (IT06) in Italy dealt with an agreement concerning the manufacture of basic pharmaceutical products and pharmaceutical preparations. On 4 June 2015, the NCA adopted a final decision making the commitments proposed by the parties binding, and terminating the proceeding without ascertaining the alleged violation. The agreement contained elements of R&D cooperation in the sense of Article 1(1) of the R&D BER and Chapter 3 of the Horizontal Guidelines (see Section 6.1.2 on R&D agreements).

Prohibition decisions concerning commercialisation agreements were issued in relation to nine horizontal cooperation agreements.

[77] *See Case T-461/07, Visa Europe Ltd and Visa International Service v European Commission (2011) ECLI:EU:T:2011:181, paras 166-168 and Case T-208/13, Portugal Telecom SGPS, SA v European Commission (2016) ECLI:EU:T:2016:368, para. 186.*

[78] *Regulation (EU) No 260/2012 of the European Parliament and of the Council of 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in euro and amending Regulation (EC) No 924/2009, OJ L-94/22, 30.3.2012.*

The German NCA issued prohibition decisions in two instances. One of the decisions (DE15) dealt with an agreement regarding the joint marketing of wood. The agreement resulted in coordination of prices (see paragraph 234 of the Horizontal Guidelines) and the combined market share of the undertakings was significantly higher than 15% (paragraph 240 of the Horizontal Guidelines). In 2012, the German NCA reappealed the initial prohibition decision under Section 32b ARC, which mirrors Article 9(2) of Regulation (EC) No 1/2003. The new prohibition decision was later upheld by the German court of first instance. However, on 12 June 2018, the Federal Supreme Court (*Bundesgerichtshof*) annulled the reappealing decision on procedural grounds. The Supreme Court rejected the argument that there had been a material change in the facts of the case such as to justify a re-appealing of the initial decision. In the opinion of the Supreme Court, a repeal was therefore legally not viable. No assessment of the substance of the case was made by the Supreme Court.

The Danish NCA (DK19) issued a prohibition decision in a case concerning a trade agreement between the Association of Danish Film Distributors and the Association of Danish Cinemas. The agreement stipulated that discounts could only be offered when a cinema had entered into an agreement with a film distributor. Secondly, discounts above 20% of the regular ticket price should be approved by the Association of Distributors before being implemented. The NCA found that the agreements restricted competition between film distributors and would eventually lead to higher prices in leasing of movies to cinemas, which would ultimately result in higher prices of movie tickets in cinemas thus hurting consumers. The NCA explicitly relied on the Horizontal Guidelines in its assessment of this horizontal cooperation agreement.

Four decisions (one of which was discussed in Section 6.1.3 on Specialisation agreements) prohibiting anti-competitive commercialisation agreements were issued by the Spanish NCA in the period under review. In the first decision (ES04), YOIGO and TELEFÓNICA signed an agreement that granted mutual access to their telecom networks and gave one of them a veto power over reselling the access and the possibility for other undertakings to market its products. The Horizontal Guidelines were followed by the NCA, in order to analyse whether the conduct had been anticompetitive. In particular, the NCA considered that YOIGO's roaming agreement on the TELEFÓNICA network benefited from the exemption provided for in Article 1(3) of Law 15/2007 of 3 July 2007 for Defence of Competition (LDC) and Article 101(3) of the Treaty, with the exception of the cited conditions contained therein, as they did not generate prevailing efficiencies over their restrictive nature, and neither have the parties demonstrated otherwise, as required by the Horizontal Guidelines.

Another Spanish NCA decision (ES05) concerned a horizontal cooperation agreement between competing operators in the acquisition, resale and exploitation of football TV rights. The conduct had effects on the acquisition and resale of football broadcasting rights, since the parties did not compete to acquire the rights, and on the provision of pay TV content, since the parties coordinated to market it. The NCA considered that this kind of agreement was not acceptable under EU competition rules, including the Horizontal Guidelines. The NCA explicitly relied on paragraph 12 of the Horizontal Guidelines in assessing that distribution agreements concluded between competitors may be similar to horizontal cooperation agreements based on the effects of the agreement on the market and potential competition issues. The NCA considered that, in this sector, both operators accounted for almost 76% of revenues in the last quarter of 2012; a percentage that increased to almost 82% of revenues in the last quarter of 2013.

In the last Spanish NCA case, an agreement on publishing and commercialising printed textbooks and electronic textbooks in Spanish language was declared anticompetitive. The NCA used the Horizontal Guidelines as a reference tool. Efficiencies were analysed in this case, but eventually discarded.

Out of the total 50 relevant NCA investigations, the NCAs explicitly relied on the Horizontal Guidelines in 38 cases. Legal assessment in the other cases either did not take place due to the novel nature of the agreements at hand or because the parties proposed commitments during the investigations. National courts upheld NCAs' decisions in seven of these cases.

Joint bidding agreements

Joint bidding agreements represent an additional category of horizontal cooperation agreements investigated by the NCAs during the past decade. Though not explicitly mentioned either in the HBERs or in the Horizontal Guidelines, guidance is included in Chapter 6 of the Guidelines on commercialisation. Via joint bidding agreements, undertakings submit a joint offer in a procurement procedure.

Out of the 126 relevant NCA cases identified in this study, eight NCA investigations concerned joint bidding agreements. These cases were investigated by the NCAs in Germany (2 investigations), Norway, Denmark, Italy, Slovenia and Sweden (each 1 investigation). 2 of these cases were discontinued, 1 case was concluded with a rejection decision and 4 with a prohibition decision. One case was a so-called advocacy proceeding, where a business association asked the NCA for advice in drafting guidelines for its members. Finally, one private enforcement case in Germany also concerned a joint bidding agreement.

Figure 13: NCA investigations (other agreements) by MS

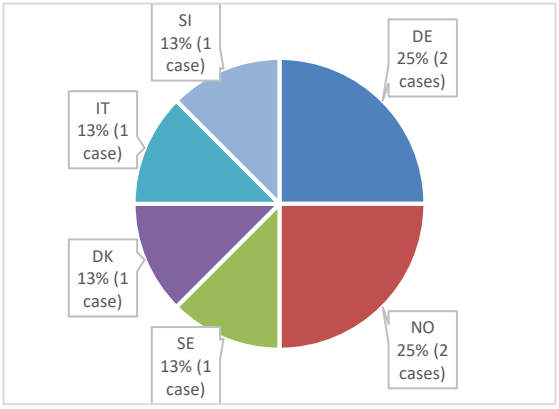
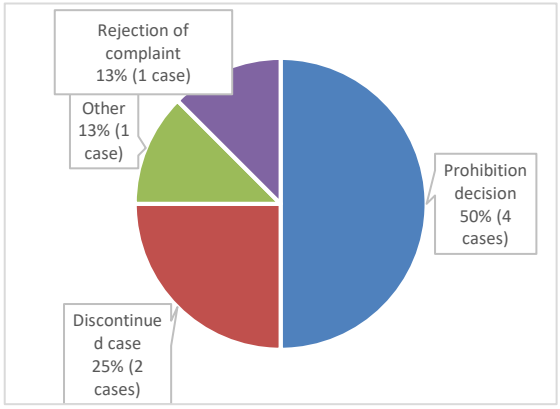


Figure 14: Outcome of NCA investigations (other agreements)



In the investigations where the NCAs carried out a detailed legal assessment, the main question was whether it was necessary for the parties to submit a joint bid in order to meet the tender requirements, or whether the parties would have had the capacity to submit separate bids - i.e. whether and to what extent a joint bidding agreement was 'not necessary' and it could restrict competition among the parties in the tender process. The different NCAs, consistently across countries, used this argument for assessing the joint bidding agreements – namely in a Danish case concerning a road marking consortium (DK14), two Norwegian cases concerning a taxi consortium and a wastewater treatment consortium (NO03, NO04) and a Slovenian case concerning an office supply consortium (SI01).

In the Danish and Norwegian cases (DK14, NO03, NO04, see example below), the NCAs came to the conclusion that the agreements were considered to restrict competition by object. The parties to the agreement were competitors, which could have submitted separate bids in the tender process; there were no efficiency gains that outweighed the negative effects. The investigations were thus concluded via prohibition decisions.

Box 11: Norway - NO04

Country:	Norway
Year:	2016
Parties:	Johny Birkeland Transport AS/Norva 24 AS (previously Septik 24 AS); Lindum AS
Sector:	Other service activities: waste management
Outcome:	Prohibition decision

Description of the agreement	The parties to the agreement are wastewater treatment service providers. They submitted a joint bid in a public tendering procedure requesting offers for wastewater management services in the municipality of Bergen.
Summary of the NCA's assessment	The two parties were the incumbent suppliers to the municipality of Bergen, and they were also the only providers pre-qualified to submit a bid. The NCA assessed whether the parties could have submitted separate bids. It considered that the parties had had actual and concrete possibilities to submit separate bids in the tender competition, and that they were thus actual or potential competitors. In absence of the cooperation, the parties would not have had knowledge about the other party's bid, its available capacity and prices offered. According to the NCA's assessment, the parties exchanged sensitive business information by submitting the joint bid. The main aspects of the cooperation were to agree on a joint price, to coordinate deliveries and to broadly agree on the sharing volumes based on historic deliveries. No agreement was made on how the parties could best combine their resources and achieve an optimal capacity utilisation. A claimed efficiency defence was rejected. Amongst other reasons, there were no efficiencies that could outweigh the negative effects on competition. The NCA relied on Chapters 1 and 2 of the Horizontal Guidelines in its assessment of the agreement. The NCA thus considered that the agreement between the parties was a restriction of competition by object, as it would have been possible for the parties to submit separate bids. The proceeding was concluded with a prohibition decision.
Horizontal Guidelines relied on by NCA	Yes, Chapters 1 and 2
Appealed	No
Appeal ruling	Not applicable
Summary of the appeal courts assessment	Not applicable

In a private enforcement case in Germany concerning a pharmaceutical supply consortium (DE46), the court assessed the capacity of the bidders to submit separate offers. However, unlike the decision of the Norwegian in NO04, the court found that the parties to the joint bidding agreement had not been in the position to submit separate / individual bids. Therefore, the court concluded that the agreement was not anticompetitive.

The Slovenian NCA dealt with a decision (SI01) concerning a joint bidding agreement between three undertakings in the context of public procurement of office supplies. The NCA found that the bid could have also been made by two instead of three of the parties, and that the agreement thus restricted competition by object. In the appeal ruling, the court argued that, based on CJEU case law[79], the fact that the procurement request could also have been performed by a bidding consortium of two instead of three competitors was by itself not sufficient to prove a restriction of competition by object. The NCA had, according to the court, not sufficiently appreciated other potential objects of the agreement.

Box 12: Slovenia - SI01

Country:	Slovenia
Year:	2015
Parties:	Mladinska Knijga Trgovina Ltd and two other undertakings
Sector:	Office supplies
Outcome:	Prohibition decision
Description of the agreement	The parties had entered into a horizontal cooperation agreement to provide joint bids in two public procurement procedures for the provision of office supplies.
Summary of the NCA's assessment	The NCA assessed whether the parties had been involved in a restrictive agreement and concerted practice which would be a restriction of competition by object under Article 6(1) of the National Competition Act. In principle, the Public Procurement Act allows joint offers under certain conditions. However, in this concrete case, the NCA considered that submitting a joint bid by three undertakings was not necessary in view of the scope of the tendering request; a sufficient joint bid could also have been made by only two of the undertakings (but not by one).

[79] *Case C-67/13 P, Groupement des Cartes Bancaires (CB) v European Commission (2014) EU:C:2014:2204.*

	The NCA further assessed the information shared between the parties and the way it was shared. Based on this assessment, it came to the conclusion that the purpose of the undertakings involved in the joint bidding agreement was to offer prices higher than the market prices, and that the aim of the joint bid was thus to restrict competition. Consequently, the proceeding was concluded with a prohibition decision.
Horizontal Guidelines relied on by NCA	No
Appealed	Yes
Appeal ruling	NCA decision annulled
Summary of the appeal courts assessment	The appeal court assessed whether the joint bidding agreement between the parties did indeed constitute a restriction of competition by object. According to the court's assessment, the NCA failed to prove that the scope of the required service was not the reason for concluding the joint bidding agreement. The fact, as stated by the NCA, that the bid could have been made by two instead of three undertakings, but not by one undertaking alone, supported the claim of the parties. The court agreed that, in principle, prices higher than market prices could, under the circumstances, be considered as evidence that the object of the agreement was to restrict competition. However, according to the court, the NCA had not sufficiently considered evidence brought forward by the parties to show that the prices were not higher than market prices. In addition, the court found that the NCA had not sufficiently considered the legal and economic framework, mainly the Public Procurement Act, that allowed joint bids under certain conditions. The facts established by the NCA were thus not sufficient to conclude that the agreement of the parties with regard to the joint bid constituted a restriction of competition by object. The appeal court did not rely on the Horizontal Guidelines in its assessment, but relied on CJEU case law[80].

As indicated above, the Horizontal Guidelines do not explicitly mention joint bidding agreements. Even though guidance is included in Chapter 6 on commercialisation, some NCAs have relied on other chapters of the Horizontal Guidelines in their assessment of joint bidding agreements. In NO03, the Norwegian NCA relied on the general provisions of the Horizontal Guidelines in Chapters 1 in assessing a joint bidding agreement, while in NO04 (see Box 13 above) the same NCA relied both on Chapters 1 and 2 of the Horizontal Guidelines. In DE32, the German NCA assessed a joint bidding agreement under Chapter 5 of the Horizontal Guidelines, concerning purchasing agreements. Finally, in DK14, the Danish NCA assessed a joint bidding agreement under Chapters 1 and 6, concerning commercialisation agreements. When submitting the list of relevant investigations in the context of the survey for this study, one NCA explicitly pointed out that the Horizontal Guidelines did not provide guidance on joint bidding agreements, and that in one investigated case this raised questions in particular regarding the applicability of paragraph 30 of the Horizontal Guidelines to such agreements. The NCA relied on the chapter of the Horizontal Guidelines concerning purchasing agreements to assess the agreement, although the case was eventually discontinued due to changing circumstances caused by the COVID-19 pandemic. A number of national guidelines on horizontal cooperation agreements also include a Chapter on joint bidding agreements (see Section 6.1.10).

The cases discussed above show a considerable number of NCA investigations concerning joint bidding agreements.

6.1.7. Standardisation Agreements

Chapter 7 of the Horizontal Guidelines is dedicated to standardisation agreements and standard terms; it provides guidance to undertakings to assess such agreements under Articles 101(1) and 101(3) of the Treaty. It applies to standardisation agreements whose principal aim is to define technical or quality requirements for products, production processes or services. In addition, it also covers standard terms and conditions for sale or purchase of goods and services. Such standard terms can be established by an industry association or directly by a group of competitors.

Out of the 126 NCA cases identified in this study, NCAs reported 12 investigations concerning standardisation agreements. Of these investigations, 4 were discontinued without formal legal assessment, 2 were rejected, 2 were concluded with a commitment decision and 3 were concluded with a prohibition decision. One investigation had a different outcome, where the NCA issued a so-called 'indicative' opinion, rather than a

[80] *Ibid.*

prohibition/commitment decision[81]. Finally, 8 investigations concerned standardisation agreements, while the other 4 concerned standard terms.

Figure 15: NCA investigations (standardisation agreements) by MS

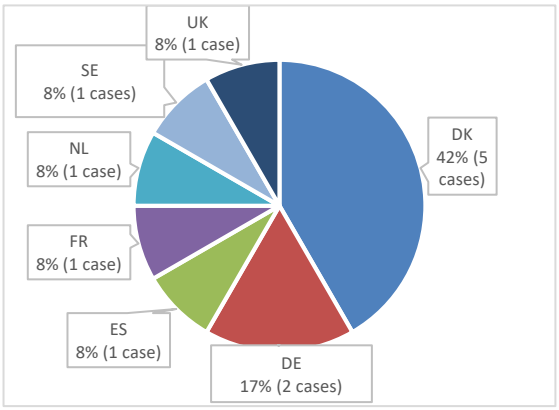
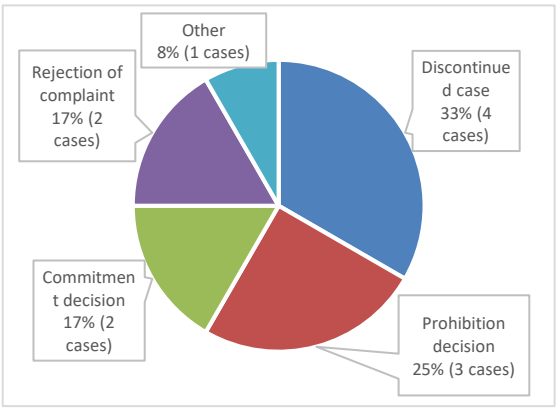


Figure 16: Outcome of NCA investigations (standardisation agreements)



The Danish NCA explicitly relied on the Horizontal Guidelines in almost half of the standardisation agreements investigated. In one case, national guidelines were relied by the authority, since the Horizontal Guidelines were not yet adopted at the time the agreement was assessed. One of these cases (DK25) is notable, because the decision of the NCA was appealed by the parties and subsequently referred by the Danish Competition Appeals Board to the Danish Competition Council for review and issuance of a new decision. The decision is discussed further in Section 6.1.9 on the compatibility of NCA decisions with court rulings.

Most NCAs relied on the Horizontal Guidelines to assess standardisation agreements (i.e. 3 investigations in Sweden, 2 investigations in Germany and 1 in France, the Netherlands, Spain and the United Kingdom, respectively). The only exception is the investigation carried out by the French NCA in case FR04 (Box 14 below). Although the NCA did not explicitly rely on the Horizontal Guidelines in the case, its assessment can be nevertheless considered in line with the Guidelines. The NCA, in fact, relied on a previous decision adopted by the European Commission[82] and the CJEU case law[83] to assess whether the standard was non-discriminatory (as outlined notably in paras. 280 and 294 of the Horizontal Guidelines). The CJEU case law / Commission decision recognized that a standardization agreement can restrict competition if the standard setting process is not open to third parties, the standard is not defined in a transparent manner, and it does not recognize any equivalent certification.

Box 13: France - FR04

Country:	France
Year:	2012
Parties:	Centre National de Prévention et de Protection (CNPP); six undertakings that are members of the Fédération Française des Sociétés d'Assurances
Sector:	Production, commercialisation, installation and maintenance of fire extinguishers
Outcome:	Prohibition decision

[81] *In this type of procedure, the parties to the agreement request an opinion from the NCA. The NCA relies on information provided by the parties, does not conduct its own investigation of the agreement and does not carry out an actual legal assessment.*
[82] *Commission Decision of 29 November 1995 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34.179, 34.202, 216 - Stichting Certificatie Kraanverhuurbedrijf and the Federatie van Nederlandse Kraanverhuurbedrijven). OJ L 312/79, 23.12.1995.*
[83] *Joined Cases T-213/95 and T-18/96, Stichting Certificatie Kraanverhuurbedrijf (SCK) and Federatie van Nederlandse Kraanbedrijven (FNK) v Commission (1997) ECLI:EU:T:1997:157.*

Description of the agreement	The CNPP, an association regrouping insurance companies developed, published and implemented a standard for the installation and maintenance of fire extinguishers. The standard required fire extinguishers to have the French 'NF' certification.
Summary of the NCA's assessment	Following several complaints from third parties, the NCA investigated the standard established by the CNPP relating to fire extinguishers. The NCA assessed whether the standard restricted competition by excluding competitors from the French market for the commercialisation, installation and maintenance of fire extinguishers. It considered that the standard, insofar as it required the national NF certification for fire extinguishers, excluded competitors who did not have NF-certified extinguishers but had extinguishers with a certificate in conformity with European standards issued by a certifying body accredited in another EU Member State. The standard was modified in 2003 to also accept fire extinguishers with a certification equivalent to NF. Based on Article 101 of the Treaty and case law from the European Commission and the CJEU, the NCA assessed whether the standard was accessible to producers from another Member State (in particular Spain where a relevant share of competitors active on the French market were based). The NCA concluded that this was not the case until the modification in 2003. Therefore, the NCA concluded that the CNPP standard for the production, commercialisation, installation and maintenance of fire extinguishers in France restricted competition by object and effect until it was changed in 2003. The CNPP was sanctioned to pay a fine of € 50,000.
Horizontal Guidelines relied on by NCA	No
Appealed	No
Appeal ruling	Not applicable
Summary of the appeal courts assessment	Not applicable

Prohibition decisions were issued in three investigations concerning standardisation agreements. An investigation by the Danish NCA (DK25) concerned a broader restrictive agreement and/or concerted practice, involving among other things the setting and using of an industry standard, aiming at excluding actual or potential competitors and restricting product supply on the Danish market for roofing membranes. In 2017, the Danish NCA concluded that the agreement had an anticompetitive object and thus infringed section 6 of the Danish Competition Act and Article 101 of the Treaty.

Box 14: Denmark - DK25

Country:	Denmark
Year:	2017
Parties:	Icopal Danmark ApS ("Icopal"), Nordic Waterproofing A/S ("NWP"), Danske Tagpapfabrikanters Brancheforening ("DTB", in English "Association of Danish Manufactures of Bitumen Waterproofing"), Tagpapbranchens Oplysningsråd (TOR, in English "Danish Roofing Advisory Board")
Sector:	Construction
Outcome:	Prohibition decision
Description of the agreement	The case concerned an agreement and/or concerted practice involving among other things the review of an industry-based standard, the TOR standard, on the Danish market for roofing membranes. The standard was set by the Danish roofing felt industry association (DTB), which is composed of the two roofing felt producers, Icopal and NWP, having already established the TOR standard in 1981. The case also concerned the establishment in 2014, of the 'TOR Approved' label and control scheme, which could be used to label roofing felt products that comply with the TOR standard.
Summary of the NCA's assessment	The NCA assessed whether the parties infringed section 6 of the Danish Competition Act and Article 101 of the Treaty by agreeing and/or colluding to exclude actual and potential competitors and to limit product supply on the Danish market for roofing membranes. Specifically, the NCA assessed whether the agreement and/or concerted practice constituted a broader restrictive agreement, involving among other things setting and using a standard, which aimed to restrict competition. Icopal and NWP together accounted for 70-80% of the Danish roofing felt market by value and 80-90% by volume. The NCA found that the parties used a subcommittee of the association DTB as the actual standard-setting body, rather than the official standard-setting body in TOR. The only people involved in the standard setting process were the leading employees of Icopal, NWP and the director/chief secretary of DTB/TOR (same person), who had been appointed by Icopal and NWP.

	In the opinion of the NCA, when setting the terms of the standard, the two Danish manufacturers took into consideration their own commercial interests regarding competition and collective competitive position on the market, rather than considering objective terms. Further, the DCCA found that TOR and the TOR label were used as means to uphold the standard's position and effect on the market, thereby supporting the restrictive objects of the parties' agreement/concerted practice. The agreement/concerted practice, including the standard, was used to exert pressure on third parties (roofers, construction advisors, etc.) not to market and/or use products that did not comply with the detailed technical specification for roofing membranes set out in the standard, as well as to exclude actual or potential competitors from the market. Further, as a result, the two manufacturers limited their product supply to the standard. The NCA thus came to the conclusion that the industry standard was part of a broader restrictive agreement aimed at excluding actual or potential competitors. According to paragraph 273 of the Horizontal Guidelines, which was cited by the NCA in its assessment, such agreement restricted competition by object. Grounds for a block exemption or an exemption under Article 101(3) of the Treaty were not identified by the NCA. Therefore, the NCA established that the agreement infringed section 6 of the Danish Competition Act and Article 101 of the Treaty, and issued a prohibition decision.
Horizontal Guidelines relied on by NCA	Yes, Chapter 7 (in particular paragraph 273)
Appealed	Yes
Appeal ruling	The Danish Competition Appeals Board re-sent the case to the NCA for review and issuance of a new decision.
Summary of the appeal courts assessment	The Danish Competition Appeals Board concluded that the NCA's analysis of the economic and legal context, limited to what the Council considered strictly necessary to establish that the agreement had an anti-competitive object, was insufficient. Thus, the NCA had not demonstrated to the requisite certainty that there was an infringement by object. In its assessment of the industry standard, the Danish Competition Appeals Board referred to paragraph 263 of the Horizontal Guidelines, according to which standardisation agreements usually produced significant positive economic effects. The court found that the industry standard itself could not be considered sufficiently harmful to competition; a further analysis of the legal and economic context would have been redundant.

The Horizontal Guidelines cover standardisation agreements adopted within national and European standardisation bodies,[84] as long as the latter bodies may be classified as associations of 'undertakings' for the application of EU competition rules.[85] However, technical standards are often defined by standard setting organisations operating at EU, and sometimes at global level. The low number of NCA investigations concerning standardisation agreements in comparison to other categories of horizontal cooperation agreements is thus not surprising. When NCAs investigated standardisation agreements, they often focussed their investigations on agreements adopted within national standard setting organizations (e.g. FR04). The NCAs generally explicitly relied on the Horizontal Guidelines in their assessment. Alternatively, like in the case FR04, the NCA relied on the previous decisions of the European Commission and CJEU case law rather than introducing a formal reference to the Horizontal Guidelines.

6.1.8. Other agreements not explicitly mentioned in the Horizontal Guidelines: Agreements pursuing sustainability goals

In the previous version of the Horizontal Guidelines[86], environmental agreements were explicitly covered in a dedicated chapter (Chapter 7). This was changed in 2011 in the current version of the Horizontal Guidelines, in which standard-setting in the environmental sector is treated as standardisation agreements insofar as it concerns environmental standards (notably in the form of an example in paragraph 329 of the Horizontal

[84] *European standardisation bodies are governed by Reg. 1025/2012.*
Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council. OJ L-316/12, 14.11.2012.
[85] *Supra, Horizontal Guidelines, paragraph 258.*
[86] *Supra, 2001 Horizontal Guidelines.*

Guidelines), or under the general sections of the Horizontal Guidelines in the case of sustainability agreements that do not concern standards.

Out of the 126 relevant NCA cases identified in the present study, the NCAs reported 5 investigations concerning agreements pursuing sustainability goals. 2 of these investigations were concluded with a rejection decision. The other 3 investigations did not lead to formal proceedings with a full legal assessment, but only to an informal analysis.

Figure 17: NCA investigations (sustainability agreements) by MS

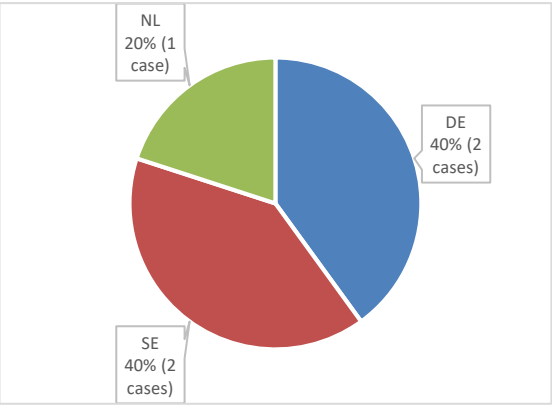
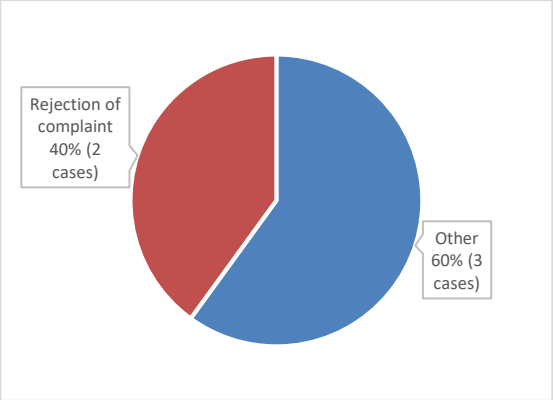


Figure 18: Outcome of NCA investigations (sustainability agreements)



The Dutch NCA dealt with an initiative between Dutch supermarkets[87], poultry farmers and meat processing companies to sell, under the label 'Chicken of Tomorrow', only chicken meat produced under conditions that guaranteed increased animal welfare (Box 16 below). The NCA found that the initiative considerably restricted competition by effect, by resulting in higher prices for consumers. According to the Dutch NCA's reply to the European Commission survey carried out to prepare the present study, the NCA relied on the Horizontal Guidelines in its assessment. However, the Dutch NCA did not provide further details regarding the chapter of the Horizontal Guidelines that was actually considered in the decision.

Box 15: Netherlands - NL15

Country:	Netherlands
Year:	2015
Parties:	'Chicken of Tomorrow' initiative
Sector:	Agriculture, forestry and fishing
Outcome:	Other: Informal analysis
Description of the agreement	Under the name 'Chicken of Tomorrow', chicken producers and food retailers agreed on arrangements about the sale of chicken meat, in particular to stop selling conventionally produced chicken meat in Dutch supermarkets and replace it with meat produced under improved animal welfare-friendly conditions. The sale of chicken meat that meet higher standards than the 'Chicken of Tomorrow' (for example organic meat) would still be possible.
Summary of the NCA's assessment	The NCA conducted an informal analysis as a means to inform businesses how sustainability agreements should be assessed under competition law. It assessed the effects of the 'Chicken of Tomorrow' agreement on consumers. In the Netherlands, most chicken meat is sold to end customers via supermarkets, and the supermarket chains that were parties to the agreement covered 95% of the Dutch consumer market for chicken meat. With the 'Chicken of Tomorrow' agreement in place, conventionally produced chicken meat would therefore not be available anymore to the majority of consumers. Therefore, the (real or potential) effect on competition in the consumer market for chicken meat would be considerable. In addition, chicken meat producers from other EU Member States who exported to the Netherlands would be negatively affected by the initiative.

[87] *Please note that another initiative by the Dutch cattle breeding industry was supported by consumers of beef meat and a declaration of intent also known as 'The Treaty of Den Bosch' was signed in 2012. The objective of the declaration was the selling of 'only sustainably produced meat'.*

	The NCA thus assessed whether the agreement involved efficiencies that would make it possible to benefit from an exemption under Section 6(3) of the Dutch Competition Act and Article 101(3) of the Treaty. The main benefits from the horizontal cooperation agreement (improved animal welfare and positive effects for the environment and public health) cannot be estimated in terms of consumers' welfare. Therefore, the NCA relied on a willingness-to-pay study carried out with consumers. The study showed that consumers are willing to pay more for better animal welfare and environmental improvements, but not as much as the price increase that was expected to result from the 'Chicken of Tomorrow' initiative. The 'Chicken of Tomorrow' did not generate any net benefits for consumers of chicken meat and, consequently, it did not meet the exemption criteria of Article 101(3) of the Treaty. Furthermore, the NCA concluded that less far-reaching measures could have made the chicken meat offered in supermarkets more sustainable, e.g., improved consumer education about the options regarding sustainable chicken meat. Therefore, the NCA established that the agreement under the 'Chicken of Tomorrow' label would lead to a restriction of competition in the market for chicken meat and advised the parties behind the initiative to modify their arrangements so that the initiative complied with competition rules.
Horizontal Guidelines relied on by NCA	Yes
Appealed	No
Appeal ruling	Not applicable
Summary of the appeal courts assessment	Not applicable

Two investigations (DE17 and D18) were reported by the German NCA. One of those (DE18) concerned a label for animals welfare and thus bears similarities with the Dutch 'Chicken of Tomorrow' case (NL15). Object of the investigation was the label 'Tierwohl' (Animal Welfare Initiative), a cooperation of retailers and agri-food industry stakeholders. The initiative is financed primarily by the four largest food retailers in Germany. Since 2015, the retailers have paid 4 cents/kg of pig and poultry meat sold to the initiative, with an increase to 6.25 cents/kg from 2018 onwards. These funds are intended to reward livestock producers for implementing animal welfare measures such as, in particular, more space in stalls. The label can be used by poultry meat producers to indicate, in several tiers, if the husbandry conditions go beyond the legal minimum requirement. Use of the label is entirely voluntary. The NCA decided not to launch formal proceedings. It supported the initiative in a press release,[88] emphasising that while the labelling scheme may in principle include anti-competitive elements, it may also lead to broader benefits for the consumers of poultry (notably more transparency about the production process and more consumer choice). While the Dutch 'Chicken of Tomorrow' initiative would have excluded other meat producers from the market, namely those producers not meeting the improved animal welfare-friendly conditions, the German initiative was voluntary. Therefore, meat not bearing the label could still be sold in the retailers' shops in Germany.

The other two cases were investigated by the Swedish NCA and concerned an energy labelling scheme for windows (SE15, SE21). The complaints were rejected based on the fact that the labelling scheme was accredited and granted by an EU-certified testing institute and that access to the label was reasonably feasible and non-discriminatory. The NCA explicitly relied on the Horizontal Guidelines in its assessment, notably paragraph 280, which states that standards that provide access on "fair, reasonable and non-discriminatory terms will normally not restrict competition".

The NCA's assessment in the Dutch 'Chicken of Tomorrow' case (NL15) was followed by a public debate in the Netherlands.[89] In July 2020, the Dutch NCA presented draft guidelines on sustainability agreements,[90] as further discussed in Section 3.1.11. In addition, a number of participants in the OPC, launched in November 2019 by the European

[88] *Bundeskartellamt, 2017, Bundeskartellamt calls for more consumer transparency in animal welfare initiative, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/28_09_2017_Tierwohl.html (21.04.2020).*

[89] *AD, 2020, ACM: Door concurrentie is Nederland nu plofkipvrij, available at: https://www.ad.nl/koken-en-eten/acm-door-concurrentie-is-nederland-nu-plofkipvrij~acdc7d79/ (21.04.2020).*
VMT, 2018, Verduurzaming versus kartelverbod, available at: https://www.vmt.nl/algemeen/artikel/2018/05/verduurzaming-versus-kartelverbod-10134846 (21.04.2020).

[90] *Authority for Consumers & Markets, 2020, Draft guidelines 'Sustainability Agreements', available at: https://www.acm.nl/en/publications/draft-guidelines-sustainability-agreements (21.04.2020).*

Commission for the evaluation of the HBERs and Horizontal Guidelines, also brought up the 'Chicken of Tomorrow' case as an example that, in their opinion, the current rules for assessing agreements pursuing sustainability goals under Chapter 7 of the Horizontal Guidelines do not sufficiently take into account future costs and benefits of sustainability agreements. A similar view has also been expressed by a number of NCAs in the context of the survey conducted for this study.

6.1.9. NCA decisions reviewed by national courts

Out of the 126 investigations into horizontal cooperation agreements that were reported by the NCAs, 25 were concluded with a formal prohibition decision. Of these 25 decisions, 12 (i.e. about half) were appealed in court. The appeal courts upheld 8 decisions of the NCAs and annulled three decisions. One appeal proceeding was still pending as of 31 March 2020. This means that two thirds of NCA prohibition decisions subject to appeal were confirmed by the appelate courts.

Figure 19: NCA prohibition decisions appealed to court

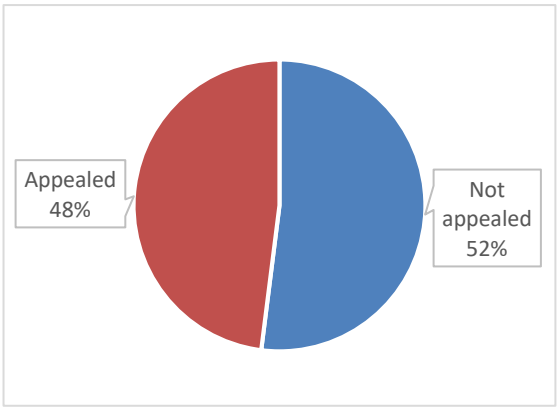
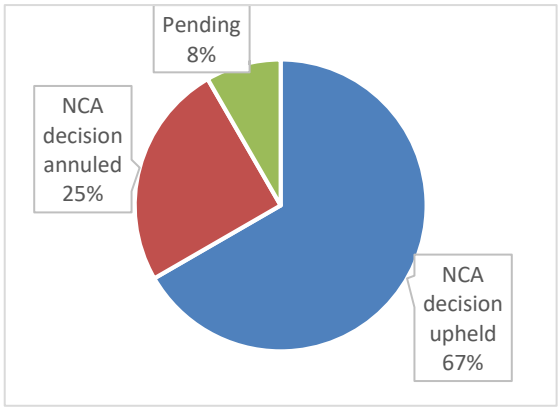


Figure 20: Outcome of the appeal procedures



The decisions that were annulled by the appeal courts were issued by the NCAs in Denmark (DK25), Hungary (HU03) and Slovenia (SI01). The decision of the Danish NCA and its subsequent appeal are particularly notable because the appeal court disagreed with the NCA's interpretation of the Horizontal Guidelines (see Box 15). The agreement in question was a broader restrictive agreement that, among other things, involved an industry-based standard, which had been found by the NCA to restrict competition by object. The appeal court, however, ruled that the NCA did not sufficiently prove a restriction by object and referred back the decision to the NCA to be re-assessed. The appeal court referred to the Horizontal Guidelines to stress that standardisation agreements are generally not considered to restrict competition and that the legal and economic context had not been sufficiently appreciated by the NCA.

The argument that the NCA had not sufficiently proven a restriction of competition by object and had not sufficiently considered the legal and economic context was also decisive in the court's annulment of the decision taken by the Slovenian NCA (see SI01 in Box 13).

The third NCA decision that was later annulled by the competent court was issued by the Hungarian NCA (HU03[91]) and concerned the exchange of individualised, quarterly, strategic data (many of them qualifying as confidential business secrets) between financial institutions through a financial database. According to paragraph 90 of the Horizontal Guidelines, the threshold when data becomes historic depends on the data's nature, aggregation, frequency of the exchange, and the characteristics of the relevant market (for example, its stability and transparency). The NCA did not consider the information exchanged as historic data, since the data in the financial database were not older than one year (a lot of the data exchanged were actually up-to-date) and the content of the database was updated frequently. The participants were able to foresee future market trends and developments. As a consequence, conclusions on the future strategic decisions

[91] *Please note that HU01 concerns essentially the same issues in the contact lenses market with similar outcomes.*

of competitors could have been drawn. The NCA explicitly relied on Chapter 2 of the Horizontal Guidelines in its assessment and established that the operation of the financial database restricted competition by its potential effects, while no efficiency gains passed on to consumers could be identified. When assessing whether the information exchange could be exempted under Article 101(3) of the Treaty, the NCA followed Chapter 2.3 of the Horizontal Guidelines. The first instance court, however, annulled the decision of the NCA and terminated the proceeding. According to the court, the NCA should have carried out an analysis of actual effects of the agreement, given the fact that the database had already operated for years. In such a case, the NCA could rely on potential effects only if it proved that there had been objective obstacles preventing actual effects to be materialized or proved. The court considered that six years after the period under investigation, former market conditions and evidence could not be reconstructed in a sufficient manner and therefore it terminated the case. The NCA appealed the ruling, but the court of second instance upheld the first ruling.

The large majority of NCAs prohibition decisions have been upheld on appeal. The latter may be considered a sign that courts have generally accepted the NCAs' assessment concerning horizontal cooperation agreements. In three decisions not upheld on appeal, the court diverged from the NCA in the assessment of the facts of the case, rather than on the interpretation of the Horizontal Guidelines: in DK25 and SI01, the appeal courts considered that the NCAs did not demonstrate with sufficient certainty that the agreements were indeed restrictions of competition by object. Yet, in HU03 the court ruled that the NCA had not put forward sufficient evidence to prove the anti-competitive effect of the information exchange mechanism established by the agreement. In spite of the different assessment of the facts of the cases, in these three cases both the national courts and the NCAs explicitly relied on the Horizontal Guidelines.

6.1.10. National guidelines on horizontal cooperation agreements

As discussed in the previous sections, most of the NCAs have explicitly relied on the Horizontal Guidelines to assess horizontal cooperation agreements in the context of their investigations. Nine NCAs have also adopted national guidelines on horizontal cooperation agreements (i.e. Belgium[92], Bulgaria[93], Denmark[94], Germany[95], Latvia[96], Luxembourg[97], the Netherlands[98], Norway[99]and the UK [100]), with one additional NCA (Greece) considering national guidelines and/or a 'sandbox' in the future under specific circumstances. Most of these national guidelines have been adopted to complement the Horizontal Guidelines, by providing more detailed information and guidance on specific topics, for example on joint bidding agreements (e.g. in the Danish and Norwegian guidelines), SMEs (e.g. the German SME cooperation guidelines and the Dutch guidelines on tariff agreements for self-employed persons in collective labour agreements[101]), trade associations (e.g. the Belgian

[92] *Guidelines available (in Dutch) at: https://www.bma-abc.be/sites/default/files/content/download/files/20191001_gids_-_uitwisseling_van_informatie_1.pdf (21.04.2021).*

[93] *Guidelines available (in Bulgarian) at: http://www.cpc.bg/storage/file/%D1%80%D0%B5%D1%88%D0%B5%D0%BD%D0%B8%D0%B5%2055%20%D0%B3%D1%80%D1%83%D0%BF%D0%BE%D0%B2%D0%BE%20%D0%BE%D1%81%D0%B2%D0%BE%D0%B1%D0%BE%D0%B6%D0%B4%D0%B0%D0%B2%D0%B0%D0%BD%D0%B5.doc (21.04.2021).*

[94] *Guidelines available (in Danish) at:https://www.kfst.dk/vejledninger/kfst/dansk/2014/20140929-informationsaktiviteter-i-brancheforeninger/ (21.04.2021).*

[95] *Guidelines available (in English) at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Merkblaetter/Leaflet%20-%20Cooperation%20for%20SMUs.html?nn=3591462 (21.04.2021).*

[96] *Guidelines available (in Latvian) at: https://likumi.lv/ta/id/181856-noteikumi-par-atsevisku-horizontalo-sadarbibas-vienosanos-nepaklausanu-konkurences-likuma-11-panta-pirmaja-dala-noteiktajam (21.04.2021).*

[97] *Guidelines available (in French) at:https://concurrence.public.lu/fr/actualites/2020/document-orientation-entreprises-coronavirus.html (21.04.2021).*

[98] *Guidelines available (in Dutch) at: https://www.acm.nl/sites/default/files/documents/leidraad-samenwerking-tussen-concurrenten.pdf (21.04.2021).*

[99] *Guidelines available (in Norwegian) at: https://konkurransetilsynet.no/decisions/veiledning-prosjektsamarbeid/ (21.04.2021).*

[100] *Guidelines available (in English) at: https://rb.gy/msf8vg (21.04.2021).*

[101] *Adopted in addition to the Guidelines on cooperation between competitors referred to above. Guidelines on tariff agreements for self-employed persons in collective labor agreements available (in Dutch) at:*

and the Dutch guidelines). In addition to the Guidelines on agreements and concerted practices, the UK also adopted the Guidance on the public transport ticketing schemes block exemption[102], the Guidance note on cooperation between competitors on the smart meter roll-out[103] and the guidance in response to COVID-19[104]. According to the NCA replies to the European Commission questionnaire carried out for this study, the national guidelines generally reflect the content of the Horizontal Guidelines.

In the questionnaire sent by the European Commission to the NCAs, joint bidding was identified by several NCAs as a type of agreement that is currently not explicitly mentioned in the Horizontal Guidelines. As mentioned above, the Danish and Norwegian NCAs have adopted national guidelines that explicitly cover joint bidding agreements. The Greek NCA has not yet adopted national guidelines, but is planning to do so if the next version of the Horizontal Guidelines does not explicitly cover joint bidding agreements. In addition, the Greek NCA has listed other types of agreements that it intends to cover in national guidelines and/or a 'sandbox' if they are not included in the EU guidelines:

- sustainability agreements (environmental and social);
- agreements between self-employed enabling collective bargaining under certain conditions;
- data pooling/data commons;
- certain types of agreements necessary for collaboration in logistics, information exchange leading to improvements in distribution channels, R&D activities in the pharmaceutical sector enabling faster product development and market introduction, such as sharing pharmaceutical companies' libraries on compounds and clinical trials – the NCA considers these agreements essential in order to deal with High Impact Low Frequency Events;
- public-private consortia for new product and services development, in particular in the broader field of AI and blockchain;

The national guidelines adopted by the Dutch NCA mention the following additional types of agreements:

- agreements for drawing up calculation methods and cost projections;
- qualification schemes;
- general terms and conditions;
- administrative collaborations;
- labour and hiring (arrangements between undertakings about the procurement of labour from employees or hiring the service of independent contractors);
- horizontal collaboration in anticipation of a concentration.

The national guidelines adopted by the Latvian NCA specify one type of agreement that is not mentioned in the Horizontal Guidelines: agreements in the field of Inland Carriage by Rail and Carriage by Road.

Finally, the Dutch NCA has recently published draft guidelines on sustainability agreements.[105] The latter aim to fill a gap in the current version of the Horizontal Guidelines, in order to provide guidance to economic operators concerning the compatibility with competition rules of agreements that aim at achieving environmental goals.

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https://www.acm.nl/sites/default/files/old_publication/publicaties/16978_leidraad-tariefafspraken-voor-zzp-ers-in-cao-s-2017-02-24.pdf (21.04.2021).

[102] *Guidelines available (in English) at: https://rb.gy/lyhey6 (21.04.2021).*

[103] *Guidelines available (in English) at: https://www.ofgem.gov.uk/system/files/docs/2016/05/guidance_note_on_cooperation_-_smart_meter_rollout_corrected_again.pdf (21.04.2021).*

[104] *Guidelines available (in English) at: https://www.gov.uk/government/publications/cma-approach-to-business-cooperation-in-response-to-covid-19 (21.04.2021).*

[105] *https://www.acm.nl/en/publications/draft-guidelines-sustainability-agreements (30.10.2020).*

6.1.11. Conclusions

The analysis of the relevant NCA/courts cases identified in this study focused on two key questions: how national courts and NCAs have enforced EU competition rules on horizontal cooperation agreements during the past decade and which types of horizontal cooperation agreements identified by national authorities are currently not dealt with by the HBERs and the Horizontal Guidelines.

The analysis carried out in the previous sub-sections show that NCAs have generally relied on the Horizontal Guidelines in their investigations concerning horizontal cooperation agreements: in particular, the NCAs expressly relied on the Horizontal Guidelines in 90 out of the 126 proceedings covered in the present study. Similarly, national courts have also referred to the Horizontal Guidelines, both in reviewing the NCAs decisions and in private enforcement cases. When the NCAs or the national courts did not rely on the Guidelines, this was mostly due to the fact that the proceedings were discontinued without a detailed legal assessment or because they lacked a cross-border dimension and thus were assessed under national competition law only.

As discussed in Section 6.1.9, most of the NCA prohibition decisions concerning horizontal cooperation agreements have been upheld on appeal. When the appeal court diverged in its assessment in comparison to the NCA, the reason of the divergence was primarily due to a different appraisal of the facts/evidence of the case. On the other hand, it is worth noticing that both the appeal courts and the NCAs have generally relied on the Horizontal Guidelines in their assessment.

While the Horizontal Guidelines represent an important instrument to ensure a coherent enforcement of Article 101 *vis-à-vis* horizontal cooperation agreements throughout the European Union, the NCAs have increasingly investigated typologies of agreements that are currently not explicitly mentioned in the Guidelines. In particular, NCAs have investigated a number of cases concerning sustainability and joint bidding agreements – i.e. categories of agreements not currently explicitly covered in the Horizontal Guidelines. The NCAs have usually assessed these types of agreements by relying on different chapters of the Horizontal Guidelines.

6.2. What is the level of legal certainty that the HBERs and the Horizontal Guidelines provide for the purpose of assessing whether horizontal cooperation agreements are compliant with Article 101 of the Treaty (i.e. are the rules clear and comprehensible, and do they allow undertaking to understand and predict the legal consequences)?

6.2.1. Summary and overall answer to the evaluation question

The views expressed during this project's research in relation to the degree of legal certainty that the HBERs and the Horizontal Guidelines provide to economic operators in assessing whether a cooperation agreement is compliant with Article 101 of the Treaty vary by type of agreement. In general, the consulted stakeholders pointed out that a higher degree of certainty was provided for R&D and for Specialisation agreements because of the combination of the HBERs with Chapter 3 and Chapter 4 of the Horizontal Guidelines. Less certainty was reported in relation to self-assessment of other types of agreements, for example those including information exchange clauses or standardisation agreements.

Block exemption regulations are considered by stakeholders as being an effective source of certainty which allows them to establish agreements without the risk of incurring a breach of Article 101 of the Treaty. However, the definition of the relevant market and the calculation of the market shares is a process considered by stakeholders as being complex and burdensome due to the difficulty of gathering the information needed to make such assessments.

According to the consulted stakeholders, the guidance in the Horizontal Guidelines on information exchange agreements does not provide sufficient certainty. The reason of this uncertainty lies notably in the greater role played by data over the past decade. The increasing importance of business arrangements involving data exchanges affects not only the legal certainty but also the relevance of this chapter of the Horizontal Guidelines. An updated and more detailed guidance of the cases in which information exchange would be deemed as anticompetitive or not is currently lacking, according to economic operators. In particular, stakeholders claimed insufficient clarity in cases of information exchange in digital business models such as platforms, ecosystems and hybrid cooperation models, in agreements involving data pooling, as well as in case of combinations of horizontal and vertical agreements for the exchange of information in digital ecosystems.

Regarding joint purchasing agreements, even if legal certainty is generally considered to be overall ensured by the current rules, the consulted economic operators mentioned a need for more clarity on some aspects. This is the case in particular of retailers and manufacturers which expressed opposite views on the fitness for purpose of the Horizontal Guidelines. According to manufacturers on one hand, the Horizontal Guidelines lack clear guidance on how legitimate joint purchasing is distinguished from an outright buyer cartel. On the other hand, retailers believe that the current safe harbour of 15% is not reasonable or consistent with other provisions of EU antitrust regulation (such as the Vertical Block Exemption Regulation), where safe harbour rules allow considerably higher market shares.

Concerning commercialisation agreements, the rules set out by the Horizontal Guidelines are, according to interviewed stakeholders, rather complex but still capable of ensuring an adequate level of legal certainty. The gaps that were highlighted in relation to legal certainty are linked to the digital area, namely that the new forms of cooperation that are emerging require more specific and up-to-date guidance and industry examples.

In relation to standardisation agreements, a more widespread concern with legal certainty was evidenced across all the types of consulted stakeholders. Compared to what has been discussed for most of the other types of agreements, even the smaller companies participating in the CATI interviews rated the degree of legal certainty relatively low. The views of the stakeholders, especially from the technology-intensive industries, all converged towards heavily contested views on the issue of licensing of standards essential

patents. On the one hand, the holders of SEPs[106] favour the principle of licensing being offered at downstream levels, while, on the other hand, the users of these standards (implementers) defend that licensing should be available at more upstream levels of the supply chain, if requested, in accordance with their interpretation of the expression "*to offer to license their essential IPR to all third parties*" in the Horizontal Guidelines.[107] Overall, it seems that the diverging interpretations of this part of the Horizontal Guidelines is causing significant legal uncertainty around this type of agreements.

