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Specialisation agreements and SMEs

Final Report

Prepared by

AEDC

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Specialisation agreements and SMEs

Final report

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Table of Contents

Abstract

This report reviews the treatment of specialisation agreements under EU competition rules, exploring if and how these rules hinder procompetitive cooperation between small and medium-sized enterprises ("SMEs"), either among them or with larger undertakings.

The report identifies potential regulatory inconsistencies which may adversely affect SMEs and highlights the need for a clear and predictable treatment of horizontal cooperation for these undertakings.

The authors propose alternatives to facilitate that SMEs enjoy the benefits of the Specialisation Block Exemption Regulation and the Horizontal Guidelines while at the same time protecting competition.

Executive summary

This report looks at the treatment of specialisation agreements under EU competition rules, currently governed by Regulation 1218/2010[1] (hereafter "SBER") and the Horizontal Guidelines ("HGL")[2] and explores whether these rules may hinder procompetitive cooperation which might have otherwise been carried out by small and medium-sized enterprises ("SMEs"),[3] either among them or with larger undertakings (hereafter for simplicity "agreements between SMEs").

The report discusses why SMEs cooperate, how they do it and the logic underlying an exemption for specialisation agreements concluded by SMEs and examines if the SBER caters for the needs of SMEs. For that purpose, Part One of the report traces the evolution of the treatment of specialisation agreements under EU law, dissects the main components of specialisation agreements as defined in the Regulation, discusses the risk that competitive and efficient agreements between SMEs may not meet the strict conditions for the exemption and assesses specific challenges that the 20% market share threshold poses to SMEs. During that analysis, the report identifies potential inconsistencies in the SBER and the HGL which may adversely affect, in particular, SMEs.

Taking stock of that examination, Part Two discusses ways to ensure to improve the access of agreements between SMEs to the SBER. For that purpose, it first looks at the treatment of SMEs under EU competition law, highlighting the need for a coordinated approach with national competition agencies, not least because of the fact that many agreements between SMEs could remain below an appreciable effect on trade between Member States and thereby fall outside the scope of EU rules. The report also looks at policies at Member State level that look at the specific situation of SMEs and the challenges that competition law poses for them in that respect. In conclusion of that analysis, the report highlights the need for a clear and predictable treatment of horizontal cooperation for SMEs, including but not limited to specialisation as defined in the SBER, and notes that SMEs may be insufficiently informed about the requirements that competition law imposes on horizontal cooperation, including the 20% market share threshold. Legal uncertainties in this field are exacerbated by the lack of clarity of the status under competition law of basic forms of cooperation such as cross-supplies, subcontracting and loose forms of joint production, which do not currently benefit from the SBER, as well as other factors.

The examination of the SBER and HGL in Part One and the analysis of its impact on SMEs in Part Two lead the authors to propose in Part Three several ways to facilitate that SMEs enjoy the benefits of the SBER and HGL while at the same time protecting competition. These suggestions are divided in two groups: those that involve SME-

1 Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements. OJ L 335, 18.12.2010, p. 43.

2 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, 14.1.2011, p. 1.

3 Commission Recommendation (2003/361/EC) of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises. OJ L 124, 20.5.2003, p. 36. See also *User Guide to SME definition,* Publications Office of the European Union, 2020.

specific measures, and those of a general scope that would particularly benefit SMEs. In the first category it is proposed (i) to clarify that the exemption applies to agreements where at least a party is a SME concerning shared facilities (such as warehouses, plants and machinery, logistic assets and distribution networks, joint inventory management, cross-supplies, etc.); (ii) to presume that agreements between SMEs fall below the threshold (coupled with an agile mechanism enabling the Commission, eventually upon request from a NCA, to withdraw that presumption) and (iii) to issue specific guidance to help SMEs to navigate competition law rules, in close cooperation with NCAs. The second category (this is, general amendments to the SBER) suggests clarifications on (i) the treatment of cross-supplies and subcontracting agreements to expand production; (ii) with respect to the notion of joint production and joint distribution absent joint control; (iii) amending the SBER to facilitate unilateral specialisation by expanding the definition of unilateral specialisation to include more than two parties; and (iv) to clarify the treatment of information exchanges in the context of specialisation agreements.

Foreword

This report, prepared by the Spanish Association for the Defence of Competition ("AEDC"),[4] looks at the treatment of specialisation agreements under EU competition rules, currently governed by Regulation 1218/2010[5] (hereafter "SBER") and the Horizontal Guidelines ("HGL")[6] and explores whether these rules may hinder procompetitive cooperation which might have otherwise been carried out by small and medium-sized enterprises ("SMEs"),[7] either among them or with larger undertakings.

This examination takes place in the broader context of the ongoing revision of the treatment of horizontal cooperation agreements, a process that runs parallel to the revision of competition rules in other areas which are related to this matter such as, the review of the rules applicable to vertical agreements[8] and the revision of the Notice on Market definition.[9] The impact of these processes in the revision of the SBER has been considered where appropriate.

The study contains the following parts:

- An ***Introduction*** that lays out the questions to be examined: why SMEs cooperate, how they do it and the logic underlying an exemption for specialisation agreements concluded by SMEs.
- ***Part One*** looks at specialisation agreements as defined in the SBER from the perspective of SMEs. It contains the following subsections:
  (a) Section 1 provides a glimpse of the evolution of the treatment of specialisation agreements under EU law.
  (b) Section 2 looks at the main components of specialisation agreements, i.e., the elements that are normally found and are arguably essential in these relationships.
  (c) Section 3 discusses agreements that might arguably be used for a similar purpose as specialisation agreements but are treated differently under competition law, so as to identify potential inconsistencies and risks of circumvention.
  (d) Finally, Section 4 takes a look at the market share threshold for specialisation agreements in the SBER and the specific challenges it poses to SMEs.

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4 The members who have contributed to this working group (by alphabetical order): Marcos Araujo, Tomás Arranz, Rafael Baena, Pablo Figueroa, Joaquín Hervada and Belén Irissarry.

5 Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements. OJ L 335, 18.12.2010, p. 43.

6 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, 14.1.2011, p. 1.

7 Commission Recommendation (2003/361/EC) of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises. OJ L 124, 20.5.2003, p. 36. See also *User Guide to SME definition,* Publications Office of the European Union, 2020.

8 https://ec.europa.eu/competition-policy/public-consultations/2021-vber_en.

9 https://ec.europa.eu/competition-policy/public-consultations/2020-market-definition-notice_en.

- ***Part Two*** examines whether and how the conclusion of specialisation agreements concluded by SMEs could be supported and contains the following subsections:
  (a) Section 1 looks at the overall treatment of SMEs in EU competition law and the balance between facilitating cooperation and ensuring healthy competition.
  (b) Section 2 questions if the market share threshold of the SBER could usefully be complemented with specific rules that would apply to SMEs alone.
  (c) Section 3 discusses options for a more flexible treatment of horizontal cooperation agreements involving SMEs, either among them or between SMEs and large undertakings in light of the policy options mentioned in the Inception Impact Assessment ("IIA").[10]
- Finally, ***Part Three*** offers some conclusions under the form of proposals resulting from the analysis conducted in the previous sections.

The considerations that follow benefit from the extensive work that has been made by the Commission in the still ongoing review of the SBER, and especially the Staff Working Document ("SWD"),[11] the IIA, and the accompanying Evaluation Support Study ("Evaluation Support Study")[12] as well as the feedback provided by multiple stakeholders in the context of the revision of the two Horizontal Block Exemption Regulations (the Research and Development Block Exemption Regulation and SBER, together "HBERs").[13] The report has sought to look at that material from the perspective of SMEs engaged and wishing to engage in cooperation of the sort provided for in the SBER (either with other SMEs or with larger companies), in light of the practical experience of the members of AEDC and their clients.
This report is the result of a consensus and does not represent the views of any individual members of the AEDC, law firm, lawyer, economist or other professional involved in its preparation.

10 Ares(2021)3714309 – 07 June 2021.

11 SWD(2021) 103 final.

12 *Evaluation support study on the EU competition rules applicable to horizontal cooperation agreements in the HBERs and the Guidelines*, Publications Office of the European Union, May 2021; available at https://ec.europa.eu/competition-policy/evaluation-support-study-eu-competition-rules-applicable-horizontal-cooperation-agreements-hbers_en.

13 See DG Competition's website: https://ec.europa.eu/competition-policy/public-consultations/2019-hbers_en#b-impact-assessment-phase.

Introduction

In its recent policy paper 'An SME Strategy for a sustainable and digital Europe',[14] the Commission vows to "*unleash the power of Europe's SMEs (…). Ultimately, the goal is that Europe becomes the most attractive place to start a small business, make it grow and scale up in the single market*". This is built on the recognition of the importance of SMEs for the EU's business fabric and will require a "*robust partnership for delivery between the EU and Member States, including regional and local authorities*". The alignment of EU competition law with these goals is pervasive.