6.2.2. Research & Development Agreements

This section summarises the main findings gathered through the study on the legal certainty provided by the R&D BER and by Chapter 3 of the Horizontal Guidelines. The table below provides an overview of the sample of respondents who provided input to our fieldwork research on R&D agreements.

Table 15: Sample of respondents per research tools - R&D agreements

Legal certainty - R&D agreements		
Tool	**# answers**	**Research questions / topics covered**
CATI	67	• Consultation rate of Horizontal Guidelines and/or horizontal block exemption regulations • What are strengths of the R&D BER? • Which activities are faced with difficulties? • Are the Horizontal Guidelines helpful in assessing competition concerns, efficiency identification? • What degree of certainty is provided by Horizontal Guidelines? • Would the Horizontal guidelines suffice without the R&D BER? • Is the current legal framework discouraging to enter into horizontal cooperation agreements
In-depth interviews	17	• Assessment whether the rules for R&D agreements offer sufficient legal certainty on the compatibility of the agreement with Article 101 of the Treaty
OPC	26[108]	• What is the level of legal certainty that the HBERs and the Horizontal Guidelines provide for the purpose of assessing whether horizontal cooperation agreements are compliant with Article 101 of the Treaty (i.e. are the rules clear and comprehensible, and do they allow undertakings to understand and predict the legal consequences)? • Have the R&D BER and Chapter 3 of the Horizontal Guidelines on research and development agreements provided sufficient legal certainty on R&D agreements companies can conclude without the risk of infringing competition law? • Does the R&D BER increase legal certainty compared with a situation where the R&D BER would not exist but only the HORIZONTAL GUIDELINES applied?

Out of 67 individual enterprises having R&D agreements, interviewed with the **CATI methodology**, 29 were small enterprises, 22 medium and 12 micro. Four enterprises belonged to the group of large companies. Regarding the three most common industries where these companies operate, these are the pharmaceutical (16%) and human health (15%) sectors and energy (15%). 40% of respondents declared being also a research centre. The remaining 64% of respondents belong to other industries such as agriculture, information and communication, food and beverage and household appliances.

The research team also conducted 17 **in-depth semi-structured interviews** to discuss the legal certainty provided by the R&D BER and the Horizontal Guidelines in relation to their R&D agreements. The interviews included 12 large enterprises in different industries (mainly food and beverage, automotive, and IT); 3 business associations (two in the chemical products industry and one cross-industry) and 2 law firms.

[106] *As discussed in Section 3.2.7, the holders of SEPs are representatives from the information and telecommunication sector, the automotive sector, hardware solutions and related trade associations advocating their interests.*
[107] *As per the wording of para. 285 of the Horizontal Guidelines.*
[108] *This number comprises both received responses stating that they have the agreement type as well as received position papers addressing the agreement type. This is the case for all figures on OPC answers in subsequent tables.*

Additional information was collected through the analysis of the responses to the **OPC** and the position papers that have been shared by the participants to the OPC[109]. The information was collected and integrated according to its relevance to the evaluation question.

The research team also reviewed the replies provided by the **NCAs** to the Commission's targeted questionnaire.

Consumer organisations were also contacted to discuss the topic but could not provide additional information for our study.

Main findings

The following paragraphs summarise the main findings, based on information gathered through the different research tools (CATI, in-depth interviews and analysis of NCA's and Open Public Consultation's replies and position papers), which lead to our overall answer to the evaluation question (Section 6.2).

Evidence gathered from the fieldwork research provided an overview of the opinions on the legal certainty afforded by the R&D BER and by Chapter 3 of the Horizontal Guidelines to economic operators. As 94% of CATI respondents in our sample were micro, small or medium enterprises, the results of CATI should be considered as being more representative of this specific category of stakeholders. According to CATI results, R&D agreements appear to be relevant for SMEs included in the sample as they are amongst the most frequently cited cooperation agreements (22% of the agreements). However, of this 22% of CATI respondents having R&D agreements in place, only a third (23 out of 67) declared to have ever consulted the R&D BER to check if their agreement benefited from an exemption under competition rules. Due to the low number of respondents who consulted the text of the BER and the Horizontal Guidelines, the robustness of the conclusions that can be drawn is limited.

Table 16 below reports what are the strengths of the R&D BER according to the CATI respondents.

Table 16: Key strengths of R&D Block Exemption Regulation

In your view, what are the strengths of the R&D Block Exemption Regulation?	N. of answers
Facilitates self-assessment through a clear and comprehensive set of requirements for exemption	11
Ensures consistency of the application of EU competition rules to horizontal R&D cooperation agreements across Member States	8
There is less need for external legal support when there is a block exemption regulation	6
I don't know	2
None of the above	1

The CATI results point to the importance of the clarity of the **R&D BER**, which appears to be particularly appreciated by the respondents. Indeed, the most common answers concern the ease of the self-assessment and the consistency between the EU competition rules and national legislation. These two aspects imply that the R&D BER ensures enough legal certainty to those micro, small and medium enterprises who consulted the Regulation, providing clear and consistent guidance to its users. This is confirmed by the third most common answer – which highlights that little further external legal support is needed given the clarity and legal certainty of the R&D BER.

Most NCAs (19 out of 29 participating authorities) also consider that the R&D BER and the Horizontal Guidelines provide sufficient legal certainty and simplify the assessment of R&D agreements. The key reason is the compliance of the R&D BER and the Horizontal

[109] *The feedback provided by stakeholders are publicly available on the European Commission website on the page dedicated to the roadmap for the revision (Available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/11886-EU-competition-rules-on-horizontal-agreements-between-companies-evaluation. Last access: 26/10/2020)*

Guidelines with the general provisions on competition law laid down by EU law. In addition, being applicable in the whole of the EU, these rules ensure a coherent and even treatment of R&D agreements – avoiding potential inconsistencies amongst national legislation. For most NCAs, the prescribed conditions are defined clearly to give exemption only to those agreements for which it can be assumed with sufficient certainty that they generate efficiencies that outweigh, in line with Article 101(3) of the Treaty, the harm caused by an eventual restriction of competition. Furthermore, Chapter 3 of the Horizontal Guidelines provides an analytical framework for the assessment of the objectives of the exemptions, as well as explanations and examples of situations where an agreement might be problematic. The combination of the R&D BER and Chapter 3 of the Horizontal Guidelines is considered key to allow for a greater certainty for economic operators that engage in R&D agreements. Some NCAs also mention that this clarity is demonstrated by the low number of requests for clarification concerning the R&D BER.

Overall, only one NCA mentioned some criticism of the R&D BER: according to this NCA, Article 5 letter b) of the R&D BER might cause some confusion to the extent that it might be complicated for an undertaking to apply what essentially are exceptions of the exceptions.[110] For example, limitations of sales such as setting of sales targets are hardcore restrictions, which make an agreement lose the protection of the R&D BER. Yet, this is no longer the case if setting of sales targets is in the context of joint exploitation of the results of the R&D efforts where joint distribution is part of the agreement.

In addition, according to the same NCA, the definition of "connected undertakings" provided by Article 1.2. of the R&D BER is too complex and therefore a simplification of the text should be considered.

As mentioned above, the combination of R&D BER and Chapter 3 of the Horizontal Guidelines seems to be, according to most NCAs, the key to a greater legal certainty for economic operators. This is confirmed by the fact that 19 (out of 29) NCAs believe that without the R&D BER, the Horizontal Guidelines alone would not provide the same level of legal certainty. For NCAs, the R&D BER allows for a better analysis of the cases, since it is more specific than the Horizontal Guidelines. For example, as mentioned by one NCA, it provides straightforward definitions of concepts. Another aspect mentioned by NCAs is the provision of a safe harbour in the R&D BER, for agreements between undertakings below certain market share thresholds. This contributes to increased legal certainty – although several economic operators mentioned that the definition of the relevant market is one of the most complex aspects for them.

Based on the limited sample of law firms participating in our in-depth interviews, there appears to be some degree of satisfaction in relation to the level of legal certainty provided by the R&D BER. Quoting an interviewee, *"the rules defined on R&D agreements in the R&D BER are clearly formulated and provide legal certainty"*. Trade associations that were interviewed did not provide relevant contributions on this.

As far as the **Horizontal Guidelines** are concerned, they are perceived to provide a good level of legal certainty, in particular thanks to the provided examples. Nonetheless, from the CATI survey, it appears that their use by SMEs is in general rather limited.

Only a third (23 out of 67) of the respondents to the CATI interviews has ever consulted the R&D BER and – amongst them, the majority consults the Horizontal Guidelines either occasionally (once or twice a year) and the minority consults the Horizontal Guidelines frequently (several times per year). However, the feedback on the Horizontal Guidelines is rather positive, as shown by the tables below.

Table 17: Perceived legal certainty of the Horizontal Guidelines (Chapter 3)

Degree of certainty	#	Share
1 - no certainty	1	4.3%
2 - low certainty	0	0.0%

[110] *i.e. Article 5's hardcore restrictions are a set of exceptions which are not exempted under the R&D BER, however then, under Article 5 letter b), the Regulation refers to "exceptions" which are not considered hardcore restrictions (related to allowed limitations of output and sales). Hence, these exceptions are exempted under the R&D BER and they represent a source of confusion for undertakings, according to one NCA*

Degree of certainty	#	Share
3 - neutral opinion	5	21.7%
4 - adequate certainty	11	47.8%
5 - high certainty	5	21.7%
I don't know	1	4.3%

Table 18: Feedback on the Horizontal Guidelines

In your view, which of the following statements best reflects your opinion of the Horizontal Guidelines in establishing R&D agreements?	N. of answers
Without the Horizontal Guidelines, it would be extremely difficult to establish or implement R&D agreements	17
The Horizontal Guidelines provide a useful guidance, but they are not sufficiently detailed and further legal counsel is needed.	4
The Horizontal Guidelines provide very little or no support at all	1
I don't know	1

According to most CATI respondents, the Horizontal Guidelines are an essential document to establish or implement R&D agreements. Indeed, the CATI confirm that difficulties related to the exemption for R&D agreements do not specifically concern legal certainty (see Table 18).

Table 19: Discouraging factors of R&D cooperation agreements

Which of the following factors related to the R&D Block Exemption Regulation together with the Horizontal Guidelines might be discouraging R&D cooperation	N. of answer
Technical complications (i.e. calculating the market shares)	7
Need for external support in our self-assessment	3
Lack of legal certainty and risk of possible fines	3
Administrative and legal burden related to the self-assessment	2
I don't know	9

As shown, the only mentioned discouraging factors amongst CATI respondents are related not to the legal certainty as such, but rather to the administrative burden and to the lack of technical skills to calculate the market shares and the relevant thresholds. In most cases (9 respondents) the interviewee was not able to mention a discouraging factor.

This is consistent with what emerged from the in-depth interviews with large enterprises which are often more critical towards the R&D BER and the Horizontal Guidelines. Most criticised aspects refer to specific provisions (i.e. definition of the product market and related market share thresholds) of the R&D BER. Meanwhile, the clarity of these documents is generally acknowledged. However, mainly according to large and multinational enterprises, there is room for improvement for ensuring the legal certainty on a specific set of aspects. These are discussed in what follows.

The table below – based on the CATI result and thus representing the feedback by SMEs – shows the most recurrent sources of difficulties when verifying whether an R&D agreement is exempted under the R&D BER.

Table 20: Source of difficulties

Which of the following activities (max 3) are, in your opinion, the main sources of difficulty when verifying whether your R&D cooperation is exempted under the R&D BER?	N. of answers
Understanding the conditions for exemption	9
Identification of relevant markets affected by the agreement	6

Which of the following activities (max 3) are, in your opinion, the main sources of difficulty when verifying whether your R&D cooperation is exempted under the R&D BER?	N. of answers
Calculating the relevant market shares	5
Understanding of definitions that apply for R&D agreements that can benefit from the exemption	4
Understanding the hardcore restrictions	3
I don't know	3

According to CATI interviewees, the main sources of difficulties are found in the complexity of the R&D BER, notably with respect to the understanding of the conditions for exemption. Indeed, the R&D BER lists a set of conditions granting the exemption – which are described in detail and may be difficult to understand, especially by SMEs that might rely on lawyers with less experience with EU Competition Law. Similar issues also concern the identification of relevant markets and the calculation of market shares.

Large and multinational enterprises acknowledged in the in-depth interviews that the R&D BER is clear and – in principle – ensures legal certainty. However, some concerns emerged on the R&D BER and the related Horizontal Guidelines not only on specific definitions, but also on the overall goal and structure of the R&D BER, as presented in the following paragraphs.

Some in-depth interviewees noted that the R&D BER is very technical and not self-explanatory and that this is compounded by the fact that there is very little case law, making interpretation more difficult. There is an overall perceived lack of flexibility in the definitions and excessive strictness of the R&D BER regarding specific aspects such as the market definition on future products and technologies as a result of R&D endeavours and the related market thresholds – i.e. the 25% threshold for exemption may be adequate for a specific market but not for another. Also, in reference to Article 3 point 2 of the R&D BER, in relation to the sharing of know-how, the inclusion of “paid-for” research as one of the categories of R&D agreements, the results of which all parties must be given full access to, is criticised. Furthermore, the limitation period of seven years is considered too short by some respondents, who suggest that longer periods would be more appropriate in sectors or types of research where returns require more time to occur.

For instance, as mentioned by a large player from the automobile sector, the Horizontal Guidelines are written with relatively common markets in mind where market shares are known; however, in certain cases, it may be hard to define future product and technology markets. For very dynamic markets and future technologies, it is challenging to identify the (potential) players. The most recent market trends lead companies to create collaborations with companies operating in other markets creating more complexity in the identification of the relevant market.

Moreover, when the R&D product is a component of a final product, the R&D BER does not explicitly allow to restrict the purchasing party from re-selling the R&D product: the R&D BER lacks clarity in relation to clauses such as these ‘field of use’ restrictions. One respondent to the case studies referred the field of use restriction that is present in the Technology Transfer BER as a comparison, highlighting how this topic is currently missing in the R&D BER.

Along the lines of the comments made by CATI respondents, also large companies noted that assessing whether the market shares of parties to R&D agreements fall under the conditions for exemption, is difficult. Moreover, SMEs which participate in R&D agreements will unlikely have sufficient market intelligence to assess their actual market shares.

It is also a concern, as stated by a large company in the automotive sector, what would happen if the market threshold exemption is exceeded after the R&D agreement is in place: this is a relevant uncertainty for large companies and in dynamic markets where market shares can change rapidly as a result of e.g. development of new technologies. According to the same stakeholder, large companies are in general more cautious in establishing formal cooperation agreements because these are more likely to raise antitrust concerns.

Opinions regarding the threshold itself are mixed: half of the respondents considered the threshold of 25% as being appropriate, the other half considered it too low or, in one case, even unnecessary for R&D agreements. Being considered too low, and given uncertainty about markets shares, the threshold carries legal risk for large companies which can have, according to some interviewees, a discouraging effect on R&D agreements.

Another source of uncertainty arises for non-full-function joint ventures for R&D undertakings: parent companies need to have access to a certain set of information on the joint venture, e.g. on the technology used, on the innovative process, etc. However, this raises concerns of a potential infringement of the rules on information exchange (see Section 6.2.4 for further discussions on the issue). According to these responses, the scope for relationships between parent companies and joint ventures (in general and especially in the field of R&D) is not fluid enough in the current framework.

Only one interviewee – representing a large multinational company – reported that the strictness of the R&D BER resulted in a potential agreement having been discarded. Specifically, Article 1 – albeit being considered rather clear – lacks practical examples and a description of its concrete application. According to the respondent, the lack of flexibility resulted in uncertainty during the negotiations between the parties on the agreement's compliance.

A law firm views Article 3 as "too heavily prescriptive" when referring to the obligation of providing full access to pre-existing indispensable know-how. This respondent considers that the text of the R&D BER goes significantly further than paragraph 138 of the Horizontal Guidelines, where parties granting licences that allow third parties to compete effectively is, in the opinion of this respondent, one option to avoid the risk that foreclosure from key technologies results but not necessarily the only one. They consider, therefore, that it should be clear in the R&D BER that granting licences is a possibility but not a requirement.

Several respondents from large and multinational enterprises that were interviewed noted that the computation of market shares is burdensome and complex. Respondents considered further that "*the legislative framework lays down a detailed procedure which sometimes is excessively costly considering the value of the agreement*".

Finally, one interviewee from a large multinational enterprise warned that the current legal framework may gradually become outdated, particularly in view of the increasing share of R&D agreements in the digital sector. Moreover, in the interviewee's view, failing to adapt to the new context may cause disadvantages to EU companies against US and Chinese competitors. Not only do the latter receive more public subsidies, but they are also not required to share any intellectual property rights ('IPRs'). Thus, according to stakeholder's view, the European Union is not currently equipped with rules that take into account the now completely globalised value chains: the requirements under which companies should share European intellectual property are not clarified.

Conclusions

While there is an overall acknowledgement by all the types of stakeholders involved in CATI, NCA consultation, OPC and in-depth interviews that the R&D BER and Chapter 3 of the Horizontal Guidelines provide an adequate level of legal certainty, some technicalities and complexities have been raised: SMEs noted that the calculation of the market shares is a burdensome task, and this is consistent with the lack of in-house legal expertise of this category of enterprises compared to large multinational companies. On the other hand, it might be argued that due to the relatively small size of the companies participating in the CATI interviews, it is more likely that these companies do not have high market shares and their agreements are more likely to fall within the conditions for exemption provided by the R&D BER.

As aforementioned, even large companies participating in the in-depth interviews and in the OPC shared an overall positive appraisal on the level of legal certainty afforded by the R&D BER and the Horizontal Guidelines. The key area of uncertainty relates to identifying relevant product markets precisely as well as own and potential players market shares. The R&D BER is also perceived by some large companies as strict on requirements for access to IPRs under Article 3 of the R&D BER, and lacking clarity on the conditions for joint exploitation to meet the BER requirements.

Clearer guidance on how to address technical issues such as the identification of relevant markets in very dynamic markets, and in relation to future technologies, is perceived to be missing.

6.2.3. Specialisation Agreements

This section summarises the main findings gathered on the legal certainty provided by the Specialisation BER and by Chapter 4 of the Horizontal Guidelines through the different research tools. The table below provides an overview of the sample of respondents who provided inputs to our fieldwork research on specialisation agreements.

Table 21: Sample of respondents per research tools - Specialisation agreements

Legal certainty - Specialisation agreements		
Tool	**# answers**	**Research questions/topics covered**
CATI	70	• Consultation rate of Horizontal Guidelines and/or horizontal block exemption regulations • What are strengths of the Specialisation BER? • Which activities are faced with difficulties? • Are the Horizontal Guidelines helpful in assessing competition concerns, efficiency identification? • What degree of certainty is provided by Horizontal Guidelines? • Would the Horizontal guidelines suffice without the Specialisation BER? • Is the current legal framework discouraging to enter into horizontal cooperation agreements
In-depth interviews	10	• Assessment whether the rules for production/specialisation agreements offer sufficient legal certainty on the compatibility of the agreement with article 101.
OPC	13	• What is the level of legal certainty that the HBERs and the Horizontal Guidelines provide for the purpose of assessing whether horizontal cooperation agreements are compliant with Article 101 of the Treaty (i.e. are the rules clear and comprehensible, and do they allow undertakings to understand and predict the legal consequences)? • Have the Specialisation BER and Chapter 4 of the Horizontal Guidelines on production agreements provided sufficient legal certainty on production/specialisation agreements companies can conclude without the risk of infringing competition law? • Does the Specialisation BER increase legal certainty compared with a situation where the Specialisation BER would not exist but only the Horizontal Guidelines applied?

Out of all the companies interviewed through CATI, 70 individual enterprises engaged in specialisation agreements. Nearly half of them were small enterprises (31 accounting for 44.3% of the sample), followed by medium enterprises (21 accounting for 30% of the sample) and micro enterprises (17 accounting for 24.3% of the sample).

52 of the interviewed companies were primarily manufacturers/producers (74.3% of the sample). About 1/3 of these companies operated in the agriculture sector (25.7%), followed by construction (11.4%) and household appliances (10%). Less companies, but still in a relevant number, were active in the pharmaceutical, energy and clothing sectors.

The research team also conducted 10 in-depth interviews to discuss the Specialisation BER and Chapter 4 of the Horizontal Guidelines, more specifically with 8 large enterprises operating in different industries (in particular in the telecommunication sector but also in the automotive, household products and health electronics). Additionally, the research team received contributions from one law firm and one trade association.

Additional information was collected through the analysis of the responses to the OPC and the position papers that have been shared by participants in the OPC. The research team also reviewed the responses provided by the NCAs. Consumer organisations were contacted to discuss the topic but could not provide additional information for our study.

Main findings

The following paragraphs summarise the main findings, gathered through the different research tools (CATI, in-depth interviews, analysis of responses and position papers submitted in the OPC, NCA replies), which lead to the overall answer to the evaluation question (Section 6.2). The paragraphs below presents the insights from the CATI interviews.

Evidence gathered from the CATI research provided an overview of the opinions on the legal certainty afforded by the Specialisation BER and by Chapter 4 of the Horizontal Guidelines. As 98% of CATI respondents in the study's sample were micro, small or medium enterprises, the results should be considered as being more representative of this specific category of stakeholders. Specialisation/production agreements appear to be relevant for the SMEs included in the sample as they are among the most frequently quoted cooperation agreements (24% of the agreements). However, only 20% of CATI respondents declared to have consulted the Specialisation BER to check whether their agreements benefited from an exemption. Due to the low number of respondents who consulted the text of the BER and the Horizontal Guidelines, the robustness of the conclusions that can be drawn is limited.

The figure below shows the strengths of the Specialisation BER according to the CATI respondents.

Table 22: Key strengths of the Specialisation Block Exemption Regulation

In your view, what are the strengths of the Specialisation BER?	N. of answers
Facilitates self-assessment through a clear and comprehensive set of the requirements for exemption	8
Ensures consistency of the application of EU competition rules to horizontal R&D cooperation agreements across EU Member	5
There is less need for external legal support when there is a block exemption regulation	1
None of the above	1

As highlighted in Table 22 above about specialisation agreements, the CATI results on the legal certainty of the Specialisation BER point to the importance of the clarity of the Regulation, which appears to be particularly appreciated by the respondents: 14 out of the 15 respondents who replied the question on the strengths of the Specialisation BER expressed positive views, highlighting the ease of the self-assessment and the consistency between the EU competition rules and the national legislation.

According to the CATI interviews, most respondents (11 out of 15) who have consulted Chapter 4 of the Horizontal Guidelines on production agreements, consider that the Horizontal Guidelines provide adequate certainty. Three additional respondents had a neutral opinion on the matter whilst only one respondent found Chapter 4 of the Horizontal Guidelines lacking in detail or clarity.

Table 23: Perceived legal certainty of the Horizontal Guidelines (Chapter 4)

Degree of certainty	#	Share
1 - no certainty	0	0.0%
2 - low certainty	1	6.7%
3 - neutral opinion	3	20.0%
4 - adequate certainty	7	46.7%
5 - high certainty	4	26.7%
I don't know	0	0.0%

Since the sample of companies participating in the CATI interviews is made mostly of SMEs, one interviewee commented that the respective national competition rules have more significance for businesses of this size, and are presumably consulted more frequently than the Specialisation BER and the Horizontal Guidelines.

The CATI interviews also reveal that difficulties related to the Specialisation BER and to the Horizontal Guidelines are various and almost equally distributed between technical complexities, need for external support, administrative burden and to a lesser extent legal certainty.

Table 24: Discouraging factors of production/specialisation cooperation agreements

Which of the following factors related to the Specialisation Block Exemption Regulation together with the Horizontal Guidelines might be discouraging production/specialisation agreements	N. of answer
Need for external support in our self-assessment	5
Technical complications (i.e. calculating the market shares)	3
Administrative and legal burden related to the self-assessment	3
Lack of legal certainty and risk of possible fines	2
Other	1

The table below – based on the CATI results and thus representing the feedback by SMEs – shows the most recurrent sources of difficulties when verifying whether a specialisation agreement is exempted under the Specialisation BER.

Table 25: Source of difficulties

Which of the following activities (max 3) are, in your opinion, the main sources of difficulty when verifying whether your production/specialisation agreement is exempted under the Specialisation BER?	N. of answers
Understanding of definitions that apply for production/specialisation agreements that can benefit from the exemption	6
Understanding the conditions for exemption	4
Identification of relevant markets affected by the agreement	3
Calculating the relevant market shares	2
Understanding the hardcore restrictions	1
I don't know	1

According to most CATI respondents, the main sources of difficulties relate to the complexity of the Specialisation BER. The definitions in Article 1 appear to be most criticised. Indeed, this article lists a set of definitions to identify the types of specialisation agreements that may benefit from an exemption – which are described in detail and may be difficult to understand. Similar issues also concern the understanding of the conditions for exemption, the identification of relevant markets and the calculation of market shares.

The in-depth interviews, conducted with larger companies, overall suggest broad satisfaction with the level of legal certainty.

Nonetheless, some interviewees flagged some perceived discrepancies between the Specialisation BER and the R&D BER, the Merger Regulation[111], the Technology Transfer BER[112] and the VBER[113], while the Specialisation BER was considered to interact particularly well with the Subcontracting Notice[114].

These respondents mentioned that issues arise from a lack of clarity and consistency for the assessment of the relationship between parent companies and joint ventures: namely, parent companies which created joint ventures and moved most activities to these joint ventures, whilst retaining some activities/areas in which they compete with the joint venture. The Specialisation BER and Chapter 4 of the Horizontal Guidelines do not specify

[111] *Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation). OJ L-24/1, 29.1.2004.*
[112] *Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements. OJ L-93/1, 28.3.2014.*
[113] *Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices. OJ L-102/1, 23.4.2010.*
[114] *Commission notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article 85 (1) of the EEC Treaty. OJ C -1/2, 3.1.1979.*

if in such a case the companies are to be treated as competitors or as the same economic entity for the assessment of competition compliance. A relative lack of legal certainty concerned also the definition of potential competitors. According to interviewees, the resulting uncertainty leads to inefficiencies in terms of lost opportunities and cancelled investments on potential agreements for fear of infringing competition law.

A third concern relatively consistently mentioned was that the examples provided in the Horizontal Guidelines are too theoretical in nature. Therefore, they are considered to be too impractical as explanatory tools, such that they are not felt to contribute to legal certainty when consulting.

Less commonly mentioned, but still relevant in terms of legal certainty, were gaps in the Specialisation BER and Horizontal Guidelines of guidance in the context of so-called post-term "non-compete"-clauses. Under these clauses, a company would mandate a limited period after the conclusion of a subcontracting agreement with potential competitors, during which the subcontracting competitor would not attempt to compete for a client's business.

Regarding the view of the NCAs in the context of legal certainty provided by the Specialisation BER and the Horizontal Guidelines, the situation is fairly similar to what has been said about R&D agreements. Out of 29 authorities, 18 consider the Specialisation BER and Chapter 4 of the Horizontal Guidelines as providing sufficient legal certainty on production/specialisation agreements while only two authorities gave a negative response. As noted by one NCA, the estimation of market share remains a critical point: it is difficult because it implies insight into the production of competitors which is not available and even as an authority it is difficult to gather the information needed for the assessment.

While there were overall more specialisation agreement cases than cases of R&D agreements, many NCAs still stated that they had only few or no occasions of applying the Specialisation BER. One NCA expressed doubts about the legal certainty regarding specialisation agreements, based on one case where the assessment of the scope (definition of product and the distinction from a distribution service) was challenging. The NCAs also emphasised the need to clarify the relationship between the Specialisation BER and other regulations, notably the Technology Transfer BER and the VBER.

Conclusions

The overall level of legal certainty provided by the Specialisation BER and Chapter 4 of the Horizontal Guidelines is high. Yet, there are aspects which would benefit from clarification, namely in terms of definitions of specialisation agreements covered by the rules and on the relationship of the Specialisation BER with other EU Regulations, notably the VBER and the Technology Transfer BER.

The safe harbour provisions of the Specialisation BER are especially appreciated in that they provide a high degree of legal certainty to the assessment of competition compliance of specialisation agreements. This has been repeatedly expressed in the OPC and the in-depth interviews. Likewise, respondents to the CATI named the facilitation of self-assessment through a clear and comprehensive set of requirements for exemption as the primary strength of the Specialisation BER.

6.2.4. Information Exchange Agreements

This section summarises the main findings gathered on the legal certainty provided by the Horizontal Guidelines through the different research tools. The table below provides an overview of the sample of respondents who provided inputs to our fieldwork research on agreements concerning the exchange of information.

Table 26: Sample of respondents per research tools - Information exchange agreements

Legal certainty – Information exchange agreements		
Tool	**# answers**	**Research questions/topics covered**
CATI	73	• Consultation rate of Horizontal Guidelines • Are the Horizontal Guidelines helpful in assessing competition concerns, efficiency identification? • What degree of certainty is provided by Horizontal Guidelines?

Legal certainty – Information exchange agreements		
Tool	**# answers**	**Research questions/topics covered**
		• Is the current legal framework discouraging to enter into horizontal cooperation agreements
In-depth interviews	35	• Assessment whether the rules for information exchange practices offer sufficient legal certainty on the compatibility of the agreement with article 101
OPC	26	• What is the level of legal certainty that the HBERs and the Horizontal Guidelines provide for the purpose of assessing whether horizontal cooperation agreements are compliant with Article 101 of the Treaty (i.e. are the rules clear and comprehensible, and do they allow undertakings to understand and predict the legal consequences)? • Have the Horizontal Guidelines provided sufficient legal certainty on agreements involving information exchange in the sense of Chapter 2 of the Horizontal Guidelines?

Information exchange is a topic discussed by the highest number of stakeholders addressed through our research tools, as shown in the Table above: 73 through the CATI methodology, 35 with in-depth interviews and also addressed by several stakeholders in their submissions to the OPC.

The CATI sample is composed by 72 SMEs of which 29 small enterprises (40% of the sample), 24 micro enterprises (33% of the sample) and 19 medium enterprises (26% of the sample) and only 1 large enterprise. Respondents are evenly distributed across all the industries with an exception for the clothing, apparel and footwear industry that is slightly over-represented (17,8% of the sample). Regarding the type of companies, the sample is composed in large part by manufacturers (37% of the sample) but includes also retailers (24,7%), wholesalers (20,5%) and research centres (17,8%).

The research team also conducted 35 interviews on this topic: with 18 enterprises operating in several industries including large distribution retailers, producers of home appliances, telecommunication, automotive and from the food sector; 14 industry associations and 3 law firms.

Additional information was collected through the analysis of the responses to the OPC and the position papers that have been shared by participants to the OPC. Three consumer organisations were able to provide some input on this topic.

Main findings

The CATI participants were asked about their familiarity with Chapter 2 of the Horizontal Guidelines: among the 73 respondents having in place horizontal cooperation agreements, which main focus is exchange of information, 60 respondents never consulted the Horizontal Guidelines.

An analysis of how clear and relevant the Horizontal Guidelines are (for those who consulted them – 13 respondents) shows a satisfactory level of legal certainty. Due to the low number of respondents who consulted the text of the Horizontal Guidelines, the robustness of the conclusions that can be drawn is limited. However, a majority indicated that Chapter 2 of the Horizontal Guidelines was helpful for identifying competition concerns (9 responses) and to identify efficiencies (11 responses), while 4 respondents did not find the Horizontal Guidelines helpful to address competition concerns. Regarding the degree of legal certainty, almost half of the CATI respondents indicated that they perceived the level of certainty afforded by the guidelines as adequate (11 responses) or high (5 responses). On the other hand, 5 respondents felt neutral about the level of legal certainty afforded by the guidelines and only one respondent claimed that they do not contribute to legal certainty.

Table 27: Perceived legal certainty provided by Chapter 2 of the Horizontal Guidelines

Degree of certainty	#	Share
1 - no certainty	1	4.3%
2 - low certainty	0	0%
3 - neutral opinion	5	21.7%
4 - adequate certainty	11	47.8%

Degree of certainty	#	Share
5 - high certainty	5	21.7%
I don't know	1	4.3%

The opinions were rather divided among the 13 micro and SMEs that consulted the Horizontal Guidelines, when asked to what extent the Horizontal Guidelines supported them in the implementation of information exchange agreements. The majority of respondents agreed that, without the Horizontal Guidelines, it would be extremely difficult to establish or implement information exchange agreements (7 out of 13). However, the other 6 respondents expressed the view that the Horizontal Guidelines provide insufficiently detailed, or very little support, in the area of information exchange.

Table 28: Feedback on the Horizontal Guidelines (Chapter 2)

In your view, which of the following statements best reflects your opinion of the Horizontal Guidelines regarding exchange of information?	N. of answers
Without the Horizontal Guidelines, it would be extremely difficult to exchange information	7
The Horizontal Guidelines provide a useful guidance, but they are not sufficiently detailed and further legal counsel is not needed.	3
The Horizontal Guidelines provide very little or no support at all	3
I don't know	1

Similarly, the opinions among the respondents who consulted the Horizontal Guidelines were divided when asked what is lacking in the current Horizontal Guidelines with respect to exchange of information: about half responded that nothing was missing or did not have an opinion, while the other half indicated the need for more detailed guidance.

Both trade associations and individual companies (e.g. from the telecommunications, automotive and cosmetics sectors) shared the view, in their replies to the OPC and to the interviews, that what is currently missing in the Horizontal Guidelines is a clarification that exchanges of information do not constitute a restriction of competition by object, unless the exchange of information is between competitors and it concerns individualised data regarding intended future prices or quantities. These respondents claimed that there is a lack of guidance on when an exchange of information is not deemed a hardcore restriction and thus should be subject to an effects-based assessment. One national association representing professionals and academics active in competition analysis noted that safe harbours (e.g. when companies have a combined market share below a certain threshold) are also not foreseen by the current legal framework.

According to some interviewed law firms, paragraphs 74, 106 and 107 of the Horizontal Guidelines referring to 'by object' infringements are not clear enough. In particular, they do not provide practical examples and a clear differentiation between exchanges of information regarding current versus future prices.

The opinion of several stakeholders based on the OPC and on the interviews (individual companies from retail, automotive sector, law firms) is that the Horizontal Guidelines do not specify sufficiently how information exchanges harm competition, for instance by linking the analysis of effects to the market characteristics (e.g. distinguishing price-driven markets versus volume-driven markets): stakeholders noted the lack of examples in the Horizontal Guidelines that took into account the specificities of particular markets.

The key issues, which were pointed out by most stakeholders expressing their views in the interviews, are also linked to the emerging new business models and the digital economy, and are considered to justify the need to update the Horizontal Guidelines. Practical examples, such as examples relevant for digital companies, digital business models of cooperation, etc. are currently lacking and would add greater legal certainty relative to relying only on the current examples which refer to the traditional sectors in the economy.

Three consumer organisations also indicated that the digitalisation of the economy is creating the need to adapt the current rules on exchange of information in order to meet

present and future challenges (with reference to data pooling, data sharing and other trends).

Moreover, the new digital business models blur the separation between horizontal and vertical relations such as in the case of integrated business models. This is especially relevant for online marketplaces and e-commerce. With the progression of digital ecosystems, the division between horizontal and vertical is becoming less clear and the Horizontal Guidelines currently lack specific examples about intra-ecosystem and platform-based (cloud-infrastructure) information exchange to offer companies greater legal certainty. An industry association explained that, on platforms, one company could be simultaneously competitor, supplier and customer, and such situations are not well handled by the Horizontal Guidelines, reducing legal certainty. This view was supported by several stakeholders representing trade associations and the private sector (e.g. electronics and telecommunication). One interviewed trade association mentioned that more guidance is required for cases where suppliers engage in vertical information exchange on volumes and prices (exempted under the VBER), while simultaneously selling directly to consumers.

A further specification (through examples or cases) in the Horizontal Guidelines on how an information exchange is anticompetitive based on the level of aggregation, on the age of data and on its frequency, is missing: in this case, stakeholders reported a significant lack of clarity. Specifically, as pointed out by an interviewed law firm, paragraph 90 of the Horizontal Guidelines lacks a clear definition of "historic'' data, which can lead to divergent interpretation by NCAs. One interviewee representing an industry association from the maritime sector pointed out a problem with collecting and exchanging statistical information and their prudent approach due to high level of legal risk in this area. Similar issues were expressed during the interviews by one national trade association (representing commerce) and several retailers regarding the problem with collecting data for benchmarking purposes.

Several stakeholders, including a law firm and several industry associations pointed out that there is a cautious approach among the members of the associations to share information on best practices and benchmarking driven by the lack of legal certainty. This view was also shared by one national association representing competition area professionals and academics. This association sees lack of clarity on the extent to which members of associations can exchange information with other members. Specifically, paragraphs 91 and 108 of the Horizontal Guidelines are considered unclear in reference to benchmarking information. As described in the economic literature, exchange of cost information may allow competitors to benchmark their performance against best practices and design internal incentive schemes, which could then lead to pro-competitive effects.[115]

Finally, the Horizontal Guidelines remain unclear about the definition of price signalling. The view was expressed by several stakeholders (a law firm, some national trade associations representing commerce sector) that there is insufficient guidance on the conditions under which a public unilateral communication of a price change by a given company should be regarded anticompetitive price signalling aimed at facilitating collusion. According to one law firm, the description in paragraph 63 of the Horizontal Guidelines is too wide and not consistent with the concept of 'concerted practice' and respective court case interpretations.

Another interviewee from a law firm pointed out that the counterfactual-based analysis that is suggested as means of assessment of restrictive effects on competition in the Horizontal Guidelines is considered very helpful. However, what is missing is an explicit statement that this counterfactual methodology should be applied in practice.

Based on our interviews and on the analysis of the position papers of stakeholders submitted in the OPC, there appears to be a general view that Chapter 2 of the Horizontal Guidelines lacks clarity on when data sharing is admissible. Stakeholders representing trade associations, law firms and private sector stressed that as data exchange is key in the development of digital economy, the Horizontal Guidelines are perceived by stakeholders (especially those active in the media and telecommunication sectors) as not

[115] *OECD. (2010). Information Exchanges between Competitors under Competition Law.*

up-to-date. This is particularly the case for agreements in areas where interoperability is needed (e.g. AI, IoT[116] or data-related projects).

The lack of clarity and examples in the Horizontal Guidelines on data pooling and data sharing agreements was raised by stakeholders both in the interviews and the OPC. Stakeholders would welcome further guidance. For example, a few points were raised concerning the treatment of data pooling by an association representing media sector:

- To what extent would the size of a data pool or the market share of those sharing the data determine whether the pool would be subject to an obligation to grant access to data? (e.g. would a group of smaller players pooling their data to gain a competitive advantage be forced to give their pooled data to a much larger player?);
- How would the Commission decide whether a data pool has market power? Would a "safe harbour" market share be appropriate in these cases (e.g. similar to joint purchasing agreements)? And, how would the Commission define the relevant market in such cases?

Among these new forms of cooperation, 'ecosystem cooperation' to foster innovation (e.g. SMEs cooperation in R&D and ICT expenditure), data sharing and data pooling have been mentioned as types of cooperation which will become very common among competitors, and especially across sectors, aimed at offering innovative digital services, (e.g. AI, IoT and 'European Data spaces'). More streamlined rules on the ability to exchange data, stimulating competition by allowing smaller firms to benefit from any potential advantages in "big data" (e.g. for machine learning), are currently missing. According to interviewed stakeholders, the Horizontal Guidelines do not make clear that non-commercial data could be shared by firms without market power without that resulting in material antitrust risk: the lack of specific guidance on these data-intensive horizontal cooperation agreements, together with the absence of a *de minimis* rule/a safe harbour for digital markets (specifically for smaller companies) does not allow to exploit the potential of the EU digital ecosystem.

Another concern expressed by an industry association is related to a provision included in the European Electronic Communications Code, according to which telecommunications companies are required by national authorities to provide detailed information on network deployments (including forecasts on the reach of their networks). However, it is not clear whether providing this information constitutes an exchange of sensitive information. The current text of the Horizontal Guidelines is a cause for concern since it states that, even if public authorities require this, it does not mean that the information exchange is automatically exempted under Article 101(3) of the Treaty.

Several stakeholders raised also doubts about the definition of 'competitor' in relation to information exchange. For example, the definition of potential competitors in the same field is problematic, as explained in an interview by a large firm (electronics sector). An ecosystem is characterised by the interactions of several types of stakeholders, e.g. manufacturers, developers selling via manufacturers platform, customers. According to this interviewee, it is not clear what information can be exchanged between players within these ecosystems, meaning that companies are unsure on which players can be considered competitors or rather which ones can become potential competitors.

A law firm expressed its concern regarding a possibly misleading perception that information exchanges which have been implemented can amount to an infringement merely due to their potential (as opposed to actual) anti-competitive effects. The stakeholder pointed out that this lack of clarity may arise in particular due to the multiple references in the Horizontal Guidelines to the court case *C-7/95 John Deere*[117], which is not in line with the latest case law on restrictions by potential effects (*paragraphs 1110 - 1129 of T-691/14 Servier*[118]). In Servier, this respondent considers, the bar is set

[116] *IoT: Internet of Things.*

[117] *Case C-7/95 P, John Deere Ltd v Commission (1998) ECLI:EU:C:1998:256, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61995CJ0007.*

[118] *Case T-691/14, Servier SAS and Others v European Commission (2018) ECLI:EU:T:2018:922, available at: http://curia.europa.eu/juris/liste.jsf?num=T-691/14&language=EN#.*

considerably higher, such that potential effects are not primarily to be considered in the case of agreements that are already in place, and, therefore, in relation to which actual, rather than potential, effects can be assessed.

Another law firm referred to the paragraphs 55 and 61 of the Horizontal Guidelines and stated that they are missing an exception permitting the unintended flow of information from one competitor to another via an independent third party (especially where that third party is a customer).

Additionally, according to the input provided by some law firms and one industry association, guidance on information exchange agreements does not provide adequate legal certainty within the context of joint ventures. Specifically, stakeholders observed that the Horizontal Guidelines do not provide sufficient clarity on the type of information that is allowed to be exchanged between parent companies and a non-full-function joint venture[119]. As pointed out by one law firm, a possible solution for this issue had already been included in a previous draft of the text of the Horizontal Guidelines, in which this type of joint ventures and parent companies were regarded as a single economic entity (i.e. considering the flow of information as intragroup exchange). However, this provision was not included in the final text of the current Horizontal Guidelines and it seems to create some issues for the founders of a joint venture: within the boundaries of competition law, parent companies have a natural need and interest in monitoring the investments of their joint ventures, accessing certain strategic information.

Another respondent from a law firm referred to paragraphs 86-94 (on the characteristics of the information exchanged) of the Horizontal Guidelines considering that they lack guidance on the management of information flows in the context of M&A transactions. M&A transactions often involve companies that are direct competitors. Naturally, it is in the nature of M&A pre-discussions that parties need to exchange information of strategic value, likely forward-looking and which is not public information. Further guidance on avoiding risk of infringement of competition rules during these discussions would be welcome.

According to a large manufacturer, restructuring proceedings represent another grey area where the exchange of information generates legal uncertainty. This specific circumstance is not mentioned at all in the Horizontal Guidelines, however, whenever there is a company in crisis, the exchange of information between the main stakeholders and the company in crisis is essential to the success of the whole restructuring proceeding: this allows to prevent insolvency and might have pro-competitive effects, helping a competitor to stay in the market. Restructuring implies a complex coordination between several stakeholders interested in the operation, with often a limited timeframe to act: according to the interviewee, the current Horizontal Guidelines do not allow effective cooperation in this specific phase of a company life cycle, potentially hampering successful restructuring.

Several stakeholders (e.g. from the retail sector) pointed out in the OPC that the Horizontal Guidelines in their current format lack a clear distinction between data sharing in B2B (Business-to-Business) and B2C (Business-to-Consumer) context, which is currently not addressed by specific examples. For instance, as explained by an interviewed trade association, it is not clear for companies to what extent information, which is publicly available to the final consumers through price-comparison websites, could also be exchanged between the companies without amounting to an infringement.

Several stakeholders (representing law firms, trade associations) made reference to low legal certainty caused by the lack of a clear definition as to what type of information is considered public/non-public (paragraph 94 of the Horizontal Guidelines). One stakeholder mentioned that it is not clear if information that can be accessed through an online platform through an account (such as Nielsen Platform) should be considered public or not.

Finally, some stakeholders from a trade association and law firms expressed the view that the Horizontal Guidelines do not provide sufficient guidance on the exchange of information between competitors concerning hub-and-spoke situations. The Horizontal Guidelines could benefit from the Commission addressing the concept of “hub-and-spoke

[119] *According to the “Commission Notice on the concept of full-function joint ventures under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings”, a joint venture is not full-function if it only takes over one specific function within the parent companies’ business activities without access to the market. This is the case, for example, for joint ventures limited to R&D or production.*

arrangements" under 101 of the Treaty and bringing clarity to the boundary between lawful and unlawful information sharing to address situations where the rules are applied differently to identical cases in different Member States. Additional guidance on the liability of the spokes would be desired: for example, whether it is necessary to show that the spokes were aware of the fact that the information exchanged with the hub was passed on further to other spokes. The current Horizontal Guidelines are missing a definition of unlawful hub-and-spoke arrangements.

As far as specifically positive views in relation to legal certainty afforded by the current Horizontal Guidelines, one stakeholder representing the insurance sector highlighted that the clarification in paragraph 97 of the Horizontal Guidelines - that exchanges of consumer data in markets with asymmetric information about consumers can also give rise to efficiencies – is very valuable for them and contributes to a high level of legal certainty. This stakeholder adds that the ability of insurers to exchange risk data allows them to develop better insights about risk level and helps to pass the benefits to consumers.

Conclusions

The treatment in the Horizontal Guidelines of cooperation agreements having an exchange of information as 'centre of gravity', raised two substantially different positions depending on the size of the stakeholders.

In the CATI interviews, micro, small and medium enterprises claimed an adequate or even high level of satisfaction on the legal certainty ensured by the Horizontal Guidelines. On the other hand, the input collected from the OPC and in-depth interviews of trade associations, law firms and large companies, indicates that the Horizontal Guidelines are not seen to provide the desired level of legal certainty. Notably, there was a shared view from individual companies and trade associations that the current lack of concrete examples, combined with the lack of safe harbours in relation to information exchange, leaves room for NCAs to make interpretations, which are not always coherent across the EU or with other EU rules.

One often mentioned problem lies notably on the evolving role and importance played by data in digital markets, affecting not only the legal certainty but also the relevance of the Horizontal Guidelines. The participants in the in-depth interviews expressed the view that the Horizontal Guidelines do not provide updated examples on the nature of the information exchanges that would be deemed as anticompetitive. In particular, a lack of focus on the following topics has been highlighted:

- digital business models such as platforms, ecosystems and hybrid cooperation models;
- combinations of horizontal and vertical relations for the exchange of information in digital ecosystems; and
- 'data pooling'.

Trade associations and companies, especially from the telecommunication and IT sectors, pointed out during interviews that there is a general feeling that any exchange of information is easily considered anti-competitive. In particular, the Horizontal Guidelines lack further specification through examples or cases of how an information exchange is anticompetitive based on the level of aggregation of the information, on the age of data and on its frequency. This might ultimately result in a bottleneck to the development of innovative technologies, processes and products, especially for what concerns digital infrastructures (see Section 6.4 on non-covered agreements, IoT and 5G), due to an extremely cautious attitude by firms. Updated examples which explicitly refer to certain sectors or products are welcome, as it happened in the past: within the insurance sector for example, it has been highlighted by one interviewee that the clarification included in paragraph 97 of the Horizontal Guidelines (i.e. exchanges of consumer data in markets with asymmetric information about consumers can also give rise to efficiencies) has been beneficial and it delivered a high level of legal certainty.

Finally, a source of unclarity is related to the treatment of the exchanges of information within joint ventures. According to the input provided by some law firms and one industry association, the Horizontal Guidelines do not provide sufficient clarity on the type of

information that is allowed to be exchanged between parent companies and a non-full-function joint venture[120]: within the boundaries of competition law, parent companies have a natural need and interest in monitoring the investments of their joint ventures, accessing certain strategic information. However, the current text of the Horizontal Guidelines does not specify, for instance, that joint ventures and parent companies could be regarded as a single economic entity (i.e. considering the flow of information as intragroup exchange).

6.2.5. Joint Purchasing Agreements

This section summarises the main findings gathered on the legal certainty provided by Chapter 5 of the Horizontal Guidelines through the different research tools. The table below provides an overview of the sample of respondents who provided inputs to our fieldwork research on joint purchasing agreements.

Table 29: Sample of respondents per research tools - Joint purchasing agreements

Legal certainty - Joint purchasing agreements		
Tool	**# answers**	**Research questions/topics covered**
CATI	64	• Consultation rate of Horizontal Guidelines • Are the Horizontal Guidelines helpful in assessing competition concerns, efficiency identification? • What degree of certainty is provided by Horizontal Guidelines? • Is the current legal framework discouraging to enter into horizontal cooperation agreements
In-depth interviews	25	• Assessment whether the rules for joint purchasing agreements offer sufficient legal certainty on the compatibility of the agreements with Article 101
OPC	25	• What is the level of legal certainty that the HBERs and the Horizontal Guidelines provide for the purpose of assessing whether horizontal cooperation agreements are compliant with Article 101 of the Treaty (i.e. are the rules clear and comprehensible, and do they allow undertakings to understand and predict the legal consequences)? • Have the Horizontal Guidelines provided sufficient legal certainty on purchasing agreements in the sense of Chapter 5 of the Horizontal Guidelines?

64 companies participating in the CATI declared having – or having had – joint purchasing agreements. 24 of these companies are retailers, 23 are manufacturers and the remaining 17 are wholesalers. The sample is mainly composed by micro (27) and small (24) companies. Regarding the industries they operate in, 22% of the companies are from food and beverage, followed by clothing, apparel and footwear (14%) and household appliances (14%). The residual 50% of the sample is composed by companies from several other sectors.

The research team also conducted 25 in-depth interviews of which 14 with companies, 9 with trade associations and retail alliances and 2 with law firms. The companies that participated to the interviews were mainly producers and large retailers.

Additional information was collected through the analysis of the responses to the OPC and the position papers that have been shared by participants to the OPC. Also the consumer organisations were contacted to discuss the topic.

Main findings

According to several OPC responses and interviews with stakeholders and law firms, economic operators carry out joint purchasing activities along the options mentioned by paragraph 194 of the Horizontal Guidelines: by a jointly controlled company (or by a company in which many other companies hold non-controlling stakes), by a contractual agreement or by even looser forms of co-operation. The most prevalent type of joint purchasing agreement among respondents to the CATI (mainly SMEs) is the creation of a full joint-venture: this form of cooperation is used by half (32 out of 64) of the market

[120] *According to the "Commission Notice on the concept of full-function joint ventures under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings", a joint venture is not full-function if it only takes over one specific function within the parent companies' business activities without access to the market. This is the case, for example, for joint ventures limited to R&D or production.*

operators in the CATI sample, followed by a company with non-controlling stakes (23 out of 64) and other looser forms of cooperation.

The level of legal certainty afforded by Chapter 5 of the Horizontal Guidelines was investigated via CATI responses, in-depth interviews and replies to the OPC. CATI interviewees were asked about their familiarity with Chapter 5 of the Horizontal Guidelines: among the 64 respondents having in place joint purchasing agreements 51 had never consulted the Horizontal Guidelines, while 11 consulted them occasionally and 2 did so regularly. Due to the low number of respondents who consulted the text of the Horizontal Guidelines, the robustness of the conclusions that can be drawn is limited.

The question on how clear and relevant Chapter 5 of the Horizontal Guidelines was (for those who consulted it – 13 respondents in total) showed an overall positive perception of the legal certainty afforded by the guidelines: 7 respondents considered it adequate or high, 4 respondents had a neutral opinion and only 2 expressed a negative view.

Table 30: Perceived legal certainty of the Horizontal Guidelines (Chapter 5)

Degree of certainty	#	Share
1 - no certainty	0	0%
2 - low certainty	2	15.4%
3 - neutral opinion	4	30.8%
4 - adequate certainty	6	46.2%
5 - high certainty	1	7.7%
I don't know	0	0%

Five respondents thought that without the Horizontal Guidelines, it would be extremely difficult to establish or implement joint purchasing agreements. However, the same number of respondents (5) claimed that even if the Horizontal Guidelines provide useful guidance, they are not sufficiently detailed and further legal counsel is needed in order to assess the competition compliance of joint purchasing agreements. Finally, 3 respondents thought that the Horizontal Guidelines provide very little or no support at all.

Table 31: Feedback on the Horizontal Guidelines (Chapter 5)

In your view, which of the following sentences identifies better your opinion of the Horizontal Guidelines in the establishing joint purchasing agreements?	N. of answers
Without the Horizontal Guidelines, it would be extremely difficult to exchange information	5
The Horizontal Guidelines provide a useful guidance, but they are not sufficiently detailed and further legal counsel is needed.	5
The Horizontal Guidelines provide very little or no support at all	3

Indeed, some SMEs believed that the Horizontal Guidelines might discourage certain (legitimate) joint purchasing agreements: in 4 out of 5 responses, this is due to the lack of legal certainty and risk of possible fines.

In the in-depth interviews and in the OPC, several stakeholders, notably law firms, manufacturers and industry associations, argue that the current version of the Horizontal Guidelines lacks clear guidance on how legitimate joint purchasing is distinguished from an outright buyer cartel. Respondents consider that the Guidelines do not set out explicitly which conducts could fall within Article 101(1) and/or be a restriction of competition 'by object'. According to an interviewed law firm, the Horizontal Guidelines do not currently provide sufficient guidance on the boundaries between illegal 'by object' purchasing cartels and lawful purchasing agreements, which are, according to some respondents, better reflected in recent case law and market developments.

In turn, the Horizontal Guidelines are also seen to not expressly recognise the benefits of joint purchasing agreements (i.e. improved efficiencies) that could balance a competition assessment under Article 101(3) of the Treaty. In fact, even though the definition of 'joint purchasing' refers to a wide range of situations, the most common examples of joint

purchasing (e.g. supermarket/retail alliances) may not currently be treated with the level of detail needed to guarantee legal certainty.

In the perspective of most of the interviewed suppliers, the Horizontal Guidelines do not sufficiently take into account the possible harmful effects from some practices and do not tackle the issue of buyer cooperation and market partitioning. Manufacturers and brand-owners see joint purchasing agreements as highly likely to be anti-competitive and consider that the Horizontal Guidelines ought to provide additional guidance to this effect. Some of the practices identified by these stakeholders are the role of gatekeepers to national retailers that these alliances perform. As a result, suppliers that wish to do business with national retailers that are members of alliances, must first pay a fee to the alliance as a condition for access to their members. Some stakeholders blamed European retail alliances for practices that they qualify as a form of coercion towards suppliers in extracting access fees. Suppliers claim that while retail alliances argue that they offer services in return, such fees do not bear a genuine relation to the offered services. Services may not be provided at all whilst the fee operates as a form of tax or toll for suppliers. These access fee negotiations and payments to European retail alliances come on top of national level negotiations. According to suppliers, such collective extraction of fees, decoupled from price negotiations, can raise competition concerns. Furthermore, suppliers indicated that alliances would use coercion against suppliers through threats of collective de-listings: products of suppliers that do not agree to the access fees are removed from stores of the national retailers, members of retail alliances.

Another area that was identified as providing insufficient legal certainty, according to law firms interviewed, is what is to be considered a "sufficiently large proportion" when it comes to the total share of a purchasing market which would lead to the market being foreclosed to competing purchasers.

There were different positions across stakeholders regarding the market share thresholds. A vast majority of retailers consider that they are too low.[121] In addition, one OPC respondent, and an interviewed law firm said that since joint purchasing involves less coordination than a full merger, the current market share thresholds of 15% is unjustifiably low by comparison with the threshold of 25% found in the Horizontal Merger Guidelines. Indeed, the Horizontal Merger Guidelines state that where the market share of the undertakings concerned does not exceed 25%, the merger is unlikely to impede effective competition. A retailer goes further and suggests an upstream safe harbour threshold of up to 30% in line with the VBER.

Some stakeholders raised issues related to a lack of legal certainty and the absence of the possibility of voluntary ex-ante consultations with the Commission and/or the national competition authorities in order to increase legal certainty. For example, given the emergence of purchasing alliances, particularly in the consumer goods/retail sectors, one question that arises is how market power should be assessed, and what would be the scope of permissible practices by purchasing alliances. There can be situations where a cross-border buying alliance that could fall well below 15% market share at national level, could still represent a significant portion of the share of sales of the upstream supplier on a pan-European basis, both in absolute and relative terms. In addition, the use of collective bargaining clauses whereby the alliance would stop purchasing from the supplier altogether, if the supplier does not comply with its terms, could further exacerbate the buyer power of the purchaser.

A caveat mentioned by some respondents to the OPC and participants to in-depth interviews is that verifying upstream market shares can be extremely difficult and will always be approximate and uncertain: this is both in terms of defining upstream relevant markets and of estimating the market shares of the members of a potential agreement. Indeed, a component or material may be purchased for different uses by different types of buyers and it is possible that the alternative components or materials that a particular buyer considers to be close substitutes differs for different buyers. Similarly, it is extremely

[121] Paragraph 208 of the Horizontal Guidelines indicates that *"if the parties' combined market shares do not exceed 15% on both the purchasing and the selling market or markets, it is likely that the conditions of Article 101(3) are fulfilled"*

difficult to produce a precise estimate of a company's upstream market share for a certain component or material.

Conclusions

The evidence gathered across the different data collection tools suggests that, even if legal certainty is overall ensured by the current rules in Chapter 5 of the Horizontal Guidelines, they lack clear guidance on a number of issues and, in particular, on how legitimate joint purchasing is distinguished from an outright buyer cartel. Moreover, there are strongly diverging views between in particular retailers and manufacturers about the adequacy of the guidance. Manufacturers consider that the chapter on joint purchasing does not sufficiently take into account the possible harmful effects upstream nor some practices used by retail alliances, such as collective fee extraction mechanisms and collective delisting. On the other hand, retailers, but also other respondents, believe that the current safe harbour of 15% is unreasonably low and inconsistent with other provisions of EU antitrust regulation (such as the Horizontal Merger Guidelines and the Vertical BER).

6.2.6. Commercialisation Agreements

This section summarises the main findings gathered on the legal certainty provided by Chapter 6 of the Horizontal Guidelines through the different research tools. The table below provides an overview of the sample of respondents who provided inputs to our fieldwork research on commercialisation agreements.

Table 32: Legal certainty - Sample of respondents per research tools - Commercialisation agreements

Legal certainty - Commercialisation agreements		
Tool	**# answers**	**Research questions/topics covered**
CATI	68	• Consultation rate of Horizontal Guidelines • Are the Horizontal Guidelines helpful in assessing competition concerns, efficiency identification? • What degree of certainty is provided by Horizontal Guidelines? • Is the current legal framework discouraging to enter into horizontal cooperation agreements
In-depth interviews	9	• Assessment whether the rules for commercialisation agreements offer sufficient legal certainty on the compatibility of the agreement with article 101.
OPC	16	• What is the level of legal certainty that the HBERs and the Horizontal Guidelines provide for the purpose of assessing whether horizontal cooperation agreements are compliant with Article 101 of the Treaty (i.e. are the rules clear and comprehensible, and do they allow undertakings to understand and predict the legal consequences)? • Have the Horizontal Guidelines provided sufficient legal certainty on commercialisation agreements in the sense of Chapter 6 of the Horizontal Guidelines

68 companies participated to the CATI, of which nearly half were small enterprises in most cases operating in the following sectors: agriculture (13,2%), clothing, apparel and footwear (13,2%), consumer electronics (11,8%), household appliance (11,8%) and furniture (10,3%). Most companies in the sample were wholesalers (39,7%) and producers (36,8%).

The research team conducted also 9 in-depth interviews discussing commercialisation agreements of which 6 with companies, 2 with trade associations and 1 with a law firm. The companies belong to the telecommunication, retail and large distribution and home appliances sectors.

Main findings

The following paragraphs summarise the main findings, gathered through the different research tools (CATI, OPC, in-depth interviews), which lead to the overall answer to the evaluation question (Section 6.2). The paragraph below presents the insights from the CATI interviews.

The participants in the CATI interviews were asked about their familiarity with Chapter 6 of the Horizontal Guidelines: among the 68 respondents having in place horizontal cooperation agreements relating to commercialisation, 80.6% of the sample never consulted the Horizontal Guidelines (most of them being SMEs), whereas a limited share of respondents consulted them (19.1%). An analysis of how clear and relevant the Horizontal Guidelines were (for those who consulted them – 13 respondents) shows a sufficient level of legal certainty. However, due to the low number of respondents who consulted the text of the Horizontal Guidelines, the robustness of the conclusions that can be drawn is limited.

Regarding the degree of legal certainty; over half of the stakeholders pointed to an adequate level of certainty (7 responses), and nearly a quarter to a high level of certainty (3 responses).

Table 33: Perceived legal certainty of the Horizontal Guidelines (Chapter 6)

Degree of certainty	#	Share
1 - no certainty	0	0%
2 - low certainty	1	7.7%
3 - neutral opinion	2	15.4%
4 - adequate certainty	7	53.8%
5 - high certainty	3	23.1%
I don't know	0	0%

Similarly, most respondents agreed that without the Horizontal Guidelines, it would be extremely difficult to establish or implement commercialisation agreements (10 responses).

Table 34: Feedback on the Horizontal Guidelines (Chapter 6)

In your view, which of the following sentences identifies better your opinion of the Horizontal Guidelines in the establishing joint purchasing agreements?	N. of answers
Without the Horizontal Guidelines, it would be extremely difficult to exchange information	10
The Horizontal Guidelines provide a useful guidance, but they are not sufficiently detailed and further legal counsel is not needed.	2
The Horizontal Guidelines provide very little or no support at all	1

On the other hand, the opinions were rather divided among CATI respondents when asked if Chapter 6 of the Horizontal Guidelines was discouraging certain commercialisation agreements, with 6 respondents replying 'Yes' and 5 replying 'No'. Among the main discouraging factors, they mentioned the need for external support in self-assessment (3 responses) and the lack of legal certainty and risk of possible fines (3 responses).

Table 35: Discouraging factors of commercialisation agreements

Which of the following factors related to the Horizontal Guidelines might be discouraging commercialisation agreements	N. of answer
Need for external support in our self-assessment	3
Lack of legal certainty and risk of possible fines	3
Administrative and legal burden related to the self-assessment	2
Technical complications (i.e. calculating the market shares)	1

Based on the input collected from in-depth interviews, the guidance on commercialisation agreements in Chapter 6 of the Horizontal Guidelines appears to provide some legal certainty. As mentioned by several companies and trade associations (representing telecommunications and consumer electronics), commercialisation agreements do not tend to appear in the stakeholders' perception as stand-alone agreements: the current legal

framework allows companies to combine commercialisation agreements with R&D and specialisation agreements, ensuring an increase in legal certainty.

A large retailer in the food sector pointed out that it engages in commercialisation agreements and that for its specific sector, the Horizontal Guidelines provided a sufficient level of legal certainty (for stand-alone agreements).

An association of retailers countered that in their view paragraph 253 of the Horizontal Guidelines easily creates the impression for commercialisation agreements undertaken online to involve hardcore restrictions. This is due to the fact that, according to this respondent, small independent retailers are considered as full on competitors even if they are operating under a common brand: hence, the association claimed that by preventing online commercialisation initiatives (e.g. common promotions) the guidelines do not allow retailers to fully exploit potential economies of scale without incurring very high legal risks. An economic operator from the food industry also mentioned this point.

Several large enterprises pointed out during the interviews that the current examples of commercialisation agreements in the Horizontal Guidelines are not detailed enough to allow them to fully understand the legal consequences of particular agreements and hence might discourage some companies from entering into such forms of cooperation.

A few economic operators interviewed, mentioned that the current legal framework for sales cooperation agreements remains complex and that the Horizontal Guidelines do not provide enough legal certainty. One economic operator pointed to this being particularly problematic for SMEs, who could benefit from cooperation with a larger market player. However, due to insufficient legal certainty, SMEs may decide not to engage in such agreements.

The interviewed stakeholders representing law firms highlighted several points that diminish the level of legal certainty for the rules regarding commercialisation agreements. One respondent from a law firm mentioned that there is no sufficient clarity about joint selling and the infringement by object, in particular when an agreement is concluded between suppliers with broad product portfolios. The issue identified referred to assessing if and to what extent the parties' products overlap. Another law firm and also one economic operator stated that the Horizontal Guidelines raise legal uncertainty in reference to the definitions of competitors and non-competitors. The law firm pointed out that it is in general unclear which regulatory framework applies for agreements between non-competitors and that this is particularly unclear for the commercialisation agreements. The stakeholder explained that at the beginning of the Horizontal Guidelines reference is made to competitors and non-competitors, however throughout the Horizontal Guidelines only agreements between competitors are addressed.

Regarding a consortia arrangement and participation in a project, a law firm mentioned that the current Horizontal Guidelines lack clarity, i.e. that such arrangement is pro-competitive in the case of objective commercial reasons (and not only in the case of a lack of technical or human resources or know-how as currently stated in the Horizontal Guidelines).

The following paragraphs present the key findings that emerged from the position papers received through the OPC on the level of legal certainty ensured by Chapter 6 of the Horizontal Guidelines, in particular highlighting several challenges relating to the digitalisation of markets.

One stakeholder from an industry association noted that the dual role of retailers (i.e. as purchasers from manufacturers and at the same time suppliers themselves of their own products to final customers) is a key area for the Horizontal Guidelines to develop. With the emergence of online marketplaces acting as intermediaries/platforms connecting suppliers and consumers, a new set of issues arise (e.g. misuse of sensitive commercial information, differentiated treatment of own goods/services vis-à-vis the consumer and the tie-in of intermediary services to ancillary services), which are currently not addressed in the Guidelines.

One stakeholder from an industry association mentioned new practices in digital markets that are currently not sufficiently covered by the Horizontal Guidelines. These include new forms of cooperation, such as digital infrastructure sharing, data sharing and data pooling

which could be included under commercialisation agreements. Additionally, as pointed out by another industry association, in the broadcasting sector, partnerships for the provision of media content (e.g. partnerships for the creation of joint Video-On-Demand (VOD) platforms) could qualify as commercialisation agreements promoting innovation and quality content. These types of agreement aim to achieve objectives such as increased variety of content available to consumers, improvement in the quality of content offered (if the partnership involves Public Service Media organisations due to their obligations to maintain a high standard of content), promotion of innovation and competition in the upstream market by acquiring content from independent production houses, the associated promotion of independent content, and finally, the respondent believes it is important to consider the possibility of EU platforms competing vis-à-vis the strong position of global VOD platforms in EU markets and the resources which they have at their disposal. In the stakeholder's view, the innovation aspect is particularly overlooked in the competition assessment under Article 101(3) of the Treaty: the creation of such platforms may enable the parties to increase the stock of capital which is needed to invest in digital applications, interactive services and to stimulate competition in upstream markets (e.g. in the content production segment). These elements are not sufficiently factored in the Horizontal Guidelines to provide stakeholders with the necessary legal certainty.

Additionally, one OPC respondent highlighted the lack of clarity regarding practices in the public procurement area. For example, it is currently not sufficiently clear under what conditions stand-alone temporary unions/consortia formed in order to improve the offer via joint bidding for tenders fall under the category of restriction by object.

Conclusions

Based on the findings from the position papers submitted in the course of the OPC, stakeholder interviews among large enterprises, law firms and trade associations and CATI of SMEs, the stakeholders' perception is that the rules set out by the Horizontal Guidelines are rather complex but still capable of ensuring an adequate level of legal certainty in relation to the implementation of commercialisation agreements. The gaps that were highlighted in relation to legal certainty are linked to the digital area, namely that the new forms of cooperation emerged require more specific and up-to-date guidance and industry examples. Several economic operators (large and multi-national firms) pointed out that commercialisation agreements do not tend to appear in the stakeholders' perception as stand-alone agreements: the current legal framework allows companies to combine commercialisation agreements with R&D and specialisation agreements, ensuring an increase in legal certainty. However, it was not possible to draw more specific examples on why commercialisation agreements alone raise more concerns than in combination with the other two types (although the existence of a safe harbour for R&D and specialisation could be an explanation). Therefore, in order to avoid antitrust concerns, large economic operators tend to combine commercialisation agreements with other agreements.

6.2.7. Standardisation Agreements

This section summarises the main findings gathered on the legal certainty provided by Chapter 7 of the Horizontal Guidelines through the different research tools. The table below provides an overview of the sample of respondents who provided inputs to our fieldwork research on standardisation agreements.

Table 36: Legal certainty - Sample of respondents per research tools - Standardisation agreements

Legal certainty - Standardisation agreements		
Tool	**# answers**	**Research questions/topics covered**
CATI	45	• Consultation rate of Horizontal Guidelines • Are the Horizontal Guidelines helpful in assessing competition concerns, efficiency identification? • What degree of certainty is provided by the Horizontal Guidelines? • Is the current legal framework discouraging to enter into horizontal cooperation agreements
In-depth interviews	28	• Assessment whether the rules for standardisation agreements offer sufficient legal certainty on the compatibility of the agreement with article 101.

Legal certainty - Standardisation agreements		
Open public consultation	28	• What is the level of legal certainty that the HBERs and the Horizontal Guidelines provide for the purpose of assessing whether horizontal cooperation agreements are compliant with Article 101 of the Treaty (i.e. are the rules clear and comprehensible, and do they allow undertakings to understand and predict the legal consequences)? • Have the Horizontal Guidelines provided sufficient legal certainty on standardisation agreements in the sense of Chapter 7 of the Horizontal Guidelines

45 companies were interviewed with the CATI methodology to discuss standardisation agreements. The composition of the sample by size of the company is the following: nearly half is composed by small companies (22), 16 interviewed companies were medium enterprises, 4 were large enterprises and 3 were micro. The most frequent industries were the following: accommodation (5), agriculture (5), household appliance (5), transportation (5), construction (4), energy (4) and professional and technical activities (4). In most cases (16 companies) these were primarily manufacturers and wholesalers (14 companies). The remaining were retailers (8) and research centres (7).

The research team also conducted 28 in-depth interviews with relevant stakeholders. Of these interviews, 11 were with companies operating mainly in the information and telecommunication sector, 3 in the automotive sector, 3 law firms, 2 were manufacturers of hardware solutions and the remaining 9 were trade associations active in the ICT sector.

Main findings

The following paragraphs summarise the main findings, gathered through the different research tools (CATI, OPC, in-depth interviews), which lead to our overall answer to the evaluation question (Section 6.2). The paragraph below presents the insights from the CATI interviews.

The participants in the CATI interviews were asked about their familiarity with Chapter 7 of the Horizontal Guidelines: among the 45 respondents having in place horizontal cooperation agreements relating to standardisation, 71.1% of the sample never consulted the Horizontal Guidelines, whereas a limited share of respondents consulted them (28.9%). An analysis of how clear and relevant the Horizontal Guidelines were (for those who consulted them – 13 respondents) indicates an adequate level of legal certainty. However, due to the low number of respondents who consulted the text of the Horizontal Guidelines, the robustness of the conclusions that can be drawn is limited.

Regarding the degree of legal certainty, over half of the stakeholders pointed to an adequate or high level of certainty (7 responses), whilst 3 out of 13 pointed out a low level of certainty.

Table 37: Perceived legal certainty of the Horizontal Guidelines (Chapter 7)

Degree of certainty	#	Share
1 - no certainty	0	0%
2 - low certainty	3	23.1%
3 - neutral opinion	3	23.1%
4 - adequate certainty	4	30.8%
5 - high certainty	3	23.1%
I don't know	0	0%

5 respondents thought that without the Horizontal Guidelines, it would be extremely difficult to establish or implement standardisation agreements. However, 5 respondents also highlighted that even if the Horizontal Guidelines provide useful guidance, they are not sufficiently detailed and further legal counsel is needed in order to assess the competition compliance of standardisation agreements. Finally, 3 respondents thought that the Horizontal Guidelines provide very little or no support at all.

Table 38: Feedback on the Horizontal Guidelines (Chapter 7)

In your view, which of the following statements best reflects your opinion of the Horizontal Guidelines in the implementation of standardisation agreements?	N. of answers
Without the Guidelines, it would be extremely difficult to implement standardisation agreements	5
The Horizontal Guidelines provide a useful guidance, but they are not sufficiently detailed and further legal counsel is needed.	5
The Horizontal Guidelines provide very little or no support at all	3

The opinions were divided among CATI respondents when asked if the Horizontal Guidelines were discouraging certain standardisation agreements, with 5 respondents replying 'Yes' and 4 replying 'No'. Among the main discouraging factors, they mentioned the lack of legal certainty and risk of possible fines (5 responses) and the need for external support in self-assessment (3 responses).

Table 39: Discouraging factors of standardisation agreements

Which of the following factors related to the Horizontal Guidelines might be discouraging standardisation agreements	N. of answers
Lack of legal certainty and risk of possible fines	5
Need for external support in our self-assessment	3
Administrative and legal burden related to the self-assessment	2

All stakeholders interviewed, including companies, trade associations and law firms, agree that the current rules are, in general, clearly defined and provide legal certainty.

In the context of Standard Development Organizations (SDOs), industry players get together to develop new technical standards for the industry. The standardisation process aims at achieving different objectives in different industries, such as developing common security and quality standards and ensuring the interoperability of different products. The holder of a patent that is considered 'essential' for the implementation of the standard (i.e. a Standard Essential Patent or SEP) is usually required by the SDO IPR Policy to disclose its patent during the standardisation process and to license such SEPs on the basis of Fair, Reasonable and Non-Discriminatory Terms (FRAND).

Although the Horizontal Guidelines refer to the FRAND requirement, the majority of the interviewed stakeholders argued that the Guidelines could provide further guidance in relation to the FRAND requirement under paragraph 285 of the Horizontal Guidelines. In particular, interviewed stakeholders mentioned the increasingly diverging interpretation of the FRAND requirement by SEP holders and implementers. On the one hand, the implementers generally argue that the SEP holder is required to license its SEP to every willing licensee on the basis of FRAND terms. On the other hand, the SEP holders usually argue that the FRAND requirement does not affect their freedom to decide at what level of the supply chain to license their SEP. In particular, SEP holders generally prefer licensing their patents only to the manufacturers of the end-users products, rather than to the components manufacturers. The debate concerning the level in the supply chain where a license on FRAND terms should be granted is particularly intense in the ICT and automotive industries. In view of the growing debate in relation to this issue, a number of interviewed stakeholders have argued that the Horizontal Guidelines lack clarity as to the FRAND requirement under paragraph 285 of the Horizontal Guidelines.

Another comment from respondents to the public consultation concerned the lack of transparency in the SDO declaration processes.

Interviewed enterprises and trade associations mentioned also discrepancies between the definition of 'standardisation' in paragraph 257 of the Horizontal Guidelines and e.g. that used by the European Telecommunications Standard Institute (ETSI). This same issue was mentioned by a large number of respondents to the OPC.

Another point currently lacking guidance arises (from in-depth interviews and OPC) from there being no reference to open-source software (OSS) in the Guidelines. This limits legal

certainty, notably for what concerns the interaction between OSS and standards setting process and the development of OSS by standard-developing organisations.

Some interviewed respondents consider that the non-enforceable nature of the Horizontal Guidelines negatively impacts the legal certainty they provide: a number of interviewed stakeholders (such as ICT manufacturers and trade associations) therefore expressed a desire for the introduction of a Standardisation BER. The lack of enforceability is cited particularly in the context of a consistent fulfilment of agreements voluntarily entered into FRAND commitments, which is subject of complaints by licence takers and equally strongly opposed by SEP owners.

Several stakeholders (e.g. trade associations and telecommunication operators) from the in-depth interviews and from the Public Consultation criticise the lack of distinction between standard setting, understood as the selection and elevation of technology to a standard, and standard development, meaning the activity in the process of which a standard is created.

Some in-depth interviewed trade associations think that the Horizontal Guidelines are overly focused on standardisation that generates IP and ought to recognise that standardisation is a dynamic process that embraces a much broader range of collaborations (e.g. creation of codes of conduct, best practices recommendations, sustainability initiatives). As a result, the Guidelines leave in a 'grey zone' a wide range of relevant standardisation practices. Notably, an interviewed large car manufacturer, also mentioned that additional guidance on pre-standardisation processes is lacking from the Horizontal Guidelines, thus contributing to existing uncertainty.

A further source of legal uncertainty results from standardisation not being an exclusively horizontal matter, as undertakings are not necessarily competing or even potential competitors but are still engaging in a joint standard setting or standard developing process.

While the principle of open and unrestricted participation in standard-setting set-out in the Horizontal Guidelines is understandable, some interviewees considered this to be vaguely formulated, leaving room for misinterpretation and, crucially leading to cumbersome negotiations involving unwieldly large numbers of participants and too much prolongation of standardisation processes. This refers to various paragraphs in the Horizontal Guidelines, in particular paragraphs 280, 281, 295 and 316,

Conclusions

The view on the legal certainty provided by Chapter 7 of the Horizontal Guidelines, on standardisation agreements, is relatively aligned across most of the types of stakeholders from whom views were collected. Compared to what has been discussed for most of the other types of agreements, even the smaller companies participating in the CATI interviews showed a lower level of satisfaction as to the degree of legal certainty afforded by the current guidance. However, due to the low number of respondents who consulted the text of the Horizontal Guidelines, the robustness of the conclusions that can be drawn is limited.

The rationale for this lower level of satisfaction can still be attributed to a number of reasons.
Firstly, while the principle of open and unrestricted participation in standard-setting set-out in the Horizontal Guidelines is understandable, some interviewees considered this to be vaguely formulated, leaving room for misinterpretation and, crucially leading to cumbersome negotiations (such as to reach consensus around a technical specification, a standard, or on the governance of the standardisation processes) involving unwieldly large numbers of participants and too much prolongation of standardisation processes.

Secondly, the Horizontal Guidelines do not include any reference to open-source software and to the interaction of open-source software with standardisation processes.

Lastly, the views of OPC participants and other interviewees, especially from the technology-intensive industries, are dominated by a clash between (i) the SEPs holders promoting the principle of effective access to technology with a license at the level of the end device and (ii) the users of these standards (implementers) defending the approach of "offer to license their essential IPR to all third parties", at any level throughout the value

chain on FRAND terms. These opposing interests explain many of the concerns regarding uncertainties in the Horizontal Guidelines, in particular the different interpretations of the wording of paragraph 285 of the Horizontal Guidelines.

6.3. How has the prevalence of different types of horizontal cooperation agreements evolved since 1 January 2011?

6.3.1. Summary and overall answer to the evaluation question

To answer this evaluation question, the research team relied on information provided by the stakeholders interviewed during the study. A more objective mapping of the prevalence of horizontal cooperation agreements and their evolution since 2011 would have required the existence of a more systematic collection of information on horizontal agreements over time. Thus, the response to this evaluation question relies on the direct experience of respondents and, in most cases, interviewed stakeholders did not have a complete overview of the prevalence of different types of horizontal cooperation agreements during the last 10 years. In addition, it was not always possible to make a clear link between an increase (or decrease) in the prevalence of certain types of horizontal cooperation agreements and the related cause but interviewees were able to provide some insights on the market trends that appear to underline the increasing importance of some types of agreements.

The main findings regarding the evolution of the prevalence for each type of horizontal cooperation agreement are summarised here and further developed in the following sections.

Regarding R&D cooperation agreements, the consulted stakeholders reported an overall increase in the last decade, in particular in the digital sector. This opinion cannot be taken as an overall statement valid for all the types of stakeholders, although it is confirmed by 25% of the CATI respondents. Evidence from the CATI interviews hints that the most common types of R&D cooperation focus on the development of new products and new technologies. However, cooperation on already existing products and technologies also plays a relevant role. In the telecommunication sector, R&D and standardisation agreements are becoming more and more important for businesses due to the large resources and investments required.

In some cases, the evolution of the prevalence of horizontal cooperation agreements is related to changes in market trends. For example, as noted by an interviewed business association, the growing concentration in the retail sector has led, in the last 10 years, to an increase in the prevalence of joint purchasing agreements among retailers or so-called retail alliances. A trend that was highlighted in the in-depth interviews, in the OPC and also by CATI respondents and literature.[122,123]

Regarding joint purchasing agreements, a large electronics manufacturer mentioned that this type of agreements have been prevalent in their sector over the last 10 years, together with specialisation/production agreements gaining importance. The increasing frequency of joint purchasing agreements was also reported by a large manufacturer in the food and beverage industry and confirmed by the CATI results (see Table 8, p.52 showing that joint purchasing agreements are the most common in the sample).

The evidence gathered through the study research tools does not allow a robust inference on how much information exchange practices have increased over the last decade. However, what surely changed is the nature and the amount of the data exchanged, which tend to flow with higher frequency thanks to digitalisation. The digitalisation of products, services and business models, the handling of big-data (e.g. data sharing and data pooling) and their increasing economic value, the emergence of new models such as the development of ecosystems and other technological developments make business

[122] *Colen, L., Bouamra-Mechemache, Z., Daskalova, V. and Nes, K., Retail alliances in the agricultural and food supply chain, EUR 30206 EN, Publications Office of the European Union, Luxembourg, 2020, ISBN 978-92-76-18585-7 (online), doi:10.2760/33720 (online), JRC120271.*

[123] *Retail alliances are "horizontal alliances of retailers, retail chains or retailer groups that cooperate in pooling some of their resources and activities, most importantly relating to sourcing supplies" (Colen, L. et al. 2020, p.6). The scope of retail alliances is debated by interviewed stakeholders: according to some manufacturers, retail alliances should not be considered as joint purchasing agreements as described in Chapter 5 of the Horizontal Guidelines, since they do not involve the negotiation of terms and conditions with national retailers in exchange of services for the suppliers. On the other hand, retailers claim that buying alliances can reduce retail prices since they increase retailers' bargaining power vis-à-vis large manufacturers. The analysis of the nature of retail alliances and their characterisation was not in scope of the present study. On this topic the recent JRC study on retail alliances in the agricultural and food supply chain provides more detailed information.*

operators call for more detailed guidance allowing them to establish new forms of cooperation agreements.

Interviewees have also reported the emergence of on new trends and types of agreements which are not currently explicitly covered by the Horizontal Guidelines, notably sustainability agreements and new forms of cooperation in the telecommunications sector (see Section 6.4.3).

CATI, in-depth interviews and the OPC evidenced the increasing relevance of sustainability goals for both consumers and businesses – and for the latter, also in light of the European initiatives that call businesses to be directly responsible for such goals. This type of overarching societal objectives requires large scale cooperation, as pointed out by a large company in the food and beverage sector. As a result, the increasing importance for governments and the European Union of sustainability objectives has led the industry to cooperate more and thus adopting horizontal cooperation agreements on these matters. This trends was confirmed by other interviewees and by CATI respondents: 27% claimed that sustainability agreements have been increasing in their sector.

6.3.2. Research & Development Agreements

Sample of respondents per research tool

This section summarises the main findings gathered on the prevalence of R&D agreements through the different research tools. The table below provides an overview of the sample of respondents who provided inputs to our fieldwork research on R&D agreements.

Table 40: Prevalence - Sample of respondents per research tools - R&D agreements[124]

Prevalence - R&D agreements		
Tool	**# answers**	**Research questions / topics covered**
CATI	67	• Respondents' location, activity in other countries, sector, size, value chain position • Operation of horizontal cooperation agreements currently versus formerly • Which horizontal cooperation agreements are combined? • Which horizontal cooperation agreements are used in parallel?
In-depth interviews	17	• Which agreements are being applied? • Combinations of horizontal cooperation agreements (multi-purpose agreements) where R&D is the main objective of the agreement. • Tracing the evolution of market practices
OPC	26	• Types of horizontal cooperation agreements respondents are involved with • Is the scope of the HBERs and of the Horizontal Guidelines still relevant in light of the prevalence of different types of horizontal cooperation agreements over the last ten years? (E.g. are there types of agreement which should be covered by a different chapter of the Horizontal Guidelines, by another BER either existing or to be introduced, etc.) • Are the R&D BER and Chapter 3 of the Horizontal Guidelines still relevant?

Main findings

The following paragraphs summarise the main findings, gathered through the different research tools (CATI, OPC, in-depth interviews), which lead to our overall answer to the evaluation question (Section 6.3.1). The paragraph below presents the insights from the CATI interviews.

According to the CATI interviews, R&D agreements are highly relevant for high-knowledge intensive sectors such as pharmaceutical and human health (30%), energy (11%), and agricultural technology (10%).

[124] *For an in-depth description of the sample of respondents, see Section 6.2, Table 15 on R&D agreements.*

Table 41: Type of cooperation established

The cooperation that your company has in place concerns	N. of answers[125]
The development of new products ("R&D efforts")	34
Already existing technologies	26
The development of new technologies ("R&D efforts")	26
Hybrid agreements (between improvement of existing products and new products)	23
Already existing products	19
Hard to define	7

The most common types of cooperation focus on the development of new products and new technologies ("R&D efforts") which shows an innovation drive. However, cooperation on already existing products and technologies is also relevant.

Out of 67 CATI respondents, 23 reported having a combination of R&D agreements with other type of horizontal cooperation agreements, four mentioned a combination of R&D with specialisation/production agreements with the purpose, for example, to improve existing technologies and be more competitive on the market which could occur when there is also a specialisation in the production according to one stakeholder. Other three CATI respondents have R&D agreements in combination with sustainability agreements. According to these respondents, for example, the combination is due to an increased importance for consumers and governments to have environment-friendly products.

The table below shows the type and structure of the most common agreements for R&D cooperation. It appears that the joint exploitation of the results is the key goal pursued through the conclusion of such agreements. Indeed, either in the form of joint research activities or paid-for research, these types of agreements significantly outnumber the others. Although it is not possible to draw robust conclusions on the prevalence of the following type of R&D agreement, according to one interview with a law firm, "*the most common agreement in terms of R&D is the formation of task forces to cope with safety testing*". These task forces invest in data requirements and follow recommendations and studies defined by the EU and the OECD guidelines, while conducting research and presenting the results. This type of cooperation is comprised in several of the typologies mentioned in Table 41 and Table 42, since safety testing can be performed both to already existing products/technologies and to newly developed ones. Specifically, this cooperation occurs in the form of common conduction of studies on active ingredients or required studies for finished products and formulations. Another interviewee highlighted that this trend is mostly due to the strategy of sharing both R&D expenditures – which are rather high in knowledge intensive sectors – and the potential returns.

Table 42: Structure of the cooperation

The cooperation takes place through:	N. of answers[126]
Joint R&D of products and technologies followed by joint exploitation of the results	32
Paid-for research and development of products and technologies followed by joint exploitation of the results	18
Joint R&D of products and technologies without joint exploitation of the results	17
Paid-for research and development of products and technologies without joint exploitation of the results	9
Other forms or R&D cooperation	2

[125] *Multiple answers were possible.*
[126] *Idem.*

Conclusions

The evidence gathered through our fieldwork research does not allow to draw robust conclusions on the prevalence of certain types of R&D agreements over others. Evidence from the CATI hints that the most common types of cooperation focus on the development of new products and new technologies ("R&D efforts") which show an innovation drive. However, cooperation on already existing products and technologies is also relevant. Some interviewed stakeholders also reported an increase of a combination of R&D and sustainability agreements due to an greater importance given by customers and governments to having environmental friendly products.

6.3.3. Specialisation Agreements

This section summarises the main findings gathered on the prevalence of specialisation agreements through the different research tools. The table below provides an overview of the sample of respondents who provided inputs to our fieldwork research on specialisation agreements.

Table 43: Prevalence - Sample of respondents per research tools - Specialisation agreements[127]

Prevalence - Specialisation agreements		
Tool	**# answers**	**Research questions/topics covered**
CATI	70	• Respondents' location, activity in other countries, sector, size, value chain position • Operation of horizontal cooperation agreements currently versus formerly • Which horizontal cooperation agreements are combined? • Which horizontal cooperation agreements are used in parallel?
In-depth interviews	10	• Which agreements are being applied? • Combinations of horizontal cooperation agreements (multi-purpose agreements) where Specialisation is the main objective of the agreement • Tracing the evolution of market practices
OPC	13	• Types of horizontal cooperation agreements respondents are involved with • Is the scope of the HBERs and of the Horizontal Guidelines still relevant in light of the prevalence of different types of horizontal cooperation agreements over the last ten years? (E.g. are there types of agreement which should be covered by a different chapter of the Horizontal Guidelines, by another BER either existing or to be introduced, etc.) • Are the Specialisation BER and Chapter 4 of the Horizontal Guidelines still relevant?

Main findings

The following paragraphs summarise the main findings, gathered through the different research tools (CATI, OPC, in-depth interviews), which lead to our overall answer to the evaluation question (Section 6.3.1). The paragraph below presents the insights from the CATI interviews.

Production agreements constitute a significant share of the horizontal cooperation agreements analysed. While absolute numbers could not be determined within the scope of this study, there are indications that this type of agreement is used more frequently than in 2011: according to the CATI respondents who reported to have in place this type of horizontal cooperation, the number of agreements established in the last ten years is 49, compared to 21 established before. As 98% of CATI respondents in our sample were micro, small or medium enterprises, the following results should be considered as being more representative of this specific category of stakeholders. Within the CATI sample, 'specialisation' in the sense of the Specialisation BER is particularly relevant for the agricultural sector (18 out of 70) followed by construction (8 out of 70) and household appliances (7 out of 70) but finds application throughout all non-service industries.

[127] *For an in-depth description of the sample of respondents, see Section 6.2, Table 21 on specialisation agreements.*

Specialisation and production agreements are expected to be more common amongst undertakings at the producing end of the value chain. This finding has been confirmed by the CATI responses, although retailers and wholesalers also claimed to make use of this form of cooperation, to a lesser extent (15 out of 70 and 20 out of 70 respectively). As observed by a majority of large undertakings interviewed in-depth (84%), these companies regard specialisation and production agreements as less relevant, or even a rare occurrence for them, relative to other agreement types and regardless of their value chain position. An explanation of this trend was not provided by the consulted stakeholders.

The objective pursued most frequently by CATI respondents is "joint production", (27 out of 70 respondents) followed by "horizontal subcontracting with a view to expand production" (16 out of 70) and specialisation agreement between two parties where one party gives up the production of certain products to buy these from the other party (15 out of 70).

Table 44: Specialisation agreement – Type of cooperation

Focus of production / specialisation agreement	# of answers[128]
Joint production	27
Horizontal subcontracting with a view to expand production	16
Specialisation agreement between two parties where one party gives up the production of certain products and buys these from the other party	15
I don't know / don't want to say	7
Specialisation agreement where two or more parties agree, on a reciprocal basis, to fully or partly give up the production	6
Other	6

In terms of combination with other types of agreements, production and specialisation agreements are most frequently paired with commercialisation and joint purchasing agreements when combination of agreements occurs: 14 out of 70 respondents across the CATI sample confirmed that they have a combination of agreements where specialisation constitutes the 'centre of gravity'. Consulted regarding the motivation of such combinations, in two cases the production agreement was combined with a joint purchasing agreement with the objective of having a stronger bargaining power with the supplier(s). In another case the production agreement was combined with the exchange of information regarding the specific production characteristics. Two stakeholders mentioned the combination with commercialisation agreements with the ultimate purpose of providing to the customer a more complete "package" (e.g. the provision of a product and the additional customer services) or simply to achieve together the commercialisation of a specific product. When asked specifically about the evolution of specialisation/production agreements in the last 10 years, interviewees were not able to provide relevant information.

Table 45: Frequency of combination between specialisation agreements and other horizontal cooperation agreements

Combination with other agreements?	#	Share
No	54	77.1%
Yes	14	20%
I don't know	2	2.9%

However, in comparing all the analysed types of agreement from CAT-interviews, this type of agreement is more commonly used without another type of agreement being applied by the same undertaking. Almost one in three undertakings are part of exclusively specialisation agreements, the second highest share among all analysed agreement types. Still, 67.1% of CATI respondents with specialisation agreements employ at least one other type of horizontal cooperation agreement, albeit not necessarily as part of the same contract or with the same contractual partners.

[128] *Multiple answers were possible*

Conclusions

The prevalence of specialisation agreements appears to have increased over the last ten years and, based on the CATI results, the agricultural sector is the most popular among SMEs for this form of cooperation. Moreover, there is a greater prevalence of specialisation agreements involving producers or manufacturers, especially among SMEs, representing 74% of the CATI sample.

Amongst all the analysed types of agreement from CATI interviews, this type of cooperation is more commonly used as a standalone agreement compared to the other types of horizontal cooperation. Almost one in three undertakings are part of exclusively specialisation agreements, the second highest share among all analysed agreement types.

A possible explanation for the increase of specialisation agreements over the last decade, is the use of specialisation/production agreements in those circumstances where undertakings needed to pursue larger production scales but preferred not to proceed to a full merger.

6.3.4. Information Exchange Agreements

This section summarises the main findings gathered on the prevalence of information exchange agreements through the different research tools. The table below provides an overview of the sample of respondents who provided inputs to our fieldwork research on information exchange agreements.

Table 46: Prevalence - Sample of respondents per research tools - Information exchange agreements[129]

Prevalence - Information exchange agreements		
Tool	**# answers**	**Research questions/topics covered**
CATI	73	• Respondents' location, activity in other countries, sector, size, value chain position • Operation of horizontal cooperation agreements currently versus formerly • Which horizontal cooperation agreements are combined? • Which horizontal cooperation agreements are used in parallel?
In-depth interviews	35	• Which agreements are being applied? • Combinations of horizontal cooperation agreements (multi-purpose agreements) where information exchange is the main objective of the agreement. • Tracing the evolution of market practices
OPC	26	• Types of horizontal cooperation agreements respondents are involved with • Is the scope of the HBERs and of the Horizontal Guidelines still relevant in light of the prevalence of different types of horizontal cooperation agreements over the last ten years? (E.g. are there types of agreement which should be covered by a different chapter of the Horizontal Guidelines, by another BER either existing or to be introduced, etc.) • Is Chapter 2 of the Horizontal Guidelines on agreements involving information exchange still relevant?

Main findings

The following paragraphs summarise the main findings, gathered through the different research tools (CATI, OPC, in-depth interviews), which lead to our overall answer to the evaluation question (Section 6.3.1). The paragraph below presents the insights from the CATI interviews.

According to the CATI respondents for this type of agreement (nearly 99% SMEs), 32 of the 73 horizontal cooperation agreements encompassing an exchange of information had as main focus an exchange of information on prices. Such a large number is surprising in view of the high competition infringement risk that exchanges of information about prices entail. The next most frequently exchanged were information on quantities sold, customers and costs. Information on current and future R&D and volumes of production is shared less frequently. Among "other types of information" respondents mentioned information exchange on production processes and technical aspects.

[129] *For an in-depth description of the sample of respondents, see Section 6.2, Table 26 on information exchange agreements.*

Table 47: Types of information exchanged in horizontal cooperation agreements

Focus of Information exchange	# of answers[130]
Information on prices	32
Information on quantities sold	22
Information on business strategy	21
Information on customers	21
Information on costs	21
Information on volumes of production	17
Information on R&D	17
Other types of information	4

Notably, 72.6% of the CATI respondents exchanged the information directly with the other parties to the horizontal cooperation agreement, instead of relying on a third party such as a trade association. The granularity of the information exchanged (Table 48) appears to be more frequently (33 respondents) information at individual company level rather than being aggregated per economic sector, per a broader product category or other less granular levels of aggregation (21 respondents).

Table 48: Granularity of the information exchanged in horizontal cooperation agreements (multiple choice)

Level of detail	#	Share
The exchange contains information at individual company level;	33	45.2%
The exchange contains information at aggregate level (e.g. you and your business partner(s) active in the same product or geographic market)	21	28.8%
The exchange contains both information at individual and at aggregate level	13	17.8%
I don't know/don't want to say	6	8.2%

The 'age of data' exchanged (paragraph 90 of the Horizontal Guidelines) is another feature of information exchange agreements enquired through the CATI interviews. Notably, 36 of the interviewees responded that their agreements involve the exchange of future data. This is a large fraction given that the Horizontal Guidelines clearly specify that the exchange of data on future actions carries the most risk of competition infringement. The majority, 55 of the respondents, indicated that they exchanged current information. This, again, is surprisingly high, particularly when combined to the previous answer where CATI respondents indicated that they are most likely to exchange information about prices. An exchange of information about current prices poses significant risk of competition infringement particularly if the data in question is not easily and publicly available. Only 16 respondents claimed to exchange information related to past values, which is the type of information less likely to distort competition.

The frequency of combination between information exchange agreements and other types of horizontal cooperation was also investigated as part of CAT-interviews and the findings indicate that any combination is rare. This finding is in contrast with the views expressed by large companies in the OPC and in-depth interviews, where exchanges of information were often incidental to the agreements. The difference may be either because SMEs engage in the exchange of information through a trade association or because SMEs are less exposed to practices which can raise concrete antitrust concerns (such as the ones related to big platforms, merger of large industrial companies, or agreements in the telecommunication sector).

In the CATI, 59 out of the 73 respondents with an information exchange agreement did not have in place other horizontal cooperation agreements with the same business partners and with the same scope, while 9 respondents did. Among the types of horizontal cooperation that have been combined with information exchange agreements were R&D and joint production agreements, as well as a 'collaboration agreement with a trade association'. Respondents indicate that the key purpose of such combinations was improving product quality and competitive benchmarking.

[130] *Multiple answers were possible*

Below are presented the results of the CATI about the prevalence of information exchange agreements and combination with other types of agreement.

Table 49: Frequency of combination between information exchange agreements and other horizontal cooperation agreements

Combination with other agreements?	#	Share
No	59	81%
Yes	9	12%
I don't know	5	7%

Conclusions

The evidence gathered through the research tools used does not allow a robust inference on how much information exchange increased over the last decade. However, what surely changed is the nature and the amount of the data exchanged, which tend to flow with higher frequency thanks to digitalisation. Section 6.2.4 provided further details on what this means in terms of legal certainty.

In our CATI sample, which is mainly composed by SMEs, the companies having a combination of agreements including information exchange was rare while from the in-depth interviews with larger companies emerged that such practices are more common.

The most frequent type of information exchanged in this form of horizontal cooperation is price, according to the evidence gathered through the CATI interviews. This information tends to be exchanged directly with the other parties to the horizontal cooperation agreement, instead of relying on a third party such as a trade association.

6.3.5. Joint Purchasing Agreements

This section summarises the main findings gathered on the prevalence of joint purchasing agreements through the different research tools. The table below provides an overview of the sample of respondents who provided inputs to our fieldwork research on joint purchasing agreements.

Table 50: Prevalence - Sample of respondents per research tools - Joint purchasing agreements[131]

Prevalence - Joint purchasing agreements		
Tool	**# answers**	**Research questions/topics covered**
CATI	64	• Respondents' location, activity in other countries, sector, size, value chain position • Operation of horizontal cooperation agreements currently versus formerly • Which horizontal cooperation agreements are combined? • Which horizontal cooperation agreements are used in parallel?
In-depth interviews	25	• Which agreements are being applied? • Combinations of horizontal cooperation agreements (multi-purpose agreements) where Joint Purchasing is the main objective of the agreement. • Tracing the evolution of market practices
OPC	25	• Types of horizontal cooperation agreements respondents are involved with • Is the scope of the HBERs and of the Horizontal Guidelines still relevant in light of the prevalence of different types of horizontal cooperation agreements over the last ten years? (E.g. are there types of agreement which should be covered by a different chapter of the Horizontal Guidelines, by another BER either existing or to be introduced, etc.) • Is Chapter 5 of the Horizontal Guidelines on purchasing agreements still relevant?

Main findings

The following paragraphs summarise the main findings, gathered through the different research tools (CATI, OPC, in-depth interviews), which lead to our overall answer to the evaluation question (Section 6.3.1). The paragraphs below present the insights from the CATI interviews. As 98% of CATI respondents in our sample were micro, small or medium

[131] *For an in-depth description of the sample of respondents, see Section 6.2, Table 29 on joint purchasing agreements.*

enterprises, the following results should be considered as being more representative of this specific category of stakeholders.

Joint purchasing agreements are used by more than one fifth (64) of the 300 CATI respondents (21% of the sample). This type of agreement is used by respondents at every level of the value chain: 34 at retail level, 28 at wholesale level and 23 at production/manufacturing level[132].