That said, SMEs have been looked at as falling out of the scope of EU competition law. As indicated in the Effect on Trade Notice,[15] agreements between SMEs are normally not capable of affecting trade between Member States, save when engaging in cross-border activity. This leaves many agreements between SMEs exclusively governed by national competition rules rather than EU competition law.[16]

Besides this jurisdictional quandary, SMEs are often challenged by a traditional reading of the prohibitions in Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU") on horizontal agreements that, without looking at any actual effects on the market, would "*strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market*", to recall the terms of the seminal *Suiker Unie* judgment.[17] While this reading has long been nuanced and SMEs' larger rivals avail themselves of multiple options to pursue licit horizontal cooperation opportunities, SMEs often lack the resources to make similar determinations with sufficient legal certainty.[18]

Against this legal background, interactions among competing undertakings are ubiquitous in the real world, this being especially relevant the weaker and smaller entities are. These contacts are of course based on interest and fraught with competitive tension. But this element notwithstanding, market players big and small

14 COM(2020) 103 final of 10.3.2020.

15 Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty. OJ C 101, 27.4.2004, p. 81, at 50. See also footnote 5 of the 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 (hereinafter "*De Minimis* Notice"). OJ C 291, 30.8.2014, p. 1.

16 Note that the lack of appreciable effect on trade would free national competition rules from any limitations under Article 3 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, 4.1.2003, p. 1). For that reason, any competition rules for SMEs would require a degree of consensus with Member States.

17 Judgment of 16 December 1975, *Suiker Unie v Commission*, joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73, EU:C:1975:174, paragraph 174.

18 As noted in the SWD, the changes brought by Regulation 1/2003 whereby undertakings are required to self-assess compliance with competition rules can create a significant burden, especially for SMEs, which may lack the necessary resources and/or legal expertise. Commission Staff Working Document – Evaluation of the Horizontal Block Exemption Regulations {SWD (2021) 104 final}, 6 May 2021, p. 13.

regularly cooperate with their rivals through multiple mechanisms such as buying and selling products or services, subcontracting projects in whole or part or joining forces to bid for given contracts, a cooperation that is often essential to survive in the market, and especially so for SMEs.[19]

In recent years, the trend towards increased cooperation between market players has been enriched through ever more complex schemes ranging from logistic cooperation leading to just-in-time management inventory efficiencies, technological cooperation leading to standard-based ecosystems, common quality branding certification, B2B platforms and a myriad of other bilateral or increasingly multilateral formats. Again, the necessity to cooperate under these and other schemes is especially important for SMEs, facilitating market entry and reducing risks that SMEs may be less able to counter than their larger rivals. At the same time, the risk that these and similar structures damage markets is generally smaller when SMEs are involved than in the case of bigger players.[20] It might be therefore recommendable that the rules on cooperation among competitors, or rivals in a broader sense, take the features of SMEs into account.

This paper discusses the logic described above, in particular, with respect to specialisation agreements, a category of cooperation whereby rivals agree to either fully or partly cease production of certain products (or refrain from producing them) and to purchase them from the other party, individually or reciprocally; or to produce them jointly, either distributing the goods jointly or separately.

Not all forms of cooperation in production are covered by the SBER. As further discussed in the relevant sections, the detailed manner in which specialisation agreements are defined by the SBER leaves out of the exemption agreements that pursue similar objectives and largely produce similar effects but lack any of the multiple defining requisites. An example would be a longstanding supply relationship whereby an undertaking sources its requirements of a product or a family of goods from a specific competitor, without any commitment not to produce itself (and thereby not *agreeing to* ceasing production). The absence of that commitment would cause the deal to escape the definition of the SBER, leaving the agreement subject to assessment under the Horizontal Guidelines or generally under Article 101 TFEU. This is liable to adversely affect SMEs, which have weaker legal resources to conduct a self-assessment of the compatibility of their deal with Article 101 TFEU and should therefore be discussed in this context.

With the above in mind, this paper explores ways to provide additional clarity to horizontal cooperation agreements on specialisation involving SMEs without damaging the structure of markets and, where possible, reducing current compliance costs. The discussion commences with a review of the scope of the SBER that serves to identify potential inconsistencies and difficulties that discourage competitive cooperation among SMEs. A second part looks at potential remedies for the deficiencies that have been identified.

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19 This is acknowledged in the Commission notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article 85(1) of the EEC Treaty ("Subcontracting Notice"), OJ C 1, 3.1.79, p. 2, paragraph 1.

20 This is true both in the case of agreements between SMEs and in mixed situations binding one or several SMEs and one or more larger entities, a structure that would not normally strengthen pre-existing market power, while providing significant development possibilities for SMEs. Only in presence of significant network foreclosure effects would that second category need specific analysis.

PART ONE: UNDERSTANDING THE SBER

This Part One discusses the agreements that fall within the scope and thereby benefit from the exemption contained in the SBER. For that purpose, Section 2.1 looks at the evolution of the block exemption focusing on the elements that concern SMEs. Section 2.2 dissects the components of these relationships, exposing the difficulties that stand in the way of horizontal cooperation among SMEs. Section 2.3 discusses agreements similar to those under the SBER but falling under other competition law instruments. Finally, Section 2.4 questions the role of the market share threshold.

The evolution of the SBER

Specialisation agreements have enjoyed a special treatment in EU competition law for a long time. Article 65 of the ECSC Treaty[21] mentioned them alongside joint-buying and joint-selling agreements as one of the three categories of agreements potentially worthy of an exemption from the prohibition of anticompetitive agreements. These three categories reveal the concern at the time that the integration in the coal and steel markets would particularly affect smaller players, making it necessary to enable some cooperation among them. In subsequent years, the Commission would use those powers to enable restructuring by companies of varying sizes in need of a coordinated strategy, given the huge, fixed costs of these industries.[22]

Following the entry into force of the EEC Treaty, Regulation 2821/71[23] identified "specialisation agreements" as a category that may be block exempted by Regulation of the Commission. The Empowerment Regulation did not define the term 'specialisation', but its recitals justified the exemption on the idea that undertakings should be allowed to "*adapt their productivity and competitiveness to the enlarged market*", arguably a similar logic as that under the ECSC Treaty. The Empowerment Regulation also noted somewhat cryptically that the exemption would "*extend to the agreements necessary for achieving it*", which is what we would arguably label now "ancillary terms", as it was clear that cooperation would involve *inter alia* exchanges of information, cooperation in planning and joint sourcing and even distribution.

The Commission first used its powers in this area through Regulation 2779/72.[24] Its approach was cautious, limiting the exemption to agreements between parties with a

21 Treaty establishing a Coal and Steel Community of 18 April 1951 (no longer in force).

22 For some relevant examples of specialisation agreements under the ECSC treaty see: Commission Decision 84/317/ECSC of 28 May 1984 authorizing specialisation agreements between Arbed and Cockerill-Sambre concerning flat and long steel products, [1984] OJ L 163, p. 37; Commission Decision 88/461/ECSC of 14 July 1988 authorizing agreements between Arbed SA and Unimetal SA concerning long products, [1988] OJ L 223, p. 39; Commission Decision 93/118/ECSC of 14 December 1992 authorizing a joint-selling and specialisation agreement for beams between Empresa Nacional Siderúrgica SA and the Aristrain group, [1993] OJ L 48, p. 54;

23 Regulation (EEC) No 2821/71 of the Council of 20 December 1971 on application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices ("Empowerment Regulation"), [1971] OJ L 285, p. 46.

24 Regulation 2779/72 of the Commission of 21 December 1972 on the application of Article 85(3) of the Treaty to categories of specialisation agreements. [1972] OJ L 292, p. 23.

market share of 10% *and* where the aggregate turnover of the undertakings (defined in a broad manner so as to include sales from entities possessing 25% of the capital) stayed below 150 million units of account. This latter element limited the exemption to agreements between relatively small undertakings (but significantly larger than the current definition of SMEs[25]).

A decade later, the exemption was renewed through Regulation 3604/82,[26] which widened the scope of the exemption by raising the market share threshold to 15% and doubling the turnover limits to 300 million ECU, this second element being partly offset by a different calculation method.[27] Shortly after, in the context of ambitious plans to further remove barriers to trade within the internal market, Regulation 417/85[28] further widened the exemption by raising the admissible market share to 20% and increasing the turnover level to 500 million ECU.

The requirement of a turnover threshold on top of the market share limit was abandoned only in 2000[29] in the context of the profound revision of the rules on competition that took place between 1997 and 2004 where block exemption regulations came to be understood as 'safe harbours'. That process was inaugurated with Regulation 2790/1999 regarding vertical agreements[30] and its accompanying Guidelines.[31] These instruments provided for a broader exemption of vertical agreements than that of previous Commission's regulations and, crucially, included a market share threshold with no turnover limitation, raising the question whether turnover thresholds should be also removed when approving other block exemptions for other categories of agreements.

That option had several additional advantages. Notably it would avoid potential inconsistencies with the treatment of certain specialisation agreements between non-competitors, which had been made subject to 1999 Vertical Regulation,[32] instead of

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25 SMEs are defined as having less than 250 workers and either a turnover below EUR 50 million or a balance sheet below EUR 43 million. See Commission Recommendation (2003/361/EC) of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (full quote in footnote 3 above).

26 Commission Regulation 3604/82 of 23 December 1982 on the application of Article 85(3) of the Treaty to categories of specialisation agreements. [1982] OJ L 376, p. 33.

27 The initial definition included for the calculation of the turnover of the parties' parent shareholdings over 25%. The 1982 revision required shareholdings above 50% so, despite increasing the monetary threshold, its scope may have been reduced for some entities.

28 Commission Regulation 417/85 of 19 December 1984 on the application of Article 85(3) of the Treaty to categories of specialisation agreements. [1985] OJ L 53, p. 1.

29 Commission Regulation 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements. [2000] OJ L 304, p. 3.

30 Commission Regulation 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, [1999] OJ L 336, p. 21.

31 Guidelines on Vertical Restraints, [2000] OJ C 291, p. 1.

32 See Recital 10 of Regulation 2658/2000 on specialisation agreements: "*As unilateral specialisation agreements between non-competitors may benefit from*

the SBER. Additionally, it would align the treatment with that of R&D agreements, which since 1985 contained market share but no turnover thresholds.[33] All this led to the decision to remove the turnover threshold for specialisation agreements, withdrawing the normative connection to size that had existed since 1972.

When examining possibilities to improve the treatment of SMEs, it is inevitable to ponder how such a move would interfere with the policy choice made at that time were turnover thresholds, eventually aligned with the current definition of SMEs, reintroduced the divergence with the treatment of vertical restraints and, potentially, R&D agreements would resurface, and the SBER would, as back in 1985, become an exception in the world of the block exemption regulations.

That said, there is clearly room for improving, at least, the treatment of SMEs by introducing additional measures that are tailored to their needs and provide additional certainty and clarity to the cooperation among these entities and between them and larger undertakings, as discussed in this paper.

Main components of the exempted cooperation

Specialisation has at its core the coordination in the production of goods and services. Joint distribution is an optional factor. Besides, and as noted already in the Empowerment Regulation, specialisation agreements often involve ancillary elements such as exchange of information, coordination in supplies or other aspects. The following subsections look at each of these components from the perspective of SMEs.

The comments below assume that the parties at stake are actual or potential competitors, which brings them initially within the scope of the SBER.[34]

Production

Specialisation agreements within the meaning of the SBER have at their heart the coordination of production between competitors. Since Regulation 2658/2000, the notion encompasses both the production of goods and the provision of services.[35] The reference to services includes both upstream cooperation between companies when preparing a final service (e.g. cooperation in the creation of a platform for apartment renting in a local area) but also cooperation in the provision of intermediary services which are necessary for the production of a certain product (i.e. logistic services or IT based management internal services for companies selling goods).

However, not all forms of cooperation in production are covered by the SBER. Only certain agreements fulfilling certain conditions benefit from the block exemption. It is useful to examine separately specialisation agreements consisting in fully or partly ceasing production of certain products and to purchase them from the other party

the block exemption provided by […] Regulation (EC) No 2790/1999 […] [regarding] vertical agreements and concerted practices, the application of the present Regulation to unilateral specialisation agreements should be limited to agreements between competitors".

33 Commission Regulation 418/85 of 19 December 1984 on the application of Article 85(3) of the Treaty to categories of research and development agreements. [1985] OJ L 53, p. 5.

34 As earlier noted, specialisation agreements between non-competitors are governed by the rules on vertical agreements.

35 Earlier specialisation block exemption regulations had not defined "production"; their Recitals however strongly suggested that only the production of goods was meant to be covered by them. See e.g. Recital 3 of Regulation 417/85.

either individually or reciprocally (i.e., unilateral and reciprocal specialisation agreements, respectively; hereafter called "type 1") and those addressed jointly (i.e., joint production; hereafter called "type 2").

Production of goods and services under type 1 specialisation agreements

Type 1 specialisation involves an initially straightforward form of coordination in the production of goods or services. In its simplest form (i.e., unilateral type 1 agreements), it implies one party ceasing that production and sourcing it from the other party. Slightly more complex is the case of *partially* ceasing or refraining from production, as this involves fixing a production quota.

Type 1 agreements benefit from the SBER under the following conditions:

(a) That a party agrees to *fully or partly cease production* of certain products or to refrain from producing them (unilateral specialisation) or that two or more parties agree on a reciprocal basis to *fully or partly cease* or refrain from producing certain but different products (reciprocal specialisation).[36]

(b) That the parties are *already* active on the same product market.[37] This leaves out agreements to enter a market under this format, that option being in any event available under type 2 (joint production) specialisation agreements.

(c) That the party ceasing production remains in the downstream market, either being supplied by its counterpart (which would remain as a producer and compete in sales) or through joint distribution with the party remaining in the production.[38] *Joint distribution* means in this context either that the parties carry out the distribution of the products by way of a joint team, organisation or undertaking, or that they appoint for that task a third party which is not a competitor.[39]

(d) That the combined market share of the parties remains below 20%.[40]

Without prejudice of the discussion in Part Three of this report, it is apparent that some of the above limitations might be removed, either in general or specifically for the case of SMEs; the following might be here noted:

- A clarification that the exemption would be available to **agreements which may result in a full or partial ceasing of production**, even if not directly agreed to; and
- **Removing the requirement that unilateral specialisation agreements are open for two companies only**, hence permitting that two or more SMEs commit to reduce/abandon production and obtain a product from a third undertaking.

36 SBER, Article 1(1)(b)(c).

37 SBER, Recital 8.

38 Recital 9 and Article 2(3) SBER suggest that parties might choose between either purchase/supply obligations or joint distribution. The definition of unilateral and reciprocal specialisation agreements in Articles 1(b) and 1(c) of the SBER however appears to require a purchase/supply obligation between the parties. This could be read as meaning that the party abandoning production should be supplied even if the parties had opted for joint distribution, failing which the SBER would be unavailable. In the context of the revision, it would be appropriate to clarify this issue.

39 SBER, Article 1(1)(q).

40 SBER, Article 3.

Besides the above, the narrow definition of the SBER leaves out of its scope agreements that would arguably involve similar forms of coordination in production, as later discussed in Section 2.3 of this report.

Production under type 2 specialisation agreements

Type 2 specialisation agreements involve closer coordination than type 1 arrangements, as the parties (which may be two or more) jointly agree output levels, quality and wholesale prices, among other competitively important parameters. Further, the SBER permits them to jointly distribute under the same rules as type 1 specialisation agreements, an option that would strengthen their cooperation even further.

Type 2 specialisation agreements benefit from the SBER under the following conditions:[41]

(a) That production is made *jointly*. This arguably leaves out agreements whereby a party leaves production entirely in the hands of other parties, an option that would neither be available under a unilateral specialisation agreement if the agreement encompassed more than two parties.

(b) The combined 20% market share threshold in the same terms as in Type 1 agreements.

Type 2 specialisation agreements are subject to less requirements than type 1 agreements. In contrast with the latter, Type 2 agreements do not require the parties to reduce their individual production activities outside the scope of their envisaged joint production arrangement.[42] Moreover, Type 2 agreements can be agreed irrespective of whether the parties are already active in the same product market, unlike type 1 agreements. These limitations show a clear preference for joint production, despite the fact that this format implies a stronger bond between rivals.

The requirement that the production is made jointly is a relevant source of confusion. The SBER defines joint production in a somewhat circular manner as production taking place "jointly".[43] The risk here is that, absent a definition, the SBER could be read as requiring, by analogy to the parallel notion of merger rules, a capacity to block decisions; leaving other looser forms of joint production outside the safe harbour.

In that respect it is noted that the SBER defines "**joint**" in the context of distribution as either carrying out the distribution of the products by way of a joint team, organisation or undertaking, without any reference to control, and even the appointment of a third party distributor that may not be a competing undertaking.[44] By analogy, joint production could be accepted if there is a genuine cooperation and even if the parties merely appoint a third entity that would produce and supply the relevant products. This reading would be a particularly attractive alternative for SMEs, which usually may have more production constraints or may have less options to enter manufacturing markets due to the high investments required. In this regard, joint production by instructing the same common manufacturer may generate the same efficiencies as other production alternatives (such as production through a jointly

41 Note that, in contrast with type 1 specialisation agreements, this format does not require that the entities are actual competitors at the time of the agreement.

42 SBER, Recital 7.

43 SBER, Article 1(1)(d).

44 SBER, Article 1(1)(q).

owned company)[45] but reducing the investment required, with no additional risks for competition. Given that there are efficiency gains in this scenario, it might be recommended to define joint production by analogy to joint distribution.