According to the CATI respondents, the most frequent type of joint purchasing agreement implies the creation of a newly founded company jointly controlled by the parties to the agreement (32 out of 64). It is also frequent (23 out of 64) for stakeholders to have in place joint purchasing agreements to engage in a form of cooperation based on holding non-controlling stakes in another company.

Table 51: Joint purchasing agreements – Form of the agreement

Form of joint purchasing agreements	# of answers[133]
The creation of a company jointly controlled by you and your partner(s);	32
A company in which you and your partner(s) hold non-controlling stakes;	23
I don't know / don't want to say	6
Other types of contractual arrangements (please specify)	5

However, during the interviews and OPC, it emerged that some of the European retail alliances under analysis differ from joint purchasing agreements *stricto sensu,* as described in Chapter 5 of the Horizontal Guidelines. In fact, according to some of the interviewed manufacturers, European retail alliances often leave to their members the role of negotiating individually terms and conditions for their purchases from suppliers. The cooperation within the retail alliance is, instead, limited to jointly negotiating collective *'on-top agreements'*[134] with certain international suppliers. This, according to the manufacturers' interpretation, amounts to these retail alliances acting as gatekeepers to national retailers that are members of their alliances. Retail alliances counter this interpretation with the argument that they offer additional services to suppliers, such as promotional services or market entry support, in exchange for fair compensation. While it is difficult to determine the relative merit of each view, the prevalence of the new forms of retailer cooperation raises questions for the Horizontal Guidelines and their adequacy to address competition concerns in this context.

In the CATI interviews sample, the sector where joint purchasing agreements are more common is the food and beverage sector: 14 out of the 64 economic operators involved in joint purchasing agreements are operating in this sector, followed by clothing, apparel & footwear (9) and household appliances (9). Moreover, in the CATI interviews, 35.6% of the respondents think that in the last 10 years this type of agreement became more common (the highest value across the types of horizontal cooperation agreements under analysis). The evidence gathered through the research tools used does not allow a robust inference on how much joint purchasing agreement increased over the last decade. However, the prevalence of this type of agreement increased in the last 10 years: this is suggested by the evidence gathered from in-depth interviews and CATI and from the increasing attention for this topic from public authorities, market operators and academics.

The value chain position and the economic sectors of the respondents are consistent with one of the main trends in the European retail sector, which consists of retailers increasingly engaging in cooperation through national and European retail alliances. Through these alliances, retailers cooperate in terms of procurement, private label sourcing and

[132] *The sum of retailers, wholesalers and producers/manufacturers does not add up to 64 (the number of interviewees who said to have in place joint purchasing agreements) because multiple answers were allowed to identify the respondent's position on the value chain.*
[133] *Multiple answers were possible*
[134] *"The contracts are negotiated by the alliance, 'on top' of the terms negotiated in contracts with members individually. On-top agreements are generally service contracts negotiated by the alliance over the services provided by the Retail alliance in return for discounts, rebates and fees". See: Colen, L., Bouamra-Mechemache.(2020)*

innovation. In recent years, the Commission[135] and some NCAs (Italy, France and Belgium)[136,137,138] have expressed growing concerns over the concentration of buyer power related to alliances of retailers: joint purchasing agreements are being more strictly scrutinised to assess whether benefits to consumers exist, whether commercially sensitive information is exchanged (both at upstream and downstream level) and collusive outcomes are facilitated.

The Horizontal Guidelines do not focus on retail alliances as such; the guidance is meant broadly for joint purchasing agreements. The Horizontal Guidelines cover purchasing carried out by a jointly controlled company, by a company in which other companies hold non-controlling stakes, and purchasing in the context of a contractual arrangement or even looser forms of co-operation. In particular, the Horizontal Guidelines allow buying groups consisting of market operators that do not compete on downstream markets. This has encouraged the growing prevalence of retail alliances that are understood to fall within the boundaries of Chapter 5 of the Horizontal Guidelines. However, this also raises criticism from manufacturers that feel harmed by these forms of horizontal cooperation. Manufacturers argue that the Horizontal Guidelines should address the risk of abuse of market power by purchasers at the retail level.

Table 52: Joint purchasing agreements – Focus of cooperation: supplier requirements

Focus of joint purchasing agreements	# of answers	Share
Allows you and your partner(s) to purchase from the same supplier(s) also outside the agreement;	32	50.0%
Requires you and your partner(s) to purchase from certain suppliers only through the agreement;	30	46.9%
I don't know/don't want to say	3	4.7%

In terms of features of joint purchasing agreements, half of the agreements in the CATI sample (32 out of 64) are not binding and allow the parties to the agreement to purchase from the same supplier also outside the agreement; 30 market operators in the CATI sample instead are in joint purchasing agreements that require them to purchase from certain suppliers only through the agreement.

At the same time, the purchasing agreements covered by the CATI sample are requiring the parties involved to purchase a well-defined volume through the agreement (20) or purchase at least a minimum volume through the agreement (25), while 19 of the purchasing agreements in the sample do not provide any indication on the volume to purchase through the agreement.

Table 53: Joint purchasing agreements – Focus of cooperation: quantity requirements

Focus of joint purchasing agreements	# of answers	Share
Requires you and your partner(s) to purchase at least a minimum volume through the agreement;	25	39.1%
Requires you and your partner(s) to purchase a well-defined volume through the agreement;	20	31.3%
Does not provide any indication to you and your partner(s) on the volume to purchase through the agreement	19	29.7%

As the prevalence of joint purchasing agreements in the market increased, particular focus has been devoted to the effect of the joint purchasing agreements on competition. In fact, as for other forms of cooperation among competitors, the review of the literature identified both pro- and anti-competitive effects for joint purchasing agreements. Where the cost savings obtained by the joint purchasing agreement are passed on to consumers, the agreement is more likely to create a positive balance between anti-competitive effects and consumer benefits. In other circumstances, and under specific market structures, joint purchasing agreements may have overall detrimental effects.

[135] *https://ec.europa.eu/commission/presscorner/detail/en/MEMO_19_2689*
[136] *Italian Competition Authority (2014). Case I768, "Centrale d'aquisto per la grande distribuzione Organizzata". Available at: https://www.agcm.it/media/comunicati-stampa/2014/9/alias-7179*
[137] *French Competition Authority (2018). "Joint purchasing agreements in the food retail market sector – The Autorité de la concurrence deepens its investigations and opens inquiries". Available at: https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/16-july-2018-joint-purchasing-agreements-food-retail-market-sector*
[138] *https://www.retaildetail.eu/en/news/food/searches-belgian-retailers-competition-inquiry*

The box below provides an overview of some of the most relevant pro-competitive and anti-competitive effects identified by the economic literature.

Box 16: The impact on competition of joint purchasing agreements - evidence from literature[139]

Galbraith (1952) suggests that the consolidation in the retail sector may be beneficial to consumers because fewer and more powerful buyers could negotiate cheaper input prices with their suppliers (countervailing power) and, in turn, consumers should be able to benefit to the extent the input price reductions are also passed on to them.

Most recent literature nuanced this position and identified the market conditions, and thus the related bargaining power of the involved actors, in which buying groups increase or reduce consumers' surplus and welfare. Several papers modelled the interactions amongst suppliers and retailers based on the characteristics of the market (i.e. more or less downstream concentration) or of the joint purchasing agreements itself (i.e. if the agreement includes a joint listing clause[140]). An example of such approach is provided by Doyle and Han (2013) where the authors assumed, in their model, a buying group where members are able to commit credibly to wholesale contracts that induce joint monopoly profits in the downstream market. The authors showed that *"the vertical restraints and contracting terms – exclusivity provisions, minimum purchase clauses and rebate schemes – enhance the stability of the buyer group by effectively limiting retailers' ability or incentives to defect from the arrangement"* (Doyle & Han, 2013). Thus, the buying group is able to negotiate lower input prices which, given an effective retail competition, may be passed onto consumers (Inderst & Mazzarotto, 2008). Caprice & Rey (2014) also demonstrated how, even if retailers remain competitors in the downstream market, the buying group can still extract a higher value from the supplier through a joint negotiation. In particular, the authors demonstrated that *"transforming individual listing decisions into a joint listing decision makes delisting less harmful* (for the retailer)*, which in turn improves group members' bargaining position compared to outsiders"* (Caprice & Rey, 2014). Molina (2019) provides evidence of a countervailing buyer power effect that reduces retail prices by roughly 7% on a specific consumer market[141]. Moreover the same study, in exploring determinants of buyer power, finds that changes in retailers' bargaining ability play an important role in the countervailing force exerted by buyer alliances which, absent this effect, would have harmed retailers: hence buyer alliances has a positive effect on retailers and on consumer price.

Another relevant aspect taken into consideration in the literature is not only the interaction between retailers and suppliers in any given – or recurrent – negotiation, but on the overall sectorial effects when a buying group is active. Inderst & Valletti (2011), for example, focus on the *"waterbed effect"* which refers to the practice by which a supplier, given the price discounts allowed in the negotiations with a specific buying group, increases prices in the negotiations with retailers that are not part of such group to compensate for the "loss" in the negotiation with the retail alliance. As shown by the authors *"when downstream firms compete in strategic substitutes, the exercise of buyer power can still lower all retail prices, despite the presence of a waterbed effect […] this is more likely if the supplier currently has little scope to price discriminate or if the size differences at present between competing firms are not yet sufficiently large"* (Inderst & Valletti, 2011).

Consumer welfare may be affected by joint purchasing agreements in two ways: depending on the degree of downstream competition, retailers pass on to consumers the reduced input prices that they can negotiate with suppliers (von Ungern-Sternberg, 1996; Inderst & Mazzarotto, 2008); the second effect is a reduction of product variety (Allain, Avignon, Chambolle, 2020).

In general, joint purchasing agreements are more likely to have positive welfare effects in markets where buying groups ensure that even the smaller retailers can compete on an effective basis (Dobson et al. (2000)) but the welfare effects are dependent on the market shares and market concentration in both the buyer and seller markets.

Below a summary of the most relevant pro-competitive and anti-competitive effects found in the literature:

Pro-competitive effects:

[139] *A complete overview on National and European retail alliances , their activities and their potential impact of on the agricultural and food supply chain can be found in: Colen, L., Bouamra-Mechemache. Z., Daskalova, V., Nes, K., Retail alliances in the agricultural and food supply chain, EUR 30206 EN, European Commission, 2020, ISBN 978-92-76-18585-7, doi:10.2760/33720 , JRC120271. https://publications.jrc.ec.europa.eu/repository/bitstream/JRC120271/jrc120271_report_retail_alliances_final_pubsy_09052020.pdf*

[140] *a joint (de)listing decision arises when a group of individual downstream firms commit to a decision that binds all of its members.*

[141] *bottled water in France*

- Increased bargaining power of retailers. This is mainly due to access to price discounts by combining volumes and in general better purchasing terms through increased bargaining leverage and bargaining ability (Colen, L., Bouamra-Mechemache Z., Daskalova, V., Nes, K.,2020);
- Buying alliances can reduce retail prices since they increase retailers' bargaining ability. Both retailers and consumers benefit from this countervailing buyer power effect to the detriment of manufacturers (Molina, 2019);
- Buyer power is, in light of competition law principles, seen as less likely to have detrimental effects to competition than seller power (Dobson, Waterson & Chu, 1998; Jacobson, 2013);
- Buyer power has the potential to create substantial cost savings – but downstream markets must be sufficiently competitive for these gains to be passed on to consumers (Dobson, Waterson & Chu, 1998);
- Non-exclusionary buyer groups which limit communication between members of the group are most beneficial from a welfare perspective. Eliminating the threat of exclusion and banning information exchange between members will reduce the risk of collusion (Normann & Rösch, 2015);
- A buyers' group can potentially serve to level the playing field between firms downstream by allowing smaller buyers access to the same terms of trade to which larger buyers have access (Doyle & Han, 2013).

***Anti-competitive effects**:*

- In case a retail alliance uses efficient contracts (i.e. central negotiation of purchasing terms) and retail alliance members compete on the final good market, they might retain significant joint market shares: the competition on the downstream market between members of the alliance in fact would have no positive effect on purchasing prices and consumer prices, or even leading to an upward pressure (Colen, L., Bouamra-Mechemache Z., Daskalova, V., Nes, K., 2020);

  In particular, transforming individual listing decisions into a joint listing decision makes delisting less harmful, which in turn improves group members' bargaining position. When contracts are public within the group (i.e. when purchasing terms are centrally negotiated), the cost savings resulting from joint purchasing arrangements are not necessarily passed on to consumers (Caprice & Rey 2015);
- Downstream firms with buyer power can collude more easily in the output market (i.e. retail market) if they also join forces on their input supply contracts (Piccolo & Miklós-Thal, 2012);
- A socially detrimental effect of buyer power may result if it undermines the long-term viability of suppliers and their willingness to commit to new product and process investments (Dobson, Waterson & Chu, 1998);
- Joint purchasing can have counter-intuitive effects (i.e. worsen market outcomes for buyers) when competition among sellers is stronger than competition among buyers (Jeon & Menicucci, 2019).

Different effects of joint purchasing agreements are described across the different answers to the OPC and from interviews with market operators. Across law firms interviewed and suppliers consulted in the OPC and through in-depth interviews, one main point mentioned is the need to reconsider the balance between efficiencies created by the joint purchasing agreement and greater buyer power (and potentially anticompetitive effects). In their opinion, since the last revision of the Horizontal Guidelines, European retail alliances have proliferated and market concentration at retail level increased: such concentration may give rise to concerns as evidenced by some national competition authorities in recent years.

From the retailers' side, joint purchasing agreements allow to acquire larger volumes at lower prices, which would lead to efficiency gains and lower consumer prices. Furthermore,

purchasing alliances increase bargaining power towards large global suppliers, which again results in lower prices.

According to four out of the six consumer organisations interviewed, joint purchasing agreements should only be permitted when price advantages, i.e. a fair share of the benefits, are demonstrably passed on to consumers. These price advantages need to be transparent and joint purchasing agreements should not serve for retailers to increase their margins, thus being anti-competitive.

Moreover, it has been suggested (especially by interviewed manufacturers) that, for this type of agreements, the level of downstream concentration has to be considered as well: some of the respondents suggested that, the larger the cooperation between companies, the higher the probability that the benefits stemming from it result in higher profits and not consumer benefit. Hence, the current market share threshold is seen as crucial and the current 15% market share threshold for joint purchasing agreements as adequate. The market share threshold is seen as a valuable criterion, especially for the self-assessment of companies, however also the level of downstream concentration should need consideration.

Out of the 22 market operators consulted through in-depth interviews on joint purchasing agreements, 8 were large individual retailers, associations of retailers or retail alliances. All of them had positive views on joint purchasing agreements. According to a majority of these retailers, the Horizontal Guidelines ensured positive effects on consumer prices (prices decreased or did not increase), consumer choice and product innovation. Retailers believe that, when evaluating purchasing cooperation, the market power imbalance between suppliers and retailers and wholesalers, acting as 'joint purchasers', should be taken into consideration. In their view, European retail and wholesale alliances bring together resellers who typically deal with international suppliers with high market shares or even 'must-have' products, with very low substitutability due to customers' brand loyalty; these suppliers also have various routes to the market. Retailers and wholesalers in turn are faced with fragmented markets (i.e. national sourcing markets) and this is further aggravated by the use of territorial supply constraints by some suppliers.However, retailers' market shares are increasing and retailers are becoming more and more active as suppliers through their own brands: according to the Private Label Manufacturers Association (PLMA), retailer brands represented between 30% and 50% of the products sold in the stores of the grocery sector in 2019, with some relevant differences depending on the country and on the product category (e.g. private label beers are characterised by lower market shares)[142].

From the suppliers' side, some practices by retail alliances are seen as anticompetitive. For instance, so-called access fees charged by these retail alliances could significantly increase the cost for suppliers of doing business in Europe. The main impact of this is that for consumers, the costs of the access fees diminish the funds that suppliers have available to compete by promoting their products and investing in product development and innovation, therefore diminishing competition, innovation and potentially increasing prices in the long term. The main concern arising from buyer cooperation should be the creation and reinforcement of buyer power that can then be used to distort competition either in the upstream or downstream market: for instance, buyers can increase market power by aggregating their demand, regardless of whether the cooperating buyers are competitors. The increase in market power arises from the accumulated demand that a supplier loses if it declines to get access to the demand of a buyer group. There is therefore no need for a competitive relation between buyers for the creation and reinforcement of market power through buyer cooperation. As observed by a manufacturers' association, what matters for buyer power aggregation "*is not whether cooperating buyers compete in the same downstream market, but whether they buy the same product. If they do, then by linking their demand they can increase their market power*". The starting point for the competitive assessment of buyer cooperation should in its view therefore not be limited to the understanding of whether participants to the alliance compete or not. A common remark among suppliers from the FMCG sector in the in-depth interviews is that the Horizontal Guidelines do not sufficiently address whether restrictions such as gatekeeping and

[142] *Private labels association (2019). https://www.plmainternational.com/ Nielsen Data PLMA's 2019 International Private Label Yearbook*

collective delisting (in particular, vertical, when the purchasing agreement is set up through a company or an association) are ancillary to the joint purchasing agreement in question.

Retail alliances in the agricultural and food supply chain and their features were the research topic of a recent publication from the JRC[143] in which the heterogeneity of views on the effect of retail alliances are well reflected[144]. In fact, on the one side, joint purchasing collaboration through retail alliances is able to generate benefits for retailers that increase their competitiveness in a competitive, consolidating and internationalising market: as long as there is sufficient downstream competition, some of the benefits that retail alliances generate are likely passed on to consumers. On the other side, a closer investigation of retail alliances and their behaviour may be warranted when under certain circumstances, the possible benefits to consumers might be off-set by the possible harm inflicted on suppliers. Finally, in view of the diversity of the forms and activities of retail alliances, the JRC report suggests a case-by-case assessment as it is hard to derive general conclusions and overall a balanced view is necessary when considering these types of joint purchasing agreements. An assessment under existing EU and national competition law and pursuant to the legislation on unfair practices provides adequate tools to address potential concerns and to protect both consumers and upstream actors, even if case law is limited. The JRC report suggests increased attention and orientation regarding the potential harm to upstream suppliers in guidelines by competition authorities.

Another debate on the current approach of the Horizontal Guidelines is related to the potential impact of joint purchasing agreements on EU market integration. Since European buying alliances operate on different markets, they could foster market integration without being competitors nor anti-competitive effects. At the same time, this approach could provide incentives to avoid downstream competition between potential competitors in different national markets, with negative impacts on EU market integration: according to some manufacturers, the current version of the Horizontal Guidelines provides an incentive for retailers not to enter each other's markets, as they would lose the benefit of joint purchasing.

Another remark made by retailers concerns the treatment of information exchanges among members of retail alliances: a lack of clarity is perceived on the extent to which information and data can be exchanged within the boundaries of Article 101 (3) of the Treaty.

The frequency of combinations between joint purchasing agreements and other types of horizontal cooperation was investigated through the CAT-interviews: 46 of the CATI respondents having in place a joint purchasing agreement stated that they do not at the same time have in place other types of horizontal cooperation agreements with the same business partners, serving the same scope.

Table 54: Frequency of combination between joint purchasing agreements and other horizontal cooperation agreements

Combination with other agreements	#	Share
No	46	72%
Yes	14	22%
I don't know	4	6%

Conclusions

One of the main trends regarding joint purchasing is the increasing cooperation between retailers through national and European retail alliances which has led to increased attention

[143] *Colen, L., Bouamra-Mechemache. Z., Daskalova, V., Nes, K., Retail alliances in the agricultural and food supply chain, EUR 30206 EN, European Commission, 2020, ISBN 978-92-76-18585-7, doi:10.2760/33720 , JRC120271.*
[144] *The Horizontal Cooperation Guidelines do not focus on Retail Alliances as such, however some activities of Retail Alliances are covered by the Guidelines such as purchasing carried out by a jointly controlled company, by a company in which other companies hold non-controlling stakes, and purchasing in the context of a contractual arrangement or even looser forms of co-operation.*

by the Commission[145] and some NCAs (Italy, France and Belgium)[146,147,148]. Through these alliances, retailers cooperate on procurement and other services. In fact, in the CAT-interviews sample, the sector where joint purchasing agreements are most common is food and beverages followed by clothing, apparel & footwear and household appliances.

Usually buyers engage in joint purchasing agreements through the creation of a company jointly controlled by the participants to the joint purchasing agreements as it was revealed in the in-depth interviews with market operators and confirmed though the CAT-interviews. The effect on competition and ultimately on consumer welfare are highly debated in an increasing number of publications on the topic: this heterogeneity of views is well reflected also from the opinions collected in the framework of this study through in-depth interviews, in particular with manufacturers and retailers.

Section 3.2.5 provided further details on the legal certainty for Joint Purchasing Agreements.

6.3.6. Commercialisation Agreements

This section summarises the main findings gathered on the prevalence of commercialisation agreements through the different research tools. The table below provides an overview of the sample of respondents who provided inputs to our fieldwork research on commercialisation agreements.

Table 55: Prevalence - Sample of respondents per research tools - Commercialisation agreements[149]

Prevalence - Commercialisation agreements		
Tool	**# answers**	**Research questions/topics covered**
CATI	68	• Respondents' location, activity in other countries, sector, size, value chain position • Operation of horizontal cooperation agreements currently versus formerly • Which horizontal cooperation agreements are combined? • Which horizontal cooperation agreements are used in parallel?
In-depth interviews	9	• Which agreements are being applied? • Combinations of horizontal cooperation agreements (multi-purpose agreements) where Commercialisation is the main objective of the agreement. • Tracing the evolution of market practices
OPC	16	• Types of horizontal cooperation agreements respondents are involved with • Is the scope of the HBERs and of the Horizontal Guidelines still relevant in light of the prevalence of different types of horizontal cooperation agreements over the last ten years? (E.g. are there types of agreement which should be covered by a different chapter of the Horizontal Guidelines, by another BER either existing or to be introduced, etc.) • Is Chapter 6 of the Horizontal Guidelines on commercialisation agreements still relevant?

Main findings

The following paragraphs summarise the main findings, gathered through the different research tools (CATI, OPC, in-depth interviews), which lead to our overall answer to the evaluation question (Section 6.3.1). The paragraph below presents the insights from the CAT-interviews. As 90% of CATI respondents in our sample were micro, small or medium enterprises, the following results should be considered as being more representative of this specific category of stakeholders.

[145] https://ec.europa.eu/commission/presscorner/detail/en/MEMO_19_2689
[146] *Italian Competition Authority (2014). Case I768, "Centrale d'acquisto per la grande distribuzione Organizzata". Available at: https://www.agcm.it/media/comunicati-stampa/2014/9/alias-7179*
[147] *French Competition Authority (2018). "Joint purchasing agreements in the food retail market sector – The Autorité de la concurrence deepens its investigations and opens inquiries". Available at: https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/16-july-2018-joint-purchasing-agreements-food-retail-market-sector*
[148] *https://www.retaildetail.eu/en/news/food/searches-belgian-retailers-competition-inquiry*
[149] *For an in-depth description of the sample of respondents, see Section 6.2, Table 32 on commercialisation agreements.*

In general, commercialisation agreements were among the three most common types of horizontal cooperation agreement used by market operators in the CAT-interviews sample as 68 interviewees said they are in these types of agreements (23% of the sample). This type of agreement is present at each level of the value chain, especially at retail level (54.4%) and wholesale (38.2%) as well as at upstream level (36.8% of the respondents were at production/manufacturing level). Moreover, in the CAT-interviews, 30.5% of the respondents (36 out of 118) think that in the last 10 years this type of agreement became more common: this is the 2nd highest value across all the types of horizontal cooperation agreements under analysis, after joint purchasing (selected by 42 out 118 respondents).

The distribution of commercialisation agreements across the economic sectors is quite widespread, with a significant prevalence in the top four industries: agriculture (13.2%), clothing, apparel and footwear (13.2%), consumer electronics (11.8%) and household appliances (11.8%). The industries that represent the lowest share of commercialisation agreements are: construction, financial and insurance activities, pharmaceutical and professional and technical activities – each of them accounts for 1.5% of the total commercialisation agreements.

Commercialisation agreements cover three main areas of horizontal cooperation: sales (79%) and distribution (71%), followed by promotion (38%). After-sales services are on the other hand the least common type of cooperation indicated by respondents (9%).

Table 56: Commercialisation agreements – Focus of cooperation

Focus of commercialisation agreements	# of answers[150]
Sales	54
Distribution	48
Promotion	26
After-sales services	6

The CATI investigated the frequency of combinations between commercialisation agreements and other types of horizontal cooperation. The results were as follows: 76.5% of the 68 respondents having in place a commercialisation agreement stated that they do not have in place at the same time other types of horizontal cooperation agreements with the same business partners, serving the same scope.

Table 57: Frequency of combination between commercialisation agreements and other horizontal cooperation agreements

Combination with other agreements?	# of answers	Share
No	52	76.5%
Yes	14	20.6%
I don't know	2	2.9%

Around 20% of the respondents indicated that they also have other horizontal cooperation agreements in place at the same time as commercialisation agreements. These results are divergent from the insights collected during the interviews (highlighting the frequency of commercialisation agreements with R&D agreements), which could be explained by the profile of the CATI respondents – 89.7% being SMEs and only 10.3% representing large enterprises. The types of horizontal cooperation, as per CATI responses (mainly SMEs), that have been combined with commercialisation agreements was 'distribution and sales' and 'joint promotion agreements'. The key purpose of such combinations was extending the methods and process to other companies for efficiency gains (e.g. via sharing resources) and to improve services offered.

Conclusions

According to the evidence gathered through the CAT-interviews, the prevalence of commercialisation agreements increased over the last ten years. This is the second most quoted type of agreement which, according to stakeholders, is more used than in the past (after joint purchasing agreements). Commercialisation agreements tend to target mostly

[150] *Multiple answers were possible*

forms of cooperation related to sales and distribution and they are used quite homogeneously across the different economic sectors, without significant spikes in certain industries.

The evidence gathered through the research tools highlighted contrasting opinions between CATI and in-depth interviews on the combination of commercialisation agreements with other forms of horizontal cooperation: only 14 (20%) of the CATI respondents indicated that they also have other horizontal cooperation agreements in place together with commercialisation agreements serving the same scope, compared to the frequency of commercialisation agreements with R&D agreements emerged from the in-depth interviews. This could be explained by the profile of the CATI respondents (90% being SMEs and only 10% representing large enterprises).

6.3.7. Standardisation Agreements

This section summarises the main findings gathered on the prevalence of standardisation agreements through the different research tools. The table below provides an overview of the sample of respondents who provided inputs to our fieldwork research on standardisation agreements.

Table 58: Prevalence - Sample of respondents per research tools - Standardisation agreements[151]

Prevalence - Standardisation agreements		
Tool	**# answers**	**Research questions/topics covered**
CATI	45	• Respondents' location, activity in other countries, sector, size, value chain position • Operation of horizontal cooperation agreements currently versus formerly • Which horizontal cooperation agreements are combined? • Which horizontal cooperation agreements are used in parallel?
In-depth interviews	28	• Which agreements are being applied? • Combinations of horizontal cooperation agreements (multi-purpose agreements) where Standardisation is the main objective of the agreement. • Tracing the evolution of market practices
OPC	28	• Types of horizontal cooperation agreements respondents are involved with • Is the scope of the HBERs and of the Horizontal Guidelines still relevant in light of the prevalence of different types of horizontal cooperation agreements over the last ten years? (E.g. are there types of agreement which should be covered by a different chapter of the Horizontal Guidelines, by another BER either existing or to be introduced, etc.) • Is Chapter 7 of the Horizontal Guidelines on standardisation agreements still relevant?

Main findings

The following paragraphs summarise the main findings, gathered through the different research tools (CATI, OPC, in-depth interviews), which lead to our overall answer to the evaluation question (Section 6.3.1).

Overall consensus among the stakeholders is that there has been very little development in the way standardisation agreements are being concluded. There has been, however, an increased take-up of this type of agreement, as engagement with standardisation processes increases across sectors. In particular, there have been considerable efforts by the European Union to encourage the use and development of standards by SMEs. 20% of the CATI respondents who claimed that horizontal cooperation agreements increased over the last decade, observed that standardisation agreements were one of the growing forms of cooperation. Despite this view expressed by the SMEs, standardisation is still dominated by large corporations, as noted in several in-depth interviews. It is therefore not too surprising that standardisation agreements appear to be among the least prevalent agreements in the CATI responses (Table 58 shows that 45 CATI respondents have in place standardisation agreements, the second least represented category after the option "Others"). It also shows an above average share of large and medium enterprises (20 out of 45) and a significantly lower share of micro enterprises (3 out of 45).

[151] *For an in-depth description of the sample of respondents, see Section 6.2, Table 36 on standardisation agreements.*

As reported in Table 60, respondents to CATI reported that in most cases the focus of the standardisation agreements they participate in is on the "definition of technical requirements" (22) and "definition of quality requirements" both for current or future products, production processes, services or methods. A third of respondents (16) reported as having standardisation agreements aimed at setting "standard terms and conditions of sale/purchase".

Table 59: Main focus of standardisation agreements

Focus of standardisation agreement	# of answers [152]
Definition of technical requirements for current or future products, production processes, services or methods	22
Definition of quality requirements for current or future products, production processes, services or methods	20
Standards terms and conditions of sale/purchase	16

In terms of distribution across industry sectors, there was no sector with a significantly higher share of standardisation agreements compared to the others. The under-representation of telecommunications (no respondent out of 45), for which standardisation plays an important role, is explained by the fact that most actors in this sector are larger enterprises which were not captured by the CATI sample. The views of these companies – expressed in the OPC and the in-depth interviews that the research team has conducted - are presented in the next paragraphs. A combination of reasons serve as explanation for the low number of businesses in the financial and insurance, as well as the arts, entertainment and recreation sectors. Firstly, these are among the three least represented sectors in the CATI survey overall, but secondly are also considered to be sectors with a low degree of active standard setting and standard developing participation. This is underlined by an overall lack of their representation in the memberships of standardisation organisations.[153]

Opposing the overall opinion, as mentioned above, that practices haven't substantially changed over the past ten years, individual voices claimed that there was a shift in the way standard essential patents are being licensed in the wireless sector. This claim was, however, not confirmed by a majority of stakeholders.

Finally, the frequency of combination between standardisation agreements and other types of horizontal cooperation agreements was investigated: 28 of the CATI respondents having in place a standardisation agreement stated that they do not have in place, at the same time, other types of horizontal cooperation agreements with the same business partners, serving the same scope.

Table 60: Frequency of combination between standardisation agreements and other horizontal cooperation agreements

Combination with other agreements	# of answers	Share
No	28	62%
Yes	13	29%
I don't know	4	9%

Conclusions

Standardisation remains heavily influenced by large corporations, especially in the context of IPR-related standards, as pointed out in several in-depth interview, despite an increased engagement by smaller businesses in recent years. Interviewees explained the difficulties that smaller players experience when their interests diverge from the larger actors in standardisation processes. Although the comparison of agreements (in the CATI sample) shows a drop in the share of stakeholders having engaged in standardisation agreements in the past and those doing so currently, there has been almost universal agreement of standardisation having gained increased relevance in recent years. On the one hand, this stems particularly from SMEs engaging in standardisation processes more and more,

[152] *Multiple answers were possible*
[153] *For example the Small Business Standards, the Annex III organisation representing SMEs under Regulation 1025/2012*

despite continued difficulties like high costs and time requirements. On the other hand, standardisation efforts have gained momentum in sectors previously not as widely recognised as benefiting from standardisation, particularly in the services sectors[154].

6.4. Are there specific types of horizontal cooperation agreements that are not explicitly covered by the Horizontal Guidelines, but where more legal certainty would be required?

6.4.1. Summary and overall answer to the evaluation question

This section summarises the views expressed during this project's research in relation to the degree of legal certainty that the Horizontal Guidelines provide to economic operators, in assessing whether those types of horizontal cooperation agreements, which are not treated in a dedicated chapter in the Guidelines, are compliant with Article 101 of the Treaty. In general, the consulted stakeholders through CATI, in-depth interviews and OPC pointed out that a higher degree of certainty would be needed, notably for those horizontal agreements aiming to promote sustainability initiatives and for other types of cooperation in the field of digital and data sharing.

Despite a general view that the Horizontal Guidelines are overall beneficial and that they increase the level of legal certainty compared to a scenario without any type of guidance, 'sustainability agreements' are not defined and not addressed explicitly in the current text of the Horizontal Guidelines. Hence, this is the source of some legal uncertainty, especially among larger companies.

This type of agreement touches upon overarching societal objectives (e.g. EU Green Deal) which require large scale cooperation. However, the current perceived lack of certainty for these cooperation agreements hampers large scale interventions and industry-wide cooperation, as pointed out by interviewees and respondents to the OPC (especially from the food and beverage industry). Ultimately, this uncertainty will increase the burden on business operators and it seems to create them some concerns related to the timely achievement of these policy goals.

A major reason for this is the lack of guidance on the assessment of economic efficiencies related to sustainability objectives: these agreements often promote benefits which are difficult to quantify in monetary terms (e.g. reduction in gas emissions, animal welfare, etc.)[155] and sometimes might generate broad societal benefits[156] which are not directly linked to a well-defined product market. Some stakeholders interviewed and who participated to the OPC argued that companies frequently abandon sustainability agreements due to the legal risk of a competition infringement. NCAs have indicated that they also rarely dealt with cases involving this type of horizontal cooperation in recent years.

As mentioned by larger companies operating in the media and telecommunication sectors, the absence of specific provisions on network sharing agreements, joint bidding and data pooling raised concerns of companies: these stakeholders highlighted the competitive risk associated to infrastructure investments which are essential in developing digital applications and networks (from the IoT to the rollout of the 5G). The current version of the Horizontal Guidelines has also triggered some complaints on its relevance in business environments characterised by data-intensive forms of cooperation.

6.4.2. Sustainability Agreements

This section summarises the main findings gathered, through the different research tools, on one of the most common types of horizontal cooperation agreements that are not covered by a dedicated chapter in the Horizontal Guidelines: sustainability agreements. The table below provides an overview of the sample of respondents who provided input to our fieldwork research on sustainability agreements.

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[154] *CEN. A Strategy for Standardization to Support the Services sector. 2016. ftp://ftp.cencenelec.eu/EN/News/SectorNews/2016/Services/Strategy-draft.pdf*

[155] *Nonetheless there are successful examples of the quantification of non-monetary benefits, as outlined by the Dutch guidelines*

[156] *The so-called 'out-of-market' efficiencies*

Table 61: Sample of respondents per research tool - sustainability agreements

Sustainability agreements		
Tool	**# answers**	**Research questions/topics covered**
CATI	52	• Consultation rate of Horizontal Guidelines and/or horizontal block exemption regulations • Do Horizontal Guidelines/Horizontal Block Exemption Regulations provide sufficient guidance? • Are the Horizontal Guidelines helpful in assessing competition concerns, efficiency identification, consumer benefits? • What degree of certainty is provided by Horizontal Guidelines? • What is missing from Horizontal Guidelines? • Is the current legal framework discouraging to enter into horizontal cooperation agreements
In-depth interviews	19	• Usage and expected benefits of sustainability agreements • Assessment whether the rules currently provided in the Horizontal Guidelines offer sufficient legal certainty on the compatibility of the sustainability agreement with article 101(even if not directly addressed).
OPC	16	• What is the level of legal certainty that the HBERs and the Horizontal Guidelines provide for the purpose of assessing whether horizontal cooperation agreements are compliant with Article 101 of the Treaty (i.e. are the rules clear and comprehensible, and do they allow undertakings to understand and predict the legal consequences)? • Have the Horizontal Guidelines provided sufficient legal certainty on other types of horizontal cooperation agreements that are currently not specifically addressed in the Horizontal Guidelines (for example sustainability agreements)

52 companies were interviewed with the CATI methodology to discuss sustainability agreements. The composition of the sample by size of the company is the following: the majority is composed by small companies (28), 13 companies were medium enterprises, 8 were micro enterprises and 3 were large. The most frequent industries were the following: agriculture was the most represented (11), closely followed by energy (8), clothing, apparel & footwear (6), construction (5). In most cases (25 companies) these were primarily manufacturers, followed by retailers (18 companies), wholesalers (13) and research centres (5).

The research team also conducted 19 in-depth interviews with relevant stakeholders. Of these interviews, 7 were with law firms, 4 with large brand manufacturers and the remaining were mostly with trade associations, retailers and one telecommunication company.

Main findings

The following paragraphs summarise the main findings, gathered through the different research tools (CATI, OPC, in-depth interviews), which lead to our overall answer to the evaluation question (Section 6.3.1).

Environmental goals are embodied in the EU acquis, notably in its founding Treaties, as observed by Holmes (2020)[157], Article 3(3) of the Treaty on the European Union[158] states that "*The Union […] shall work for the sustainable development of Europe […] and a high level of protection and improvement of the quality of the environment*". Moreover, Article 11 of the Treaty[159] provides that "*Environmental protection requirements must be integrated into the definition and interpretation of the Union policies and activities, in particular with a view to promoting sustainable development*". This environmental and also sustainable aspect of the Union policies, is directly linked to competition policy as "*competition rules are treaty based and, as enshrined in Article 7 of the TFEU, should be seen in the light of the wider European values underpinning Union legislation regarding social affairs, the social market economy, environmental standards, climate policy and*

[157] *S. Holmes (2020). Climate change, sustainability and competition law. Available at: https://events.concurrences.com/IMG/pdf/simon_holmes_article.pdf*
[158] *OJ C 326, 26.10.2012, pp. 13–390*
[159] *OJ C 326, 26.10.2012, pp. 47–390*

consumer protection; […] the application of EU competition law should address all market distortions, including those created by negative social and environmental externalities".[160]

However, according to several lawyers, economists and stakeholders that were interviewed, a gap exists between these objectives and the current competition policy tools that should support the so-called 'sustainability agreements'. The definition of 'sustainable' as such does not have strict boundaries and, as defined by the 2012 UN Resolution 66/288[161], sustainable development has a threefold dimension of economic, social and environmental development. Within these three axes, companies are encouraged to exploit synergies to develop high quality, innovative and sustainable products, to promote animal welfare and to foster social inclusion.

These agreements shall lie within the boundaries of fair and equal competition, however a gap is perceived between the clarity offered by competition policy tools (e.g. the Horizontal Guidelines) and sustainability objectives, and this is particularly relevant to this evaluation support study. In fact, a specific reference to sustainability agreements and to the assessment of related efficiencies is missing from the Horizontal Guidelines: this lack of guidance is one of the cornerstones of the debate on horizontal sustainability agreements, in the literature and in the evidence coming from the interviews and from the OPC.

The paragraph below presents the insights from the CATI interviews. As 94% of CATI respondents in our sample were micro, small or medium enterprises, the following results should be considered as being more representative of this specific category of stakeholders.

The evidence collected through the CATI survey on the distribution of sustainability agreements across the economic sectors, shows a prevalence in four industries: as shown in Table 62, 'agriculture' is the most popular sector for this type of agreements, followed by 'energy', 'clothing, apparel & footwear' and 'construction'.

Table 62: Sustainability agreements by industry

Industry	# of companies	Share
Agriculture	11	21%
Energy	8	15%
Clothing, apparel & footwear	6	12%
Construction	5	10%
Accommodation and food service activities	3	6%
Food and beverage	3	6%
Pharmaceutical	3	6%
Consumer electronics	2	4%
Furniture	2	4%
Household appliance	2	4%
Information and communication	2	4%
Telecommunications	2	4%
Transportation and storage	2	4%
Human health	1	2%
Total	**52**	**100%**

Examples of these forms of cooperation between companies include agreements aiming to reduce waste generation and carbon emissions, to promote recycling of plastic and to improve energy efficiency: Table 63 presents the most frequent objectives pursued with sustainability agreements, according to the stakeholders participating in the CATI survey. Three main areas of horizontal cooperation have been identified, notably 'reduction of the

[160] *European Parliament (2019). European Parliament resolution of 31 January 2019 on the Annual Report on Competition Policy. Available at: https://www.europarl.europa.eu/doceo/document/TA-8-2019-0062_EN.html*
[161] *United Nations (2012). Resolution adopted by the General Assembly on 27 July 2012. 66/288, The future we want*

environmental impact of the distribution chain', 'improvement of energy efficiency' and 'development of innovative products with low environmental footprint'. 'Protection of animal welfare' is the least common type of cooperation, mentioned by only 5 respondents out of 52.

Table 63: Prevalence of types of sustainability agreements

Focus of sustainability agreement	# of answers[162]
Reduction of the environmental impact of the distribution chain	20
Improvement of energy efficiency	18
Development of innovative products with a low environmental footprint	16
Improvement of working conditions	12
Reduction of waste generation	11
Reduction of emissions	10
Promotion of the recycling of materials used during the production process	7
Protection of animal welfare	5
Total # of interviewed companies	**52**

Notably, even among medium, small and micro enterprises participating to the CATI interviews: 14 out of 52 respondents stated to have consulted the Horizontal Guidelines (Table 64). The share of respondents who consulted the Guidelines is roughly the same as for the other types of agreements covered by the Horizontal Guidelines. In contrast with the wider opinion emerging from interviews and OPC, only one out of 14 respondents who consulted the Horizontal Guidelines believed that these are not helpful in identifying potential competition concerns related to sustainability agreements; only one out of 14 respondents also believed that the Horizontal Guidelines could discourage the implementation of sustainability agreements. 13 out of 14 respondents considered the Horizontal Guidelines helpful in identifying competition concerns and efficiencies.

Table 64: Share of respondents having sustainability agreements who consulted the Horizontal Guidelines

Consulted Horizontal Guidelines	#	Share
No	38	73%
Yes	14	27%

As already mentioned, the current text of the Horizontal Guidelines does not include a chapter dedicated to sustainability agreements as such: nevertheless, these types of agreement can benefit from the tools for self-assessment provided by the Guidelines, given that they may fulfil the criteria of Article 101(3) of the Treaty.

Holmes (2020)[163] observes that there is room for discussion on the interpretation of the conditions for exemption under Article 101(3) of the Treaty: trying to evaluate every agreement in terms of economic or monetary value might fall short of recognising cost savings, innovation, improved quality and efficiency as 'direct economic benefits'. Most environmental benefits indeed fall within these 'non-monetary' features.[164] A similar point is made by Murray (2019)[165], in the sense that competition authorities should explore ways to translate non-economic benefits into economic terms, for example the economic effects

[162] *Multiple answers were possible*
[163] *S. Holmes (2020). Climate change, sustainability and competition law. Available at: https://events.concurrences.com/IMG/pdf/simon_holmes_article.pdf*
[164] *OECD (2010). Horizontal cooperation agreements in the environmental context. Available at: https://one.oecd.org/document/DAF/COMP(2010)39/en/pdf*
[165] *G. Murray (2019). Antitrust and sustainability: globally warming up to be a hot topic? Kluwer Competition Law Blog, October 2019. Available at: http://competitionlawblog.kluwercompetitionlaw.com/2019/10/18/antitrust-and-sustainability-globally-warming-up-to-be-a-hot-topic/*

of avoided emissions of harmful gases. This is a crucial approach that ensures a comprehensive cost-benefit analysis.

Moreover, Holmes (2020) and Murray (2019) drew two examples from EU case law to outline how agreements having sustainable goals similar in nature, may well be ruled differently by the Commission and/or by National Competition Authorities: the 'Chicken of Tomorrow' and the 'CECED' cases. In the Dutch 'Chicken of Tomorrow' case[166] (previously discussed in Section 6.1.8) chicken producers came to an agreement to improve the welfare of chickens. Chickens nurtured with less sustainable methods were to be replaced with a new 'breed' of chickens: this new slower growing breed of chickens, raised with a minimum use of antibiotics, a reduction in the CO_2 footprint and a strict enforcement of compliance with legal animal welfare standards, ought to change the buying conditions of chicken meat for supermarkets. The supermarket chains involved in the 'Chicken of Tomorrow' programme, would have had to adjust their buying conditions to these new criteria, i.e. starting from 2020, consumers would have no longer been able to purchase other chicken meat in Dutch supermarkets.

The Dutch Competition Authority attempted to quantify the benefits of these improvements, looking into animal welfare, environment benefits and public health considerations, finding that the improvements came at a higher cost than what consumers were willing to pay. The participating supermarkets sell approximately 95% of all chicken meat sold to consumers in the Netherlands, thus enjoying high market shares. As there were (according to the NCA) no net benefits passed on to consumers, the Dutch NCA believed that the sustainability arrangements concerning the 'Chicken of Tomorrow' also have a considerable effect (real or potential) on the consumer market for chicken meat. Hence, the NCA concluded that the potential advantages to animal welfare did not outweigh the reduction of consumer choice and potential price increases. Notably, a follow-up study by the Dutch Competition Authority published in August 2020[167] suggests that the planned anticompetitive agreement was not necessary to realise the improvement in animal welfare that was envisaged by the 'Chicken of Tomorrow' programme: the study concludes that the welfare conditions of the current selection of chicken meat sold in Dutch supermarkets more than exceeds the minimum requirements of the Chicken of Tomorrow, a success which can be attributed to the individual actions of different market participants in the supply chain.

In the washing machines 'CECED' case,[168] which predates the adoption of the Commission Guidelines on the application of Article 101(3) in April 2004, the EU Commission's assessment produced a different outcome, despite comparably high market shares being involved: Holmes (2020) points out that the Commission granted an exemption to an agreement between producers and importers of washing machines (accounting for some 95% of European sales) which involved discontinuing the least energy efficient machines and pursuing joint energy efficiency targets with the development of more environmentally friendly machines. Despite increasing prices (by up to 19%) and reduced competition, the Commission accepted that the collective benefits for society (i.e. a reduction in energy consumption) outweighed these costs. Therefore, the Commission showed that it may be possible to quantify what appear at first to be non-economic factors or "benefits to society" from avoided emissions.[169]

The 'Chicken of Tomorrow' and the 'CECED' cases have been also mentioned by some stakeholders during the interview programme and in their written contributions to the OPC launched in the context of this evaluation. The widely shared opinion of stakeholders from different sectors, and operating at different levels of the value chain, is that the growing political attention towards sustainability, including climate change (e.g. at the EU level with the EU Green Deal) is not adequately met by the current version of the Horizontal

[166] *ACM (2015). ACM's analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow'. Available at: https://www.acm.nl/sites/default/files/old_publication/publicaties/13789_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf.pdf*

[167] *ACM (2020). Welfare of today's chicken and that of the 'Chicken of Tomorrow. Available at: https://www.acm.nl/sites/default/files/documents/2020-08/welfare-of-todays-chicken-and-that-of-the-chicken-of-tomorrow.pdf*

[168] *OJ L 187, 26.7.2000, pp. 47–54*

[169] *G. Murray (2019). Antitrust and sustainability: globally warming up to be a hot topic? Kluwer Competition Law Blog, October 2019*

Guidelines. Notably, some interviewees stated that it was striking to note that a dedicated chapter for sustainability goals is missing in the current version of the Horizontal Guidelines, whilst a Chapter on environmental agreements was present in the 2001 version of the Horizontal Guidelines.

Most of the interviewees reported that the current tools for the assessment of horizontal cooperation agreements having sustainability goals do not allow a sufficiently high degree of certainty. The result of this is that companies, instead of the desired self-assessment through the Horizontal Guidelines, have to rely on the legal counsel of specialised law firms: according to some interviewed law firms, due to the status of the current EU competition framework, lawyers give very conservative advice on whether or not these types of horizontal cooperation agreements could fall within Article 101(3) of the Treaty. According to a 2020 research by the law firm Linklaters[170], 93% of the surveyed businesses want to work closely with peers when pursuing sustainability goals, with 9 out of 10 saying that collaboration is key to achieve these objectives. On the other hand, the survey showed that 57% of the respondents had concrete examples of sustainability projects that they have not pursued because the legal risk was too high[171]. The external support from specialised legal counsel might still be needed after a revision of the current Horizontal Guidelines, but the boundaries for cooperation on sustainability between companies could be better clarified to favour the achievement of this type of objectives.

Stakeholders highlighted the following two aspects of the current framework, where uncertainty lies most frequently:

- the scope of sustainability agreements;
- the definition of efficiency gains linked to the assessment of economic benefit for consumers.

Concerning the scope, both consumer organisations that responded to our call and the representatives of the companies that were interviewed observed that the current interpretation of a 'fair share for consumers' (one of the conditions of Article 101(3) of the Treaty) primarily concerns pricing aspects and in-market benefits. Such an approach is perceived by interviewees as not broad enough, as benefits are generated also in terms of 'out-of-market' values. In fact, other types of sustainability benefits include issues such as deforestation, animal welfare and child labour that often demonstrate a global character and generate benefits that might be out of the relevant consumer market: since the geographical scope of sustainability agreements concerns cross-border topics like carbon neutrality and global warming, which are also beneficial for consumers of the internal market, stakeholders pointed out that often the geographic market definition adopted by NCAs and by the Commission is too narrow. The current framework, according to a trade association, does not ensure that the concept of sustainability in competition policy spans beyond the European Union's borders: the focus towards sustainability should benefit from international coordination and inclusiveness along global supply chains.

Large manufacturers also stressed the need for coordination along supply chains and the need to reach a certain level of economies of scale to obtain sustainability goals. The interviewees pointed out that the lack of specific indications in the Horizontal Guidelines do not explicitly allow competitors to cooperate with no risk of infringement of competition law, notably when the purpose of the cooperation is to achieve industry-wide compliance with environmental and other sustainability obligations. In certain circumstances, environmental obligations are stemming from direct provisions of other EU Directives (e.g. Waste Framework Directive[172], Single-Use Plastic Directive[173], Packaging and Packaging

[170] *Linklaters (2020). Competition law needs to cooperate: companies want clarity to enable climate change initiatives to be pursued. Available at: https://lpscdn.linklaters.com/-/media/files/document-store/pdf/uk/2020/april/linklaters_competition-law-needs-to-cooperate_april-2020.ashx?rev=2c2c8c7d-91a8-496f-99fb-92a799c55cb2&extension=pdf&hash=6641BEDB36EC877CA43C7D995BD6EEDA*

[171] *Ibid.*

[172] *Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives. OJ L 312, 22.11.2008*

[173] *Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment. OJ L 155, 12.6.2019*

Waste Directive[174]). In order to comply with these Directives, industry players have to set up complex mechanisms of cooperation (e.g. deposit return systems to reuse beverage packaging) which involve several players (including competitors) along the supply chain. In these cases, according to interviewees, unilateral actions alone made by individual companies cannot achieve the desired objectives prescribed by the EU Directives. At the same time, market share thresholds for horizontal cooperation agreements may be exceeded and the risk of anti-competitive information exchanges undermines the effectiveness of companies' efforts.