Questions also emerge with respect to the notion of "**production**" and its relationship with "**products**". The first term is defined as "the manufacture of goods or the preparation of services",[46] while product "means a good or a service, *including both intermediary goods or services and final goods or services, with the exception of distribution and rental services*".[47] Given that "joint production" is defined as the agreement to produce *products* jointly, and the definition of *products* includes intermediary goods or services, the exemption should be read as permitting the joint management of shared facilities such as production warehouses, joint plants and shared access to machinery. That would be clear if there is joint production of the end product but might be arguable if it merely applies to auxiliary or intermediary elements such as warehouses, or assets such as mines or dumping grounds, etc. It would therefore be advisable to clarify if the SBER may apply to cooperation upstream, downstream or parallel to joint production.[48]

These mechanisms are in fact important for SMEs. SMEs may be interested in more limited cooperation formulas concerning sharing facilities, such as warehouses, plants and machinery, logistic assets and distribution networks, joint inventory management, cross supplies of raw materials or finished products among competitors. SMEs are frequently family business or companies owned by a concentrated group of shareholders, that may prefer formulas that allow them to maintain their autonomy in the adoption of business decisions and their own identity vis-à-vis their customers, competitors and clients, and generally want flexibility and formulas that allow them to cooperate in the production phase whilst maintaining to the extent possible their autonomy in the management of their business.

Other sources of confusion concern production planning commitments and other access agreements.[49] While broad equal access rules are generally unproblematic, those providing preferences to one or other parent entity or exclusivity might be questioned.[50] Unfortunately, neither the SBER nor the HGL engage in a discussion on these elements. Given the goal to increase legal certainty in this area, a clarification would be welcome.

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45 Paragraph 183 HGL explain the main potential efficiencies that can be generated through joint production agreements.

46 SBER, Article 1(1)(g).

47 SBER, Article 1(1)(f).

48 In connection with this proposal it would be advisable to simplify the terminology with new definitions on products and services, eventually removing the reference to 'preparation of services', a term used only in the recitals and in a single sentence, itself a definition, which actually seems to refer to 'provision' and not 'preparation' of services.

49 Joint facilities may require access arrangements like hours of operation of machines, access to inventories, use of shared spaces, etc. An example would be access rules on equipment/machinery, with ancillary terms governing access to capacity quotas by each of the participating entities.

50 Cooperation between entities often reserves the benefits to the parties, and this may raise foreclosure claims. An example would be a logistic network set up by several competitors and unavailable for rivals.

Purchase/supply obligations

As a condition for the acceptance of specialisation agreements, the SBER requires that the party abandoning production is supplied by the party benefitting from that commitment, so that the benefits of specialisation materialise without any one party leaving the market downstream of production entirely. For that purpose, the SBER requires, in the case of type 1 (unilateral and reciprocal specialisation) agreements, that the cooperation agreement provides for supply and purchase obligations.
The drafting of this part of the SBER is confusing, especially in the following regards:

- It might be argued that a party abandoning production should be supplied even if the parties have agreed joint distribution. As earlier noted, Recital 9 SBER seems to provide for joint distribution as an option for unilateral specialisation agreements, which would be contradictory with the requirement of direct supplies to a party.
- In a similar respect, and with regard to type 2 specialisation agreements (joint production), the SBER might be clearer with respect to the option between separate and joint distribution.[51]
- There is another inconsistency between Recital 9 SBER, which declares that specialisation agreements must provide for "supply *and* purchase obligations or joint distribution", while Article 2(3) SBER which refers to the parties accepting "an exclusive purchase *or* exclusive supply obligation", or joint distribution. It might be argued that Recital 9 SBER merely requires that the party abandoning production must buy and remain in the market *and* the party benefitting from that commitment must supply the market, while Article 2(3) SBER permits that supply relationship to be exclusive, either from the supply side (i.e., the supplier would be obliged or induced to sell the contract products only or mainly to one buyer[52]) *or* from the buyer's side (i.e., the buyer would be required to source only from the supplier[53]). Another element of confusion stems from the apparent prohibition that the parties agree to *both*, exclusive purchase and exclusive supply.

The requirement that the party abandoning production would receive supplies (unless joint distribution was agreed) was not included in the early SBERs, having first appeared in Regulation 2658/2000. Its logic seems to be based on avoiding market allocation agreements, in particular in case of reciprocal specialisation agreements.[54] It is however noted that this requirement of maintaining presence in the downstream

51 Recital 9 of the SBER does not refer to type 2 specialisation agreements in the context of separate distribution but it may be understood from the context that this is something that the parties could agree, as Article 2(3)(b) SBER presents joint distribution as an option.

52 Paragraph 192 HGL.

53 The term "exclusive supply" was commonly used in competition law in the past, as in Regulation 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements ([1983] OJ 173, p. 5) but has since been replaced by "single branding" (see e.g. the current Vertical Guidelines at paragraph 129). The SBER does not define it which may cause confusion.

54 See in that regard the example analysed by the Commission in paragraph 190 HGL.

market may not make economic sense for the parties and can be easily circumvented by purely formal supply commitments or artificial joint selling structures. Further, and as discussed later in this report, this condition is not present in R&D agreements. For these reasons it is suggested to remove the requirement that both parties maintain a presence in the downstream market, at least for SMEs.

Joint distribution

As an alternative to independent distribution, the SBER permits that the parties agree to jointly distribute the goods or services in question, an option available for both type 1 and type 2 specialisation agreements, and, if they do it, allows them, amongst other restrictions of competition, to agree on resale prices[55]. As earlier noted, joint distribution means in this context either that the parties carry out the distribution of the products by way of a joint team, organisation or undertaking, or that they appoint for that task a third party which is not a competitor. Unlike type 1 unilateral specialisation agreements, it is clearly stated in the SBER that joint production and distribution can be agreed between two or more competitors, and this is particularly useful for SMEs, who may need more parties with small volumes to generate meaningful efficiencies.

The admission of joint distribution substantially extends the reach of the cooperation between the parties. As the HGL note, joint distribution and marketing carry a higher risk of restrictive effects on competition than pure joint production agreements.[56] Joint distribution further involves the joint setting of prices and sales. It is also noted that the SBER permits joint distribution for parties with up to a 20% market share, while joint commercialisation/selling that is not preceded by a specialisation agreement is subject to a market share threshold of 15%.[57]

Paragraph 160 HGL confusingly suggests that joint distribution would only be available if 'the parties would not otherwise have an incentive to enter into the production agreement in the first place'. This would go against the idea that joint distribution is an available option for the parties and should be corrected.

Besides the above, the reference in paragraph 160 HGL to market sharing is also confusing, as it discusses the exceptions in Article 4 SBER which concern only price fixing and production volumes. These provisions seem to refer to different types of ancillary restrictions - paragraph 160 HGL would refer to restrictions absent which the parties would not have engaged in the cooperation for failure of incentives, while Article 4 SBER would refer to unavoidable limitations such as the necessity to fix prices (something the parties could not avoid when selling jointly) or agreeing production volumes (also unavoidable when producing jointly). That said it would be good if this was corrected.[58]

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55 Article 4(a) SBER.

56 Paragraph 167 HGL. That same paragraph notes however that "*joint distribution agreements for products which have been jointly produced are generally less likely to restrict competition than stand-alone joint distribution agreements*", which is arguable.

57 Paragraph 140 HGL.

58 A related question that has been raised is whether it would make any difference if joint selling was agreed subsequently to a specialisation agreement, i.e., the parties having initially agreed independent distribution and later changed their mind. Arguably that would indicate that joint distribution would not be indispensable, and therefore under a strict reading of paragraph 160 HGL it may

The provisions of the SBER about joint distribution may not be capturing more informal cooperation by SMEs, who have less resources to commit in joint teams, organisations or undertakings, and who will usually rely on direct distribution, rather than in a joint distribution with one or more of their competitors. In particular, companies, and specially SMEs, are interested in more loose alternatives to coordinate distribution of the jointly produced goods, while maintaining their commercial freedom to decide their own commercial strategies. Therefore, these alternatives would generate less relevant potential negative effects on competition and should be considered to be included in the SBER.

Coordinated distribution can be defined as a situation in which the parties jointly produce goods or services and have a joint interest in supporting and positioning the product in the market in an aligned way (maybe because they share a common brand or because they are launching an innovative product new to clients), and, thus, agree on general price positioning (rather than maximum prices), specific promotions, or other commercial elements (branding, communication, packaging) without totally aligning prices, as the parties in the agreement will be free to decide their own commercial strategy within the generally agreed terms. In this regard, coordinated distribution in the context of joint production agreements can justify an extension of the definition of 'joint distribution' as described in Article 1(1)(q) SBER.

Example of coordinated distribution

Companies A, B, C and D are medium size distributors of consumer goods and compete with each other in a number of local markets. They do not have the resources individually to produce own-brand products to compete with the very recognised own-brands of large vertically integrated competitors.

Therefore, they agree to jointly produce a number of own-brand products to be commercialised under the same brand, that they will own jointly. In order to do that, they will jointly subcontract production with a manufacturer. This requires an agreement about which products will be manufactured, which will be their technical specifications, quality, components, purchase price, minimum volumes, etc., but also which will be the common brand and whether they will recommend that such brand will be positioned in the market as low value (as a first price), as a medium quality product, or as a premium brand. Otherwise, the different positioning of the product in each of the distributors may be confusing for consumers as regards its value proposition and quality. Promotion of the jointly-owned brand may also require common promotions or advertising campaigns.

Nevertheless, each of the four abovementioned distributors wants to remain free to decide its own prices and commercial strategy within the agreed terms to compete with the others. In these circumstances, companies A, B, C and D jointly produce (through joint subcontracting) the own-brand references (commercialised under the commonly owned and managed brand), and they coordinate distribution without jointly distributing the products under the terms of the SBER and, thus, allowing more intra-brand competition than in traditional joint distribution.

not be acceptable. That said it is not difficult to understand that parties may not always decide on joint exploitation ab initio despite there being efficiency reasons. Looking at these elements would also drag the parties and eventually enforcers to protracted discussions on the parties' thinking, which should be wherever possible avoided. On balance we would submit that a clear right to jointly distribute below the 20% market share threshold, as currently provided for, is preferable.

On the basis of what has just been explained, it is proposed to consider an amendment of the definition of "joint distribution"[59] and of Article 2(3)(b) SBER, to expand the perimeter of the exemption to cover situations in which the parties sell the products individually but also in a coordinated way.
Additionally, as with joint production, other questions emerge with respect to the notion of "joint", particularly whether it should be read exclusively as encompassing a balance along the lines of "joint control" as defined under the Merger Regulation.[60] That reading would arguably leave out distribution structures run on the basis of majorities but lacking veto rights and cast a shade over agreements reserving to one party stronger powers than those of other participating undertakings.
In this respect, consideration may be given to defining joint distribution along the lines of the 'joint exploitation' provided for in Regulation 1217/2010,[61] which permits that the parties allocate between them how production and distribution should be done (not necessarily imposing joint or separate distribution but accepting other options such as one party assuming that activity).

Information exchanges

In recent times, undertakings have become increasingly wary of any exchanges of information with competitors, particularly in areas such as prices or production capacity. That justifies a reference here.
The starting principle on the assessment of information sharing in this context is found in paragraph 56 HGL, which foresees that "*information exchange can be part of another type of horizontal co-operation agreement […]. The assessment of the latter type of information exchanges should be carried out in the context of the assessment of the horizontal co-operation agreement itself*". Confusingly however, the part of the HGL discussing production agreements seems to take a different reading. Paragraph 181 HGL, while noting that "(a)*ny negative effects arising from the exchange of information will not be assessed separately but in the light of the overall effects of the agreement*" moves on to declare that "(w)*hether the exchange of information in the context of a production agreement is likely to lead to restrictive effects on competition should be assessed according to the guidance given in Chapter 2*", which suggests a full examination under stand-alone principles. That idea is reinforced in the following paragraph, which observes that an information exchange "*not exceeding the sharing of data necessary for the joint production of the goods subject to the production agreement*" would be considered "*likely to meet the criteria of Article 101(3) TFEU*" and not, as intuition would have it, an ancillary restraint. That suggests that, even if the information was ancillary to joint production, competition agencies could still

59 Article 1(q) SBER.

60 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings. [2004] OJ L 24, p. 1 ("EUMR" or "Merger Regulation").

61 See Article 1(g) and (m) 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 certain categories of research and development agreements. [2010] OJ L 335, p. 36.

require the parties to prove[62] that the information exchange, not the overall joint production agreement, would on its own fulfil the requirements of Article 101(3) TFEU.

Alternative structures for specialisation agreements

One salient feature of specialisation agreements is that horizontal cooperation in production, which is the element lying at its heart, may be pursued through other instruments, which competition rules treat differently.

Some of these structures may be identified as joint production agreements under competition rules for the purposes of the HGL, but most frequently that will not be the case. Independently of the label that the parties may use, these options could be treated differently by competition law, some arguably even being wholly outside their scope. This may result in apparent or actual cases of circumvention and ultimately increase compliance risks.

The two main categories of subcontracting agreements, labelled type 1 and type 2 in this report, are prone to this phenomenon. Type 1 agreements are ultimately, as the HGL note, a form of subcontracting production, a broad category that ranges from the simplest occasional purchase of goods or services for onward resale to a structured IP protected tolling service. Type 2 (joint production), in turn, may be implemented through (besides more complex forms of subcontracting) unincorporated profit-sharing arrangements, joint ventures with varying degrees of participation and influence from shareholders.

Examples of this reality are not hard to find. Type 1 specialisation agreements (defined above as those encompassing what the SBER labels unilateral and reciprocal specialisation) may be pursued through mere purchasing relationships whereby undertaking A sources products from undertaking B without any limitation on undertaking A to produce independently, as this commitment may not be necessary or appropriate under certain circumstances. As earlier noted, those relationships would not qualify as specialisation agreements under the SBER.

If one turns to type 2 specialisation agreements (joint production), again competitors may design multiple structures loosely termed a "joint venture" that might arguably not fall under the SBER, and arguably neither under merger rules. That would particularly be the case of minority shareholdings in entities controlled by a rival,[63] a ubiquitous phenomenon in the commercial world (and a significant loophole of competition law enforcement), a frequent way to cooperate that seemingly flies under the radar.

As an example, we may look at the waste management case decided by the Spanish competition authority back in 2014.[64] The Decision was annulled by the Supreme

62 Under Article 2 of Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ([2004] OJ L 1, p. 1) the undertaking or association of undertakings claiming the benefit of Article (101)(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.

63 For example, a minority but substantial shareholdings in a competitors' affiliates (e.g. 25% shareholding), for instance a warehouse or a scrapyard used by several competitors. The facility would not be jointly controlled but there would be some, arguably a lot, of joint management between the shareholders/partners.

64 Decision of 6 November 2014, case S/0430/12, *Recogida de Papel*.

Court[65] for procedural reasons, but the practice analysed is relevant for the purposes of this discussion.[66] In this case, a number of paper waste collection companies owned a joint company (UDER) in order to cooperate in the collection, acquisition and recycling of paper. The investigated companies argued that UDER could benefit from the SBER because their market share was below 20% in the market for the relevant waste management processing services and the subsequent sale of recycled paper. However, the CNMC concluded that UDER could not benefit from the SBER and could not be considered a procompetitive cooperation either but a cartel (UDER being a facilitator), as the parties were fixing purchase prices (of materials) and selling prices (of recycled products) through UDER.[67]

This section sets out to test the boundaries of the notion of specialisation as defined in EU competition rules by looking at these alternative/fall-back structures from the perspective of SMEs and how they are treated under EU competition rules. The categories under analysis are (i) supply relationships, (ii) subcontracting agreements, (iii) R&D related cooperation and (iv) joint ventures.

Supply relationships

Supply relationships (a broad category here used to identify any agreement whereby parties purchase goods or services, either for their own use or for resale), are ubiquitous. This is also true among competitors.

These relationships are especially important for SMEs, which rely on them to address production shortages, test entering new markets or to improve the reach of their offer to their clients.

In their most basic form, supply relationships enable market players to source standardised products or services, which might later be resold, with or without major alterations. They are, in that respect, vertical relationships. That said, they are often entered into also among competitors in a context of upstream cooperation.

From a competition law perspective, supply agreements between actual competitors that are active at the same level of trade fall outside of the scope of the Vertical BER[68] and need to be examined under the section of the HGL dealing with agreements on commercialisation. That section discusses restrictive terms that may result from these sales (price fixing, market allocation) or effects that may result from those transactions, but it is questionable whether the sales themselves would be considered restrictive of competition.

In that respect, the HGL suggest that supplies between competitors may need to be looked at as a type of joint production if their "centre of gravity" responds to that logic (and the agreement falls outside the scope of the SBER).[69] This is a correct perspective. In the event these cross-supplies were concealing a broader agreement

65 Judgment of the Supreme Court of 26 February 2010, case 2593/2018 (ECLI:ES:TS:2019:581).

66 See https://www.cnmc.es/expedientes/s043012.

67 The CNMC also concluded that the companies were sharing markets because UDER was not in charge of the distribution. It was the company that was closer to the client the one that was allocated the sale. When there were more than two companies closer to a certain client, a rotation system was agreed.

68 See Article 2(4) of Regulation 330/2010.

69 HGL, paragraph 228.

involving a cartel (as determined in the UDER case discussed above), the agreements should be treated as such.

Subcontracting

The broad category of subcontracting agreements represents a more articulate form of cooperation in production than mere supply relationships. Here the notion is meant to cover those contracts whereby a buyer issues an order for bespoke products, this is, featuring specific measurements, fittings or design or to be produced under a technology provided by the buyer.[70]

Subcontracting enjoys a favourable treatment under EU competition rules. The Subcontracting Notice adopted in 1978 declared them "*not on themselves caught by the prohibition*" of Article 101 TFEU; it also states that "*[t]his class of agreement is at the present time a form of work distribution which […] offers opportunities for development in particular to [SMEs]*". The Notice delves particularly on the restrictions that may be applied where technology is being supplied and that can be caught under the prohibition of Article 101(1) TFEU but subcontracting itself (and arguably any ancillary terms connected to it) would not be subject to Article 101(1) TFEU.