Companies are often reluctant to innovate, pursuing sustainability goals, because of the so-called 'first mover disadvantage': the development of new technologies and products implies investments that in the short-term might lead to higher consumer prices to recoup the costs of the innovation. It may be the case that the sustainable benefits would outweigh these higher retail prices only at a later stage. According to law firms and a trade association, cases such as the '*Chicken of tomorrow*' represent a deterring example for companies: in the absence of a detailed guidance allowing the self-assessment of the conditions for exemption, those companies that would enter into sustainability agreements fear facing a competition infringement because the development of new products might genuinely result in a higher retail price, e.g. a new technology that in the short-term might be more expensive, but that in the long run would be cheaper and reach more sustainability goals than other technologies.

This concern over prices is linked to the second element of uncertainty mentioned by most stakeholders, i.e. the definition of 'efficiency gains'. Most stakeholders recognised the need to rethink the current notion of efficiency in purely monetary terms: efficiency as it is conceived, looks mostly at competitive prices and not necessarily to a wider public interest. This implies that initiatives aiming at sustainable outcomes in social or environmental terms, fall under the notion of efficiency, while contributing to consumer welfare. With respect to this, stakeholders referred also to the 'Chicken of tomorrow' case, which assessed efficiency solely in economic terms (i.e. willingness to pay and retail prices). Hence, interviewees noted that public interest in 'non-monetary' outcomes of such agreements are not correctly weighted: the focus on what is immediate in the short-term (e.g. a tangible price and product) does not capture environmental efficiencies (e.g. reduction in CO2 emissions) and does not explain properly how to quantify or translate these spillovers in economic terms.

Nevertheless, interviewed stakeholders and participants to the OPC (in particular a law firm and a trade association) acknowledged that it is challenging to translate such benefits, that appear at first to be non-economic, into monetary terms. According to these stakeholders and to the interviewed consumer organisations, being too lenient and vague in defining 'sustainability' might allow certain companies to cartelise or to engage in anti-competitive conduct: without detailed guidance on what is allowed and what is assessed under sustainable goals, a too generic definition of 'sustainability' could hinder genuine sustainability objectives and instead favour companies spreading misleading information about how a company's products are more sustainable: the so-called phenomenon of 'greenwashing'.

Finally, the frequency of combination between sustainability agreements and other types of horizontal cooperation was investigated: 29 of the CATI respondents having in place a sustainability agreement stated that they do not have in place at the same time other types of horizontal cooperation agreements with the same business partners, serving the same scope.

Table 65: Frequency of combination between sustainability agreements and other horizontal cooperation agreements

Combination with other agreements	#	Share
No	29	55.8%
Yes	13	25%
I don't know	10	19.2%

[174] *European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste. OJ L 365 31.12.1994*

However, according to in-depth interviewees, and in particular according to a large manufacturer among these stakeholders, it is becoming more and more difficult to single out the 'centre of gravity' of certain types of agreement (including the ones having sustainability goals): the objectives of horizontal forms of cooperation are often intermingled and there might be a higher presence (compared to the one reported here) in the market of agreements indirectly serving a sustainability purpose.

Conclusions

Despite a general view that the Horizontal Guidelines are overall beneficial and that they increase the level of legal certainty compared to a scenario without any type of guidance, 'sustainability agreements' are not defined and not addressed explicitly in the current text of the Horizontal Guidelines. Hence, this is the source of some legal uncertainty, especially among larger companies. A major reason for this is the lack of guidance on the assessment of economic efficiencies related to sustainable objectives: these agreements often promote benefits that are hardly quantifiable in monetary terms (e.g. reduction in gas emissions, animal welfare, etc.) and sometimes might generate so-called 'out-of-market' efficiencies not directly linked to a well-defined product market. Some stakeholders argued that companies frequently abandon sustainability agreements due to the legal risk of a competition infringement. NCAs also rarely dealt with cases involving this type of horizontal cooperation in recent years.

6.4.3. Other Non-covered Agreements

Sample of respondents per research tool

This section summarises the main findings gathered, through the different research tools, on other types of horizontal cooperation agreements that are not covered by the Horizontal Guidelines. The table below provides an overview of the sample of respondents who provided inputs to our fieldwork research on non-covered agreements other than the ones pursuing sustainability goals.

Table 66: Sample of respondents per research tool - Other non-covered agreements

Other non-covered agreements		
Tool	**# answers**	**Research questions / topics covered**
CATI	39	• Consultation rate of Horizontal Guidelines and/or horizontal block exemption regulations • Do Horizontal Guidelines/Horizontal Block Exemption Regulations provide sufficient guidance? • Should other types of horizontal cooperation agreements be covered by the Horizontal Guidelines? • Is current legal framework discouraging to enter into horizontal cooperation agreements
In-depth interviews	11	• Identifying types of horizontal cooperation agreements that are becoming more common amongst stakeholders which are not covered by Horizontal Guidelines that need further legal certainty. • Identifying, and describing combinations of horizontal cooperation agreements (multi-purpose agreements) where the non-covered agreement is the main objective of the agreement
OPC	23	• Are there specific types of horizontal cooperation agreements that are not covered by the Horizontal Guidelines, but where more legal certainty would be required? • What is the level of legal certainty that the HBERs and the Horizontal Guidelines provide for the purpose of assessing whether horizontal cooperation agreements are compliant with Article 101 of the Treaty (i.e. are the rules clear and comprehensible, and do they allow undertakings to understand and predict the legal consequences)?

39 companies were interviewed with the CATI methodology to discuss types of horizontal cooperation agreements not covered by the Horizontal Guidelines. The composition of the sample by size of the company is the following: most of the companies were small (16), with a good share of medium companies (13) and micro enterprises (10). No large companies were part of the CATI sample. The most frequent industries were the following: professional and technical activities (5) was the most represented sector, together with energy (5). Household appliances (4) and "other" (4) were also well represented, followed by clothing, apparel & footwear (3), transportation and storage (3) and pharmaceutical

(3). In most cases (15 companies) these were primarily retailers, followed by manufacturers (14 companies), research centres (10) and wholesalers (3).

The research team also conducted 11 in-depth interviews with relevant stakeholders. Of these interviews, 7 were with companies and 4 with trade associations: these stakeholders mostly came from the telecommunications and IT sectors.

Main findings

The following paragraphs summarise the main findings, gathered through the different research tools (CATI, OPC, in-depth interviews), which lead to our overall answer to the evaluation question (Section 6.3.1).

The evolution of market trends together with legal, economic, and political developments question the relevance of the HBERs and the Horizontal Guidelines. New market practices and forms of horizontal cooperation have arisen, and other already existing types of agreements might have become more frequent compared to the past. Agreements having sustainability goals (Section 6.4.2) are amongst the most important examples of forms of horizontal cooperation which are currently not addressed by a specific chapter of the Horizontal Guidelines, or by a separate block exemption regulation.

The paragraph below presents the insights from the CATI interviews. As 100% of CATI respondents in our sample were micro, small or medium enterprises, the following results should be considered as being more representative of this specific category of stakeholders.

The evidence collected through the CATI survey on the distribution across the economic sectors of horizontal cooperation agreements 'non-covered' by the Horizontal Guidelines, shows a slight prevalence in four industries: as shown in Table 67, the 'energy' and the 'professional and technical activities' sectors account for 5 each of these agreements, followed by 'household appliance' and 'other industry' (unfortunately, none of the four respondents provided additional information on the economic sector).

Table 67: Non-covered agreements by industry

Industry	# of companies	Share
Energy	5	13%
Professional and technical activities	5	13%
Household appliance	4	10%
Other industry, please specify	4	10%
Clothing, apparel & footwear	3	8%
Pharmaceutical	3	8%
Transportation and storage	3	8%
Agriculture	2	5%
Arts, entertainment and recreation	2	5%
Construction	2	5%
Food and beverage	2	5%
Accommodation and food service activities	1	3%
Consumer electronics	1	3%
Furniture	1	3%
Telecommunications	1	3%
Total	**39**	**100%**

The insights gathered from NCAs, written contributions to the OPC and interviews, highlighted the most frequent types of agreements which respondents felt were not (sufficiently)covered by the Horizontal Guidelines:

- joint bidding agreements (investigated by NCAs in several cases over recent years);
- price signalling;
- agreements in extraordinary situations such as during a pandemic;

- agreements between self-employed enabling collective bargaining under certain conditions;
- data pooling/data commons;
- network sharing agreements;
- public-private consortia for new product and services development, in particular in the broader field of AI;
- blockchain (private or public permissioned and permission less ledger) membership/consortia agreements/arrangements;
- cooperation agreements in order to deal with High Impact Low Frequency events (e.g. agreements in the pharmaceutical sector allowing to share pharmaceutical companies' libraries on compounds and clinical trials);
- airline alliances;
- qualification schemes;
- labour and hiring (arrangements between undertakings about the procurement of labour from employees or hiring the service of independent contractors);
- agreements in the field of inland carriage by rail and carriage by road.

The input provided by the companies participating to the CATI interviews in addition mentioned 'bilateral agreements to weaken protectionist tendencies in trade', 'forms of cooperation established to create short supply chains fostering stable forms of collective offer', 'towing agreements', 'car rental agreements', 'agreements with trade unions'.

The strong majority of medium, small and micro enterprises participating in the CAT-interviews and which are engaging in cooperation agreements they consider 'not covered', stated that they have never consulted the Horizontal Guidelines (Table 68): only 7 respondents consulted the Horizontal Guidelines.

Table 68: Share of respondents having 'non-covered' horizontal cooperation agreements who consulted the Horizontal Guidelines

Consulted Horizontal Guidelines	# of answers	Share
No	32	82%
Yes	7	18%

The most common opinion among the respondents to the CATI interviews is that the current framework does not discourage the establishment of types of horizontal cooperation that they consider not covered by the Horizontal Guidelines: due to the low number of CATI respondents who consulted the text of the Horizontal Guidelines, the robustness of this finding is limited.

Table 69: Share of respondents believing that 'non-covered' horizontal cooperation agreements might be discouraged by the current legal framework

Might the current legal framework discourage the establishment of non-covered horizontal cooperation?	# of answers	Share
Yes	3	8%
No	25	64%
I don't know	11	28%

As previously discussed in Sections 6.2.4 and 6.3.4 on information exchange agreements, the debate on how to treat data and whether data pooling (or other forms of cooperation) can be suitably covered within the framework of the information exchange chapter has been discussed with some interviewees and it is also an ongoing discussion within the Commission. This is confirmed explicitly by the Commission's Communication A European strategy for data: "*The Commission will provide more guidance to stakeholders on the compliance of data sharing and pooling arrangements with EU competition law by means of an update of the Horizontal Co-operation Guidelines*". This is echoed by several

companies and trade associations, in their answers to the Public Consultation and to the interviews. In their view, the current version of the Horizontal Guidelines does not take new market dynamics and new forms of digital cooperation into account: companies are not enabled by the EU competition framework to cooperate and to be competitive in the digital environment, especially against large global players. Moreover, some stakeholders added that current issues such as barriers to entry, bottlenecks, quasi-monopolies and conglomerate effects would be tackled by clearer guidance on the scope of horizontal cooperation in digital markets.

Similarly to the point raised in Section 6.4.2 on the scale required to achieve industry-wide sustainable goals, telecommunication operators made a similar point related to another type of non-covered agreement: network sharing agreements. There is a growing consensus within the telecommunication industry about the fact that the absence of a dedicated chapter in the Guidelines (or of a dedicated BER) is not adequate to the frequency of this form of cooperation which has increased significantly during the last decade. Network sharing agreements, in the industry view, lead to greater efficiency in terms of coverage, costs, innovation, quality and environmental impact. Notably, this type of horizontal cooperation is seen by these stakeholders as especially relevant in the current context of the deployment of 5G technology.

The Horizontal Guidelines, according to the interviewed stakeholders from the digital and telecommunications sector, fail also to provide enough legal certainty and relevance on the thresholds for the calculation of the market shares. The digital market is characterised by the presence of many 'zero price markets' which make complex the definition of the product markets and their related market shares criteria for exemptions. In this sense, stakeholders commented that the concept of 'hardcore restriction', especially in the telecommunications markets, might be misleading: it might be difficult to fall under an exemption (defined only through market shares), as only few big players are present in this market and competitive long-term effects generated by cooperation between competitors might fall short of being correctly quantified.

Finally, some trade associations highlighted the absence in the Horizontal Guidelines of a specific chapter on 'joint bidding'. In their view, the Horizontal Guidelines do not clarify the conditions on which joint bidding between competitors can create potential restrictive effects on competition (e.g. when an horizontal cooperation agreement between competitors effectively leads to a reduction of the number of bids that a customer could receive). They consider that the Horizontal Guidelines do not provide relevant examples of joint bidding, which is particularly relevant for the media sector. Notably, they comment on the creation of a consortium to bid for media rights such as sports broadcasting rights[175] as an area of interest that it is not currently addressed. Moreover, one OPC respondent noted that the Guidelines may give rise to costs in that it does not consider the potential for pro-competitive effects of joint bidding. This is particularly relevant in digital markets which have a natural tendency to concentration due to, among others, strong network effects and economies of scale. These markets, therefore, tend to tip towards a single winner: against this background, horizontal cooperation of smaller players in general and joint bidding arrangements in particular may benefit competition.

Finally, the frequency of combination between horizontal cooperation agreements that respondents feel are not covered and other types of horizontal cooperation was investigated: 26 of the CATI respondents having in place a type of agreement that they feel is not covered stated that they do not have in place at the same time other types of horizontal cooperation agreements with the same business partners, serving the same scope.

Table 70: Frequency of combination between non-covered agreements and other horizontal cooperation agreements

Combination with other agreements	#	Share
No	26	66.7%

[175] *European Broadcasting Union (2020). EBU Reply to the Commission's Consultation on Horizontal Cooperation Agreements. Available at: https://www.ebu.ch/files/live/sites/ebu/files/Publications/Position_Papers/EBU%20Reply%20to%20the%20European%20Commissions%20Consultation%20on%20Horizontal%20Cooperation.pdf*

Combination with other agreements	#	Share
Yes	7	17.9%
I don't know	6	15.4%

Conclusions

Although there is the general view amongst all the stakeholders consulted through the different research tools that the Horizontal Guidelines are overall beneficial and increase the level of legal certainty compared to a scenario without any type of guidance, there are certain agreements which are not defined and not addressed explicitly in the current text of the Horizontal Guidelines. Hence, this creates some lack of legal clarity, especially among larger companies. The absence of specific provisions on network sharing agreements, joint bidding and data pooling raised the concerns of companies operating in media and telecommunication sectors: these stakeholders highlighted the competitive risk associated to infrastructural investments which are essential in developing digital applications and networks (from the IoT to the rollout of 5G). The current version of the Horizontal Guidelines has also triggered some complaints on its relevance in business environments characterised by data-intensive forms of cooperation.

7. Efficiency Evaluation Questions

7.1. Does the assessment of whether the HBERs, together with the Horizontal Guidelines, is applicable to certain horizontal cooperation agreements, generate costs proportionate to the benefits they bring?

7.1.1. Summary and overall answer to the evaluation question

The competition self-assessment tools provided by the HBERs and the Horizontal Guidelines are broadly viewed by most respondents as providing a good level of legal certainty as well as generally effective guidance on how to structure cooperation agreements and what agreement elements to avoid. Almost all stakeholders believe the HBERs and the Horizontal Guidelines are an improvement over having only Article 101 of the Treaty, and, as such, a source of cost reduction through greater legal certainty.

The most important benefits as perceived by the stakeholders whose views were consulted in the course of this study include: (i) definitions, which guide the reader through the types of agreements covered by the HBERs and the Horizontal Guidelines, although these definitions are not always perceived to be entirely clear, (ii) market share thresholds provide a safe harbour for a wide range of agreements among small firms, although these thresholds or the absence thereof are also a source of criticism in some cases, (iii) the indication of hardcore restrictions is valued as guidance on what elements must be avoided, (iv) guidance in relation to competition assessment, (v) the examples provided to illustrate compliant and non-compliant agreements and (vi) the two HBERs are appreciated in that they provide greater legal certainty than the Horizontal Guidelines alone.

In relation to the costs of assessing whether the HBERs and the Horizontal Guidelines are applicable to certain horizontal cooperation agreements, the consulted stakeholders raised three areas of cost: (i) lack of legal certainty leading to risk of infringement of competition rules and associated enforcement actions, (ii) lack of legal certainty leading to the need to engage external counsel or significant resources from in-house legal teams, and (iii) excessive cost to address legal uncertainty leading to disincentive to invest in cooperation agreements thus missed opportunities that could have brought about efficiencies, enhanced competition and, ultimately, consumer benefit.

Neither interviewees (both through CATI and in-depth interviews) nor NCAs were able to quantify the costs and benefits generated by applying the HBERs and the Horizontal Guidelines and most of them were thus unable to express an opinion on cost-efficiency. About one third of NCAs estimate that the costs are proportionate to the benefits and also some interviewees consider the Horizontal Guidelines and the HBERs as providing more benefits than costs.

Below, each agreement category is analysed in turn.

7.1.2. Research & Development Agreements

Sample of respondents per research tool

This section summarises the main findings gathered on the efficiency of R&D agreements through the different research tools. The table below provides an overview of the sample of respondents who provided inputs to our fieldwork research on R&D agreements.

Table 71: Efficiency - Sample of respondents per research tools - R&D agreements[176]

Efficiency - R&D agreements		
Tool	**# answers**	**Research questions / topics covered**
CATI	67	• Main sources of cost when using the Horizontal Guidelines and the R&D BER for the self-assessment of R&D cooperation agreements

[176] *For an in-depth description of the sample of respondents, see Section 6.2, Table 15 on R&D agreements.*

Efficiency - R&D agreements		
Tool	**# answers**	**Research questions/topics covered**
In-depth interviews	17	• Main sources of cost for undertakings and members of trade associations when verifying the compliance of R&D agreements with the Regulation and when conducting the self-assessment using the Horizontal Guidelines • Assessment of costs in identifying the relevant market
OPC	26[177]	• Different types of costs of applying the current R&D BER and the Horizontal Guidelines • Quantification of costs (e.g. estimate of quantifiable costs in terms of value and as a percentage of annual turnover) • Evolution of costs compared to the previous version of the R&D BER and its related Horizontal Guidelines • Benefits of R&D BER; • Benefits of Horizontal Guidelines; • Proportionality of costs of the R&D BER and Horizontal Guidelines compared to benefits

Main findings

The following paragraphs summarise the main findings, gathered through the different research tools (CATI, OPC, in-depth interviews), which lead to our overall answer to the evaluation question (Section 7.1.16.3.1).The most common position of interviewed stakeholders, for what concerns the costs and the benefits of the R&D BER and Chapter 3 of the Horizontal Guidelines, is that they provide a good degree of regulatory certainty which does not, however, always prevent respondents seeking external legal support. As pointed out during the in-depth interviews by different stakeholders from the automotive and telecommunication sectors, the main sources of direct costs are legal and economic advisory costs. Even if the HBER and the Horizontal Guidelines provide in most cases a good degree of legal certainty, for complex agreements the in-house legal departments need usually to be supported by external legal advisors or, when necessary, also by economic advisors (e.g. for the identification of the relevant markets).

In addition, as pointed out by an interviewee in the telecommunication sector, the real costs are not related to the process of ex-ante self-assessment but rather to the potential anti-trust investigations which could have a significant impact in the business strategy and operations of the company. Thus, compliance uncertainty in relation to a potential R&D agreement may lead it to be abandoned with the consequence of missed opportunities and innovation delays. This opinion is also shared by other businesses. For example, a respondent from the aviation industry mentions that R&D cooperation agreements can be time consuming, complex and negotiations are quite difficult (especially when undertakings have difficulties in protecting IPRs) thus, if the cooperation poses also competition concerns and a risk of potential fines, there is a tendency to either pursue research individually or abandon it.

The CATI results confirm this, with the most mentioned sources of cost being administrative, external legal advice and economic consultants. Related to the latter, “calculating the market share” was, for most respondents a difficulty that could discourage R&D cooperation.

A further analysis on the balancing between costs and benefits has been performed in the dedicated case studies (attached in Annex II).

Several of the companies interviewed for the case studies have some experience with R&D agreements. These typically reflect agreements with a wide range of partners, including competitors, suppliers and consortia with universities and scientists. They engage in R&D cooperation relatively frequently, with one or more new agreement(s) initiated every year.For a wide range of R&D agreements, and for the larger among the firms studied, assessments are undertaken by in-house competition lawyers. This involves the internal legal team applying the Horizontal Guidelines and the R&D BER and advising the business on any legal risks that the agreements may give rise to. This is generally an iterative process along which the legal team seeks to understand the business motivations for the

[177] *This number comprises both received responses stating that they have the agreement type as well as received position papers addressing the agreement type. This is the case for all figures on OPC answers in subsequent tables.*

agreements and informs of the competition compliance risks that certain elements of the agreements may potentially give rise to. At the end, some of these elements may be adapted and some may be kept if the business can explain in sufficient detail their indispensability for the agreement.

Benefits of the Horizontal Guidelines and the R&D BER

For most respondents with in-house lawyers, applying these rules is considered relatively straightforward. While there may be some costs associated with a learning period, in-house lawyers can benefit from their expertise and experience and thus can make these frequent assessments quite quickly. The fact that these assessments can be made so efficiently is in large measure attributed to the helpful nature of the guidance in the R&D BER and the Horizontal Guidelines. This guidance directs the lawyers to the clauses that they need to focus on. One respondent indicated that after an initial learning curve they now feel that the Horizontal Guidelines and the R&D BER provide guidance without any further associated costs.

Several case study interviewees said that they use the R&D BER frequently and find it useful or very useful. One company described the R&D BER as similar to a comfort zone where it is made clear what is “ok” to do. Another said the clear-cut rules on hardcore restrictions are particularly helpful as a starting point for the competition compliance assessments. Some respondents believe that the BER adds value relatively to the Horizontal Guidelines: the R&D BER is clearer and more concise than the Horizontal Guidelines, and the addition of what one respondent calls “safe harbours” adds legal certainty.

One respondent further explained that the R&D BER saves time and simplifies competition assessments relative to the Horizontal Guidelines. This is the case in scenarios where the BER conditions are easy to apply to the facts, but this is not always the case. In practice, competition lawyers will look at both the BER and the Horizontal Guidelines when assessing potential agreements (particularly as the Horizontal Guidelines have some helpful guidance on agreements that do not fall within Art 101(1) of the Treaty at all).

One additional valued aspect of this BER is the fact that it covers much more than just purely horizontal cooperation agreements (the R&D BER applies to joint R&D, joint exploitation of R&D results and paid for R&D). For several respondents this is important because the nature of R&D agreements in which they engage is varied. They may involve competitors, suppliers, consortia of different types, universities, research centres, and scientists.

Costs of applying the R&D BER and the Horizontal Guidelines

One respondent suggested that Chapter 3 of the Horizontal Guidelines does not take into account the developments that are taking place in traditional companies that are developing new technologies. The Horizontal Guidelines differentiate between existing products and/or technologies on the one hand (paragraphs 113-118), and competition in innovation (R&D) on the other (paragraph 119). According to this respondent, this differentiation limits the ability of traditional industry players to cooperate amongst themselves, while global companies active outside the EU jurisdiction are able to cooperate to develop these innovative services. Ultimately, in the respondent’s view, these limits to cooperation often translate into a cost due to missed business opportunities.

The R&D BER and Horizontal Guidelines, according to some views, are not sufficiently adapted to the changes brought about by digitalisation. In particular, the legal framework lacks flexibility and clarity with regards to horizontal cooperation agreements. The current rules do not take sufficiently into account the interdependence of different markets and the specificities of digital markets .

Costs of the R&D BER

According to one respondent from the in-depth interviews operating in the telecommunications sector, the 25% combined market share threshold in Article 4(2) of the R&D BER only allows R&D cooperation between relatively small companies. Yet, these companies often lack the financial resources to innovate. In these terms, the lower

threshold is creating an indirect societal cost in terms of "missed opportunities" of innovative research.

One of the legal experts interviewed indicated that it is fairly common that the terms of a particular R&D agreement do not fall within the R&D BER. However, in many cases, the agreement can proceed as it is possible to self-assess under the Horizontal Guidelines. Nonetheless, the limited coverage in the R&D BER increases the costs as the self-assessment can take longer and results in lower legal certainty. In some cases, this implies that it is more difficult to reach an agreement with the other party since they perceive a higher risk of non-compliance if the R&D BER is not applicable. This expert went on to explain that there is sometimes a misunderstanding that falling outside the R&D BER is necessarily problematic under competition law, rather than simply requiring a more detailed assessment of the individual circumstances.

Quantification of costs – an example

This sub-section seeks to provide some insight into the procedures that companies go through when drawing on the R&D BER and the Horizontal Guidelines for self-assessing competition compliance of R&D agreements. These procedures and the level of involvement of different areas of a company are the factors that determine the more quantifiable aspects of these self-assessment costs. The sub-section is based on the discussions held during in-depth interviews and the case studies. As only few of the many respondents approached felt that they could discuss costs, this sub-section illustrates the elements of cost rather than seeking to precisely quantify it.

According to interviewees and case study participants, typically, a competition assessment of an R&D agreement will start with the more impactful elements of the rules, which are considered to be the market share thresholds, the hardcore restrictions and the excluded restrictions. If it can be readily determined that the market share thresholds are met and that the agreement does not contain any of the hardcore or excluded restrictions, the compliance assessment is relatively straightforward and respective cost in terms of time expended by legal experts and management is low.

For more complex agreements, these assessments are rarely straightforward. This implies that several iterations may be required between legal team and project team to fine-tune certain clauses until an adequate level of legal certainty is achieved.

Common problematic clauses, that can translate into excluded restrictions or hardcore restrictions, are, for example, who owns the IP in the end of the cooperation, what type of licensing is envisaged and whether conditions are imposed on the use by others of the R&D outputs.

During the assessment process, in-house lawyers point out potential risks. In some cases, these may relate to borderline clauses, and the business side may decide to remove or change these clauses. In other cases, some clauses are very important for the commercial motivation of the agreement. If clauses need to stay, the legal team suggests how they can be adapted to decrease competition infringement risks. If they are essential, they may stay. The risk is flagged but the agreement may ultimately proceed.

The quantifiable element of costs in a competition compliance assessment lies therefore in the time taken by the business and their legal experts on a series of steps: (i) analysis of the agreement against most impactful elements of the guidance leading to questions and recommendations to the business, (ii) analysis by the business whether the agreement can be easily adapted to meet the recommendations from the legal team, (iii) if the latter is not feasible, the legal team makes a more in-depth analysis and proposes a series of amendments and additional clauses so that competition compliance is achieved in an alternative way.

Some respondents were able to provide an estimate in terms of legal expert's time. For some of the businesses the research team spoke to, R&D agreements are a core business activity. For these, a compliance assessment will ordinarily occupy 2 weeks of the in-house legal team's time. One other respondent indicated that an assessment by the in-house legal team takes between one week and one month.

Conclusions

General remarks have been provided noting the importance of the guidance, the frequency with which it is used and the generally higher level of legal certainty it affords (compared to an absence of Horizontal Guidelines and R&D BER).

However, some concerns have been expressed by the interviewed legal experts indicating that it is fairly common that the terms of a particular R&D agreement do not fall within the R&D BER: this limited coverage of the BER increases the costs as the self-assessment can take longer and result in lower legal certainty. In some cases, this implies that it is more difficult to reach an agreement with the other party since they perceive a higher risk of non-compliance if the R&D BER is not applicable.

Nonetheless, according to a legal expert interviewed, in many cases, the R&D agreements concerned can proceed as it is possible to self-assess under the Horizontal Guidelines.

7.1.3. Specialisation / Production Agreements

Sample of respondents per research tool

Table 72: Efficiency - Sample of respondents per research tools - Specialisation agreements[178]

Efficiency - Specialisation agreements		
Tool	**# answers**	**Research questions / topics covered**
CATI	70	• Main sources of cost when using the Horizontal Guidelines and the Specialisation BER for the self-assessment of specialisation cooperation agreements
In-depth interviews	10	• Main sources of cost for undertakings and members of trade associations when verifying the compliance of specialisation agreements with the Regulation and when conducting the self-assessment using the Horizontal Guidelines • Assessment of costs in identifying the relevant market
OPC	13	• Different types of costs of applying the current Specialisation BER and the Horizontal Guidelines • Quantification of costs (e.g. estimate of quantifiable costs in terms of value and as a percentage of annual turnover) • Evolution of costs compared to the previous version of the Specialisation BER and its related Horizontal Guidelines • Benefits of Specialisation BER; • Benefits of Horizontal Guidelines; • Proportionality of costs of the Specialisation BER and Horizontal Guidelines compared to benefits

Main findings

The following paragraphs summarise the main findings, gathered through the different research tools (CATI, OPC, in-depth interviews), which lead to our overall answer to the evaluation question (Section 7.1.16.3.1).

Benefits of the Specialisation BER and of the Horizontal Guidelines

The benefits provided by the Specialisation BER and Horizontal Guidelines are the concise and easy-to-access guidance. The clear-cut rules in the BER and the more elaborate explanations in the Horizontal Guidelines are helpful when it comes to the assessment of specialisation/production agreements. They allow practitioners to rapidly get a good idea of the areas and topics where particular caution is required.

One case study respondent considers the Specialisation BER to be clear and that it saves time for the in-house legal team during compliance assessment. The respondent also stated that, overall, the Horizontal Guidelines offer significant benefits in terms of time and costs saved. Furthermore, this respondent believes that the Horizontal Guidelines strike the right balance between on the one hand being sufficiently concise, so that they can be read quickly and agreements can be accessed effectively, and, on the other hand, detailed

[178] *For an in-depth description of the sample of respondents, see Section 6.2, Table 21 on specialisation agreements.*

enough to cover a wide range of the more common situations that a business such as theirs will typically encounter.

Even though some respondents criticize the rules, they still find them valuable. One respondent said that the Horizontal Guidelines offer a useful framework and set of principles for assessment that can be used by analogy to assess a wider set of agreements.

Costs

One respondent considers that the guidance in the Horizontal Guidelines regarding production agreements can be helpful for the self-assessment of network sharing and other types of digital infrastructure mutualisation agreements but they are not sufficiently adapted to the specificities of these forms of cooperation and cannot provide sufficient legal certainty to the parties involved. This uncertainty, as mentioned for other types of agreements, leads thus to increased costs, in particular for legal advice.

One response considered that the procedures that firms have to go through to ensure compliance and avoid exposure to legal risk are very burdensome, time-consuming and do not fully provide legal certainty. As a result, many innovative and competitive products are never created or abandoned halfway, as this respondent suggests occurred at the time of the Commission's *E5* antitrust investigation.[179] This respondent is particularly concerned that the current framework is counter-productive as it will allow non-European digital operators to bring innovations to market faster than EU ones. This would result in a cost due to missed opportunities for EU companies: non-European digital operators would possibly benefit from the winner-takes-all effect which would in turn make European operators dependent on global actors needing to negotiate access conditions to these innovative solutions.

For some of the case study respondents, production agreements can be projects of significant strategic importance. In these circumstances, the risks of getting compliance assessments wrong can be very large. As a result, these respondents opt to seek external legal advice, even if they have in-house legal teams. The need for external legal advice is justified in several ways: in some complex cases, the external counsel is perceived to offer greater legal certainty; when sensitive advice and communications are involved, discussions with external counsel have the advantage of enjoying legal professional privilege; and certain complex cases require extensive legal research and specific administrative support, such as administrative tools to handle the exchange of sensitive information between the parties.

Conclusions

The most mentioned benefits of the Specialisation BER and the Horizontal Guidelines centre on the concise and easy-to-access guidance that they provide. Other important benefits include the split between clear-cut rules in the Specialisation BER and the more elaborate explanations in the Horizontal Guidelines. Overall, the Horizontal Guidelines offer significant benefits in terms of time and costs saved.

On the costs side, the issues identified include lack of guidance on application of the Specialisation BER to sub-contracting agreements and lack of guidance in relation to infrastructure sharing agreements such as in telecom markets. Furthermore, the perceived effect of the current legal framework on stakeholders is that the current process of avoiding exposure to legal risk is considered burdensome, time-consuming and does not give legal certainty.

While the discussions with stakeholders helped in identifying these main areas of costs and benefit, respondents were generally unable to provide an adequate level of specificity that would have allowed for their quantification.

[179] *Case No 39943 – E5 – Cooperation among large telecom operators; https://ec.europa.eu/commission/presscorner/detail/en/IP_13_208*

7.1.4. Information Exchange Agreements

Sample of respondents per research tool

Table 73: Efficiency - Sample of respondents per research tools – Information exchange agreements[180]

Efficiency – Information exchange agreements		
Tool	**# answers**	**Research questions/topics covered**
CATI	73	• Main sources of cost when using the Horizontal Guidelines for the self-assessment of information exchange agreements
In-depth interviews	35	• Main sources of cost for undertakings and members of trade associations when verifying the compliance of information exchange agreements when conducting the self-assessment using the Horizontal Guidelines
OPC	26	• Different types of costs of applying the current Horizontal Guidelines • Quantification of costs (e.g. estimate of quantifiable costs in terms of value and as a percentage of annual turnover) • Evolution of costs compared to the previous version of the Horizontal Guidelines • Benefits of Horizontal Guidelines; • Proportionality of costs of the Horizontal Guidelines compared to benefits

Main findings

The following paragraphs summarise the main findings, gathered through the different research tools (CATI, OPC, in-depth interviews), which lead to our overall answer to the evaluation question (Section 7.1.16.3.1).

For some respondents, exchanges of information can be a central element of their business models. For others, information exchanges are ancillary to other agreements, e.g. information exchange in the context of joint bidding for a tender. In either case, competition rules impose strict limits on the horizontal disclosure and exchange of potentially sensitive information.

As mentioned by a business in the automotive sector, the costs when verifying the compliance of information exchange agreements are relatively high. The respondent's company relies mainly on in-house experts, but in special cases external legal counsel is required as well.

Information exchange is also a concern for an association in the telecommunication sector which main purpose is exactly to facilitate information exchange amongst its members. The costs of meetings within the association are thus high due to a complex set of compliance mechanisms to be implemented in order to avoid any potential infringement due to illegal information exchange. The associations reports that these costs are 2-3 times higher as they would be in case more legal certainty is provided.

Also the results of the CATI survey shows that amongst respondents, the legal advice support for information exchange agreements is the main source of cost followed by the costs of delay due to legal uncertainty.

Benefits

Apart from commenting on the general value of the guidance provided by the Horizontal Guidelines, the respondents have not indicated any specific benefits they afford.

Costs

Areas of cost associated with the application of the Horizontal Guidelines to information exchange agreements were indicated by several respondents.

Firstly, that the Horizontal Guidelines presume parties are only engaging in horizontal relationships and they do not account for both vertical and horizontal relations at the same time. For example, in dual distribution scenarios, suppliers work closely with both wholesalers and retailers. In these situations, there is an intense flow of information

[180] *For an in-depth description of the sample of respondents, see Section 6.2, Table 26 on information exchange agreements.*

between parties; but the Horizontal Guidelines do not provide sufficient legal certainty around such agreements. This has implications in terms of costs as guidance on the legality of such forms of information exchange needs to be sought outside the framework of the Horizontal Guidelines.

Secondly, in instances where the parties are at the initial stages of exploring possible cooperation agreements and, more generally, if the form of cooperation evolves over the period during which discussions and negotiations take place, compliance with the rules on information exchange can be difficult to maintain. The evolving nature of agreements complicates the parties' ability to comply with the requirement that information exchanges not exceed "need-to-know" information. It can occur that some information may be exchanged that was need-to-know in relation to an initial envisaged cooperation but, as the cooperation evolved to take another form, that information, that has already been exchanged, is no longer justifiable as need-to-know for the new form of cooperation. This implies that negotiations themselves may need to be monitored by competition counsel. However, constant and close external support for such projects, to avoid the exchange of sensitive information that exceeds the "need-to-know" principle at any given point of time, will be very costly. In other words, the costs imposed by the very strict requirements around information exchange may result on excessive costs for businesses.

Several respondents consider the Horizontal Guidelines too restrictive and that these overestimate the potential anti-competitive effects and underestimate the potential pro-competitive effects of information exchanges. Instead there ought to be a stronger presumption of pro-competitive effects. As a result, companies and their legal representatives are overly conscious of the legal risks associated with info exchanges. This may hinder potentially beneficial commercial initiatives. For example, information exchange is vital to ascertain whether R&D collaboration is possible between parties but there is a risk that such exchange would violate competition law around sharing strategically important technology data. In this example, it is unclear what technology data (paragraph 86 of the Horizontal Guidelines) could be considered strategic enough to create issues/require safeguards. This narrow focus of the Horizontal Guidelines can give rise to costs either in terms of certain information exchanges requiring legal evaluation outside the Horizontal Guidelines' framework or, eventually, missed business opportunities that could not be taken forward due to the deterred information exchanges. Some respondents consider that the Horizontal Guidelines have too many exceptions. While the need for flexibility is understandable, exceptions reduce legal certainty. Some of the consultation responses criticise the structure of the text in that several paragraphs start with a situation where an exchange of information is in principle not problematic but then go on to say that the possibility of it being problematic cannot be excluded. This complex structure can give rise to costs, particularly by making legal assessments more costly and resulting in less certainty for businesses about the legal risk associated with certain practices.

Other specific points of the Horizontal Guidelines have also been identified as giving rise to similar cost effects. One example is related to the definition of "genuinely public information" in paragraph 92, and the complexity of verifying the conditions in that definition. Another is associated with the category of "by object" restrictions and it not being exhaustively defined. Furthermore, legal assessments are likely to be more costly than they could otherwise be if paragraphs 86 to 94 and 105 of the Horizontal Guidelines offered a clearer indication of the relative importance that should be given to each of the characteristics of the information exchange. Finally, costs of legal assessment would be lower if the Horizontal Guidelines provided more detailed guidance on the legal test and on the standard of proof for a "hub-and-spoke" agreement or for concerted practices relating to information exchanges.

Costs relating to the assessment process

When considering information exchange agreements, in-house legal teams of some respondents act both proactively and reactively. They are proactive in establishing safeguards and a general awareness of information that would be deemed sensitive in competition law terms. They are reactive when responding to queries from other departments within the company in relation to information exchange.

Assessments of certain information exchange queries can often take just 10 to 15 minutes of the competition lawyer's time. The legal departments of some respondents encounter a lot of queries from employees from other departments about information exchange. Employees are typically quite attuned to the potential risks of anti-competitive information exchange, although some confuse confidentiality with competition law concerns. The respondent said they receive queries on a near daily basis, but the majority of queries are quickly resolved.

For agreements where reciprocal information is shared, the work is more thorough. A recent case described by one respondent took about two days of the lawyer's time. To make assessments of this type, the in-house lawyer needs to understand the context of the agreement in a first stage and in a second stage analyse the agreement and the exchange of information in view of the Horizontal Guidelines and also case law.

Conclusions

Whilst the research team received general comments in relation to benefits, most of the responses focused on a range of aspects of the treatment of information exchanges in the Horizontal Guidelines which, in the view of the respondents, give rise to costs. The type of costs that were mentioned were costs associated with legal assessments of practices which did not fit well into the situations considered by the Horizontal Guidelines and therefore had to be assessed under more general competition rules, and deterrent effects on certain cooperation agreements which are often dependent on important exchanges of information.

A summary of the aspects of the Horizontal Guidelines that were identified as giving rise to this type of costs is given below.

- Applicability of the information exchanges guidance to market developments such as digitalisation – applicability to a wider and more flexible range of information exchanges
- Excessively restrictive rules; particularly cumbersome when businesses are trying to engage in other agreements and need to exchange information among them.
- The rules are considered too restrictive, imposing costs on businesses planning other types of horizontal agreements.
- There are too many exceptions making the rules complicated to follow.
- Definitions such 'genuinely public' information are not considered helpful.

7.1.5. Joint Purchasing Agreements

Sample of respondents per research tool

Table 74: Efficiency - Sample of respondents per research tools – Joint purchasing agreements[181]

Efficiency – Joint purchasing agreements		
Tool	**# answers**	**Research questions/topics covered**
CATI	64	• Main sources of cost when using the Horizontal Guidelines for the self-assessment of joint purchasing agreements
In-depth interviews	25	• Main sources of cost for undertakings and members of trade associations when verifying the compliance of joint purchasing agreements when conducting the self-assessment using the Horizontal Guidelines
OPC	25	• Different types of costs of applying the current Horizontal Guidelines • Quantification of costs (e.g. estimate of quantifiable costs in terms of value and as a percentage of annual turnover) • Evolution of costs compared to the previous version of the Horizontal Guidelines • Benefits of Horizontal Guidelines; • Proportionality of costs of the Horizontal Guidelines compared to benefits

[181] *For an in-depth description of the sample of respondents, see Section 6.2, Table 29 on joint purchasing agreements*

Main findings

The following paragraphs summarise the main findings, gathered through the different research tools (CATI, OPC, in-depth interviews), which lead to our overall answer to the evaluation question.

According to respondents to our CATI survey, the cost of external legal advice and the delays due to legal uncertainty are the most relevant types of costs for joint purchasing agreements. As pointed out by a large company in the food and beverage sector and an association of retailers in the same industry, for example, verifying compliance of these practices is time consuming for internal human resources (especially for the assessment, involving business people, data, review, etc.).

However, the association of retailers also stated that for its members the biggest cost is the reduced efficiency in the system as retailers feel prevented from optimising purchasing arrangements. Instead, they need to ensure there is enough margin to guarantee compliance with the applicable legal framework. These compliance costs are also borne by the associations themselves when developing a new service, because this also needs to be adapted and checked. As a consequence, there are some delays that could have been avoided.

Benefits

One respondent identified the 15% market share *de facto* safe harbour for joint purchasing agreements in the Horizontal Guidelines as being beneficial, allowing for significantly lower assessment costs in a wide range of cases.

Similarly, the identification of the main competition concerns offered by the Horizontal Guidelines and the guidance on commonality of costs are considered to be very helpful, equally generating benefits in terms of lower assessment costs.

Costs

According to responses from certain retailer groups, the rules on joint purchasing agreements in the Horizontal Guidelines undermine the competitiveness of groups of independent retailers and therefore limit competition. More generally, the growing presence of cooperation agreements in European markets and the dispersion of national authorities' initiatives on this subject, are indications of a need in the market for an area of guidance that the Horizontal Guidelines do not currently address. This lacuna produces a cost in terms of discrepancies across Member States which arise because new forms of agreements are prevalent and are not considered in the Horizontal Guidelines.

One respondent considered that the chapter of the Horizontal Guidelines covering joint purchasing agreements is, to some extent, contradictory and incoherent, and that there seems to be some dissonance between the Horizontal Guidelines and case law. Any such inconsistencies, make it difficult and more costly to legally assess joint purchasing agreements.

The above raises the question of whether there may be a lacuna in the Horizontal Guidelines, for failing to consider that such purchasing agreements may, in some circumstances, have negative effects on competition. For example, if the effect of joint purchasing is to leave too little revenue to suppliers thus affecting quality and innovation at supplier level. This can be described as an area of "cost" in the sense that the Horizontal Guidelines may permit agreements which in fact are harmful for competition.

Another source of cost mentioned in the responses was the use of ambiguous terminology. An example referred by a response is the reference in paragraph 194 to "*even looser forms of co-operation*".[182]) Such ambiguities give rise to costs, either because businesses require greater assistance in terms of legal expertise or because they deter cooperation by certain forms of cooperation without actually meaning to.

Finally, another identified area of cost relates to conditions in the Horizontal Guidelines that are difficult and costly for businesses to check adherence to. For example, the 15%

[182] *"(…) Joint purchasing can be carried out by a jointly controlled company, by a company in which many other companies hold non-controlling stakes, by a contractual arrangement or by even looser forms of co-operation (…)."*

market share safe harbour, in the case of purchasing agreements, is very difficult for a particular business to verify. The resulting costs may be either expenses incurred hiring market analysts or a deterrent effect on the cooperation itself.

Quantification of competition assessment costs

One respondent was able to provide an example of competition assessment costs in the case of a joint purchasing agreement. In this particular agreement, it was necessary to obtain external legal advice to support fact-finding, legal assessment and administrative support in relation to the exchange of sensitive information in a protected space. Additionally, there were costs associated with coordination between the external and internal legal teams.

In this particular example, an in-house lawyer worked on the project for approximately eight months, with the most intense period lasting about two months. This period involved legal assessment, fact-finding, drafting reports and setting up a data room. They worked on the project for approximately 25% of their time during the most intense period (using a medium hourly rate from those referred below of, say, EUR 400, this is equivalent to about EUR 32 000). The total costs of the external legal support they received on this project was between EUR 50 000-70 000. The cost of the data room administration was a further EUR 10 000-15 000 and costs of coordination between the internal legal team and the external lawyers were EUR 5 000-7 000. Indicative hourly rates for external counsel of around EIR 400-500 for partners and EUR 280-400 for associates were assumed in these calculations.

Conclusions

The analysis of responses and submissions collected in relation to joint purchasing agreements indicates some important benefits as well as a wide range of costs.

The named benefits are associated with the market shares' safe harbour, identification of the main competition concerns, and the guidance on commonality of costs which makes the legal assessment easier and increases legal certainty.

The most significant costs mentioned are associated with the lack of more tailored guidance in relation to independent retail groups, lack of guidance on joint bidding, and a perceived inconsistency and/or lack of clarity about the weight afforded to market shares versus commonality of costs. These lacunae, inconsistencies and complexity of some of the assessments required by the Horizontal Guidelines, give rise to costs such as those associated with complex legal assessments of competition compliance, external consultants to make in-depth market analyses, and a potential deterrence of cooperation agreements that would be beneficial for consumers.

7.1.6. Commercialisation Agreements

Sample of respondents per research tool

Table 75: Efficiency - Sample of respondents per research tools – Commercialisation agreements[183]

Efficiency – Commercialisation agreements		
Tool	**# answers**	**Research questions/topics covered**
CATI	68	• Main sources of cost when using the Horizontal Guidelines for the self-assessment of commercialisation agreements
In-depth interviews	9	• Main sources of cost for undertakings and members of trade associations when verifying the compliance of commercialisation agreements when conducting the self-assessment using the Horizontal Guidelines
OPC	16	• Different types of costs of applying the current Horizontal Guidelines • Quantification of costs (e.g. estimate of quantifiable costs in terms of value and as a percentage of annual turnover) • Evolution of costs compared to the previous version of the Horizontal Guidelines • Benefits of Horizontal Guidelines; • Proportionality of costs of the Horizontal Guidelines compared to benefits

[183] *For an in-depth description of the sample of respondents, see Section 6.2, Table 32 on commercialisation agreements.*

Main findings

In the context of commercialisation agreements, broadly speaking, the respondents in the case study interviews indicated that the costs associated with the Horizontal Guidelines were disproportionate with the benefits that they bring. Whilst these respondents acknowledged there were clear benefits brought about by the Horizontal Guidelines, they were somewhat limited in comparison to the costs associated with compliance assessments of commercialisation agreements.

The following paragraphs summarise the main findings, gathered through the different research tools (CATI, OPC, in-depth interviews), which lead to our overall answer to the evaluation question.

Notably, the assessment of benefits and costs generated by the use of the Horizontal Guidelines, for those companies engaging in commercialisation agreements, is characterised by a lack of specific evidence. Unfortunately, the stakeholders providing their views on the topic through the different research tools were unable to provide quantitative evidence on their costs: stakeholders' views on costs and benefits were generically pointing at the lack of legal certainty of certain bits of the Horizontal Guidelines, without creating a direct link between specific paragraphs of the Horizontal Guidelines and the costs arisen (or the benefits generated). Therefore, the findings and the conclusions presented in the following paragraphs shall be considered as representative of a very small sample of respondents and their robustness is limited.

Benefits

One of the respondents that the research team interviewed explained that the Horizontal Guidelines provide a certain amount of legal certainty, especially when compared with a hypothetical situation where there were no Horizontal Guidelines and companies were solely guided by Article 101 of the Treaty. The respondent further explained that in their experience national competition authorities' interpretation of Article 101 of the Treaty has varied from country to country, which can be difficult for companies to contend with. However, the Horizontal Guidelines provide a certain amount of legal certainty in this regard and reduce the variance of such interpretations; something which the respondent saw as a clear benefit.

Another case study respondent stated that the Horizontal Guidelines themselves are fairly clear and have been developed over time to adapt to changing markets. This clarity provides a benefit in the sense of legal certainty for companies, which in turn may result in a reduction in compliance assessment time and costs.

Costs

However, whilst both respondents with experience of commercialisation agreements in a horizontal setting noted there were benefits of the Horizontal Guidelines, they had more to say on the costs associated with the Horizontal Guidelines on said agreements.

One particular cost is linked to the lack of sufficiently specific examples to illustrate how horizontal cooperation agreements generating qualitative efficiencies (such that they would be eligible for exemption under Article 101(3) of the Treaty), would be assessed. This specific point was made by one of the case study respondents, an organisation which is a part of the broadcasting and media industry (see Section 6.2.6 for further details): the specific cost in relation to this issue is the lack of guidance provided by the Horizontal Guidelines, insofar as how prospective agreements of this type may be assessed by the Commission. The respondent explained that an example of how the Commission may conduct an assessment of this type, is currently missing: ultimately, this translates to an increased legal cost or to foregone business opportunities.

In fact, the same respondent also noted that several agreements of this type have been prohibited across the EU, in their opinion, often due to lack of consideration for qualitative efficiencies. This then has had a further effect on the industry with organisations less likely to pursue agreements of this type.

Another respondent to the case study interviews outlined some costs associated with the Horizontal Guidelines in their own industry, the retail sector. The respondent explained that under the current guidelines independent retail groups are at a competitive disadvantage when compared with integrated groups in the market. Under the current guidelines when these groups are not identified as single economic entities, they are not able to make optimal use of their sharable benefits. The lack of clarity in relation to how these groups are classified creates uncertainty in the legality of cooperation in key areas such as joint marketing, common pricing, joint purchasing and store chain planning and coordination.

The lacunae in the Guidelines, this respondent argues, can have a dampening effect on business practices that would be pro-competitive. In particular, the joint commercialisation in the case of independent retail groups would allow them to compete with integrated retailers and retail tech giants who are able to freely coordinate prices across retail locations, as well as product ranges, service levels and share information across their entire retail operations without any constraints.

A specific area of cost mentioned by this respondent relates to the complexity and inefficiencies in setting up a website for consumers to shop from members of the group. Because there can be no agreement on prices, the restrictions on these websites so that they remain legal make them costly and unwieldy. Furthermore, these groups are dependent on expert legal guidance to navigate these restrictions, and thus incur costs in the form of legal fees and time spent on assessing these issues.

Conclusions

Overall, the respondents with experience of commercialisation agreements in a horizontal setting indicated that the costs associated with the Horizontal Guidelines in the context of commercialisation agreements outweigh the benefits.

As abovementioned, most of the stakeholders providing their views on the efficiency of the Horizontal Guidelines in the context of commercialisation agreements were unable to provide quantitative evidence on their costs: therefore, the findings and the conclusions shall be considered as representative of a very small sample of respondents and their robustness is limited.

7.1.7. Standardisation agreements

Sample of respondents per research tool

Table 76: Efficiency - Sample of respondents per research tools – Standardisation agreements[184]

Efficiency – Standardisation agreements		
Tool	**# answers**	**Research questions/topics covered**
CATI	45	• Main sources of cost when using the Horizontal Guidelines for the self-assessment of standardisation agreements
In-depth interviews	28	• Main sources of cost for undertakings and members of trade associations when verifying the compliance of standardisation agreements when conducting the self-assessment using the Horizontal Guidelines
OPC	28	• Different types of costs of applying the current Horizontal Guidelines • Quantification of costs (e.g. estimate of quantifiable costs in terms of value and as a percentage of annual turnover) • Evolution of costs compared to the previous version of the Horizontal Guidelines • Benefits of Horizontal Guidelines; • Proportionality of costs of the Horizontal Guidelines compared to benefits

[184] *For an in-depth description of the sample of respondents, see Section 6.2, Table 36 on standardisation agreements*

Main findings

The following paragraphs summarise the main findings, gathered through the different research tools (CATI, OPC, in-depth interviews), which lead to our overall answer to the evaluation question (Section 7.1.16.3.1).

Standardisation agreements are very important for companies that invest strongly in R&D as they affect their future revenues from the licensing of IPRs. These developers are also members of some Standards Developing Organisations (SDOs) and will take part in discussions around developing standards.

Typically, SDO rules are checked for compliance with the Horizontal Guidelines at the time of their formation. For SDOs that have been established for a long time, the guidance is already incorporated in the way they operate. Since new SDOs are frequently formed, the Horizontal Guidelines continue to play a crucial role. The Horizontal Guidelines provide a balance between the patenting rights that arise from successful R&D investments and the granting of wide access to the underlying technologies.

Benefits

Some respondents consider that the guidance and the examples in the Horizontal Guidelines in relation to standardisation agreements are extremely important and particularly valuable. The Horizontal Guidelines are a first port of call for their legal teams.

As mentioned above, the Horizontal Guidelines are also an exceptionally important template for the IPR policy that SDOs implement. The stage at which the Horizontal Guidelines become most important is after the development of the standards and at the time of licensing the SEPs.

Standardisation agreements are vitally important for the smaller (SME) technology companies operating at the upper levels of technology supply chains.

Some respondents believe that the Horizontal Guidelines reduce SDOs' legal costs because they facilitate compliance assessments. These costs are incurred at the time the SDO is set-up. Afterwards, there is rarely any need for further assessments.

Costs

Some respondents do not consider that the Horizontal Guidelines provide adequate guidance on standardisation agreements, in light of the uncertainty around licensing obligations of a SEP holder, along the supply chain of a given technology product.

One technology SME indicated that this type of licensing uncertainty gives rise to costs and has a dampening effect on innovation. In particular, because the Horizontal Guidelines do not provide guidance on this issue, any product developer using technology inputs faces the risk that the SEP holder will ask them to obtain a license. The uncertainty around the conditions, along the value chain, under which such licensing might be offered by the SEP holder, makes the pursuit of new projects in these circumstances difficult for the business.

Furthermore, to determine whether certain inputs will raise licensing issues can be quite complex and costly. Reviewing IPR issues is a big cost, and it may require hiring external consultants. Furthermore, it distracts from the technology SME's core work. Therefore, an SME is likely to not undertake a project if there is uncertainty regarding licensing.

Several respondents identified a concern with the use of the expression "to all third parties" in a sentence in paragraph 285 of the Horizontal Guidelines.[185] They indicate that this sentence gives rise to different interpretations of the Horizontal Guidelines and a high level of uncertainty for businesses.

According to some respondents, the wider risk that can result from the uncertainty created by paragraph 285 is that it may turn companies away from open standards and jeopardise

[185] *"In order to ensure effective access to the standard, the IPR policy would need to require participants wishing to have their IPR included in the standard to provide an irrevocable commitment in writing to offer to license their essential IPR to all third parties on fair, reasonable and non-discriminatory terms ('FRAND commitment')."*

the open standards regime that currently prevails, in favour of proprietary platforms.[186] These are individual ecosystems that do not interoperate, and an outcome that would likely be much worse for consumers than the current situation of interoperability.

It was also pointed out that the requirements of unrestricted access, in the context of standard development, in paragraph 281 of the Horizontal Guidelines can give rise to costs. In certain cases, it may be unworkable or overly burdensome that all competitors in all affected markets participate in the process leading to the selection of the standard. The right of third parties to participate should be balanced against the risk that this is abused by companies wishing to block a standardisation process not aligned with their commercial interests. Concurrently, paragraph 295 of the Horizontal Guidelines could be further developed and the criteria for exception to unrestricted participation could be made clearer while not implying a heavy burden of proof.

According to respondents, the framework in the Horizontal Guidelines is likely to lead to lengthy and somewhat cumbersome processes, implying additional costs. Some market participants may be reluctant to take part and may prefer to reach arrangements outside the framework of SDOs. Yet, the Horizontal Guidelines do not seem to encompass this possibility or provide guidance in that respect. One respondent also pointed out that, while the primary purpose of FRAND requirements is to prevent SEPs holders from demanding excessively high royalties - a practice that has been referred to as patent 'hold-up', and which could affect implementers after they are locked into a standard - the Horizontal Guidelines should also take into consideration the reverse problem, i.e. opportunistic refusals by implementers to agree on royalties vis-à-vis FRAND-abiding patent holders. This 'reverse hold-up', or 'hold-out', has the potential to depress prices, increase litigation and reduce incentives to invest in standard related innovations.[187]

One other response noted that the current guidelines do not cover the development of open-source software (OSS), arguing that this is an important lacuna of the guidance. The result of this omission is that development of OSS lacks the kind of safeguards associated with standardisation and requires additional costs. For example, OSS development is not necessarily open to all, and OSS development frequently lacks transparency and competitive peer review type voting. The result may be OSS development that does not lead to vigorous competition on the technology/innovation level. Without Guidelines-type safeguards, OSS development is prone to potential infringements of Article 101. Additional guidance relating to OSS development would therefore be welcomed, and probably best addressed by an extension of Chapter 7 of the current Horizontal Guidelines.

Several responses note that the Horizontal Guidelines do not sufficiently distinguish between the separate steps of standard development and their implementation, which they feel comes as a cost to them.

Another response indicated that the examples provided, while helpful in terms of compliance assessments, ought to be expanded to cover more realistic situations in technology markets. The current examples are too stylised and difficult to apply to a companies' real-world situation, which implies additional costs.

Assessment of costs of the Horizontal Guidelines

One respondent identified the following categories of costs as most relevant in assessing competition compliance of standardisation agreements: legal fees, compliance costs, delays in implementation and contract negotiations. Legal fees and compliance costs can refer to the use of in-house legal team's time.

[186] To clarify, the point is being made from the perspective of those that hold licences. They feel that if they are forced to license at the very upstream level, they will receive inadequate compensation for their IP. In such circumstances, they may prefer to have closed standards in which case they incur no obligation to license.

[187] In *Unwired Planet International Ltd. v. Huawei Technologies Ltd.* [2017] EWHC 711, the English courts highlighted that FRAND commitments are not only meant to address hold up problems, but also to strike a fair balance between the conflicting interests of licensees and licensors. Namely, FRAND commitments must ensure a proper reward for innovation, avoid holdup, and prevent holdout. (See also Colangelo, G. and G. Scaramuzzino G. (2019) "*Unwired Planet Act 2: the return of the FRAND range*", European Competition Law Review 40:306.) In the same vein, the Court of Appeal of The Hague (*Koninklijke Philips N.V. v. Asustek Computers Inc.*, (2019) C/09/512839 / HA ZA 16-712, para. 4.180.) detailed the tactics deployed by the defendant in order to avoid taking a license and stated that, because of implementer's unwillingness, the SEP holder was not obligated to make a FRAND-offer.

One SME respondent operating in a technology sector reported that they do not undertake assessments of compliance with the Horizontal Guidelines. However, the respondent spoke of the process of assessing whether potential inputs have the appropriate licensing. This process has in the past involved seeking external legal support to investigate the licensing issue. The process was both time-consuming and costly. They sought to assess the licensing status of particular inputs in a project they were planning to develop. The consultants spent considerable resources over several months and were unable to provide a conclusive answer. The SME abandoned the project. They no longer seek external legal support for such matters due to their experience in this case. This anecdotal reference reflects a potential for important costs associated with the current level of uncertainty about the obligation to license contained in paragraph 285 of the Horizontal Guidelines. Since it is not clear to stakeholders at what level the supply chain the obligation to license is imposed, users of inputs that contain SEPs face uncertainty as to the licensing requirements. Since the risk of using unlicensed IP is likely to be considered too high for an SME company to bear, this uncertainty is a significant deterrent to downstream innovation and product development.

In the previously mentioned example where one respondent employed external legal support to provide help with licensing issues the total cost was over EUR 20 000. The case took two months, at the end of which the law firm did not have a definitive answer for this respondent.

Conclusions

The comments received in relation to costs and benefits of the Chapter on standardisation agreements in the Horizontal Guidelines were coloured by the controversy surrounding licensing conditions, which opposes SEP holders to implementers. Against relatively few specific benefits, several sources of cost were identified: the requirements of unrestricted access in paragraph 281 of the Horizontal Guidelines, the absence of guidance on open source software development; the lack of examples better reflecting real-world market situations; and the absence of a stronger presumption of legality of standardisation agreements.

7.2. Would the costs of ensuring compliance of horizontal cooperation agreements with Article 101 of the Treaty have increased if no HBERs had been in place?

7.2.1. Summary and overall answer to the evaluation question

The potential effect on costs for business operators in the hypothetical scenario where no HBERs had been in place was discussed with all consulted stakeholders: in the first place, the OPC launched by the Commission included questions asking participants to indicate if costs would increase, remain the same or decrease were the HBERs not being in place. Results[188] show that – while most participants would not be able to provide an answer – a third of them would assume that costs for companies would be higher.

A similar question was also asked to NCAs in the survey launched by the Commission in the framework for the evaluation of the HBERs[189]. While most NCAs have not provided an assessment of this question, some consider that the costs would increase if the HBERs and the Horizontal Guidelines were not in place because the companies would have additional expenses for legal counsel. The lack of harmonisation and subsequent need to comply with different requirements in the different national jurisdictions would also increase costs. For the NCAs themselves, none of them could provide concrete figures on costs but they nonetheless estimated that costs for ensuring compliance of horizontal cooperation

[188] *Factual summary of the contributions received during the public consultation on the evaluation of the two block exemption regulations and the guidelines on horizontal cooperation agreements. Results available at: https://ec.europa.eu/competition/consultations/2019_hbers/HBERs_consultation_summary.pdf*

[189] *Summary of the contributions of National Competition Authorities to the evaluation of the R&D and the Specialisation Block Exemption Regulations and the Commission Guidelines on Horizontal Cooperation Agreements. Results available at: https://ec.europa.eu/competition/consultations/2019_hbers/NCA_summary.pdf*

agreements with competition rules would increase if the HBERs and the Horizontal Guidelines were not in place.

The topic was also discussed by the research team during interviews with businesses and business organisations[190] and in the case studies dedicated to the aspects of efficiency of the regulations and the guidelines (see Annex II – Case Studies).

Evidence from the in-depth and CAT-interviews reveals that, although the R&D BER adds value, it is seen by some respondents as too conservative and this may have the effect of limiting innovation and productivity. Despite some grey areas (e.g. the definitions of 'actual' and 'potential' competitors) generating uncertainty and ultimately increasing legal costs, the overall opinion gathered across the research tools is that without the R&D BER in place the costs of ensuring compliance would be definitely higher.

The R&D BER also leaves some uncertainty as to its applicability to R&D agreements that involve the combination of existing technologies and/or products already developed. For one respondent, this uncertainty entails costs by increasing the legal risks associated with certain R&D activities.

Respondents also suggested that lack of clarity in relation to the stage of innovation at which competition assessments take place, for example whether only at the stage where parties are close to production, creates uncertainty and can have dampening effects on investments.

One respondent identified the benefits brought about by the safe harbour market share rules in the HBERs. The safe harbour rules provide an increase in legal certainty, without which costs in terms of legal fees associated with compliance assessment would rise.

Generally, the respondents enquired in this study through the different research tools expressed similar views concerning the Specialisation BER. Respondents seem to acknowledge that whilst there are some flaws in the Specialisation BER, its presence did help to reduce the overall costs of compliance assessments in regard to horizontal cooperation agreements. A number of respondents noted that without its existence they would expect their costs to rise.

A respondent from the automotive sector outlined the difficulty in defining certain agreements under the current HBERs. Agreements that they said were best described as specialisation agreements, could not be strictly defined as specialisation agreements under the definition in the Specialisation BER. Thus, sometimes these opportunities were foregone as they did not fall neatly into the BER definition.

However, the respondent did also note certain benefits of the HBERs, in particular they noted that the Specialisation BER is clear and they stated that it saves time for their legal department when it comes to compliance assessment. The same could be said for R&D assessments in some cases where the conditions are easy to apply, but the respondent stated that this is not always the case.

Another respondent experienced similar issues with categorising agreements under the Specialisation BER, similar to the aforementioned issue above. The respondent has experienced difficulty in applying the Specialisation BER to subcontracting agreements that their company frequently engage with. Due to the lack of clarity in the BER, it is unclear to the respondent whether these types of agreements may qualify for the exemption and thus costs rise in compliance assessments for agreements of this type.

The respondent did note that the HBERs clear-cut rules on certain aspects were beneficial and provided time and cost-saving benefits in regard to compliance assessments.

The respondents to the case study interviews provided further context on whether the costs would rise without the presence of the HBERs. Notably one respondent explained that

[190] *The actual questions were: "Did the R&D BER in combination with the Horizontal Guidelines generated to your company considerable cost savings when assessing compliance with the EU antitrust regulatory framework as compared to a hypothetical alternative situation with only the Horizontal Guidelines in place?" and "Did the Specialisation BER in combination with the Horizontal Guidelines generated to your company considerable cost savings when assessing compliance with the EU antitrust regulatory framework as compared to a hypothetical alternative situation with only the Horizontal Guidelines in place?"*

the HBERs provide additional legal certainty which has the potential to save businesses time and money when assessing their agreements.

7.3. Have the costs generated by the application of the HBERs and the Horizontal Guidelines increased as compared to the previous legislative framework (Commission Regulations (EC) No 2658-2659/2000 and related Horizontal Guidelines)?

Main findings

The evaluation question aims at estimating the impact on costs generated by the current HBERs and the Horizontal Guidelines in comparison to the previous regulatory framework. This topic was addressed with all the consulted stakeholders and via several means.

First of all, this question was asked in both the OPC and the survey to NCAs launched by the Commission in late 2019 in the framework of the evaluation of the HBERs and the Horizontal Guidelines. The large majority of the participants to the OPC (67 out of 77) could not reply to the specific question, while seven believed that costs have increased – i.e. due to an increased complexity of rules or because of the effort needed to find out whether they meet the exemption requirements - three considered that costs have decreased thanks to a greater clarity and ease of application.

Most NCAs were not able to assess how the costs generated by assessing horizontal cooperation agreements under the HBERs and the Horizontal Guidelines have evolved. Some NCAs nevertheless consider that the assessment costs for companies have decreased due to the increased legal certainty provided by the HBERs and Guidelines: however, it is worth noting that this consideration from the NCAs could not be further detailed with concrete examples and quantifiable evidence.

One case study respondent with experience of the previous regime explained that the costs of compliance, in relation to applying the HBERs and the Horizontal Guidelines, have fallen since the introduction of the current framework. They explained that they found the current framework easier to apply, which has generally led to a reduction in the associated costs.

More specifically, the respondent noted that the introduction of a chapter on information exchange in the current version was an improvement. The previous framework required more time being spent looking at case law and other sources leading to an overall greater amount of time spent in the self-assessment process, than under the current framework.

Conclusions

The majority of respondents that spoke to the research team were unable to compare the current framework with the previous legal regime. This was largely due to respondents being relatively new to their roles, i.e. none of the respondents that spoke to the research team had been in their roles before the current legal framework came into action.

Several of the respondents did however compare the current guidance to a counterfactual scenario whereby neither the HBERs nor the Horizontal Guidelines were present. In this case, assessments would need to be made solely using information in Article 101 of the Treaty. Respondents indicated that they believed such a scenario would result in a significant rise in compliance assessment costs.

However, the participants to the CATI and in-depth interviews were not able to provide a comparison of the costs with between the two legislative frameworks. This is mostly due to a lack of quantitative evidence (i.e. businesses hardly collect data on this very specific source of cost) and to the fact that most of respondents were not able to gather this information: very often, the respondents' tenure in a certain company was much shorter than the time span between the previous and the current version of the HBERs and of the Horizontal Guidelines.

8. Annex I – Results of the CATI survey

8.1. General questions

Table 77: Which of the following types of horizontal cooperation have you participated in the last 10 years with competing or potentially competing companies?

Agreement type	Number of respondents	%
Commercialisation	69	23,0%
Information exchange	76	25,3%
Joint purchasing	64	21,3%
Others (see General - Column AB)	39	13,0%
Production/specialisation	72	24,0%
Research and development	66	22,0%
Standardisation	45	15,0%
Sustainability	51	17,0%

Table 78: Correlation statistics

Additional correlation statistics	Number of respondents	%
Average number of partners across all agreements and respondents	3,28	
Average number of partners respondents have agreements with:	7,09	
# with at least 2 types of agreement	167	55,7%
# with at least 3 types of agreement	11	3,7%
# with at least 4 types of agreement	4	1,3%

Table 79: Has the number of horizontal cooperation agreements changed over the last 10 years in your sector?

Answer	Number of respondents	%
Yes, the number of some agreements decreased	40	13%
Yes, the number of some agreements increased	118	39%
Don't know	35	12%
No	107	35%

Table 80: Which are the types of horizontal cooperation agreements that have become more common in your sector in the last ten years? (multiple choice)

Answer	Number of respondents	%
Commercialisation agreements	36	30,5%
Other, please specify	3	2,5%
Information exchange practices (also within other types of agreements)	34	28,8%
Joint purchasing agreements	42	35,6%
R&D agreements	30	25,4%
Standardisation agreements	24	20,3%
Production/specialisation agreements	24	20,3%
Agreements concerning environmental aspects or other sustainability goals	32	27,1%

Table 81: In your opinion, did climate change and its related sustainability goals change the market your company is active in?

Answer	Number of respondents
Yes, it encouraged sustainable, ethical and environmental-friendly business practices	66
Yes, other reasons	25
Yes, increased demand for environmental-friendly products	64

Answer	Number of respondents
No	27

Table 82: Over the last 10 years, did you witness a major change in the traditional competitive structures (e.g. a blurring of the line between horizontal and vertical ones) that could concern horizontal cooperation agreements?

Answer	Number of respondents	%
Yes	61	38,6%
No	97	61,4%

Table 83: Do you think that recent market developments and business realities had a negative impact on the legal certainty of the current rules on horizontal cooperation agreements?

Answer	Number of respondents	%
Yes	33	11,0%
No	267	89,0%

Table 84: In your view, do the Horizontal Guidelines provide companies with clear rules to identify which chapter of the Horizontal Guidelines applies to horizontal cooperation agreements where different types of cooperation are combined?

Answer	Number of respondents	%
Yes	68	40,7%
No	50	29,9%
I don't know	49	29,3%

8.2. Questions on R&D Agreements

Table 85: The cooperation that your company has in place concerns: (multiple choice)

Answer	Number of respondents	%
Already existing products	19	28,4%
Already existing technologies	26	38,8%
The development of new products ("R&D efforts")	34	50,7%
The development of new technologies ("R&D efforts")	26	38,8%
Hybrid agreements (between improvement of existing products and new products)	23	34,3%
Hard to define	7	10,4%

Table 86: Have you ever consulted the R&D Block Exemption Regulation to check if an agreement benefits from the exemption from competition rules?

Answer	Number of respondents	%
Yes	23	34,3%
No	44	65,7%

Table 87: Key strengths of R&D Block Exemption Regulation

In your view, what are the strengths of the R&D Block Exemption Regulation?	N. of answers
Facilitates self-assessment through a clear and comprehensive set of requirements for exemption	11
Ensures consistency of the application of EU competition rules to horizontal R&D cooperation agreements across Member States	8
There is less need for external legal support when there is a block exemption regulation	6
I don't know	2

In your view, what are the strengths of the R&D Block Exemption Regulation?	N. of answers
None of the above	1

Table 88: How often do you consult the Horizontal Guidelines with respect to the implementation of R&D agreements? (multiple choice)

Answer	Number of respondents	%
Occasionally (once or twice per year)	19	82,6%
Frequently (several times per year)	4	17,4%

Table 89: Are the Horizontal Guidelines helpful in identifying potential competition concerns related to R&D agreements? (multiple choice)

Answer	Number of respondents	%
Yes	20	87,0%
No	3	13,0%
I don't know	0	0,0%

Table 90: Are the Horizontal Guidelines helpful in identifying potential efficiencies related to R&D agreements? (multiple choice)

Answer	Number of respondents	%
Yes	21	91,3%
No	2	8,7%
I don't know	0	0,0%

Table 91: How much legal certainty do the Horizontal Guidelines provide to your company in establishing and implementing R&D agreements? (multiple choice)

Answer	Number of respondents	%
1 - no certainty	1	4,3%
2 - low certainty	0	0,0%
3 - neutral opinion	5	21,7%
4 - adequate certainty	11	47,8%
5 - high certainty	5	21,7%
I don't know	1	4,3%

Table 92: Feedback on the Horizontal Guidelines

In your view, which of the following statements best reflects your opinion of the Horizontal Guidelines in establishing R&D agreements?	N. of answers
Without the Horizontal Guidelines, it would be extremely difficult to establish or implement R&D agreements	17
The Horizontal Guidelines provide a useful guidance, but they are not sufficiently detailed and further legal counsel is needed.	4
The Horizontal Guidelines provide very little or no support at all	1
I don't know	1

Table 93: Which of the following factors related to the R&D Block Exemption Regulation together with the Horizontal Guidelines might be discouraging R&D cooperation (max 2 options): (multiple choice)

Answer	Number of respondents	%
Technical complications (i.e. calculating the market shares)	7	30,4%
I don't know	9	39,1%
Need for external support in our self-assessment	3	13,0%

Answer	Number of respondents	%
Lack of legal certainty and risk of possible fines	3	13,0%
Administrative and legal burden related to the self-assessment	2	8,7%
I don't know	9	39,1%

Table 94: Which of the following (max 3) are, in your opinion, the main sources of cost when using the Horizontal Guidelines and the R&D BER for the self-assessment of R&D cooperation agreements? (multiple choice)

Answer	Number of respondents	%
Administrative costs	7	30,4%
Costs of abandoning projects due to legal uncertainty	2	8,7%
Cost of external legal advice	8	34,8%
Costs of delays caused by legal uncertainty	1	4,3%
Cost of internal legal advice	1	4,3%
Cost of economic consultants	7	30,4%
I don't know	4	17,4%

Table 95: Do you have R&D agreements that are combined with other types of horizontal cooperation (cooperation with the same parties serving the same business objectives)

Answer	Number of respondents	%
Yes	23	34,3%
No	38	56,7%
I don't know	6	9,0%

8.3. Questions on Specialisation Agreements

Table 96: Have you ever consulted the Specialisation Block Exemption Regulation to check whether an agreement benefits from the exemption from competition rules?

Answer	Number of respondents	%
Yes	14	20,0%
No	56	80,0%

Table 97: In your view, what are the strengths of the Regulation?

Answer	Number of respondents	%
Facilitates self-assessment through a clear and comprehensive set of the requirements for exemption	8	57,1%
Ensures consistency of the application of EU competition rules to horizontal specialisation agreements across EU Member	5	35,7%
There is less need for external legal support when there is a block exemption regulation	1	7,1%
There is less need for external legal support when there is a block exemption regulation	1	7,1%
None of the above	1	7,1%

Table 98: Which of the following activities (max 3) are, in your opinion, the main sources of difficulty when verifying whether your production cooperation is exempted under the Specialisation BER?

Answer	Number of respondents	%
Understanding of definitions that apply for specialisation agreements that can benefit from the exemption	6	42,9%
Calculating the relevant market shares	2	14,3%
Understanding the conditions for exemption	4	28,6%
Identification of relevant markets affected by the agreement	3	21,4%
Understanding the hardcore restrictions	1	7,1%

Answer	Number of respondents	%
I don't know	1	7,1%

Table 99: Have you ever consulted the Horizontal Guidelines of the European Commission for guidance on the establishment or implementation of a production/specialisation agreement?

Answer	Number of respondents	%
Yes	15	21,4%
No	55	78,6%

Table 100: How often do you consult the Horizontal Guidelines with respect to the implementation of production/specialisation agreements?

Answer	Number of respondents	%
Occasionally (once or twice per year)	13	87%
Frequently (several times per year)	2	13%

Table 101: Are the Horizontal Guidelines helpful in identifying potential competition concerns related to production/specialisation agreements?

Answer	Number of respondents	%
Yes	12	80,0%
No	2	13,3%
I don't know	1	6,7%

Table 102: Are the Horizontal Guidelines helpful in identifying potential efficiencies related to production/specialisation agreements?

Answer	Number of respondents	%
Yes	12	80%
No	2	13%
I don't know	1	6,7%

Table 103: In your view, which of the following statements best reflects your opinion of the Horizontal Guidelines in establishing production/specialisation agreements?

Answer	Number of respondents	%
Without the Guidelines, it would be extremely difficult to establish or implement production/specialisation agreements	8	53,3%
The Horizontal Guidelines provide a useful guidance, but they are not sufficiently detailed and further legal counsel is required	6	40,0%
The Horizontal Guidelines provide very little or no support at all	1	6,7%

Table 104: In your view, without the Specialisation Block Exemption Regulation, would the Horizontal Guidelines provide sufficient guidance to establish and implement production/specialisation agreements compliant with Article 101?

Answer	Number of respondents	%
Yes	6	40,0%
No	3	20,0%
I don't know	6	40,0%

Table 105: Do you believe the Specialisation Block Exemption Regulation together with the Horizontal Guidelines might discourage certain production/specialisation agreements?

Answer	Number of respondents	%
Yes	6	40,0%
No	6	40,0%
I don't know	3	20,0%

Table 106: Do you believe the Specialisation Block Exemption Regulation together with the Horizontal Guidelines might discourage certain production/specialisation agreements?

Answer	Number of respondents	%
Need for external support in our self-assessment	5	41,7%
Technical complications (i.e. calculating the market shares)	3	25,0%
Administrative and legal burden related to the self-assessment	3	25,0%
Lack of legal certainty and risk of possible fines	2	16,7%
Other	1	8,3%

Table 107: Which of the following (max 3) are, in your opinion, the main sources of cost when using the Horizontal Guidelines and the Specialisation BER for the self-assessment of production/specialisation agreements?

Answer	Number of respondents	%
Administrative costs	4	26,7%
Cost of economic consultants	6	40,0%
Cost of internal legal advice	2	13,3%
Cost of external legal advice	4	26,7%
Costs of delays caused by legal uncertainty	1	6,7%
Costs of abandoning projects due to legal uncertainty	1	6,7%
I don't know	1	6,7%

Table 108: Do you have production/specialisation agreements that are combined with other types of horizontal cooperation (cooperation with the same parties serving the same business objectives)

Answer	Number of respondents	%
Yes	14	20,0%
No	54	77,1%
I don't know	2	2,9%

8.4. Questions on Information Exchange Agreements

Table 109: How is the information exchanged?

Answer	Number of respondents	%
Directly with the other party/ies to the arrangement;	53	72,6%
Through a third party (e.g. a trade association, customer, supplier or online platform);	30	41,1%

Table 110: Have you ever consulted the Horizontal Guidelines of the European Commission for guidance on exchange of information?

Answer	Number of respondents	%
Yes	13	17,8%
No	60	82,2%

Table 111: How often do you consult the Horizontal Guidelines with respect to exchange of information?

Answer	Number of respondents	%
Occasionally (once or twice per year)	10	77%
Frequently (several times per year)	3	23%

Table 112: Are the Horizontal Guidelines helpful in identifying potential competition concerns related to exchange of information?

Answer	Number of respondents	%
Yes	9	69,2%
No	4	30,8%

Table 113: Are the Horizontal Guidelines helpful in identifying potential efficiencies related to exchange of information?

Answer	Number of respondents	%
Yes	11	85%
No	2	15%

Table 114: How much legal certainty do the Horizontal Guidelines provide to your company in establishing and implementing information exchange agreements? (multiple choice)

Answer	Number of respondents	%
1 - no certainty	0	0
2 - low certainty	1	7,7%
3 - neutral opinion	2	15,4%
4 - adequate certainty	6	46,2%
5 - high certainty	4	30,8%
I don't know	0	0

Table 115: In your view, which of the following statements best reflects your opinion of the Horizontal Guidelines regarding exchange of information?

Answer	Number of respondents	%
Without the Guidelines, it would be extremely difficult to exchange information	7	53,8%
The Horizontal Guidelines provide a useful guidance, but they are not sufficiently detailed and further legal counsel is	3	23,1%
The Horizontal Guidelines provide very little or no support at all	3	23,1%

Table 116: Are there types of information that, in your view, should be allowed to be exchanged but are currently not allowed?

Answer	Number of respondents	%
Yes	4	30,8%
No	9	69,2%
I don't know	0	0,0%

Table 117: Do you believe the Horizontal Guidelines might discourage certain types of information exchanges?

Answer	Number of respondents	%
Yes	1	7,7%
No	8	61,5%
I don't know	4	30,8%

Table 118: Which of the following (max 3) are, in your opinion, the main sources of cost when using the Horizontal Guidelines for the self-assessment of information exchanges?

Answer	Number of respondents	%
Cost of external legal advice	7	53,8%
Costs of delays caused by legal uncertainty	4	30,8%
Administrative costs	3	23,1%
Cost of economic consultants	3	23,1%
Cost of internal legal advice	2	15,4%

Answer	Number of respondents	%
Costs of abandoning projects due to legal uncertainty	2	15,4%
I don't know	1	7,7%

Table 119: Do you have information exchange agreements that are combined with other types of horizontal cooperation (cooperation with the same parties serving the same business objectives)

Answer	Number of respondents	%
Yes	9	12,3%
No	59	80,8%
I don't know	5	6,8%

8.5. Questions on Joint Purchasing Agreements

Table 120: The joint purchasing agreement you have in place with your business partner(s) operates through (multiple choice)

Answer	Number of respondents	%
Requires you and your partner(s) to purchase at least a minimum volume through the agreement;	25	39,1%
Does not provide any indication to you and your partner(s) on the volume to purchase through the agreement	19	29,7%
Requires you and your partner(s) to purchase a well-defined volume through the agreement;	20	31,3%
Allows you and your partner(s) to purchase from the same supplier(s) also outside the agreement;	32	50,0%
Requires you and your partner(s) to purchase from certain suppliers only through the agreement;	30	46,9%
I don't know/don't want to say	3	4,7%

Table 121: The joint purchasing agreement you have in place with your business partner(s) operates through (multiple choice)

Answer	Number of respondents	%
A company in which you and your partner(s) hold non-controlling stakes;	23	35,9%
The creation of a company jointly controlled by you and your partner(s);	32	50,0%
Other types of contractual arrangements (please specify)	5	7,8%
I don't know / don't want to say	6	9,4%

Table 122: The joint purchasing agreement you have in place with your business partner(s) concerns purchasing:

Answer	Number of respondents	%
In the whole of the EU	18	28,2%
Within one country;	45	70,3%
I don't know/don't want to say	1	1,6%

Table 123: Have you ever consulted the Horizontal Guidelines of the European Commission for guidance on the establishment and implementation of joint purchasing agreements?

Answer	Number of respondents	%
Yes	13	20,3%
No	51	79,7%

Table 124: How often do you consult the Horizontal Guidelines with respect to the implementation of joint purchasing agreements?

Answer	Number of respondents	%
Occasionally (once or twice per year)	11	84,6%
Frequently (several times per year)	2	15,4%

Table 125: Are the Horizontal Guidelines helpful in identifying potential competition concerns related to joint purchasing agreements?

Answer	Number of respondents	%
Yes	8	62%
No	5	38%

Table 126: Are the Horizontal Guidelines helpful in identifying potential efficiencies related to joint purchasing agreements?

Answer	Number of respondents	%
Yes	7	53,8%
No	5	38,5%
I don't know	1	7,7%

Table 127: How much legal certainty do the Horizontal Guidelines provide to your company in establishing joint purchasing agreements? (multiple choice)

Answer	Number of respondents	%
1 - no certainty	0	0
2 - low certainty	2	15,4%
3 - neutral opinion	4	30,8%
4 - adequate certainty	6	46,2%
5 - high certainty	1	7,7%
I don't know	0	0

Table 128: In your view, which of the following sentences identifies better your opinion of the Horizontal Guidelines in the establishing joint purchasing agreements?

Answer	Number of respondents	%
The Horizontal Guidelines provide a useful guidance, but they are not sufficiently detailed and further legal counsel is	5	38,5%
Without the Guidelines, it would be extremely difficult to establish or implement joint purchasing agreements	5	38,5%
The Horizontal Guidelines provide very little or no support at all	3	23,1%

Table 129: Do you believe the Horizontal Guidelines might discourage certain joint purchasing agreements?

Answer	Number of respondents	%
Yes	5	38,5%
No	5	38,5%
I don't know	3	23,1%

Table 130: Which of the following factors related to the Horizontal Guidelines might be discouraging joint purchasing agreements (multiple choice)

Answer	Number of respondents	%
Need for external support in our self-assessment	2	40,0%
Lack of legal certainty and risk of possible fines	4	80,0%
Technical complications	1	20,0%
Administrative and legal burden related to the self-assessment	3	60,0%

Table 131: Which of the following (max 3) are, in your opinion, the main sources of cost when using the Horizontal Guidelines for the self-assessment of joint purchasing agreements? (multiple choice)

Answer	Number of respondents	%
Cost of external legal advice	9	69,2%

Answer	Number of respondents	%
Administrative costs	4	30,8%
Cost of economic consultants	4	30,8%
Costs of delays caused by legal uncertainty	5	38,5%
Costs of abandoning projects due to legal uncertainty	2	15,4%
I don't know	1	7,7%

Table 132: Do you have joint purchasing agreements that are combined with other types of horizontal cooperation (cooperation with the same parties serving the same business objectives)

Answer	Number of respondents	%
Yes	14	21,9%
No	46	71,9%
I don't know	4	6,3%

8.6. Questions on Commercialisation

Table 133: Your Commercialisation agreement concerns: (multiple choice)

Answer	Number of respondents	%
Distribution	48	70,6%
Sales	54	79,4%
Promotion	26	38,2%
After-sales services	6	8,8%

Table 134: The Commercialisation agreement you have in place with other companies is:

Answer	Number of respondents	%
Non-reciprocal	27	39,7%
Reciprocal	39	57,4%
I don't know	2	2,9%

Table 135: Have you ever consulted the Horizontal Guidelines of the European Commission for guidance on the establishment and implementation of commercialisation agreements?

Answer	Number of respondents	%
Yes	13	19,1%
No	55	80,9%

Table 136: How often do you consult the Horizontal Guidelines with respect to the implementation of commercialisation agreements?

Answer	Number of respondents	%
Occasionally (once or twice per year)	8	61,5%
Frequently (several times per year)	5	38,5%

Table 137: Are the Horizontal Guidelines helpful in identifying potential competition concerns related to commercialisation agreements?

Answer	Number of respondents	%
Yes	11	85%
No	2	15%

Table 138: Are the Horizontal Guidelines helpful in identifying potential efficiencies related to commercialisation agreements?

Answer	Number of respondents	%
Yes	11	84,6%
No	2	15,4%

Table 139: How much legal certainty do the Horizontal Guidelines provide to your company in establishing commercialisation agreements?

Answer	Number of respondents	%
1 - no certainty	0	0
2 - low certainty	1	7,7%
3 - neutral opinion	2	15,4%
4 - adequate certainty	7	53,8%
5 - high certainty	3	23,1%
I don't know	0	0

Table 140: In your view, which of the following sentences identifies better your opinion of the Horizontal Guidelines in establishing commercialisation agreements?

Answer	Number of respondents	%
Without the Guidelines, it would be extremely difficult to establish or implement commercialisation agreements	10	76,9%
The Horizontal Guidelines provide a useful guidance, but they are not sufficiently detailed and further legal counsel is	2	15,4%
The Horizontal Guidelines provide very little or no support at all	1	7,7%

Table 141: Do you believe the Horizontal Guidelines might discourage certain commercialisation agreements?

Answer	Number of respondents	%
Yes	5	38,5%
No	6	46,2%
I don't know	2	15,4%

Table 142: Which of the following factors related to the Horizontal Guidelines might be discouraging commercialisation agreements (multiple choice)

Answer	Number of respondents	%
Need for external support in our self-assessment	3	60,0%
Lack of legal certainty and risk of possible fines	3	60,0%
Administrative and legal burden related to the self-assessment	2	40,0%
Technical complications	1	20,0%

Table 143: Which of the following (max 3) are, in your opinion, the main sources of cost when using the Horizontal Guidelines for the self-assessment of commercialisation agreements? (multiple choice)

Answer	Number of respondents	%
Cost of internal legal advice	3	23,1%
Administrative costs	3	23,1%
Cost of economic consultants	5	38,5%
Costs of delays caused by legal uncertainty	2	15,4%
Cost of external legal advice	3	23,1%
Costs of abandoning projects due to legal uncertainty	2	15,4%
I don't know	2	15,4%

Table 144: Do you have commercialisation agreements that are combined with other types of horizontal cooperation (cooperation with the same parties serving the same business objectives)

Answer	Number of respondents	%
Yes	14	20,6%
No	52	76,5%
I don't know	2	2,9%

8.7. Questions on Standardisation Agreements

Table 145: Have you ever consulted the Horizontal Guidelines of the European Commission for guidance on the establishment and implementation of standardisation agreements?

Answer	Number of respondents	%
Yes	13	28,9%
No	32	71,1%

Table 146: How often do you consult the Horizontal Guidelines with respect to the implementation of standardisation agreements?

Answer	Number of respondents	%
Occasionally (once or twice per year)	7	53,8%
Frequently (several times per year)	6	46,2%

Table 147: Are the Horizontal Guidelines helpful in identifying potential competition concerns related to standardisation agreements?

Answer	Number of respondents	%
Yes	11	84,6%
No	2	15,4%

Table 148: Are the Horizontal Guidelines helpful in identifying potential efficiencies related to standardisation agreements?

Answer	Number of respondents	%
Yes	11	84,6%
No	2	15,4%

Table 149: How much legal certainty do the Horizontal Guidelines provide to your company in establishing standardisation agreements?

Answer	Number of respondents	%
1 - no certainty	0	0,0%
2 - low certainty	3	23,1%
3 - neutral opinion	3	23,1%
4 - adequate certainty	4	30,8%
5 - high certainty	3	23,1%
I don't know	0	0

Table 150: In your view, which of the following statements best reflects your opinion of the Horizontal Guidelines in the implementation of standardisation agreements?

Answer	Number of respondents	%
The Horizontal Guidelines provide very little or no support at all	3	23,1%
Without the Guidelines, it would be extremely difficult to implement standardisation agreements	5	38,5%
The Horizontal Guidelines provide a useful guidance, but they are not sufficiently detailed and further legal counsel is	5	38,5%

Table 151: Do you believe the Horizontal Guidelines might discourage certain standardisation agreements?

Answer	Number of respondents	%
Yes	5	38,5%
No	4	30,8%
I don't know	4	30,8%

Table 152: Which of the following factors related to the Horizontal Guidelines might be discouraging standardisation agreements (max 2 options)

Answer	Number of respondents	%
Lack of legal certainty and risk of possible fines	5	100,0%
Need for external support in our self-assessment	3	60,0%
Administrative and legal burden related to the self-assessment	2	40,0%

Table 153: Which of the following (max 3) are, in your opinion, the main sources of cost when using the Horizontal Guidelines for the self-assessment of standardisation agreements? (multiple choice)

Answer	Number of respondents	%
Cost of external legal advice	9	69,2%
Cost of economic consultants	4	30,8%
Administrative costs	3	23,1%
Cost of internal legal advice	1	7,7%
Costs of delays caused by legal uncertainty	6	46,2%
Costs of abandoning projects due to legal uncertainty	3	23,1%
I don't know	1	7,7%

Table 154: Do you have standardisation agreements that are combined with other types of horizontal cooperation (cooperation with the same parties serving the same business objectives)

Answer	Number of respondents	%
Yes	13	28,9%
No	28	62,2%
I don't know	4	8,9%

8.8. Questions on Sustainability Agreements

Table 155: Have you ever consulted the Horizontal Guidelines of the European Commission for guidance on the establishment and implementation of sustainability agreements?

Answer	Number of respondents	%
Yes	14	26,9%
No	38	73,1%

Table 156: Are the Horizontal Guidelines helpful in identifying potential competition concerns related to sustainability agreements?

Answer	Number of respondents	%
Yes	13	92,9%
No	1	7,1%

Table 157: Do Horizontal Guidelines provide sufficient guidance for the assessment of consumer benefits resulting from sustainability agreements?

Answer	Number of respondents	%
Yes	9	64,3%

Answer	Number of respondents	%
No	4	28,6%
I don't know	1	7,1%

Table 158: How much legal certainty do the Horizontal Guidelines provide to your company in establishing sustainability agreements?

Answer	Number of respondents	%
1 - no certainty	1	7,1%
2 - low certainty	0	0,0%
3 - neutral opinion	8	57,1%
4 - adequate certainty	1	7,1%
5 - high certainty	4	28,6%
I don't know	0	0,0%

Table 159: What do you think is missing from the Horizontal Guidelines with respect to sustainability agreements? | 1st Mention

Answer	Number of respondents	%
Providing a definition of “environmental” or “sustainability” agreement with a dedicated chapter;	8	57,1%
Clarify how to assess the efficiencies achieved through sustainability agreements;	3	21,4%
Clarifying how environmental cooperation agreements can be treated as one of the other categories of horizontal cooperation	1	7,1%
Other	1	7,1%
I don't know	1	7,1%

Table 160: Do you believe the Horizontal Guidelines might discourage sustainability agreements?

Answer	Number of respondents	%
Yes	1	7,1%
No	10	71,4%
I don't know	3	21,4%

Table 161: Which of the following (max 3) are, in your opinion, the main sources of cost when using the Horizontal Guidelines for the self-assessment of sustainability agreements? (multiple choice)

Answer	Number of respondents	%
Cost of external legal advice	6	11,5%
Administrative costs	21	40,4%
Cost of internal legal advice	2	3,8%
Cost of economic consultants	18	34,6%
Costs of abandoning projects due to legal uncertainty	10	19,2%
Costs of delays caused by legal uncertainty	10	19,2%
I don't know	7	13,5%

Table 162: Do you have sustainability agreements that are combined with other types of horizontal cooperation (cooperation with the same parties serving the same business objectives)

Answer	Number of respondents	%
Yes	13	25,0%
No	29	55,8%
I don't know	10	19,2%

8.9. Other Non-covered agreements

Table 163: Have you ever consulted the European Commission's Horizontal Guidelines or the two horizontal block exemption regulations for guidance on the implementation of such other types of horizontal cooperation agreements?

Answer	Number of respondents	%
Yes	7	17,9%
No	32	82,1%

Table 164: Do you believe that the Horizontal Guidelines and the two horizontal block exemption regulations provide sufficient guidance for the previously mentioned horizontal cooperation agreements?

Answer	Number of respondents	%
Yes	6	85,7%
No, the rules need to be updated to reflect new market trends	1	14,3%

Table 165: Do you think that, outside the agreements covered by the two horizontal block exemption regulations, there are other types of horizontal cooperation agreements that would satisfy the conditions for a block exemption regulation?

Answer	Number of respondents	%
Yes	0	0,0%
No	7	100,0%

Table 166: Do you think that there are other types of horizontal cooperation agreements that should be covered by the Horizontal Guidelines?

Answer	Number of respondents	%
Yes	0	0,0%
No	7	100,0%

Table 167: Do you believe the current legal framework might discourage the establishment of non-covered horizontal cooperation?

Answer	Number of respondents	%
Yes	3	7,7%
No	25	64,1%
I don't know	11	28,2%

Table 168: Do you have a type of horizontal cooperation agreement not covered by the Guidelines that is combined with other types of horizontal cooperation (cooperation with the same parties serving the same business objectives)?

Answer	Number of respondents	%
Yes	7	17,9%
No	26	66,7%
I don't know	6	15,4%

9. Annex II – Case Studies

Case study one – medium size company; agro-chemicals sector ("AC")

Information exchange
R&D cooperation

The following information is drawn from a case study interview with a member of AC's regulatory team and from the company's website.

AC is a medium-size company active in the agro-chemical industry.

Experience with horizontal cooperation agreements

Types of agreement that AC have engaged with

Information exchange and R&D cooperation agreements are central to AC's business operations. AC operates in the "post-patent" segment of the plant protection products market. Post-patent firms develop products based on active substances that are no longer patent protected, which is usually after ten years. The active substances are developed by the larger development companies in the market. A company like AC uses the unprotected active substance and develops a new formulation based on it. The entire post-patent segment of the industry is reliant on the availability of information regarding active substances. Companies wait for these substances to become unprotected, after the ten-year patent period, before developing their own differentiated formulations of particular plant protection products.

There are many other companies active in this segment of the market. When these companies need to conduct tests on a substance before they can produce it, they will group together to co-share the costs of these tests. The companies will then share the results of these tests among them. This type of horizontal cooperation involves both information exchange and joint R&D. The information exchanged in these agreements is technical data only; no commercial data is shared among competitors.

Regulation 1107/2009 sets the approval criteria for active substances. The regulation specifies the approval procedure which the producer must submit as a dossier to the rapporteur Member State for assessment. Besides efficacy, the assessment is based on properties like mutagenicity, carcinogenity, reprotoxicity, endocrine disrupting properties, persistency and bioaccumulation. Mutual recognition of authorisations is possible. The authorisation clearly states the accepted uses of the substances and sets the necessary requirements thereof.

Most of the tests, such as tests for toxicity, are independent of the formulation. Therefore, several companies that plan to come to the market, each with their own formulation based on a common active substance, can share the tests and the test results. The results on the active substance are the ones that matter. Tests are the same regardless of formulation, hence co-development agreements are an important way to share the costs of these tests. After the tests usually only minimal changes are made. If the change is considered "major", i.e. changing 10% of the formulation, then all the tests must be repeated.

Importance for business & affected markets

The respondent described this type of agreements as absolutely crucial to AC's business. The costs of performing testing independently would be too high, thus is it crucial for AC to be able to share these costs with their competitors. The same would be said for their competitors in the same post-patent market segment, they are reliant on horizontal cooperation.

Assessments of agreements under HBERs and Horizontal Guidelines

How these assessments are made

When new agreements are proposed, AC's in-house legal team will consider all aspects of the agreements to assess their compliance with competition law. The internal lawyers will then amend aspects where necessary and discuss the agreements with lawyers from other companies. This process will proceed until they form a text which they deem to be

fully compliant with competition law. The respondent believes that this is the only significant point at which the HBERs and the Horizontal Guidelines are consulted.

Influence of HBERs / Horizontal Guidelines on agreements

Most of the staff at AC are aware of the competition law regarding these types of agreements, therefore there is very little ongoing competition law training or referring to the HBERs or the Horizontal Guidelines. As these agreements are such common place at AC they have historically been shaped based on the HBERs or the Horizontal Guidelines, but the influence of the guidance is no longer something that is felt on a day to day basis.

Proportionality of costs & benefits attributed to the HBERs & Horizontal Guidelines

Details of costs & benefits

The costs of assessment are mostly the use of the in-house legal team's time spent on assessing the compliance of potential agreements.

The European Crop Care Association, of whom AC are a member, responded to the OPC in relation to the HBERs and the Horizontal Guidelines. In their response, they identified the benefits of both the R&D and specialisation BERs of maintaining the competitiveness within the sector.

Particular difficulties with HBERs / Horizontal Guidelines

The respondent did not mention any particular difficulties with either the HBERs or the Horizontal Guidelines. AC's legal team are familiar with the regulations and guidelines in place and are comfortable applying them.

Quantification of costs

A standard compliance assessment will ordinarily occupy 2 weeks of the in-house legal team's time. AC have 4 in-house lawyers, out of a total workforce between 500 and 1000 employees. The respondent was keen to emphasise that their legal team only spend a small portion of their time on horizontal cooperation agreements. They mostly focus on issues related to access to information and patent protection abuses. These are issues that affect AC in their relation with the IPR holders.

Case study two – large company; telecoms sector ("TCS")

Standardisation agreements
R&D cooperation
Information exchanges
Joint production

The following information has been taken from publicly available documents and position papers by TCS as well as a case study interview with members of TCS's policy department and legal team, and a series of email exchanges in preparation for and in follow up to the main interview.

TCS is a large company active in the telecoms industry.

Experience with horizontal cooperation agreements

TCS has engaged in or considered engaging in a variety of different horizontal cooperation agreements, including standardisation agreements, R&D cooperation, information exchange and joint production agreements.

The most significant type of agreements that TCS engage with are standardisation agreements. TCS enters into standardisation agreements either directly or indirectly as party to discussions that take place within standard developing organisations (SDOs). All of these agreements are very important to TCS as they affect their future revenues from the licensing of IPR that results from their substantial R&D investments.

TCS is a member of several SDOs and is a founding member of some of them. If TCS joins an SDO as a founding member, they have a say about the form of standardisation agreements and the IPR policy within the SDO.