The clarity of that pronouncement has been however obscured over the years. The 2001 Horizontal Guidelines listed subcontracting agreements as a modality of joint production alongside specialisation agreements, presenting them as potentially restrictive horizontal agreements. Despite that, these guidelines usefully noted that "*subcontracting agreements between competitors do not fall under Article [101(1) TFEU] if they are limited to individual sales and purchases on the merchant market without any further obligations and without forming part of a wider commercial relationship between the parties*", with a footnote clarifying that these agreements may fall under the prohibition if they contained vertical restraints, such as restrictions on passive sales, resale price maintenance or others.[71]

Unfortunately, this mention would be removed in the 2011 version of the HGL, which appears to treat "subcontracting agreements to expand production" under the same principles of the SBER, including the market share threshold.[72] That implies that this category of subcontracting, arguably not restrictive under the Subcontracting Notice as it only expands production without introducing any limitation on the parties, would in fact be considered as falling within the scope of Article 101(1) and therefore in need of an exemption under Article 101(3) TFEU.

These references have substantially increased the legal risk that SMEs may face when engaging in subcontracting even where there is no indication of any commitment to coordinate or cease production or containing restrictions such as those identified in the 2001 Horizontal Guidelines. While in part the pledge in the HGL that this cooperation is initially acceptable below the 20% market share threshold would appear to diminish some of the concerns, the uncertainties that inevitably accompany market delimitation lead to substantial risks. For that reason, the revision of the SBER is a good

70 A particular kind of subcontracting are "tolling" agreements, whereby all or a part of the materials needed for production are supplied by the buyer, who essentially purchases services rather than products. Ultimately, these agreements cater particularly for buyers who actively intervene in the manufacturing process, in which they may have experience or own IP rights or technology.

71 Horizontal Guidelines 2001, [2001] OJ C 3, p.2, paragraph 89.

72 See paragraphs 153 and 169 HGL.

opportunity to provide certainty as to the restrictions that may be considered indispensable for this sort of cooperation to take place, at least, among SMEs or between them and larger undertakings.

Joint ventures

Type 2 specialisation agreements, this is, those pursued jointly by two or more competitors, are implemented through various structures including the following:

(a) ***Fully functional joint ventures*** (as defined by merger control provisions) are subject to the Merger Regulation provided the thresholds in its Article 1 are met. Below the thresholds of the Merger Regulation, these structures could be subject to national merger control rules (which depends on national definitions and thresholds that are not harmonised). In these cases, Article 21 EUMR provides that the Commission might also apply Article 101 TFEU to those structures; however, the Commission has pledged to refrain from relying on this provision when the transaction has been notified as a merger under national rules. ***Non-fully functional joint ventures***. Jointly controlled but not "fully functional" joint ventures (within the meaning of the Consolidated Jurisdictional Notice[73]) such as a joint production operation supplying only the parent companies and enjoying no market autonomy would be looked at (both procedurally and on their merits) under Article 101 TFEU and eventually the SBER.

(b) ***Structures not jointly controlled***. Cooperation could also be structured through entities not jointly controlled (as this concept is understood in competition law, especially in the Consolidated Jurisdictional Notice). This would, for instance, be the case of an entity with three or more shareholders, none having the capacity to impose or veto commercial decisions.[74] Merger rules only apply to these structures if at least two of the parties contribute existing businesses or one of the parties acquire sole or joint control over a pre-existing business of another party.[75] As to Article 101 TFEU, this provision is not actively enforced to minority shareholdings.[76] As regards the SBER, the absence of a clear joint control might affect its application.

(c) ***Other joint production structures***. Other potential structures arrangements that may be used to produce jointly are consortia provided for under national laws for certain public or private short-term projects. The HGL treats those structures as joint selling agreements; just to note that consortia are also used for joint production, for instance the construction of a tunnel or the provision of waste management services, which would initially fall with the scope of the SBER. It is noted that the treatment of consortia under competition rules has

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73 Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [2008] OJ C 95 1.

74 For instance, an entity run under shifting majorities of 40%, 30% and 30% and standard majority voting rules.

75 Note that some national merger rules define mergers differently to the Merger Regulation and as a result some of these structures could fall under their scope.

76 See in this respect Tzanaki, Anna, Varieties and Mechanisms of Common Ownership: A Calibration Exercise for Competition Policy (January 27, 2021), available at SSRN https://ssrn.com/abstract=3779856 or http://dx.doi.org/10.2139/ssrn.3779856 and the rich literature quoted therein.

become complicated in recent years, especially following the EFTA Court decision in *Ski and Follo Taxi*,[77] where these arrangements were considered restrictions by object. An examination of this issue exceeds the purpose of this report. It is in any event noted the importance that consortia may have for many SMEs and the difficulties that the lack of clear rules means in this respect.

It stems from the above that joint production in a broad sense is treated in different ways under competition law, the main alternatives being merger rules, the SBER or the general guidance under the HGL. There is also a broad grey area with an unclear status as to whether EU or national competition rules would apply to some of these eventual alternative options.

When placed in the context of SMEs, this situation might lead them to opt for these alternative structures, however less precise they might be regarding the respective rights and obligations. In contrast with larger market players, SMEs are in general terms arguably less sophisticated and understandably less cautious with regard to agreements with competitors. The downsides of this are apparent: less precise structures with less than perfect clarity under competition law may, despite their apparent flexibility, exacerbate the difficulties of complying with competition law.

Note also that the CATI survey quotes as a source of lack of clarity and consistency the treatment of agreements between parent companies and joint ventures.[78] Namely parent companies that create joint ventures whilst remaining active in the same area, thus competing with the joint venture. The SBER does not specify whether these companies should be considered competitors or part of the same economic entity. This is relevant because, as previously stated, SMEs may prefer more flexible ways of cooperation which may not fit in the straitjacket of the current SBER.

The market share threshold

This last section of Part 1 discusses the market share threshold, which is a defining element in the acceptability of horizontal cooperation. The discussion that follows seeks to expose its logic and potential challenges for SMEs.

Since the initial BER adopted in 1972, the exemption has been conditioned to market share thresholds. These were in the beginning much lower (the first SBER placed them at 10%) and have been raised over the years. In its current form, the exemption SBER applies when the combined market share of the parties does not exceed 20% on any relevant market, irrespectively of other circumstances such as the size of the companies.

The market share threshold is intended to operate as an objective criterion to provide legal certainty to companies and authorities, which are presumed to provide benefits in excess of their potential restrictive effects below that threshold. In that respect it is not meant to exclusively apply to specialisation agreements as defined by the SBER (this is, unilateral and reciprocal specialisation and joint production), but also to subcontracting with a view to expanding production, as paragraph 169 HGL indicates. The threshold is, on the other hand, likely to be considered when assessing the

77 Judgment of the EFTA Court of 22 December 2016, *Ski Taxi SA, Follo Taxi SA v Konkurransetilsynet*, [2016] EFTA Ct. Rep. 1002.

78 The results of the CATI survey are included in the Evaluation Support Study (May 2021).

legality of other forms of horizontal cooperation on production such as those described in the previous sections of this report.

While market share thresholds have become quite common in block exemption regulations in the last 20 years or so, it is important to acknowledge their limitations, especially when applied to SMEs, who operate often in local or regional markets, where geographical market definition is especially difficult besides the product market definition itself.

In the offline world, SMEs tend to specialise in niche categories which may be defined as separate markets. A small or narrow product or geographic market may lead to the conclusion that SMEs may enjoy high market shares, which would place them outside the exemption foreseen in SBER. Think for instance of a workshop repairing cars in a town, a fleet managing transportation of medicines to nearby pharmacies or a local farm supplying proximity restaurant. Another example could be nascent markets in the digital economy area. These potential difficulties are especially relevant from a national enforcement perspective, which is more likely to be concerned with local market power situations and generally the risks of coordination among SMEs. It is not surprising that the SWD notes that "*the market definition and the calculation of market shares was also considered difficult, especially for SMEs, mostly due to the administrative burden and to the lack of technical skills*".[79] This may incentivise SMEs not to take antitrust risks to explore cooperation mechanisms with their competitors, such as specialisation agreements, and remain within the safe harbour offered by the *De Minimis* rules.[80]

One specific example of this we have come across concerns proposed cooperation between several small supermarkets, all SMEs, in a given town, which were planning to set up a common home delivery service during the COVID crisis. Ultimately the project was abandoned, mainly because of uncertainties on the competition law principles that would apply to that venture including market share calculation, relevant services at stake and conditions that the parties may have imposed on each other.

Ultimately, the risk is that SMEs, which are a natural candidate for specialisation agreements, are left out of the benefits of the SBER, which does not factor in their reduced size, as the initial SBERs did. In that respect, consideration might be given to enforcement tools that, while respecting the current market share threshold, reduce the level of risk of an overly strict reading for SMEs.

In order to avoid this risk, it is suggested to provide for a legal presumption that agreements between SMEs fall below the threshold, because it would be assumed that they do not reach a 20% market share in the relevant market. This could be coupled with an agile mechanism (to be included, for instance, in the abovementioned Article 5 SBER) enabling the Commission, eventually upon request from a national competition authority ("NCA"), to challenge that presumption by adopting a decision concluding that, under the correctly defined relevant market, the SMEs in question do not benefit of the SBER exemption for their specialisation agreement, enabling an eventual case-by-case balancing, without normally imposing sanctions. This mechanism would allow the Commission or NCAs to protect competition in an agile way, while reducing the difficulties, costs and legal risks for SMEs entering into specialisation agreements.