Standardisation agreements of this nature are crucial to TCS's business and indeed crucial to the entire market. TCS support open standards, i.e. those that can be used by anyone and are not owned by individuals or commercial organisations. Open standardisation means that the SDO is open to participants and to competitors. Proposals to develop standards can come from any members. Development of standards is through a consensual process and a joint technology roadmap to develop standards is agreed upon.

The standards that are developed in this context are extremely complex. For example, for a 4G mobile network to operate seamlessly across all countries and all handsets, there are huge amounts of R&D that have gone into developing the appropriate standards. These have been contributed to by many different companies. For example, ETSI (the European Telecoms Standards Institute) helped organise the work of thousands of people across a decade to develop the standards now used to make 4G (similarly for Bluetooth and Wi-Fi). Consumers do not see this process, but it brings huge value to them. It ensures that all brands work with all other brands and that the entire infrastructure works together seamlessly. The respondents believe that standards development is becoming even more important as we move towards 5G and IoT. More products are to be connected and communicating with each other.

Investment in R&D and R&D cooperation are fundamental to TCS. TCS have a global network of R&D centres, each with individual technology and competence specialties. The ecosystems around each R&D centre connect with experts on a global scale and this R&D network is further complemented by cooperation with universities and other research facilities.

Information exchanges are also relevant for TCS but they are different from other agreements since they are not based on established arrangements and rules. Information exchanges typically occur in the context of performing another function whereby exchange of information is necessary. Thus, information exchange is not the sole or even the main focus of an agreement. An example the respondents gave was information exchange in the context of a tender. During the bidding process information

may be exchanged between partners, but the main element of the agreement is the joint bidding.

Assessment of agreements under HBERs & Horizontal Guidelines

How these assessments are made

In general, all potential agreements are assessed in relation to the Horizontal Guidelines at TCS. The respondents explained that the Horizontal Guidelines are extremely important and their legal team will always consult them. The respondents emphasised that the examples provided in the Horizontal Guidelines are particularly valuable.

Generally, information exchange agreements and R&D cooperation are handled by TCS's in-house legal team. The assessment of this type of agreements is an iterative process of dialogue between the business side and the legal team.

For example, to assess a typical R&D agreement, the business side starts by informing the legal team about the specifics of a proposed agreement; the legal team will then ask a number of questions regarding aspects of the agreement that have relevance for the competition assessment. Once these questions have been answered, the legal team makes an assessment of the proposed agreement based on these responses.

In relation to information exchange agreements, the in-house legal team will act both proactively and reactively. They are proactive in establishing safeguards and a general awareness of information that would be deemed sensitive in competition law terms. They are reactive when responding to queries from other departments within the company in relation to information exchange. For example, information provided in an industry newsletter.

For standardisation agreements, TCS will often seek legal advice for both potential initiatives and those that they already have in place.

Influence of HBERs / Horizontal Guidelines on agreements

Regarding the aforementioned SDO deliberations over standards, the respondents explained that the Horizontal Guidelines are an exceptionally important template for the IPR policies that SDOs implement. The stage at which the Horizontal Guidelines are most important is after the development of the standards and at the time of licensing these standards.

The respondents explained that SDOs are checked for compliance with the Horizontal Guidelines at the time of their formation. SDOs that have been established for a long time, such as, for example, ETSI, do not necessarily look at the Horizontal Guidelines on an on-going basis because this guidance is already incorporated in the organisation rules and established in the way they operate.

As more standardisation consortia are formed, the Horizontal Guidelines continue to play a crucial role. The Horizontal Guidelines provide a balance between patenting of significant investments and access to the underlying technologies.

As a guide for discussions at the SDO level, TCS consider several paragraphs of the Horizontal Guidelines to be relevant, particularly paragraphs 280 and 281 on unrestricted participation, and paragraphs 283 to 286 on IPR policy. The IPR policy defines rules on access and terms of access to the standards.

The Horizontal Guidelines are relevant to TCS also in case of enforcement actions.

Proportionality of costs & benefits attributed to the HBERs & Horizontal Guidelines

Details of costs & benefits

In their response to the OPC, TCS identified the following costs "Legal fees, compliance costs, delays in implementation and contract negotiations". With regards to legal fees and compliance costs this was mostly through the use of their in-house legal team's time.

The respondents also highlighted the benefits of the HBERs and the Horizontal Guidelines. With respect to the HBERs they referred the safe harbour market share rules

as beneficial. From the Horizontal Guidelines they emphasised that the template that they provide to SDOs for their IPR policy as extremely beneficial. In their publicly available position papers and submissions, TCS referenced the baseline guidance that the Horizontal Guidelines provide as being beneficial.

The role of the Horizontal Guidelines

In the context of standardisation agreements, competitors need to get together to select standards in relation to thousands of different aspects of technology products and possibly from thousands of alternatives. It is important that the best technologies are selected. It is also important that these standards are then open for others to implement. This is where the FRAND (fair, reasonable and non-discriminatory) licensing regime is vital. In abiding by the FRAND principles included in the Horizontal Guidelines, these organisations make a series of commitments in relation to giving access to the technologies underlying the standards that they develop.

Standard-essential-patents (SEPs) are particularly important because they refer to technology that has to be used in developing any products within a given standard. They relate to very valuable technology, which generally cost tens of millions of euros to develop. In turn, when standards that include these SEPs are adopted, the corresponding IPRs generate important licensing revenues. These licensing revenues are a fundamental return on the investments made and sustain the incentives for such investments to continue in the future.

Particular difficulties with the Horizontal Guidelines

Within the Horizontal Guidelines, the respondents identified one particular difficulty in the wording of a sentence in paragraph 285 of the Horizontal Guidelines:

"In order to ensure effective access to the standard, the IPR policy would need to require participants wishing to have their IPR included in the standard to provide an irrevocable commitment in writing to offer to license their essential IPR to all third parties on fair, reasonable and non-discriminatory terms ('FRAND commitment')."

TCS believe that this wording ("to all third parties") has a detrimental effect on the processes of standardisation agreements outlined in the previous section. This sentence gives rise to different interpretations of the Horizontal Guidelines which allow for companies to avoid or reduce license payments made to TCS and other IPR holders.

TCS believe paragraph 285 requires SEP holders to license anyone who asks. This is at odds with the rest of the Horizontal Guidelines which are premised on access to standards, as also enshrined in the access-based IPR policies of SDOs like ETSI.

In TCS's experience, endpoint licensing should be the rule. This means that the owner of the IPR can go to the endpoint – the final product manufacturer – and collect licensing fees there. Under a particular interpretation of the "all third parties" phrase, this end product manufacturer can tell TCS that the licence should be bought further upstream. This could mean that the owner of the IPR has to go to the suppliers of this manufacturer or to the suppliers of the suppliers. The result is that it is unclear where in the supply chain the obligation to acquire a licence lies. Licensing may be deflected or pushed up in the supply chain to a level where the value of the royalty is much lower than at the end product level.

TCS believe this has huge indirect costs because it endangers licensing revenues and therefore the incentives to invest in new technologies. The respondents explained this has also been referred to as the "licence to all" interpretation of the Horizontal Guidelines. It supports procrastination in paying licensing and is causing a problem with very real and practical effects. In other words, it is not only a problem for TCS's royalty revenues; it may have a wider impact on the development of technologies. The costs of the 4 words "to all third parties", can be very high indeed.

TCS believe there is a wider risk that can result from these words in paragraph 285: it may turn companies away from open standards and jeopardise the open standards regime that currently prevails, in favour of proprietary platforms. These then become individual ecosystems that do not interoperate.

The respondents also explained that in some cases TCS do not license because it is too costly to do so. The Horizontal Guidelines are important because they ensure that users have access to the technologies. In some cases that access may be at zero licence fee.

In their publicly available position documents, TCS outlined a specific difficulty with the Horizontal Guidelines regarding joint purchasing agreements. Paragraph 194 of the Horizontal Guidelines is as follows:

"This chapter focuses on agreements concerning the joint purchase of products. Joint purchasing can be carried out by a jointly controlled company, by a company in which many other companies hold non-controlling stakes, by a contractual arrangement or by even looser forms of co-operation (collectively referred to as 'joint purchasing arrangements')."

The use of the terms "even looser forms of co-operation" is ambiguous in TCS's view. They believe it should be clarified whether the intent of this definition is to address groups of companies without external stakeholders (other than shareholders) that structure purchasing to the effect of sustaining a principal contracting entity and entitling all group companies to purchase under the agreement. TCS believe reference could be made to specific group structures, as embedded in Member States' laws as a more reliable means of definition.

Particular difficulties with the R&D BER

In TCS's publicly available submissions, they explained that the R&D BER and Chapter 3 of the Horizontal Guidelines do not align well with the business realities of today. They believe they could provide greater legal certainty in order to further foster R&D and innovation. TCS believe the "safe harbours" in the R&D BER and in Chapter 3 of the Horizontal Guidelines could be further expanded and the BER could provide more useful case examples, including in innovative technology markets.

Quantification of costs – an illustration for R&D and standardisation

The process that the in-house legal team undertakes, to assess compliance for R&D agreements (described above), takes on average between one week and one month. The length of time depends on how detailed the questions that the legal team needs to ask to the business side need to be and how hard it is for the business to answer them.

For questions related to information exchanges, legal assessments are typically much simpler and take on average about one day of the legal team's time.

In terms of standardisation agreements, these are also generally reviewed in-house. TCS review between 15 and 30 such agreements per year. The team is very experienced with this type of agreements which are used by TCS very frequently and for a range of different purposes. Naturally, the team is also very familiar with the competition framework in this space, therefore consulting the guidelines is not usually needed. As such, they are a minimal additional cost from a "Standards Agreement" review perspective. On the whole they provide very useful guidance for those less familiar with the issues. TCS can point to the Horizontal Guidelines, for example, during IPR policy negotiations, if the need arises. They provide a framework under which expectations of the negotiating parties can be aligned. As a result, they facilitate the parties' reaching agreements more effectively and under terms that are somewhat more predictable. As such, in TCS's assessment, the Horizontal Guidelines can help reduce costs in this industry overall.

This important role of the Horizontal Guidelines is however in jeopardy, in the view of this interlocutor, due to the already mentioned inclusion of the words "to all third parties" in para 285. TCS consider that these words are presently being relied on by some in a manner contrary to longstanding industry practice which, if supported whether expressly or tacitly by the Commission, has the potential for serious repercussions and fragmentation which would add very significant costs across the industry – with billions of Euros annually at stake for European companies, jeopardising the entire open standards eco-system.

Costs versus assessing compliance with Article 101 of the Treaty without the Horizontal Guidelines

The respondents believe that SDOs legal costs are probably reduced as a result of the Horizontal Guidelines. They believe the Horizontal Guidelines are helpful for SDOs. The respondents explained that different SDOs will have different approaches to making these assessments. Some SDOs have small legal teams, some may have no legal teams at all. In some cases, external counsel is used for these assessments. In any case, once the SDO is set-up, there is rarely any need for further assessing.

TCS explained that the examples provided in the Horizontal Guidelines are very helpful in terms of compliance assessments, but that they could be expanded to cover more realistic situations in the technology market. The currently included examples can be too stylised to be applicable to some of the situations and questions raised by TCS and by the SDOs in which they participate.

Added value of the R&D BER, versus the Horizontal Guidelines only

In relation to the R&D BER, TCS believe that the BER adds value to the Horizontal Guidelines. The R&D BER and the Horizontal Guidelines complement each other and the R&D BER would be more difficult to understand and to apply without the Horizontal Guidelines. The guidelines put the regulation in the right context, although both the R&D BER and the Horizontal Guidelines should be updated in terms of content and case examples.

The R&D BER is clearer and more concise than the Horizontal Guidelines. The addition of "safe harbours" adds legal certainty. In a legal sense, TCS describe it as similar to a comfort zone which makes it clear what is "ok" to do.

With regards to information exchange agreements the respondents believe that the Horizontal Guidelines provide enough certainty and there is no need for a BER.

Costs compared to the previous legal regime

The respondents did not compare the current legal regime with the previous one, however they did state that they believe the HBERs and the Horizontal Guidelines are indispensable and they provide a lot of help.

Case study three – large company; automotive sector ("AS")

R&D cooperation
Specialisation agreements
Information exchanges

The following information is drawn from AS's publicly available position papers regarding the HBERs and the Horizontal Guidelines and a case study interview with a member of AS's legal department

AS is a large company active in the automotive sector.

Experience with horizontal cooperation agreements

AS has engaged with a variety of different horizontal cooperation agreements. The respondent outlined experience with R&D cooperation, specialisation agreements and information exchanges. AS has engaged in agreements which have relied upon both HBERs.

AS is involved in a few, on average, somewhere up to ten, R&D agreements every year. AS's R&D agreements can vary hugely in size. At one extreme AS undertakes some agreements with large industrial partners. Such agreements will involve in-house lawyers from both sides. At the other end AS forms R&D agreements with research bodies and/or universities. AS also undertakes mid-sized agreements, partnering with smaller firms. These firms may not have their own legal teams.

AS is involved in slightly fewer specialisation agreements (than R&D agreements), but still typically more than one per year. The respondent explained that AS can form specialisation agreements with large partners, but in these cases, the product or component in question will be a minor input in terms of the value of the final product being produced.

Information exchange agreements also vary dramatically in size and scope. Some can be straightforwardly assessed, whilst others are far more complex. Information exchange often takes place in the context of larger agreement which include several other aspects.

Assessment of agreements under HBERs & Horizontal Guidelines

How these assessments are made

Assessment will be undertaken by AS's in-house legal team when required. For some "day-to-day" agreements, however, the respondent explained that the IP team will usually be able to conduct the assessments without consulting the legal department.

In very large, complex agreements AS may seek external legal support; this is rare. The respondent believes this would typically be for about one agreement per year. For larger agreements the respondent explained that the legal department have a considerable amount of work, although competition aspects are only one part of this work. Initially, the legal team is asked for their opinion on whether an agreement is feasible from a competition compliance perspective. If they believe it is, this leads to a second draft of the agreement with a more in-depth look at competition aspects. After this there may be discussions between various involved departments and another re-draft. The process is iterative, and can be lengthy, however the legal team does not necessarily contribute at every stage.

The legal department encounters a lot of queries from employees from other departments about information exchange. All employees are attuned to the potential risks of anti-competitive information exchange, although some confuse confidentiality with commercially sensitive information. The respondent said they receive queries on a daily basis, but the majority of queries have no competition implications and are quickly resolved. However, some cases do need to be assessed more closely; which will then be done by the in-house legal team.

Influence of HBERs / Horizontal Guidelines on agreements

Regarding R&D agreements, the respondent explained that the laws in place can affect the shape of the agreement, but they have not known of agreements having to be abandoned because they could not align with the requirements in the guidance on horizontal cooperation agreements.

The respondent explained that not all agreements fall neatly into one of the specific horizontal cooperation agreement topics. In some agreements, particular elements may be difficult to categorise. The respondent explained this in relation to specialisation agreements. Certain types of such agreements could not be strictly defined as specialisation agreements under the definitions in the Specialisation BER. However, the respondent said that the Horizontal Guidelines are still useful and even if an agreement does not fall neatly within one of the agreement categories in the Horizontal Guidelines, the Horizontal Guidelines do still offer a useful framework and set of principles for assessment that can be used by analogy to assess a wider set of agreements.

In AS's view, the Horizontal Guidelines are always the starting point for any competition assessment that they do, however, they may not always provide a complete answer.

Proportionality of costs & benefits attributed to the HBERs & Horizontal Guidelines

Details of costs & benefits

Costs for AS are mainly in the use of their in-house legal team's time. In their published position papers, AS also referred delays in implementation of agreements as a cost of compliance assessment. As mentioned above, on rare occasions, AS will seek external legal support which is at further cost.

Furthermore, in their response they outline specific wording in the R&D BER which complicates and slows the competition assessment process. AS explains that in Article 1(m)(i) & (ii) of the R&D BER the meaning of "joint" could be made clearer. The question is whether it applies to exploitation-related activities as well as the R&D activities. AS also suggests that Article 1(n) & (o) of the R&D BER is inconsistent as to whether "specialisation" requires both parties to be involved in relevant activities. AS explains that these inconsistencies slow down assessment processes.

In terms of benefits, AS acknowledges that the HBERs and the Horizontal Guidelines encourage companies to engage in pro-competitive collaboration. It also states that some assessments can be done easily by the internal legal team thanks to the guidance provided. Nonetheless, AS explains that the benefits could be strengthened further by further clarifying elements of the R&D BER, as mentioned above.

The respondent considers the Specialisation BER to be clear and that it saves time for the legal team during assessment procedures. They also stated that, overall, the Horizontal Guidelines offer significant benefits in terms of time and costs saved.

The respondent believes the Horizontal Guidelines strike the right balance between being sufficiently concise on one hand, so that they can be read quickly and agreements can be accessed effectively, and, on the other hand, detailed enough to cover a wide range of the more common situations that a business such as AS will encounter.

Particular difficulties with the Horizontal Guidelines

In some instances, the Horizontal Guidelines may not provide sufficient detail to facilitate competition assessments. In this regard, the respondent explained that the examples provided in the Horizontal Guidelines may not be applicable to the situation they are considering. The respondent believes that better suited examples could improve the guidance and make the Horizontal Guidelines more effective.

Particular difficulties with the HBERs

A specific difficulty related to the R&D BER is that, for certain agreements, the business side find it difficult to check for hardcore restrictions and excluded restrictions. They will approach the internal legal team for assistance. This is particularly the case for new agreements, where the company does not have prior experience and thus is not aware of what type of clauses will be compliant or not.

Another difficulty the respondent outlined was the seven-year limit on exploitation of developments made as a result of joint R&D. For some developments, seven years can be considered a short period of time, as it can take a long time to find a way to market a product.

Quantification of costs

For the larger R&D cooperation agreements, the legal assessment usually takes between one and three weeks of the internal legal team's time. For R&D agreements with universities and research bodies this is less than one week.

Assessments of specialisation agreements take significantly less time than the large R&D agreements, usually they will take less than a week of the legal team's time.

Assessments of certain information exchange queries can often take just 10 to 15 minutes of the competition lawyer's time. Several of these are queries sent by other areas of the business to the legal team, but they are not truly "information exchange" in the sense of the Horizontal Guidelines.

For agreements where reciprocal information is shared, the work is more thorough. A recent case took up two days of the lawyer's time. The lawyer needs to understand the context of the agreement in a first stage and in a second stage analyse the agreement and the exchange of information in view of the Horizontal Guidelines and also case law.

Costs of assessing compliance with Article 101 of the Treaty

Assessment costs are mostly internalised at AS, with their in-house legal team usually performing compliance assessments. It is only on rare occasions where these costs are extended to include external legal support.

Cost savings compared to a situation where only Horizontal Guidelines were present

The respondent explained that the R&D BER saves time and simplifies competition assessment relative to only the Horizontal Guidelines. This is the case in scenarios where the conditions are easy to apply to the facts, but this is not always the case. In practice, competition lawyers will look at both the BER and the Horizontal Guidelines when assessing potential agreements.

Costs compared to the previous legal regime

AS believe that the costs of compliance assessment have fallen in comparison to the previous legal regime. They believe the current framework is easier to apply and this has led to a general reduction in costs.

Case study four – SME; technology sector ("TS")

Standardisation agreements
R&D cooperation
Information exchange

TS is an SME in the technology sector.

The following information is taken from TS's publicly available position papers regarding the HBERs and the Horizontal Guidelines and a case study interview with the CEO of TS. This case study is also supplemented from a further two interviews: one with another technology SME (TS2) and the second with a lawyer (SEP Lawyer) specialising in advice for SMEs regarding SEP licensing.

Experience with horizontal cooperation agreements

Types of agreement that TS have engaged with

The respondent explained that TS undertakes some collaborative "know-how" agreements with competitors and they also partake in other research agreements with partners such as universities. In these types of agreements, the "know-how" is jointly developed, and the resulting products are marketed through third parties. The university is paid royalties in such cases. However, these agreements do not need to be assessed for compliance with the Horizontal Guidelines as the organisations involved are relatively small and the combined market share of participants is well below the threshold level.

The more pertinent agreements in focus for TS are standardisation agreements. As an end product developing company the agreements made with regard to technical standards have a major impact on TS.

TS2 engages in R&D agreements and information exchange agreements. TS2 is growing rapidly. As the company expands, they have experienced a growing number of horizontal cooperation agreements. TS2 anticipates that this will only rise further as the company continues to grow, they also expect to have more interaction with standardisation agreements in the near future. As a consequence, the Horizontal Guidelines have become much more relevant to the business.

Importance for the business & their affected markets

Standardisation agreements are vitally important to TS's business. Standards which allow abusive SEP licensing to be practiced by IPR holders are completely detrimental to their business, as well as all other similar SMEs. For TS, issues with licensing become a binary problem. A project can either be done or not depending on whether inputs for the project have the correct licensing. If what is supplied to TS is not properly licensed, they cannot do their work. If the licence was not resolved upstream, TS faces the risk that the licence holder will ask them to license. The conditions of these licences can be completely unfeasible for the business.

If there is any uncertainty around the licensing of an input it is unlikely the project will go ahead, as the costs of buying licensing for any of these inputs would be too high. To determine whether certain inputs will raise licensing issues can be quite complex. Reviewing contracts is a big cost, and it may require hiring external consultants. Furthermore, it distracts from TS' core work. Therefore, if there is any uncertainty regarding licensing it is likely they will not undertake the project.

TS2 engages in fewer than 10 R&D agreements each year, however they expect this to rise to several dozens of agreements per year in the near future. They also engage in around 100 information exchange agreements discussing new technologies with other firms. These interactions require carefully drafted NDA-like agreements to be made. These are considered not strictly horizontal cooperation agreements in the sense of typical information exchange agreements under the Horizontal Guidelines.

Assessment of agreements under HBERs & Horizontal Guidelines

How these assessments are made

TS does not undertake assessments of compliance with horizontal cooperation agreements. However, the respondent spoke of the process of assessing whether potential inputs have the appropriate licensing. This process involved seeking external legal support to investigate the licensing issue. The process was both timely and costly. This particular instance was six years ago, and TS no longer seeks external legal support for such matters due to their experience in this case. The respondent also mentioned that they had spoken to other companies who have had similar experiences.

TS2 does not currently have an internal legal department but are considering forming one to deal with the rise in the demand for the services of legal advice within the business. Currently TS2 will ordinarily assess compliance within house with the know-how they have developed from familiarising themselves with the Horizontal Guidelines and with typical agreements.

The SEP Lawyer the team spoke to provides legal advice to SMEs receiving licensing requests from IPR holders. The lawyer explained the typical process they may undertake: an SME, of 100-150 employees, receives a licence request, asking for licensing on certain terms indicated by the IPR holder. The SME needs to turn to external legal advice. The lawyer writes a letter to the claimed SEP holder, asking for details on the alleged patent infringement, including details of prior licensing, earlier in the value chain, and generally about the basis for their claim. The list of elements that the letter will ask about is guided by the Horizontal Guidelines. The IPR holder may refuse to provide these elements. The lawyer goes back and says – "this is what the Horizontal Guidelines say". The lawyer may also refer to case law. In particular the ECJ 2015 *Huawei vs ZTE* judgment and FRAND case law in Europe after this judgment.

Influence of HBERs / Horizontal Guidelines on agreements

TS believes generally the Horizontal Guidelines provide helpful guidance on standardisation agreements, but insufficient clarity in the Horizontal Guidelines gives rise to issues of IPR holder licensing abuse.

TS2 believes that the Horizontal Guidelines and HBERs provide guidance for agreements without any further associated costs. They also explained that they only needed to learn about the guidance once before they were familiar with it.

The SEP Lawyer explained the process outlined above is dependent on the Horizontal Guidelines and builds upon the framework provided by them. The lawyer referenced paragraph 287 as important – the standard should be accessible, there should be no refusal to license and no licensing on unfair or unreasonable terms.

Proportionality of costs & benefits attributed to the HBERs & Horizontal Guidelines

Details of costs & benefits

The costs from TS's perspective are related to the lack of legal clarity in the Horizontal Guidelines with regards to standardisation agreements. The lack of legal clarity allows IPR holders to practice abusive SEP licensing. This leads to higher costs than are necessary for TS as their options are limited to those of which they can be certain that they will not encounter licensing issues. With an improvement to the Horizontal Guidelines this could provide greater choice to companies such as TS and would promote IoT innovation.

TS has also acknowledged the benefits of the Horizontal Guidelines being in place, stating that the principles they provide are important.

TS2 acknowledged the benefits that the Horizontal Guidelines provide in terms of framing interaction between parties discussing horizontal cooperation agreements and licensing issues for example. The guidance the Horizontal Guidelines provide allow TS2 to ensure interactions are not anti-competitive.

The SEP Lawyer outlined the key provisions in the Horizontal Guidelines as extremely useful. Lawyers will refer to them very often in the course of dealing with disputes. The lawyer explained that they do not believe anything is wrongly set out in the Horizontal Guidelines, but they are not properly enforced, they are allowed to be exploited. Large

IPR holders are able to use their power to exploit small companies by forcing them to sign NDAs or agree to unfair licensing agreements. The lawyer believes the Horizontal Guidelines need stronger enforcement and greater clarification in some areas to alleviate these issues. Specifically, the Horizontal Guidelines could be more explicit on whether standard licensing is available to anyone who wants one.

The lawyer also outlined some issues whereby IPR holders will only wait to issue licensing fees downstream, in order to claim greater value. Downstream developers may buy unlicensed components unknowingly, this uncertainty is a huge cost to small firms who are not able to plan finances without knowing their likely licensing fees. The lawyer stated that if Horizontal Guidelines made clear at what level of the supply chain IPR holders must charges for licensing fees they would be more helpful, and there would be less need for lawyers and litigation.

Particular difficulties with the Horizontal Guidelines

The sole difficulty that TS highlights is the issue with legal clarity that has already been alluded to throughout the case study. TS also states that it is SMEs, such as TS, that feel the effects of these issues most. TS does not have substantive legal budgets to deal with SEP-themed litigation tactics from overly aggressive SEP holders.

Quantification of costs

In the previously mentioned example where TS employed external legal support to provide help with licensing issues the total cost was over EUR 20 000. The case took two months, at the end of which the legal company did not have a definitive answer for TS.

For TS2, most assessment cases take between 1 and 2 days, with mostly only one or two iterations to the initial proposal required. Assessments are done in-house.

The SEP Lawyer was able to provide some insight into the costs that SMEs may face when dealing with litigation or licensing issues from IPR holders. A typical SME that the lawyer works with may have 15-20 ongoing licensing requests, although they may not all be ‘live’ at once with some going quiet for a number of months at a time. Each licensing request may take between 5-10 hours of the lawyer’s time. This time is spent writing a response, researching case law and developing iterations. Most SEP lawyers will charge between GBP 450-500 an hour. Costs may vary on how aggressive the licensor is. The lawyer estimated that if it reaches the litigation stage, which is rare, it could cost between GBP 300 000-400 000. A typical SME budget to deal with 10 licensing requests files is about EUR 100 000 in legal fees per year.

Costs of assessing compliance with Article 101 of the Treaty

As explained above, TS does not directly assess compliance of horizontal cooperation agreements with Article 101 of the Treaty. Their costs are in assessing whether their suppliers have the appropriate licensing standards.

TS2 has experienced cost savings associated with horizontal cooperation agreement compliance through the familiarity they have gained with the Horizontal Guidelines. The Horizontal Guidelines help to flag any potential issues

Cost savings compared to a situation where only Horizontal Guidelines were present

No experience related to the HBERs.

Costs compared to the previous legal regime

TS acknowledges the certainty that the Horizontal Guidelines provide, especially in terms of FRAND commitments preventing IPR holders free reign of licensing abuse. In this sense, they recognise the Horizontal Guidelines as being beneficial compared to a scenario without them.

The SEP Lawyer stated that without the Horizontal Guidelines the whole process would be much more challenging, with each case having to be started from scratch. They did have experience of the previous regime.

Case study five – large company; consumer products ("CP")

Joint production / specialisation
R&D cooperation
Joint purchasing
Information exchanges

The research team collected information for this case study from an interview and email discussions with a representative from CP, as well as from publicly available position papers from companies operating in the area of consumer products.

CP is a manufacturer of consumer products, as well as a provider of related services, such as repair and maintenance and sale of parts and accessories. CP is a large company in this sector.

Experience with horizontal cooperation agreements

Generally speaking, everyday competition law advice at CP is largely focused on vertical issues (relations with the retail level). Horizontal cooperation agreements are not usually at the core of CP's activities, but CP has some experience with certain types of such agreements and the application of the relevant rules in the Horizontal Guidelines and HBERs.

In particular, in CP's industry, supply agreements between competing manufacturers – referred to as A and B for the purpose of this paragraph – are not uncommon. Under such agreements, company A provides technical and design specifications to company B, and company B manufactures products based on these specifications on behalf of company A and with company A's brand, and supplies these products to company A. Company A then sells these products to its trade partners and/or to consumers under its own brand. Trade partners or consumers are typically not aware that A is not the original manufacturer of these products.

CP also has some experience of R&D agreements. In particular, it has had R&D agreements with a wide variety of partners, including competitors, suppliers and in consortia with universities and scientists. Some of these R&D projects have even received EU funding. CP engages in R&D cooperation relatively frequently, with roughly one new such agreement being initiated every few months.

CP also, occasionally, looks into joint purchasing agreements with competitors, but there is no recent experience of such agreements having been concluded.

Agreements that specifically and exclusively cover information exchange are not relevant for CP. However, the competition law limits of the disclosure and exchange of potentially sensitive information in the context of other horizontal cooperation agreements are an important concern.

Assessment of agreements under the Horizontal Guidelines and the HBERs

CP is well-positioned to assess compliance of a wide range of horizontal cooperation agreements, with two full-time in-house competition lawyers. For a range of agreements, assessments are undertaken in-house by CP's competition lawyers. This involves the internal legal team applying the Horizontal Guidelines and HBERs and advising the business on any risks that the agreements may give rise to. This is generally an iterative process along which the legal team seeks to understand the business motivations for the agreements and informs of the competition risks that certain elements of the agreements may potentially give rise to. At the end, some of these elements may be adapted and some may be kept if the business can explain in sufficient detail their indispensability for the agreement.

In the case of bigger projects with correspondingly higher risks, CP can opt to seek external legal advice. This is due to several reasons: in some complex cases, the external counsel is perceived to offer greater legal certainty; when sensitive advice and communications are involved, discussions with external counsel have the advantage of enjoying legal privilege; and certain complex cases require extensive legal research and

specific administrative support, such as setting up data rooms for the exchange of sensitive information between the parties, from the external legal firm, which the in-house lawyers are not in a position to offer.

Horizontal Guidelines and the HBERs currently lack legal certainty

Specialisation BER

One specific difficulty that CP mentions regarding the Specialisation BER, and the supply agreements mentioned above in particular, has to do with definition and categorisation of agreements in this area. CP believes that this type of agreement may be viewed as "subcontracting agreements with a view to expanding production" according to paragraph 152 of the Horizontal Guidelines. However, it has doubts whether such agreements can qualify as specialisation agreements under the Specialisation BER because, as read under Article 1 (1) (g) of the BER, it would appear that "subcontracting is only a form of joint production under the BER if the parties to the joint production agreement jointly subcontract a third party, and not if one of them uses the other one as a subcontractor". Accordingly, it is unclear if one of the most common types of horizontal cooperation agreements used by CP can benefit from a block exemption or not.

In addition, the respondent noted that there is considerable uncertainty for CP in terms of what information, regarding costs and pre-supplier information, can be requested and disclosed in the context of such agreements. It is challenging in practice to negotiate reduced purchase prices without addressing the supplier's production costs, or to ensure that quality and safety standards are met without gaining insight into the supplier's production processes and relations with pre-suppliers. The Horizontal Guidelines, with their general "need-to-know" principle in paragraph 102, are not extremely helpful in this regard.

R&D BER

The respondent said that they frequently use the R&D BER and find it useful, however, it is very technical and not self-explanatory. The fact that there is very little case law can make interpretation more difficult. More specifically, there is, for example, a lack of clarity on joint exploitation, in terms of both exclusive sales and exclusive purchasing. For exclusive sales, CP believes that the R&D product producing company may be excluded from selling the R&D product to any other party (or at least a competitor to the purchasing party) without it being deemed a restriction of sales. However, the BER does not provide clarity in relation to whether this exclusivity would be deemed a restriction of passive sales. In the context of exclusive purchasing, the BER does not make it clear whether a purchasing party can commit to purchasing an R&D product exclusively from a certain producing party, without risk of infringement. This case of exclusive purchasing is not mentioned in the BER so it should, according to this respondent, be exempted. However, further clarification in the Horizontal Guidelines would be helpful.

In a similar scenario to the exclusive purchasing above, if the R&D product is a component of a final product, the respondent believes that the producing party should be allowed to restrict the purchasing party from re-selling the R&D product on its own, in particular to other competitors. This 'field of use' restriction would then mean the purchasing party were only able to use it for manufacturing of its own final products and for resale as a spare part, if applicable. The clarity around such scenarios could be improved within the R&D BER. The respondent referenced the field of use restriction that is present in the Technology Transfer BER as a comparison.

Joint purchasing agreements

CP considers that the chapter of the Horizontal Guidelines covering purchasing agreements is, to some extent, contradictory and incoherent, and that there seems to be some dissonance between the Horizontal Guidelines and case law. This makes it difficult to assess joint purchasing agreements.

The Horizontal Guidelines appear to indicate that the key concern of joint purchasing is that it may have anti-competitive effects at the "downstream" level, in particular if the parties have market power and if the agreement results in a high commonality of costs.

At the same time, in a recent case of a purchasing cartel decided by the German Federal Cartel Office, BMW, Daimler and Volkswagen were found to be guilty of anticompetitive practices in the joint purchasing of 'long steel' products. The companies were fined around EUR 100 million for exchanging information amongst each other about the methodology of calculating surcharges they were paying for the long steel products, which led to the elimination of price competition amongst suppliers. In this case the downstream market share of the companies exceeded the 15% "safe harbour" limit of the Horizontal Guidelines, however the long steel products accounted for less than 1% of the total cost of production of vehicles. To CP, the fact that the cost of the input was so low relative to total costs suggested that the agreement could possibly have been established as a legitimate horizontal cooperation, because the overall effect on commonality of costs amongst competitors was likely to be minimal. Therefore, despite high combined market shares among the competitors the downstream effect of the agreement would be practically non-existent. The fact that this case was pursued as a cartel seems to indicate to CP that the assessment of joint purchasing cannot be focused only on the downstream effect – which seems to be the key concern in the Guidelines – but that the upstream relations must also play a role.

If this were correct, then CP believes that the Horizontal Guidelines insufficiently address situations where the supplier could be thought of as a "victim" of the purchasing power of its clients. For CP's own business, this could play a role to the extent that CP sells its products to purchasing groups of retailers. If, for example, a group of retailers form a purchasing alliance under the Horizontal Guidelines, they may gain significant bargaining power over their supplier. The supplier may then become the victim of such an alliance, with the horizontal cooperation acting as an 'upside-down cartel'. However, since the products supplied by CP only account for a small part of the retailers' overall business, there would likely be no downstream effects. To capture such cases, the respondent believes that the Horizontal Guidelines may be improved by including a greater consideration of the power of buyers in upstream markets.

Information exchanges

The respondent notes that agreements that specifically and exclusively cover information exchange are not relevant in practice, but identified two particular difficulties when applying the Horizontal Guidelines to cases of information exchange in general.

Firstly, that the Horizontal Guidelines presume parties are only engaging in horizontal relationships and they do not account for both vertical and horizontal relations at the same time. For example, in dual distribution scenarios, suppliers work closely with retailers as their trade partners, while at the same time acting as their competitor. In these situations, there is by nature an intense flow of information between parties in the vertical dimension; but the Horizontal Guidelines do not provide sufficient legal certainty around such cases.

Secondly, in instances where the parties are at the initial stages of exploring possible cooperation agreements and, more generally, if the form of cooperation evolves over the period during which discussions and negotiations take place, compliance with the rules on information exchange can be difficult to maintain. The evolving nature of agreements complicates the parties' ability to comply with the requirement that information exchanges not exceed need-to-know information. It can occur that some information may be exchanged that was need-to-know in relation to an initial envisaged cooperation but, as the cooperation evolved to take another form, that information, that has already been exchanged, is no longer justifiable as need-to-know for the new form of cooperation. This implies that negotiations themselves may need to be monitored by competition counsel. However, constant and close support for such projects, to avoid the exchange of sensitive information that exceeds the "need-to-know" principle at any given point of time, will be very costly, especially if external lawyers are involved. In other words, the costs imposed by the very strict requirements around information exchange may result on excessive costs for businesses.

Proportionality of costs & benefits attributed to the HBERs & Horizontal Guidelines

In view of the foregoing comments, regarding specific areas of the Horizontal Guidelines and the HBERs, the respondent was asked to evaluate the proportionality of the respective costs and benefits.

Generally speaking, the respondent considers that CP's experience with the Horizontal Guidelines and the HBERs is positive. The guidance provided by these documents makes competition compliance assessments easier. As such, in a wide range of cases, the rules can be applied straightforwardly and without seeking external legal advice.

In terms of the benefits offered by the HBERs and Horizontal Guidelines, CP states that any concise and easy-to-access guidance is extremely helpful. The clear-cut rules in the BERs, their recitals, and the more elaborate explanations in the Horizontal Guidelines are helpful when it comes to assessments. They allow practitioners rapidly to get a good idea of the areas and topics where particular caution is required. For example, CP identified the 15% market share de facto safe harbour for joint purchasing agreements in the Horizontal Guidelines as being beneficial. In the context of R&D agreements, the BER and the Horizontal Guidelines provide a good framework of pro-competitive aspects on the one hand (e.g., the contribution of complementary skills and assets by the parties and the aim of speeding up the launch of new products) and risks / requirements on the other hand (e.g., restrictions imposed on the partner's own R&D activity and the need to share results and pre-existing know-how)

At the same time, the respondent noted that verifying upstream market shares can be extremely difficult and will always be approximate and uncertain. This is both in terms of defining upstream relevant markets and of estimating the market shares of the members of a potential agreement. Indeed, a component or material may be purchased for different uses by different types of buyers and it is possible that the alternative components or materials that a particular buyer considers to be close substitutes differs for different buyers. Similarly, it is extremely difficult to produce a precise estimate of a company's upstream market share for a certain component or material. Again, because components and materials can have very diverse uses, a buyer may have little awareness of who all the other buyers and possible buyers are, and even less ability to quantify the value of the purchases of all other buyers relative to one's own purchases.

As another general comment, although not strictly speaking referring to advantages or drawbacks of the Horizontal Guidelines and the HBERs, the respondent also noted that their experience of horizontal cooperation agreements has shown that they can often be "moving targets". For example, as negotiations progress, what initially may have looked like R&D cooperation can later resemble something closer to a specialisation agreement. This implies that the assessment against competition rules needs to be in place for extended periods of time and may require to be updated often. For agreements that require external legal support, this can rapidly become very costly.

CP stressed the need for an improvement in the legal guidance, specifically around the supply agreements mentioned above.

Savings from Horizontal Guidelines and HBERS

Since the consequences of making a wrong assessment can be very serious in the area of competition law (investigation, fines), it is absolutely imperative, in this respondent's view, that the extremely broad rules in Articles 101 and 102 of the Treaty are explained and fleshed out in regulations and in guidance documents. If there were not such guidance, the EU Commission would need to re-introduce the possibility to obtain formal clearance for agreements between competitors or, at least, "comfort letters", to create sufficient legal certainty.

As regards cost savings, having the HBERs and the Horizontal Guidelines saves cost in the sense that they save time: When assessing some form of cooperation, the HBERs and the Horizontal Guidelines are where lawyers look first, and this is where this respondent gets an indication of what the most important elements are that will play a role in their assessment – such as market power, commonality of costs, spill-over risks, market characteristics, risk of collusion, etc.

For matters such as some R&D agreements with limited scope and limited business importance, CP's in-house lawyer will simply apply the rules and advise the business on any potentially remaining risks.

For bigger projects, the risks in case of "getting it wrong" increase and so more legal certainty is required. Furthermore, in these cases, requirements around legal privilege, administrative support, and resources take on greater importance. Therefore, in-house lawyers are more likely to turn to external advice. In those cases, even the guidance offered by the Horizontal Guidelines and the HBERs is "not enough" and their existence makes little difference for the choice to involve external lawyers, and thereby incur additional costs. However, since the external lawyers can rely on the Horizontal Guidelines and the HBERs, it is likely that they can make their assessment faster and therefore less costly for CP.

From CP's perspective, a scenario where neither the HBERs nor the Horizontal Guidelines existed would result in referring to various textbooks, legal commentaries and seeking support from external experts on all matters related to horizontal cooperation, all of which would result in an increase in costs. Without any guidance, legal advice would likely be much lower in quality and legal teams would practically not even know where to start when it came to assessing horizontal cooperation agreements. It is likely that external advice would be of lower quality also, as law firms would have no method according to which to provide appropriate analysis. This scenario might also result in agreements proceeding without proper compliance assessments. CP believe that both the HBERs and Horizontal Guidelines add significant value in terms of assessing compatibility of horizontal cooperation agreements.

Assessment of costs

The costs which are associated with ensuring agreements comply with the regulations are mainly in both internal and external legal advice, including legal research and fact-finding. The respondent identified external legal advice as a major cost item for legal departments.

Quantification of costs – joint purchasing example

The respondent was able to provide an example of competition assessment costs in the case of a proposed joint purchasing agreement (which was eventually not concluded for lack of commercial viability).

In this particular agreement CP decided to obtain external legal advice, in particular because of the potentially large scope of this cooperation, its novelty (CP had no previous experience in joint purchasing with competitors), and the fact that very sensitive information would need to be exchanged. The external support involved fact-finding, legal assessment and administrative support, which included setting up a restricted-access data room to exchange sensitive information in a protected space. Additionally, there were costs associated with coordination between CP's external lawyers and the partner company's external and internal lawyers.

A CP team worked on the project for approximately 8 months, with the most intense period lasting about 2 months. This period involved legal assessment, fact-finding, drafting reports and setting up a data room. One of CP's in-house competition lawyers worked on the project for approximately 25% of their time during the most intense period. (using a medium hourly rate from those referred below of, say, EUR 400, this is equivalent to about EUR 32 000) The total costs of the external legal support they received on this project was between EUR 50 000-70 000. The cost of the data room administration was a further EUR 10 000-15 000 and costs of coordination between CP legal team and the partner's lawyers were EUR 5 000-7 000. Indicative hourly rates for external counsel in Germany, according to one of the respondents, are estimated at aroundEUR 400-500 for partners and EUR 280-400 for associates.

Quantification of costs – R&D agreements example

CP's respondent indicated that the R&D BER is used quite frequently by their legal department, at least once every few months. The scope, subject matter and significance of such R&D agreements differs considerably. Often such agreements are – when

compared, for example, to the joint purchasing scenario explained above – relatively insignificant. This BER is considered very useful, even if not perfect.

It is important to note that the R&D BER does not only cover horizontal cooperation agreements, and that R&D agreements in practice are often concluded with parties that are not competitors (such as suppliers or research institutes) or in "mixed" scenarios (e.g., in consortia, with participants from many different industries and universities and scientists). Even those agreements need to be assessed under the R&D BER.

For the assessment of this type of agreements, CP indicated that both the R&D BER and the Horizontal Guidelines (in the case of agreements involving competitors) are used.

CP's lawyers consider that applying these rules is relatively straightforward. Furthermore, many R&D agreements (in particular with non-competitors) are viewed as relatively low risk, when compared, for example, to a major joint purchasing agreement with a competitor. The most likely worst-case scenario would be the non-enforceability of a particular contract provision rather than a cartel investigation with the risk of high fines. Accordingly, it is less likely that CP lawyers will involve external counsel in such matters.

Assessments of agreements in this area take about 1-2 days of the in-house lawyer's time (fact-finding on the commercial background and purpose of the agreement; assessment of relevant markets and market shares; application of the HBER and / or Guidelines; legal opinion in writing) In-house lawyers can benefit from their expertise and experience and thus can make these frequent assessments quite quickly. The assessment is fast because guidance tells them which clauses to focus on.

CP finds the clear-cut rules on hardcore restrictions helpful as a starting point for assessment. They also find the list of absolute "no-go's" useful for legal practitioners, who do not regularly deal with such issues, to quickly get a feel for areas and topics where particular caution is required.

In the case of the R&D agreements with which CP typically engages, and in the opinion of this respondent, the R&D BER adds value to the Horizontal Guidelines but the Horizontal Guidelines could be enough if they were somewhat improved. One aspect of added value of the BER is that binding rules are generally preferred by lawyers to "soft law".

Case study six – two business associations ; media broadcasting ("MB") & retail sector ("RS")

Commercialisation agreements
Information exchange
Joint purchasing

The research team spoke with a business association from the media broadcasting industry and another business association from the retail sector. The focus of the two interviews was on their members' experience with commercialisation agreements, but the two associations also touched on some of their members' other experience with horizontal cooperation agreements.

The information in this case study is drawn from the two interviews, the association's response to the OPC and a number of supporting documents sent from the associations.

Experience with horizontal cooperation agreements

MB's members are mostly Public Service Media (PSM) organisations that are primarily publicly funded. MB is a large business association with many members across Europe. The purpose of MB is to facilitate cooperation between its members and to provide advice to members on these partnerships and on policy reform.

MB's members typically partake in a variety of horizontal cooperation agreements which vary by company size and country. The agreements which MB found to come up most regularly are those concerning commercialisation and data sharing agreements. An example that MB provided on the type of commercialisation agreement which their members undertake is partnerships for the provision of media content. This may be partnerships for the creation of a joint Video-On-Demand (VOD) platform.

RS's members are also involved in a number of different horizontal cooperation agreements, namely joint purchasing, information exchange and commercialisation agreements. RS's members are groups of independent retailers which join together to purchase goods and services, exchange data/information and conduct joint commercialisation where possible.

These agreements can cover both horizontal and vertical aspects, with both the guidelines on horizontal and vertical agreements being relevant to their members.

Legal certainty provided by the Horizontal Guidelines and the HBERs could be enhanced

Members of MB have highlighted issues regarding the lack of consideration of qualitative efficiencies as being a major issue with compliance assessments regarding commercialisation agreements. MB states that national competition authorities and the European Commission have focussed on the cost saving efficiencies of horizontal cooperation agreements and failed to consider public interest in the context of qualitative efficiencies provided by such agreements. MB explains that this is particularly relevant in digital markets where non-price parameters are more important, such as quality, variety and innovation.

MB has found that many decisions regarding potential commercialisation agreements between PSM organisations have ended in prohibition decisions, which in turn may dissuade other PSM organisations from considering such agreements. MB considers there to be four major flaws to the decision-making of competition authorities in such instances: firstly, that such agreements provide greater choice and variety to consumers, PSM organisations are bound by quality obligations which would mean that any content would be of a high level of quality, PSM companies support independent production thus these agreements may result in greater competition in upstream markets and competition authorities do not consider the position of global players (e.g. Netflix) in the market and the power that they hold. One of the main concerns of competition authorities has been that such agreements would result in a reduction in domestic

competition, but MB believe the competition is not with other domestic firms but with global players from the US.

Regarding information exchange, MB believes that the Horizontal Guidelines may be updated to consider that information exchange in the broadcasting sector may in fact be pro-competitive. They also believe that the definition of strategic information may need to be redefined in the context of digital markets. MB states that the current guidance is too ambiguous on data sharing and the case law too limited to be able to apply it in the broadcasting industry.

RS explained that their members are not able to jointly commercialise under current guidelines unless they use complex measures online. They believe that the current Horizontal Guidelines do not consider groups of this type and must be revised to do so. Groups of this type are not able to apply resale price maintenance (RPM) as it is currently against EU law, but if they were allowed to do so this would in fact increase competition in the sector by allowing small, independent retailers to join forces to compete with larger companies.

The RS association believes that there should be separate rules for groups of this type of business model, as they revolve around partnerships with competing companies. The groups are based on agreements as a starting point, to for example jointly purchase goods and services. They are currently restricted in how much they can cooperate in certain aspects, particularly in elements which would be considered as 'commercialisation'. This restriction reduces their ability to compete with larger retailers. As a minimum, the association suggested there should be a possibility to develop a centralised online medium in which to coordinate multi-channel retail organisations, facilitating joint commercialisation and allowing for information sharing which would lead to efficient and effective pricing and promotion. The objective of which would be to achieve a more level playing field in the market with a higher number of operators in it.

Proportionality of costs & benefits attributed to the HBERs & Horizontal Guidelines

In respect to commercialisation agreements, MB stated that they believe the costs attributed to the Horizontal Guidelines are not proportionate to the benefits. MB explained that given the lack of legal certainty and the limited case law which have resulted in prohibition decisions the cost outweigh the benefits under the current regime. However, MB did also explain that the guidance does improve legal certainty to an extent. MB explains that national competition authorities tend to interpret Article 101 of the Treaty differently and the Horizontal Guidelines serve as an element of certainty to guard against differences in interpretations.

RS stated that without the Horizontal Guidelines the scenarios for agreements such as those that their members undertake would become more difficult, thus in that sense the Horizontal Guidelines are more beneficial than harmful. However, under the current Horizontal Guidelines the agreements which RS's members partake in are classified as joint purchasing agreements. This classification limits the capabilities of the groups in what they are allowed to cooperate on, if they were instead classified as commercialisation agreements the groups may be able to utilise the cooperation arrangements more.

RS also mentioned that the 15% safe harbour limit does not apply to integrated retail groups. Therefore, integrated groups may have an advantage whereby the rules are different for them than other retail groups. Integrated groups only have to consider vertical elements.

10. Annex III – CATI Survey Questionnaire

(separate document)

11. Annex IV – In-depth interviews Questionnaire

(separate document)

12. Annex VI – List of NCA and national court cases

Code	Type of proceeding	NCA case number and case name	Parties to the horizontal cooperation agreement in question	Type of horizontal cooperation agreement[191]							Economic sector	Outcome[192]					If appealed, outcome of the appeal proceedings[193]		
				RD	Sp	Ie	P	C	S	O		CD	DC	PD	RC	O	U	A	P
BG01	NCA decision followed by a an appeal	Case No K3K - 912/2011 Clinical research	Medical Invest - Medical Diagnostic Laboratory Prima Lab OOD, claimant Chrono OOD and Associated Laboratories OOD, defendant				X				Human health and social work activities				X		X		
BG02	NCA decision followed by an appeal	Decision No1555/10.11.2011, Food vouchers	Tombou Bulgaria Ltd. – claimant; Sodexo Pass Bulgaria EOOD – defendant; Viabel EOOD – defendant; VM Finance Group JSC - defendant		X						Accommodation and food service activities				X		X		
CZ01	NCA investigation only	S098/2011/KD Czech Waste Management Association (Česká asociace odpadového hospodářství)	Czech Waste Management Association			X					***outside classification***			X		X			
CZ02	NCA investigation only	ÚOHS-S543/2013/KD Association of Energy Auditors (Asociace energetických auditorů)	Association of Energy Auditors			X					Other service activities			X		X			
CZ03	NCA investigation only	S44/2015/KD Professional and ethical code of property expert and appraiser	Czech Chamber of Property Appraisers, professional			X					Other service activities	X		X		X			

[191] *Type of horizontal cooperation agreements: (i) R&D agreements ('R&D'), (ii) specialisation agreements ('Sp'), (iii) information exchange agreements ('Ie'), (iv) purchasing agreements ('P'), (v) commercialisation agreements ('C'), (vi) standardisation agreements ('S') and (vii) others ('O').*
[192] *Outcomes: (i) commitment decision ('CD'), (ii) discontinued case ('DC'), (iii) prohibition decision ('PD'), (iv) rejection of complaint ('RC') and (v) others ('O').*
[193] *Outcome of the appeal: (i) upheld ('U'), (ii) annulled ('A') and (iii) pending ('P').*

Code	Type of proceeding	NCA case number and case name	Parties to the horizontal cooperation agreement in question	Type of horizontal cooperation agreement[191]							Economic sector	Outcome[192]					If appealed, outcome of the appeal proceedings[193]		
		(Profesní a etický kodex znalce a odhadce majetku)	association of experts and appraisers, z.s.																
CZ04	NCA investigation only	ÚOHS-S0569/2015/KD Code of ethics, Czech Association of Barrel Watercoolers ČABW z.s. (Etický kodex, Česká asociace barelových watercoolerů ČABW z.s.)	Czech Association of Barrel Watercoolers ČABW z.s.			X					Accommodation and food service activities			X		X			
CZ05	NCA investigation only	ÚOHS-S0425/2016/KD Prohibited decision of the association of competitors, the Association of Road and Towing Services, z. s. (Zakázané rozhodnutí sdružení soutěžitelů, Asociace silničních a odtahových služeb, z. s.)	Association of Road and Towing Services, z.s.			X					Transportation and storage			X		X			
CZ06	NCA investigation only	ÚOHS-S0382/2017/KD Tariffs for interpretation and translation between Czech and Czech sign language (Tarify za tlumočení a překlad mezi češtinou a českým znakovým jazykem)	Czech Chamber of Sign Language Interpreters, z.s.			X					Other service activities			X		X			
CZ07	NCA investigation only	S0381/2017/KD Tariffs for interpreting and translation in the ToP magazine for the year 2007 - 2017 (Tarify za tlumočení a překlad v časopisu ToP pro rok 2007 - 2017)	Unity of interpreters and translators			X					Other service activities			X		X			
CZ08	NCA investigation only	S566/2012/KD Chamber of Veterinary Surgeons of the Czech Republic (Komora veterinárních lékařů České republiky)	Chamber of Veterinary Surgeons of the Czech Republic			X					Other service activities			X		X			

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DE01	NCA investigation only	B1-8/12 market information system for the bathroom furniture industry	Verband der Holzindustrie und Kunststoffverarbeitung Westfalen-Lippe e.V., Herford			X					Furniture		X						
DE02	NCA investigation only	B1-27/11 - Product database for the building materials trade	BauDatenbank GmbH, Celle			X					Construction		X						
DE03	NCA investigation only	B1-61/12 Marktbericht Holz	Zukunft Holz GmbH			X					Agriculture, forestry and fishing		X						
DE04	NCA investigation only	B1-111/12 benchmarking study on cement prices	European cement manufacturers			X					Construction		X						
DE05	NCA investigation only	B2-140/19, Unamera GmbH, Lichtentanne; Launch of agricultural trading platform	Unamera GmbH, BayWa AG, München („BayWa"), Getreide AG, Hamburg („Getreide AG"), ATR Landhandel GmbH & Co. KG, Ratzeburg („ATR")			X					Agriculture, forestry and fishing					X			
DE06	NCA investigation only	B5-16/18-019, Wirtschaftsvereinigung Stahl (Reformation of steel producers' association)	Wirtschaftsvereinigung Stahl			X					***outside classification***		X						
DE07	NCA investigation only	B5-1/18-001, Development of an online trading platform, XOM Metals GmbH	Klöckner & Co. SE, Duisburg, Germany			X					***outside classification***		X						
DE08	NCA investigation only	B1-43/16	PORIT GmbH and its five shareholders			X	X	X			Construction		X						
DE09	NCA investigation only	B6-81/11-2 - ARD/ZDF joint venture "Germany's Gold"	ZDF Enterprises GmbH, WDR mediagroup GmbH					X			Arts, entertainment and recreation		X						
DE10	NCA investigation only	B1-202/17	Land North Rhine-Westfalia					X			Agriculture, forestry and fishing		X						

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DE11	NCA investigation only	B1-42/18: ZVB Ziegelvertrieb Bayern GmbH	ZVB Ziegelvertrieb Bayern GmbH					X			Construction		X						
DE12	NCA investigation only	B6-114/10 - DFL Zentralvermarktung (joint selling)	DFL Deutsche Fußball Liga e.V./DFL Deutsche Fußball Liga GmbH					X			Arts, entertainment and recreation	X							
DE13	NCA investigation only	B6-108/12 - BCN/WAZ	Burda Community Network GmbH/WAZ Zeitschriften Marketing GmbH &Co. (Funke Mediengruppe)					X			Information and communication		X						
DE14	NCA investigation only	B6-28/19 - DFL Zentralvermarktung (joint selling)	DFL Deutsche Fußball Liga e.V./DFL Deutsche Fußball Liga GmbH					X			Arts, entertainment and recreation	X							
DE15	NCA decision followed by an appeal	B1-72/17 Round timber in Baden-Wuerttemberg	Land Baden-Wuerttemberg					X			Agriculture, forestry and fishing			X			X		
DE16	NCA decision followed by an appeal	B6-32/15 - DFL Zentralvermarktung	DFL Deutsche Fußball Liga e.V./DFL Deutsche Fußball Liga GmbH					X			Arts, entertainment and recreation	X					X		
DE17	NCA investigation only	B2-79/15 - Fairtrade	Fairtrade							X	Agriculture, forestry and fishing					X			
DE18	NCA investigation only	B2-72/14 - Initiative Tierwohl	Industry alliance of agriculture, meat industry and food retail							X	Agriculture, forestry and fishing					X			
DE19	NCA investigation only	B1-11/15: supplier consortia in the rolled asphalt sector	Companies of the rolled asphalt sector		X					X	Construction					X			
DE20	NCA investigation only	B1-169/16: tbu Transport-Beton-Union GmbH & Co. KG	tbu Transport-Beton-Union GmbH & Co. KG		X						Construction		X						

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DE21	NCA investigation only	B1-212/17	KVB Kies-Vertrieb GmbH & Co. KG		X						Construction		X						
DE22	NCA investigation only	B6-67/14 - "COWU"	All associations with connection to advertising industry: ZAW, BVMI, GVU, SPIO, OMG, Börsenverein, BIU and bvv							X	Other service activities		X						
DE23	NCA decision followed by an appeal	B7-22/07 TV-Grundverschlüsselung	ProSiebenSAT.1 Media AG, RTL Group					X	X		Information and communication	X					X		
DE24	NCA investigation only	B4-88/16 "Geldbote"	Fiducia & GAD IT AG (Genossenschaftsbanken) Star Finanz-Software Entwicklung und Vertriebs GmbH (Sparkassen-Gruppe)					X			Financial and insurance activities		X						
DE25	NCA investigation only	B4-88/16 Kwitt	Sparkassen-Finanzgruppe					X			Financial and insurance activities		X						
DE26	NCA investigation only	B4-122/15 Paydirekt	Führende Unternehmen der deutschen Kreditwirtschaft (Volks- und Raiffeisenbanken, Sparkassen Privatbanken					X			Financial and insurance activities		X						
DE27	NCA investigation only	B5-1/2012-10 - Joint purchase agreement	Bayer, E.On. Evonik, Henkel, Lufthansa and Siemens				X				***outside classification***		X						
DE28	NCA investigation only	B2-101/16 - RTG	The Food Retailers Real, Bünting, Bartels-Langness, Klaas&Kock, Kaes				X				***outside classification***					X			
DE29	NCA investigation only	B1-149/14	Eurobaustoff Handelsgesellschaft GmbH & Co. KG				X				Construction		X						
DE30	NCA investigation only	B1-229/18 Furniture purchasing cooperation VME Union GmbH	VME Union GmbH and KHG GmbH & Co.KG (Krieger/Höffner-Gruppe)				X				Furniture		X						

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DE31	NCA investigation only	B1-118/12 Online Platform by distributors of MHK Group	MHK-Shop GmbH as platform operator and up to 600 participating distributors				X	X			Furniture		X						
DE32	NCA investigation only	B6-45/18 - Sky/DAZN - UCL-Cooperation	Sky Ltd., London/Sky Deutschland Fernsehen GmbH & Co. KG; DAZN Group Ltd./DAZN Media Channel Ltd./Perform Investment Germany GmbH		X		X			X	Arts, entertainment and recreation		X						
DE33	NCA investigation only	B 4 – 50/19	BMW AG und Daimler AG	X			X				***outside classification***					X			
DE34	NCA investigation only	B1-119/15	Bisotherm GmbH and it´s two shareholders	X	X			X			Construction		X						
DE35	NCA investigation only	B1-120/15	LB Klimaleichtblock GmbH and its three shareholders	X	X			X			Construction		X						
DE36	NCA investigation only	B1-99/15: Mittelstandskartell Mein Ziegelhaus GmbH & Co. KG	Mein Ziegelhaus GmbH & Co. KG and its six shareholders	X	X		X				Construction		X						
DE37	NCA investigation only	B7-96/11	Telekom Deutschland GmbH + eins energie in sachsen GmbH & Co. KG		X						Information and communication		X						
DE38	NCA investigation only	B7-46/13	Telekom Deutschland GmbH + Telefonica Germany GmbH & Co. KG		X	X					Information and communication		X						
DE39	NCA decision followed by an appeal	B7-21/18	Deutsche Telekom AG + EWE AG		X	X		X			Information and communication	X							X
DE40	NCA decision followed by an appeal	B6-94/10 - "Amazonas"	RTL Interactive GmbH/Pro7Sat.1 Media AG		X			X			Information and communication			X			X		

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DE41	NCA investigation only	B1-51/12 Palettenpool	Danogips GmbH & Co. KG, Neuss Knauf Gips KG, Iphofen Lafarge Gips GmbH, Oberursel Saint Gobain						X		Construction		X						
DE42	Court proceedings only	BGH, KZR 4/17, 29.01.2019	DeTeMedien/Deutsche Telekom Medien GmbH; Deutschen Telekom AG (DTAG) /. Fachverlag							X	Information and communication				X				
DE43	Court proceedings only	BGH, KZR 90/13, 27.01.2015	„Dentalartikel“ (dental items) Dental Union ./. Nordwest Dental				X				***outside classification***				X				
DE44	Court proceedings only	LG Köln, 88 O (Kart) 17/11, 14.02.2012	Bundesverband Presse-Grosso ./. L Media Group				X				Information and communication			X				X	
DE45	Court proceedings only	OLG Düsseldorf, VI-U (Kart) 4/15, 16.12.2015	Electronic locking systems (HGL)	X	X			X			***outside classification***								
DE46	Court proceedings only	OLG Düsseldorf, VII-Verg 3/16, 08.06.2016	Bidding consortia							X	Human health and social work activities				X				
DE47	Court proceedings only	BGH, KZR 92/13, 15.12.2016	Pelikan /. Pelican							X	***outside classification***				X				
DE48	Court proceedings only	BGH, KZR 69/14, 12.07.2016	Peek & Cloppenburg HH / Peek & Cloppenburg D							X	***outside classification***				X				
DK01	NCA investigation only	15/04335 Admonition regarding not agreeing to a coordinated boycott of a company	CONFIDENTIAL			X					CONFIDENTIAL		X						

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DK02	NCA investigation only	15/08733 Admonition regarding an association´s price example sent to its members	CONFIDENTIAL			X					CONFIDENTIAL		X						
DK03	NCA investigation only	CONFIDENTIAL	CONFIDENTIAL			X					CONFIDENTIAL		X						
DK04	NCA investigation only	CONFIDENTIAL	CONFIDENTIAL			X					CONFIDENTIAL		X						
DK05	NCA investigation only	CONFIDENTIAL	CONFIDENTIAL			X					CONFIDENTIAL					X			
DK06	NCA decision followed by an appeal	13/03634 LELY's coordination of prices and markets	Lely Scandinavia A/S and it's Danish franchisees: Lely Center Herrup, Lely Center Rødekro, Lely Center Tarm and Lely Center Viborg			X		X			Agriculture, forestry and fishing			X			X		
DK07	NCA investigation only	13/05331 Case/descion name: Agreements on restructuring of chain cooperation in Dagrofa ApS.	Dagrofa ApS ("Dagrofa") and each of the independent retailers of the supermarket chains SuperBest (now "MENY") and Spar, respectively.			X		X			***outside classification***	X							
DK08	NCA investigation only	CONFIDENTIAL	CONFIDENTIAL			X				X	CONFIDENTIAL		X						
DK09	NCA investigation only	13/01863 Indicative opinion to trade organisation about exchange of information (an industry statistic containing information)	Danboat (an industry association for maritime sport related companies with aprox. 60 members).			X					Arts, entertainment and recreation					X			

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DK10	NCA investigation only	CONFIDENTIAL	CONFIDENTIAL			X					CONFIDENTIAL					X			
DK11	NCA decision followed by an appeal	15/06516 Anti-competitive agreements in the Team DS-association.	Team DS a.m.b.a.			X	X				Arts, entertainment and recreation			X			X		
DK12	NCA investigation only	CONFIDENTIAL	CONFIDENTIAL			X	X	X			CONFIDENTIAL		X						
DK13	NCA investigation only	CONFIDENTIAL	CONFIDENTIAL					X			CONFIDENTIAL		X						
DK14	NCA decision followed by an appeal	The NCA's: - The Competition Council: 14/04158, "Dansk Vejmarkerings Konsortium" (Danish Road Marking Consortium Agreement). The Competition Appeal Tribunals: - The Danish Competition Appeal Tribunal: KL-2-2015 and KL-3-2015, "Eurostar Danmark A/S og LKF Vejmarkering A/S mod Konkurrencerådet". The Courts: - The Maritime and Commercial High: Court U-2-16 and U-3-16, "Konkurrencerådet mod LKF Vejmarkering A/S og Eurostar Danmark A/S".	- GVCO A/S (previous LKF Vejmarkering A/S) - Eurostar Danmark A/S						X		Construction			X			X		

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		- The Supreme Court: 191/2018, "Konkurrencerådet mod Eurostar Danmark A/S og GVCO A/S (tidligere LKF Vejmarkering A/S).																	
DK15	NCA decision followed by an appeal	The NCA's: The Competition Council: 18/04950: Outdoor - investigation of AFA JCDecaux and Clear Channel The Danish Competition Appeal Tribunal: KL-1-2019 KL-2-2019: Outdoor - investigation of AFA JCDecaux and Clear Channel The Courts: The Maritime and Commercial High: Pending.	Clear Channel Danmark A/S /// AFA JCDecaux A/S							X	Other service activities			X					X
DK16	NCA investigation only	19/05554: Platformssagen Happy Helper (Platform case Happy Helper)	The digital platform Happy Helper.				X	X			Other service activities	X							
DK17	NCA investigation only	19/05552 Platformssagen Hilfr (Platform case Hilfr)	The digital platform Hilr.				X	X			Other service activities	X							
DK18	NCA investigation only	CONFIDENTIAL	CONFIDENTIAL				X	X			CONFIDENTIAL					X			

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DK19	NCA investigation only	12/05409 - Danish Cinemas - The Movie Case	The association of Danish film distributors and the association of Danish cinemas (DK: Foreningen af Filmudlejere i Danmark og Danske Biografer)					X			Arts, entertainment and recreation			X					
DK20	NCA investigation only	13/04400 "Danish media rights for liga football - review of commitments"	Superligaen A/S, DBU, and Divisionsforeningen (The Association of Danish League Clubs)					X			Arts, entertainment and recreation	X							
DK21	NCA investigation only	4/0120-0402-0057 Anmeldelse af netdelingssamarbejde mellem Telia og Telenor (Notification of network sharing between Telia and Telenor)	Telia Danmark, Filial af Telia Nättjänster Norden AB and Telenor A/S		X						Information and communication	X							
DK22	NCA investigation only followed by an appeal	The NCA's: The Competition Council: 15/06094: Campingrådets campingpasordning:(The camping council's camping card scheme) The Danish Competition Appeal Tribunal: KL-3-2017: DK Camp vs the Competition Council.	Campingrådet (Camping Council) and DK-CAMP		X			X			Arts, entertainment and recreation			X			X		
DK23	NCA investigation only	CONFIDENTIAL	CONFIDENTIAL						X		CONFIDENTIAL		X						
DK24	NCA investigation only	CONFIDENTIAL	CONFIDENTIAL						X		CONFIDENTIAL		X						

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DK25	NCA decision followed by an appeal	The NCA's: The Competition Council: 15/04120 Restriction of competition on the Danish market for roofing membranes. The Danish Competition Appeal Tribunal: KL-2-2017, KL-4-2017 and KL-5-2017.	Icopal Danmark ApS, Nordic Waterproofing A/S, Danske Tagpapfabrikanters Brancheforening (DTB) and Tagpapbranchens Oplysningsråd (TOR).						X		Construction			X				X	
DK26	NCA investigation only	18/06890: Indicative opinion on terms and conditions in the building industry (AB18) Vejledende udtalelse om Almindelige Betingelser for arbejder og leverancer i bygge- og anlægsvirksomhed (AB 18)	"AB-comittee" who drafted AB 18 (consists of organizations within the construction sector, representatives from the government and judicial system)						X		Construction					X			
DK27	NCA investigation only	4/0120-0100-0689 Dansk Brand- og Sikringsteknisk Instituts Retningslinie 001 / Industry guideline R001 regarding automatic sprinkler systems	Four organizations: TEKNIQ, Forsikring & Pension, SikkerhedsBranchen and Foreningen af Kommunale Beredskabschefer.						X		Construction	X							
EL01	NCA investigation only	642/2017, constructors cartel (settlement)	15 construction companies					X			Construction					X			
EL02	NCA investigation only	647/2017, constructor's cartel	7 construction companies					X			Construction					X			
EL03	NCA investigation only	640/2017, Audatex et al.	AUDATEX HELLAS, and its shareholders, i.e.4 Greek insurance companies		X						Financial and insurance activities				X				

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ES01	NCA investigation only	S/DC/0607/17 TABACOS	PHILIP MORRIS SPAIN, S.L., ALTADIS, S.A., JT INTERNATIONAL IBERIA, S.L.U. COMPAÑÍA DE DISTRIBUCIÓN INTEGRAL LOGISTA, S.A.			X					***outside classification***			X						
ES02	NCA investigation only	S/DC/0611/17 OBRA CIVIL	Acciona Construcción;Corsán-Corviam Construcción;Dragados;FCC Construcción;Ferrovial Agromán;Obrascón Huarte Lain; Sacyr Construcción							X	Construction					X				
ES03	NCA investigation only	S/0425/12 INDUSTRIAS LÁCTEAS 2	CALIDAD PASCUAL SA, CENTRAL LECHERA DE GALICIA, CORPORACION ALIMENTARIA PEÑASANTA SA, DANONE SA, GRUPO LACTALIS IBERIA SA, NESTLÉ ESPAÑA SA, etc.			X					***outside classification***			X						
ES04	NCA investigation only	S/0490/13 ACUERDOS TELEFONICA /YOIGO	XFERA MÓVILES, S.A.U., TELEFÓNICA MÓVILES DE ESPAÑA, S.A.U. TELEFÓNICA DE ESPAÑA, S.A.U.					X			Information and communication			X						
ES05	NCA decision followed by an appeal	S/0436/12 DTS DISTRIBUIDORA DE TV DIGITAL	Distribuidora de Televisión Digital S.A. Telefónica de España, S.A.U					X			Arts, entertainment and recreation			X			X			
ES06	NCA investigation only	S/DC/0594/16 ANELE	Asociación Nacional de Editores de Libros y material de Enseñanza (ANELE) and other 34 text book editors					X	X		Arts, entertainment and recreation			X						
ES07	NCA investigation only	S/DC/0570/15 Aprovisionamiento DIA/EROSKI	Distribuidora Internacional de Alimentación SA (DIA)				X				***outside classification***				X					

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			EROSKI S. COOP. (EROSKI)																
ES08	NCA decision followed by an appeal	S/DC/0518/14 AERC	Asociación Española de Radiodifusión Comercial				X				Information and communication			X			X		
ES09	NCA investigation only	Expte. S/DC/0578/16 MENSAJERÍA Y PAQUETERÍA EMPRESARIAL	DHL, UPS, TNT, TOURLINE, REDYSER, MBE, ICS, GLS, FEDEX and CEX		X			X			Transportation and storage			X					
ES10	NCA investigation only	S/0404/12, SERVICIOS COMERCIALES AENA, 2 January 2014	Airport management company AENA and 11 car rental companies			X					Transportation and storage			X					
FI01	NCA investigation only	Energiateollisuus, case no 289/KKV/14.00.00/2016	Energiateollisuus ry (Finnish Energy registered organization)			X					Other service activities		X						
FI02	NCA investigation only	Tendering cooperation between adult education institutions (Aikuisoppilaitosten tarjousyhteistyö) case no 293/KKV14.00.00/2014,	Aikuiskoulutus Kouvola; Jyväskylän aikuisopisto; Lapin ammattiopisto; Sataedu Oy; Työtehoseura					X			Other service activities		X						
FI03	NCA investigation only	Sanoma-Fox (Joint Selling Agreement of Television Advertisement), case noKKV/833/14.00.00/2019	Sanoma Media Finland Oy (Sanoma); Fox Networkds Group Oy (Fox).					X			Information and communication		X						
FI04	NCA investigation only	Suomen Yhteisverkko (DNA/Telia), case no 438/14.00.00/2014	DNA Oy; TeliaSonera Finland Oyj		X						Information and communication	X							
FI05	NCA investigation only	Horizontal Cooperation in Electronic Identification (Tupas), case no 317/61/2007, 738/61/2007, 765/61/2007	Finanssialan Keskusliitto ry; Nordea Pankki Suomi Oyj; OP-Pohjola osk; Helsingin OP Pankki Oyj; Turun Seudun Osuuspankki		X						Other service activities		X						

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FI06	NCA investigation only	Automatia, case no KKV/1469/14.00.00/2015	Automatia Pankkiautomaatit Oy; Danske Bank Oyj; Nordea Bank AB; OP Osuuskunta		X			X			Financial and insurance activities	X							
FR01	NCA investigation only	Decision n° 17-D-03 of 27 February 2017 relating to practices in the sector of car rental	6 car rental companies (Europcar, Avis, Hertz, Milton, Sixt, ADA) and some of their franchisees, 12 French airports			X					Transportation and storage				X				
FR02	NCA investigation only	Decision n° 19-D-25 of 17 December 2019 relating to practices in the meal vouchers sector	4 issuers of meal vouchers in France (Edenred France, Up, Natixis Intertitres and Sodexo Pass France) and the Centrale de Règlement des Titres (CRT)			X					Accommodation and food service activities			X					
FR03	NCA investigation only	Decision n° 13-D-03 of 13 February 2013 relating to practices in the pork butchering sector	5 major Breton slaughterers, others slaughtering companies, the slaughter houses professional body (SNCP)) and Auction Market Buyers Federation			X					Agriculture, forestry and fishing			X					
FR04	NCA investigation only	Decision n° 12-D-26 of 20 December 2012 relating to practices in the production, commercialisation, installation and maintenance of fire extinguishers	An association of undertakings (CNPP), a certifying body in the fields of prevention and protection against fire and 6 entities						X		***outside classification***			X					
HU01	NCA decision followed by an appeal	Vj/96/2010 Contact lenses	CooperVision Kft. Novartis Hungária Kft. FOTEX-OFOTÉRT Kft. Johnson&Johnson Kft. Kleffmann & Partner Market Research Kft.			X					Human health and social work activities			X				X	
HU02	NCA investigation only	Vj/22/2015. paper products	AUCHAN Magyarország Kft., DM-Drogerie Markt Kft., METRO Kft., ROSSMANN Kft., ESSITY HUNGARY Kft., SPAR Kft.,			X					***outside classification***		X						

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			TESCO-GLOBAL Zrt., VAJDA-PAPÍR Kft.																
HU03	NCA decision followed by a Court appeal	Vj/8/2012. Bankdatabase	Hungarian Banking Association, International Training Center for Bankers Ltd. and several financial institutions			X					Financial and insurance activities			X				X	
IE01	NCA investigation only	The Competition and Consumer Protection Commission and Relay Software Limited and Alliance Plc and AXA Insurance Limited and Sertus Underwriting Limited and Zurich Insurance plc and RSA Insurance Ireland Limited.	Relay Software Limited Alliance Plc AXA Insurance Limited Sertus Underwriting Limited Zurich Insurance plc RSA Insurance Ireland Limited			X					Financial and insurance activities	X							
IE02	NCA investigation only	Private Nursing Homes	Nursing Homes Ireland (NHI), the representative body for the sector.							X	Human health and social work activities	X							
IE03	NCA investigation only	COM-2016-002 IPOA	Irish Property Owners Association ("IPOA") and its members							X	Accommodation and food service activities	X							
IT01	NCA investigation only	Case N. I739 - MONDADORI ELECTA-RÉUNION DES MUSÉES NATIONAUX/JVCO	Mondadori Electa (Electa); Réunion des Musées Nationaux (RMN).							X	Arts, entertainment and recreation		X						
IT02	NCA investigation only	Case N. I773 - CONSORZIO BANCOMAT-COMMISSIONI BILL PAYMENTS	Consorzio BANCOMAT, a consortium active in the management of payment circuits and payment cards of BANCOMAT network and their related trademarks.		X			X			Financial and insurance activities	X							
IT03	NCA decision followed by a Court appeal	Case N.I794 - ABI/SEDA, closed with prohibition by the decision n. 26565, on 28/04/2017	Italian Banking Association (ABI) and these banking groups: Unicredit, Intesa SanPaolo, ICCREA, ICBPI, BNL,		X			X			Financial and insurance activities			X					X

Code	Type of proceeding	NCA case number and case name	Parties to the horizontal cooperation agreement in question	Type of horizontal cooperation agreement[191]							Economic sector	Outcome[192]					If appealed, outcome of the appeal proceedings[193]		
			MPS, UBI Banca, Cariparma, plus 3 others.																
IT04	NCA investigation only	Case N. I799 - TIM-FASTWEB-REALIZZAZIONE RETE IN FIBRA	Telecom Italia S.p.A.; Fastweb S.p.A.		X						Information and communication	X							
IT05	NCA investigation only	Case N. I768 - CENTRALE D'ACQUISTO PER LA GRANDE DISTRIBUZIONE ORGANIZZATA	CENTRALE ITALIANA S.c. a r.l.;COOP ITALIA S.c. a r.l; DESPAR SERVIZI Consorzio GARTICO a r.l.; DISCOVERDE S.r.l.; SIGMA.				X	X			***outside classification***	X							
IT06	NCA investigation only	Case N. I770 - ARCA/NOVARTIS-ITALFARMACO	Novartis Farma S.p.A.; Italfarmaco S.p.A	X		X		X			Human health and social work activities	X							
LT01	NCA decision followed by an appeal	Decision of 20th January, 2011	National Health Insurance Fund, UAB 'Ortopagalba', UAB 'Ortopedijos centras', UAB 'Ortopedijos klinika' and others versus the Competition Council of the Republic of Lithuania				X				***outside classification***			X			X		
LV01	NCA investigation only	-SIA „Sumata" and SIA „Astarte Nafta" Nr. 1522/12/03.02./9 (20.07.2012); -SIA „Astarte Nafta" and SIA „East-West Transit" Nr. 904/13/03.02./6 (30.05.2013); -SIA „East-West Transit" and SIA „Sumata" Nr. 1231/13/03.02./9 (11.07.2013); -SIA „Neste Latvija" and SIA „RusLatNafta" Nr. 143/14/03.02./1 (14.02.2014); -SIA „RusLatNafta" and SIA						X			Transportation and storage					X			

Code	Type of proceeding	NCA case number and case name	Parties to the horizontal cooperation agreement in question	Type of horizontal cooperation agreement[191]							Economic sector	Outcome[192]					If appealed, outcome of the appeal proceedings[193]		
		„East-West Transit" Nr. 960/14/03.02./5 (29.05.2014); -SIA „East-West Transit" and SIA „Gotika Auto" Nr. 893/15/7.3.2./3 (28.05.2015); -AS „Virši-A" and SIA „MC" Nr. 2272/15/7.3.2./9 (05.11.2015); -AS „Virši-A" and SIA „KURZEMES SĒKLAS" Nr. 2289/15/7.3.2./10 (05.11.2015); -SIA "Latvijas propāna gāze" un SIA "Eko gāze" Nr.630/16/5-3/2 (12.05.2016).																
LV02	NCA investigation only	AS "Kredītinformācijas Birojs" un AS "CREFO Birojs" Nr. KL\2.2-3\19\4 (28.03.2019)	AS "Kredītinformācijas Birojs" un AS "CREFO Birojs"					X			Financial and insurance activities					X			
MT01	NCA investigation only	Case COMP-MCCAA 4/2017	Insurance companies			X				X	Financial and insurance activities					X			
NL01	NCA investigation only	Case number 13.0612.53; Case name Mobiele operators	KPN, T-Mobile and Vodafone			X					Information and communication	X							
NL02	NCA investigation only	Case number 6711 AND 7245; case name FTN	Dutch Federation for the Textile Care Industry (FTN), which is the trade association for textile care professionals in the Netherlands							X	Other service activities	X							
NL03	NCA decision followed by an appeal	Case number prisma 6888; case name LHV	The Dutch National Association of General Practitioners (LHV)							X	***outside classification***			X				X	

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NL04	NCA decision followed by an appeal	Case number prisma 6855; case name Wasserijen	Rentex Floron, Rentex Awé, CL, Rentex Dieben							X	Other service activities			X			X		
NL05	NCA investigation only	Case number 15.1214.15; Case name Informal opinion about the collaboration between UMCU, St. Antonius Hospital and Meander Medical Center regarding complex oncology	Three Dutch hospitals: i) UMCU, ii) St. Antonius Hospital and iii) Meander Medical Center			X					Human health and social work activities					X			
NL06	NCA investigation only	Case number 13.0293.15; case name Informal opinion PACT	PACT: a cooperative association established by a group of pharmacists, with the aim to offer support in negotiations with health insurers.			X					Human health and social work activities					X			
NL07	NCA investigation only	Case number 17.0377.29; case name Toezeggingsbesluit Svitzer en Iskes	Svitzer, Iskes and PTA					X			Transportation and storage	X							
NL08	NCA investigation only	Case number 13.0195.66; case name Sluiting kolencentrales	Members of the trade association of the Dutch energy industry, Energie Nederland		X						Other service activities					X			
NL09	NCA investigation only	Case number 14.1134.15, accessibility cash money	ABN AMRO, ING, Rabobank, SNS en Betaalvereniging Nederland					X			Financial and insurance activities					X			
NL10	NCA investigation only	Case number 14.0840.15; case name Informal opinion about joint procurement of TNFi drug	Health insurer Achmea and 'participating' hospitals (which are hospitals that are located within the core catchment area of Achmea)				X				Human health and social work activities					X			
NL11	NCA investigation only	Case number 14.1210.15; case name Informal opinion about collective procurement of proton therapy by health insurers	Eight health insurers, which have been anonymized in the document				X				Human health and social work activities					X			

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NL12	NCA investigation only	Case number 17.0538.15; case name Informal opinion about emergency home care	Five home care providers: i) Fundis, ii) Espria, iii) Sensire, iv) Florence and v) Zuidzorg		X						Human health and social work activities					X			
NL13	NCA investigation only	Case number 16.0677.28; Case name Beton mortel	Mebin B.V., Cementbouw B.V., Dyckerhoff Basal Nederland B.V., Bruil Beton & Mix Groep B.V., Mortelcentrale Cuijk B.V., Rouwmaat Groep, and Agar Holdin		X	X					Construction	X							
NL14	NCA decision followed by an appeal	Case number prisma 7512; case name Geld Service Nederland	Geldservice Nederland B.V. and participating banks ABN AMRO, Rabobank and ING Bank		X		X				Financial and insurance activities				X		X		
NL15	NCA investigation only	Case number 13.0195.66; case name Kip van morgen	Industry wide arrangements between supermarkets, poultry farmers, and broiler meat processors							X	Agriculture, forestry and fishing					X			
NL16	NCA decision followed by an appeal	Case number 12.0256.53.2.01, Geborgde rundveedierenartsen	Koninklijke Nederlandse Maatschappij voor Diergeneeskunde (KNMvD) Royal Dutch Company for Veterinary						X		Other service activities				X		X		
NO01	NCA decision followed by an appeal	Case 2014/0192 – El Proffen AS/Ep Contracting AS – Lysteknikk Elektroentreprenør AS – Elektro Nettverk Service AS – Arkel Asker og Bærum AS – Hoel Elektro AS – Røa Elektriske AS	See Q 3.2		X	X					Other service activities			X			X		
NO02	NCA investigation only	Case 2013/0031 NorgesGruppen ASA – ICA Norge AS	NorgesGruppen ASA (NG) ICA Norge AS (ICA)				X				***outside classification***		X						
NO03	NCA decision followed by an appeal	Case 2010/0731 Ski Taxi, Follo Taxisentral og Ski Follo Taxidrift	Ski Taxi BA, Follo Taxisentral BA, Ski Follo Taxidrift AS			X				X	Human health and social work activities			X			X		

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NO04	NCA investigation only	Case V2016-7 – Johny Birkeland Transport AS/Norva 24 AS – Lindum AS	Johny Birkeland Transport AS/Norva 24 AS Lindum AS			X				X	Other service activities			X					
PT01	NCA decision followed by an appeal	PRC/2012/9	ABANCA, BIC, BBVA, BPI, BCP, BES, Santander, BANIF, Barclays, Crédito Agrícola, Montepio, CGD, Deutsche Bank, UCI			X					Financial and insurance activities			X					X
PT02	NCA investigation only	PRC/2015/8	Associação Portuguesa de Leasing, Factoring e Renting (ALF)/BCP/Santander Consumer/Santander Totta/Barclays/Montepio/Mercedes Benz Financial Services			X					Other service activities	X							
PT03	NCA investigation only	2015/9	ASFAC-Associação de Instituições de Crédito Especializado/Santander Consumer/Santander Totta/Montepio/Mercedes Benz Financial Services/Volkswagen Bank			X					Financial and insurance activities	X							
PT04	NCA investigation only	PRC/2016/9	Altice, NOS, Vodafone, NOWO				X				Arts, entertainment and recreation					X			
RO01	NCA investigation only	ECN 3598 - UNSAR	members of UNSAR			X					Financial and insurance activities			X					
RO02	NCA investigation only	ECN 3756 - CFAR	Chamber of Financial Auditors of Romania and its members							X	Financial and insurance activities			X					
RO03	NCA investigation only	ECN 2854 - APIA (Agency for Payments and and Intervention in Agriculture)	SC Intrarom SA, SC Siveco Romania SA							X	Information and communication			X					

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RO04	NCA investigation only	ECN 2271 - REREC	members of REREC							X	Household appliance			X					
RO05	NCA investigation only	ECN 1963 - FRF&LPF	The Romanian Federation of Football The Professional Football League					X			Arts, entertainment and recreation	X							
SE01	NCA investigation only	Dnr 30/2015 Svensk Försäkring	Svensk Försäkring							X	Financial and insurance activities				X				
SE02	NCA investigation only	Dnr 38/2012 Sweboat	Svenska Varvsföreningen through Båtbranschens riksförbund (Sweboat)							X	***outside classification***		X						
SE03	NCA investigation only	Dnr 75/2013 Sveriges Tandteknikerförbund	Branschorganisationen Sveriges Tandteknikerförbund							X	Human health and social work activities		X						
SE04	NCA investigation only	Dnr 138/2012 Tele2 Sverige AB, Telia Sonera AB	Tele2 Sverige AB, Telia Sonera AB							X	Information and communication		X						
SE05	NCA investigation only	Dnr 267/2013 Moelven Industrier AB	Moelven Industrier AB, Moelven Component AB, Moelven Wood AB, Setra Group AB, Vida AB, Vida Wood AB and Martinsons Såg Aktiebolag			X					Agriculture, forestry and fishing		X						
SE06	NCA investigation only	Dnr 367/2012 4T Sverige AB	Telia Sonera Sverige AB, Tele2 Sverige AB, Telenor Sverige AB and Hi3G Access AB					X		X	Financial and insurance activities		X						
SE07	NCA investigation only	Dnr 399/2011 Brunswick Marine in Sweden AB, KGK Motor AB, AB Volvo Penta and Yamaha Motor Scandinavia AB.	Brunswick Marine in Sweden AB, KGK Motor AB, AB Volvo Penta and Yamaha Motor Scandinavia AB							X	***outside classification***		X						

Code	Type of proceeding	NCA case number and case name	Parties to the horizontal cooperation agreement in question	Type of horizontal cooperation agreement[191]							Economic sector	Outcome[192]					If appealed, outcome of the appeal proceedings[193]		
SE08	NCA investigation only	Dnr 5/2013 Telenor Sverige AB, Tele2 Sverige AB, Net4Mobility HB	Telenor Sverige AB (Telenor), Tele2 Sverige AB (Tele2), Net4Mobility HB (N4M)		X					X	Information and communication				X				
SE09	NCA investigation only	Dnr 168/2012 Sveriges Åkeriföretag	Sveriges Åkeriföretag			X					Other service activities		X						
SE10	NCA decision followed by an appeal	Dnr. 483/2013, Konkurrensverket ./.Aleris and others	Aleris Diagnostik AB, Capio S:t Görans Sjukhus AB, Hjärtkärlgruppen i Sverige AB, Globen Heart AB and Medical Support i Stockholm Aktiebolag			X		X		X	Human health and social work activities					X	X	X[194]	
SE11	NCA investigation only	Dnr 501/2012 Svenska Hockeyligan AB	Svenska Hockeyligan AB (SHL)							X	Arts, entertainment and recreation		X						
SE12	NCA decision followed by an appeal	Dnr 511/2014, Konkurrensverket ./. Alfa Quality Moving AB, NFB Transport Systems AB and ICM Kungsholms AB, 2014-07-14	Alfa Quality Moving AB (”Alfa”) NFB Transport Systems AB (”NFB”) and ICM Kungsholms AB (”ICM”)							X	Transportation and storage					X		X	
SE13	NCA investigation only	Dnr 174/2012 SBS Discovery Radio AB, RBS Broadcasting AB (NRJ)	SBS Discovery Radio AB RBS Broadcasting AB (NRJ)		X			X			Other service activities	X							
SE14	NCA investigation only	Dnr 530/2014 KMC Karlstad Speedway av Svenska Motorcykel and Snöskoterförbundet	KMC Karlstad Speedway (KMC) av Svenska Motorcykel- and Snöskoterförbundet (SVEMO) Disciplin- och Besvärsnämnd							X	Arts, entertainment and recreation				X				
SE15	NCA investigation only	Dnr 209/2012 EQ Fönster	EQ Fönster						X	X	Other service activities				X				

[194] *Please note that the decision (summon application) in this case was upheld by the first instance but annulled on appeal.*

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SE16	NCA investigation only	Dnr 549/2011 Rezidor Royal Hotel AB, Rezidor Hotel AB , Hotel Hilton Plaza AB , SSRS Grand Hotel Savoy AB , Scandic Hotels AB and Hotell Konserthuset AB	Rezidor Royal Hotel AB (Radisson Blu Hotel in Malmö), Rezidor Hotel AB (Park Inn by Radisson), Hotel Hilton Plaza AB (Hilton Malmö City), SSRS Grand Hotel Savoy AB (Elite Hotel Savoy), Scandic Hotels AB (Scandic Hotel S : t Jörgen) and Hotell Konserthuset AB (Quality Hotel Konserthuset).			X				X	Accommodation and food service activities		X						
SE17	NCA investigation only	Dnr 579/2018 Bygg- och miljöförvaltningen Gislaveds kommun	The Building and Environment Administration, Gislaved Municipality and the restaurants etc. that has serving permits in the municipality			X				X	Accommodation and food service activities		X						
SE18	NCA investigation only	Dnr 260/2013 Svenska Förläggareföreningen and Svenska Bokhandlareföreningen	Svenska Förläggareföreningen (SVF) Svenska Bokhandlareföreningen (SVB)		X	X					Arts, entertainment and recreation		X						
SE19	NCA investigation only	Dnr 589/2019 Cirkle K Sverige AB	Cirkle K Sverige AB (Cirkle K)			X					Transportation and storage		X						
SE20	NCA investigation only	Dnr 590/2013 Svenska Kroppskulturförbundet	Svenska Kroppskulturförbundet (SKKF).							X	Arts, entertainment and recreation				X				
SE21	NCA investigation only	Dnr 305/2013 EQ Fönster	EQ Fönster						X	X	Other service activities				X				
SE22	NCA investigation only	Dnr 414/2012 Sweboat	Svenska Varvsföreningen genom Båtbranschens riksförbund (Sweboat)			X					***outside classification***		X						
SE23	NCA investigation only	Dnr 610/2017 Lemminkäinen Sverige AB , Sandahls Grus och Asfalt AB	Lemminkäinen Sverige AB (Lemminkäinen) Sandahls Grus och Asfalt AB (Sandahls)			X					Construction		X						

Code	Type of proceeding	NCA case number and case name	Parties to the horizontal cooperation agreement in question	Type of horizontal cooperation agreement[191]							Economic sector	Outcome[192]					If appealed, outcome of the appeal proceedings[193]		
SE24	NCA investigation only	Dnr 630/2017 NCC Industry AB, Peab Asfalt AB, Skanska Industrial Solutions AB	NCC Industry AB; Peab Asfalt AB; Skanska Industrial Solutions AB			X					Construction	X							
SE25	NCA investigation only	Dnr 645/2016 Bauhaus & Co KB, K-Rauta AB	Bauhaus & Co KB (Bauhaus); K-Rauta AB (K-Rauta)			X				X	Construction		X						
SE26	NCA investigation only	Dnr 442/2015 Geomatikk Sverige AB	Geomatikk Sverige AB						X	X	***outside classification***				X				
SE27	NCA investigation only	Dnr 674/2014 Svenska Bankförening	Svenska Bankförening							X	Financial and insurance activities		X						
SE28	NCA decision followed by an appeal	Dnr 709-2009 Svenska Bilsportsförbundet (SBF)and dnr. A5/11 MD 2012/16 Konkurrensverket ./. Svenska Bilsportsförbundet (SBF)	Svenska Bilsportsförbundet (SBF)							X	Arts, entertainment and recreation			X			X		
SE29	NCA investigation only	Dnr 723/2016 Svenska Hockeyligan AB	Svenska Ishockeyspelares Centralorganisation (SICO), Svenska ishockeyförbundet (SIF), Svenska Hockeyligan AB (SHL) och Hockeyallsvenskan AB (HAAB)							X	Arts, entertainment and recreation				X				
SE30	NCA investigation only	Dnr 733/2013 Skogs-och Lantarbetsgivareförbundet; Facket för skogs-, trä- och grafisk bransch (GS)	Skogs-och Lantarbetsgivareförbundet Facket för skogs- trä- och grafisk bransch (GS)							X	Agriculture, forestry and fishing				X				
SE31	NCA investigation only	Dnr 752/2016 Sveriges Advokatsamfund	Sveriges Advokatsamfund							X	Other service activities				X				

Code	Type of proceeding	NCA case number and case name	Parties to the horizontal cooperation agreement in question	Type of horizontal cooperation agreement[191]							Economic sector	Outcome[192]					If appealed, outcome of the appeal proceedings[193]		
SE32	NCA decision followed by an appeal	Dnr 848/2014 PMT 17299-14Konkurrensverket ./. Göteborg Energi GothNet AB (”GothNet”) and TeliaSonera Sverige AB (”Telia”), PMT 761-17 Telia Sverige AB ./. Konkurrensverket	TeliaSonera Sverige AB and Göteborg Energi GothNet AB			X		X		X	Information and communication					X	X	X[195]	
SE33	NCA investigation only	Dnr 520/2018 Assistancekåren Sweden AB	Assistancekåren Sweden AB (Assistancekåren)		X	X				X	Transportation and storage				X				
SE34	NCA investigation only	Dnr 532/2014 Finansiell ID-Teknik BID AB	Finansiell ID-Teknik BID AB (BID)		X			X			Financial and insurance activities				X				
SE35	NCA investigation only	Dnr 584/2014 PostNord Sverige AB och Bring Citymail Sweden AB	PostNord Sverige AB (PostNord) och Bring Citymail Sweden AB (Bring)	X		X					Transportation and storage				X				
SE36	NCA decision followed by an appeal	Dnr 605/2010 DäckiaEuromaster T 18896-10 and MD 2012:9 Konkurrensverket ./. Däckia Aktiebolag; Euromaster Aktiebolag	Däckia Aktiebolag; Euromaster Aktiebolag					X			***outside classification***					X	X		
SE37	NCA investigation only	Dnr 607/2011 Rationella Kontors Varuinköp AB	Rationella Kontors Varuinköp (RKV-kedjan)			X		X			***outside classification***	X							
SE38	NCA investigation only	Dnr 661/2012 Golvkedjan	Golvkedjan Ekonomisk Förening och Golvkedjan AB			X		X			Construction		X						

[195] *Please note that the decision (summon application) in this case was upheld by the first instance but annulled on appeal.*

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SI01	NCA decision followed by an appeal	Case No. I U 1823/2014 MLADINSKA KNJIGA Trgovina Ltd (office supplies company) as Plaintiff v. SLOVENIAN COMPETITION PROTECTION AGENCY (hereinafter "the Agency") as Defendant							X		***outside classification***			X				X	
UK01	NCA investigation only	Project Emerald - Commission rates	Third party intermediaries / price comparison websites			X					Other service activities		X						
UK02	NCA investigation only	Cleanroom laundry services and products - Case 50283	Fenland Laundries Limited ('Fenland') and Berendsen Cleanroom Services Limited, formerly Micronclean (Newbury) Limited ('Berendsen Newbury')					X		X	Other service activities			X					
UK03	NCA investigation only	Energy price comparison websites - Case 50332. See also Ofgem's Paid online search advertising investigation, which was transferred to the CMA as case 50332.	Some energy price comparison websites.							X	Other service activities		X						
UK04	NCA investigation only	Investigation of Mastercard and Visa interchange fee arrangements – Case CE/6345/05 and CE/4500/04	Mastercard and Visa.							X	Financial and insurance activities		X						
UK05	NCA investigation only	Restrictive Arrangements Preventing Estate and Letting Agents from Advertising Fees in Local Newspaper - Case CE/9827/13	An association of estate and lettings agents in Hampshire, 3 of its members and a newspaper publisher (three agreements in place).							X	Real estate activities			X					
UK06	NCA investigation only	Face-to-face marketing investigation	Energy Retail Association ("ERA"), Association of Energy Suppliers ("AES")							X	Other service activities		X						

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			British Gas, EDF Energy, E.On, RWE Npower, SSE and Scottish Power																
UK07	NCA investigation only	Private motor insurance – Case CE/9388/10	Ageas, Aviva, AXA Insurance, Liverpool Victoria, RBS Insurance, Royal & Sun Alliance, Zurich Insurance (insurers), Experian, SSP (software providers)			X					Financial and insurance activities	X							
UK08	NCA investigation only	CMP/1-2016/CA98 Anti-competitive conduct in the asset management sector	Hargreave Hale Limited, Newton Investment Management Limited, River and Mercantile Asset Management LLP			X					Financial and insurance activities			X					
UK09	NCA investigation only	Nortriptyline investigation: infringements decisions for anti-competitive agreement and conduct – Case 50507.2	King Pharmaceuticals Ltd (King), Auden Mckenzie (Pharma Division) Ltd (Auden), Lexon (UK) Ltd (Lexon) and Alissa Healthcare Research Ltd (Alissa)			X		X			Human health and social work activities			X					
UK10	NCA investigation only	CW/01138/09/14 Competition Act investigation into the sale of live UK audio-visual media rights to Premier League matches (ECN case number 3290)	The Football Association Premier League Limited and all associated Premier League Football Teams (c.24 parties)						X		Arts, entertainment and recreation		X						

Abstract

Purpose – The main objective of this study is to support the Directorate General for Competition (DG COMP) in the evaluation of the Commission Regulations (EU) No 1217/2010 (Research & Development Block Exemption Regulation – 'R&D BER') and 1218/2010 (Specialisation Block Exemption Regulation – 'Specialisation BER'), together referred to as the 'horizontal block exemption regulations' (or 'HBERs') and the related Horizontal Guidelines. To contribute to this objective, the study provides qualitative and quantitative evidence on the relevance of the HBERs and the Horizontal Guidelines for horizontal cooperation agreements.

Methodology – The overall methodological approach covers several methods including primary data collection through interviews with companies located in six European countries (Austria, France, Italy, Poland, Slovakia and Sweden), business associations, law firms, consumer organisations and experts. In addition, the study analyses relevant cases of EU National Competition Authorities, national guidelines on horizontal cooperation agreements and a number of judgments of national courts.

Findings – The evidence collected for this study points to an overall adequate degree of legal certainty afforded by the HBERs, together with the Horizontal Guidelines, especially for R&D and specialisation agreements. Where respondents pointed to some lack of clarity, especially in the Horizontal Guidelines, this was attributed to a few factors which apply to all types of agreements (e.g. challenges in defining relevant markets, etc.). Respondents also identified two major trends that had a negative impact on the relevance of the current regulatory framework because these trends, namely the digitalisation of the economy and the increased importance of sustainability, are not adequately covered by the HBERs and the Horizontal Guidelines. In addition, while almost all stakeholders considered that the HBERs and the Horizontal Guidelines are a source of cost reduction by providing increased legal certainty, they also identified room for improving legal certainty.

Publications Office
of the European Union

KD-02-21-603-EN-N
doi: 10.2763/414394