79 SWD cit., p. 48.

80 *De Minimis* Notice (see footnote 12).

Alternatively, to facilitate that SMEs enter into specialisation agreements when they are not able to determine accurately their market share, an amendment of the HGL may also be useful. In this regard, the HGL might explain that**:**

(a) in line with the case law of the ECJ,[81] it cannot be presumed: (i) that the object of Type 1 specialisation agreements is to restrict competition; or (ii) that price agreements ancillary to joint distribution[82] in the context of joint production agreements (Type 2 specialisation agreements) have the object of restricting competition under Article 101 TFEU. This would benefit both SMEs and non-SMEs alike by requiring an effects analysis of their specialisation agreements and a proportionality analysis of any restrictions they include, but would help SMEs particularly because it would facilitate that they benefit of the *De Minimis* rules, as only by object restrictions exclude the potential application of such rules; and

(b) it can also be presumed, in line with a parallel reasoning under paragraph 157 of the Technology Transfer Guidelines[83], that, outside the area of hardcore restrictions, Article 101 TFEU is unlikely to be infringed if SMEs entering in specialisation agreements compete with at least one non-SME company producing the products/providing the services object of the specialisation and: (i) it is not possible to have an accurate market share estimation for the relevant SMEs; and (ii) the information available indicates that non-SME companies have an aggregated market share of 50% or more in the relevant market. In order to reduce any risks in related downstream markets as a consequence of joint distribution when SMEs benefit of such presumption, it might be combined with a requirement that there is also at least a non-SME competing company in the downstream commercialisation market. This amendment and extension of the HGL would benefit SMEs because it would offer them a safe harbour for the application of the SBER in non-transparent markets in which they may have difficulties to estimate market shares, in particular, in markets, such as the digital markets, in which they want to improve their chances of competing successfully with large companies with more resources and potentially other competitive advantages.

Other eventual options such as a higher market share threshold for SMEs would, in our view, be inconsistent with the system of the SBER and arguably not very helpful, as the real problem is not so much the level of the threshold but the uncertainties in its calculation. We have also considered broader exclusions for micro SMEs or the possibility of granting special status to undertakings in the digital world. However, companies active in the digital world, despite qualifying as SME, may have important market shares.

81 Judgement of 11 September 2014, case C-67/13 – *Groupement des cartes Bancaire*s, (ECLI:EU:C:2014:2204).

82 As defined under Section 2.2.3 of the Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97-118.

83 Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements. OJ C 89, 28.3.2014, p. 3.

PART TWO: THE CASE FOR IMPROVING SMEs ACCESS TO THE EXEMPTION

This Part Two discusses the case for a reform of the current rules concerning specialisation agreements that would put SMEs in its centre, recognise the importance of cooperation among them to succeed in the internal market and provide clarity to what they may do and where the boundaries lie so as to facilitate compliance.
The structure of this Part is as follows: Section 3.1 looks at the treatment of SMEs in EU competition law and the difficulties of the conflicting goals of supporting their creation and growth through cooperation and the potential risks from the perspective of competition. Section 3.2 looks at the definition of SMEs and its relationship with the market share threshold of the SBER and ponders whether these two measuring sticks may be interchangeable or cumulative. Finally, Section 3.3 discusses various options for a more flexible treatment of horizontal cooperation agreements involving SMEs, either among them or between SMEs and large undertakings, looking particularly at improving the treatment of joint ventures.

SMEs and EU competition law

EU law is understandably supportive of SMEs. These are not only the lion's share of the business players in Europe, but they also have particularly dynamic structures with the potential to evolve into bigger players. Supporting them has developed into a comprehensive policy spearheaded by the Commission, as noted at the beginning of this paper.

Appreciable effect on trade

However, SMEs find themselves in a special situation. When discussing if trade between Member States is being *appreciably affected*, the Effect on Trade Notice[84] presumes that agreements between SMEs are normally not capable of affecting trade between Member States because their activities are usually local or at most regional in nature (as opposed to cross-border). A similar consideration is included in the Vertical Guidelines[85]. The *De Minimis* Notice also takes this view when confirming that any agreement, including specialisation agreements, fall outside Article 101 TFEU if they are not capable of appreciably affecting trade between Member States, a conclusion to which it attaches a cross reference to the Effect on Trade Notice.[86]
This, in practice, could mean that national rules, rather than Articles 101 and 102 TFEU, are likely to regulate agreements between SMEs. This assumption would question the applicability of the SBER to agreements among SMEs and the SBER being replaced by national rules which may not be bound by the consistency requirements enshrined in Article 3 of Regulation 1/2003.
However, the understanding that SMEs are not generally subject to EU law needs to be revisited, particularly in view of the advances in globalization seen in the years that have passed since those documents (in particular, the Effect on Trade Notice – 2004,

84 Commission Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07), paragraph 50.

85 Commission Guidelines on Vertical Restraints, paragraph 11.

86 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, paragraph 4.

but also the *De Minimis* Notice – 2014) were issued (e.g., e-commerce and logistic advances that easily surpass national boundaries).
By way of example, Article 3 of Regulation 169/2009 recognised new realities when exempting certain agreements by SMEs in the transport sector from the application of Article 101 TFEU.[87]

Guidance for SMEs at national level

It should be noted that most proceedings involving SMEs are currently carried out at national level. For example, in Spain, the CNMC has investigated cases involving driving schools; lift maintenance companies, fire-fighting equipment, bakeries, local photographers, etc.[88]
Certain national competition laws expressly contemplate a more lenient policy versus SMEs when compared with general competition rules. In addition to the *de minimis* rules existing at national level, which are particularly well-suited for agreements between SMEs (but which do not usually allow the so-called 'hardcore restrictions'), certain national laws include additional exemptions on the basis of the number of companies party to the agreement and/or the combined turnover of the companies participating in a certain cooperation. Some of the national rules, in fact, make express reference to SMEs. For example:

(a) Dutch Competition Law excludes from the scope of the prohibition agreements between no more than eight companies not exceeding a combined turnover of EUR 5,500,000 (for companies whose core activity is the supply of goods) and EUR 1,100,000 (in all other cases). In addition, agreements with a market share below 5% and involving companies with turnover of no more than EUR 40,000 are also excluded from the prohibition.[89]

(b) Section 3 of German Competition Law states that agreements concluded between competing undertakings with the object of rationalisation of economic activities, which do not significantly affect competition in the market, and which allow to improve competitiveness of small or medium sized enterprises are exempted from the application of competition law.[90] The application of this exemption is automatic, without the need of a previous notification. Given that this exemption is subject to self-assessment, there is not much public information in the public domain. The last Annual Report of the Bundeskartellamt

87 See Article 3 of Council Regulation (EC) No 169/2009 of 26 February 2009 applying rules of competition to transport by rail, road and inland waterway.

88 In Spain, SMEs are also monitored by regional competition authorities, with competence to apply national competition law to conducts with exclusive effects within a certain region. Investigations from regional competition authorities are even more likely to affect SMEs given the limited geographical scope of the practices that they can investigate (for example, in Andalucía, the competition authority has investigated fisherman associations, taxis, local construction companies, local ports, language schools, funeral service companies, school transport companies or certain shops within a skiing resort).

89 Article 7 of Act of 22 May 1997.

90 Section 3 of Act against Restraints of Competition in the version published on 26 June 2013 (Bundesgesetzblatt (Federal Law Gazette) I, 2013, p. 1750, 3245), as last amended by Article 1 of the Act of 18 January 2021 (Federal Law Gazette I, p. 2).

available only quotes one case where the SME exemption was invoked in the period 2019-2020.[91]

(c) In France, certain agreements that have the object of improving the management of SMEs are considered in conformity with competition law rules if the Autorité de la Concurrence issues a positive report on the matter.[92]

(d) In Belgium, Article IV(1)(3), 3°of the Belgian Economic Law Code (similar to Article 101(3) TFUE) states that an agreement between undertakings may not infringe Belgian competition law if it contributes to the reinforcement of the competitiveness of an SME (provided that the effects of the agreement in question are limited to the Belgian territory).[93]

(e) In the UK, competition law confers immunity from fines to (a) agreements infringing the Chapter I prohibition where the parties have a combined turnover of less than GBP 20 million; and (b) conducts of minor importance in relation to infringements of Chapter II prohibition (abuse of dominance). A conduct is deemed of minor importance if the undertaking concerned has turnover of less than GBP 50 million. The immunity did not apply to infringements of Articles 101 and 102 TFEU, so small business whose activities had an effect on trade could not benefit from this regime. The UK Competition and Markets Authority ("CMA") can still investigate the agreement or conduct and issue an infringement decision which may be the basis for follow-on damages. At present, the UK Government has issued a consultation on competition law reform. One of the points under consideration is to lower the turnover threshold to GBP 10 million, on the basis that "s*ince these rules were created, the risk that anticompetitive conduct in small and emerging sectors can be harmful to growth and innovation has become increasingly clear"*. [94]

In Spain, the former Spanish Competition Law 16/1989 contemplated an exemption for those agreements having as their object or effect to increase the rationality and the competitiveness of companies, in particular of SMEs.[95] This provision however disappeared in the current Spanish Competition Law 15/2007, of 3 July 2007.

Other jurisdictions do not foresee any particular exemption for SMEs; however, it is understood that they take size into account when deciding whether a case may be prosecuted under their priority setting policies. Similarly, NCAs may decide to apply a more lenient approach when setting the level of the fines.

If, during an investigation, an SME comes up with a specific defence relating to its specific condition as SME – which, in our experience, is not frequent - or as regards its

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91 See https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Taetigkeitsberichte/Bundeskartellamt%20-%20T%C3%A4tigkeitsbericht%202019_2020.pdf?__blob=publicationFile&v=5.

92 Article L420-4, modified by Law n° 2016-1920, December 29, 2016, Article 3(V).

93 Code de droit économique, Article IV(1).

94 See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004015/CCS001_CCS0721951242-001_Reforming_Competition_and_Consumer_Policy_E-Laying.pdf, paragraph 1152.

95 Law 16/1989, of 17th July, Article 5(1)(c).

lack of access to specialised legal advice, the NCA would normally decide to apply national competition law rigorously. This is so because the agreements investigated by NCAs which involve SMEs normally relate to hardcore restrictions. In those situations, a more lenient approach in the substantive analysis or in the level of the fine is unlikely.

This conclusion however cannot be extended to the analysis to be done in relation to a specialisation agreement concluded between SMEs with no apparent hardcore restriction. The experience of NCAs with those agreements is very limited. It is worth noting that, according to the Evaluation Support Study,[96] only 33 NCA investigations out of 126 relevant horizontal cooperation cases concerned specialisation agreements. 20 out of the 33 were mixed agreements also including other types of horizontal cooperation, and a significant part of them (13 out of 20) were analysed under a different chapter of the HGL.

However, the lines between permitted cooperation in production and a restriction by object are not always clear. The UDER case decided by the Spanish Competition Authority (see Section 2.3 above), whereby certain companies created a joint venture to cooperate in the collection, acquisition and recycling of paper is an interesting example. In that case, the Spanish CNMC concluded that the cooperation did not fall within the SBER and could not benefit from an exemption as the parties were fixing prices and allocating markets.[97]

In view of the above, whether the exclusion of most agreements concluded between SMEs from the scope of EU competition law was done to release SMEs of the burden associated with EU law or in a spirit of cooperation with NCAs, this policy makes it more complex for SMEs to gain legal certainty from EU and several and diverging national rules and, therefore, guidance is required.

SME's awareness of competition rules

In fact, the situation is further complicated by the fact that SMEs may not always be fully aware of the need to observe competition rules. In that regard, competition law may not be in the radar of SMEs. SMEs tend to confuse competition law with other areas of law (for example, they may consider that a company that is competing is incurring in unfair competition law, which may not be the case).

(a) An example of this can be found in the campaign launched by the Dutch competition authority in 2019 to alert SMEs that competition rules also apply to them (and not only to large companies).[98]

(b) It is also worth mentioning the study prepared by BDRC Continental for the UK competition authority (dated 15 May 2015),[99] concluding that SME's awareness of competition rules is minimal. Regarding information materials, the study concludes "*the shorter and the clearer the better, SMEs are time-poor and want to be told what they can and cannot do; grey areas where they are warned of the dangers of certain behaviors, but not provided with clear guidance should be*

96 Evaluation Support Study, p. 64.

97 See footnote 50 *supra.*

98 See https://www.acm.nl/en/publications/small-and-medium-sized-businesses-know-too-little-about-illegal-anticompetitive-arrangements.

99 Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/477543/BDRC_Comp_Law_Qual_Research.pdf.

avoided in communications with this audience. They simply encourage the audience to switch off".

(c) In March 2007, the German Bundeskartellamt published an information leaflet on the possibilities of cooperation for small and medium-sized enterprises. The Bundeskartellamt includes some practical examples for SMEs. Regarding price agreements, the competition authority considers that they could only be allowed in exceptional cases, where they serve the purpose of rationalisation. This may be the case in particular in a joint advertising or marketing venture by SMEs. It is also confirmed that quota agreements do not serve the "rationalisation of economic activities" and as a rule cannot be the object of a cooperation between SMEs.[100]

(d) On 20 July 2017, the Belgian competition authority published competition law guidelines for SMEs, explaining the relevant rules and providing detail on compliance programs and other measures to avoid competition law infringements.[101]

(e) Similarly, the French competition authority has also published a guide specifically addressed to SMEs in order to help them avoid competition law infringements because of lack of knowledge of the relevant rules and also to help them take action when they are the victims of anticompetitive practices.[102]

This stance adopted by several NCAs results in mixed signals for SMEs on the admissibility of their cooperation, either with other SMEs or larger undertakings.

Finally, another element to consider is that while specialisation agreements appear to be relevant for SMEs, these companies often lack knowledge or fail to reach available guidance. In this regard, an external study requested by the Commission in the context of its evaluation of the HBERs and the Horizontal Guidelines reached the conclusion that specialisation/production agreements are among the most frequently quoted cooperation agreements (24% of the agreements) but only 20% of CATI respondents declared to have consulted the Specialisation BER to check whether their agreements benefited from an exemption.[103]

A full analysis of this matter is outside the scope of this paper. That said, SMEs are clearly entitled to the benefits of the single market, and the existence of common rules on competition are an integral part of that. The regulation of basic principles on horizontal cooperation is an integral part of a policy that safeguards competition in the internal market. In that respect, common rules such as the SBER should be understood as applicable to all entities trading in the single market.

In light of the uncertainties that may exist on this issue it would be important that this potential jurisdictional issue is discussed within the ECN so as to avoid any questioning on the treatment of horizontal agreements for these entities.

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100 Available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Merkblaetter/Leaflet%20-%20Cooperation%20for%20SMUs.html?nn=3591462.

101 See https://www.abc-bma.be/sites/default/files/content/download/files/20160704_conformite_pme_0.pdf.

102 See https://media.autoritedelaconcurrence.fr/guide-pme/.

103 Evaluation Support Study (May 2021).

Treatment of specialisation agreements for SMEs

When looking at ways to ensure that SMEs benefit from the certainty provided in the SBER a question comes to the fore: should SMEs be identified as beneficiaries of any particular rights or derogations? And if so, what derogations might be considered in their favour?

SMEs and the subjective scope of the SBER

The SBER aims to strike a complicated balance between competition and cooperation. The EU competition system is based on the rule that rivals are in principle requested to refrain from any cooperation. In the damning terms of *Suiker Unie*, recalled above, competition laws "*strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market*". Against this general rule, and as an exception, competition law declares Article 101 TFEU inapplicable to specialisation agreements where parties enjoy a combined market share that does not exceed 20% and do not contain any hardcore restriction.

It is worth noting that initial rules on specialisation agreements measured market share as well as the size of participating companies. But this second element would be removed in 2000, as previously discussed, giving a predominant role to market power as opposed to company size when reviewing cooperation between competitors.

The reintroduction of quantitative thresholds in the SBER may yield positive results, most notably ease of measurement and thus legal certainty for market players, reducing their costs and initial reticence to explore cooperation structures. But it may also cause unwanted disturbances such as not being an adequate proxy of market presence in certain sectors or activities as the same threshold would apply to potentially very different markets (e.g., a significant turnover in a large market may not be indicative of any relevant market presence and vice versa), pose difficulties in the application of the TFEU (as earlier discussed in reference to the Effect on Trade Notice) or betray the logic underpinning the system - that horizontal cooperation is admissible below situations of market power, irrespective of size. It is also noted that the definition of SMEs now includes a quantification of turnover (enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million[104]) which is in fact below the quantitative/turnover thresholds included in the SBER up until 2000 when it was removed.

That said, there are ways to improve the treatment of SMEs engaging in horizontal cooperation, especially by providing legal certainty to various structures of cooperation, as discussed in the next section.

Improving the treatment of specialisation agreements for SMEs

The discussion entertained in earlier sections of this paper suggests that:

1. Horizontal cooperation is particularly important for SMEs. This includes specialisation as defined in the SBER but also alternative structures for both type 1 and type 2 specialisation agreements.

[104] Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, [2003] OJ L 124/36.

2. SMEs may be insufficiently informed about the requirements that competition law imposes on horizontal cooperation, which results in legal risks, in particular regarding specialisation agreements. SMEs may also face difficulties in order to identify with sufficient certainty whether they are below the 20% market share threshold or whether the agreement contains a hardcore restriction. The identification of the relevant markets affected by a certain agreement and the calculation of the market shares have also been identified as a source of difficulty in the CATI survey.
3. Legal uncertainties in this field are exacerbated by the lack of clarity of the status under competition law of basic forms of cooperation such as cross-supplies, subcontracting and loose forms of joint production, which do not currently benefit from the SBER. Lack of legal certainty was also identified in the responses to the CATI survey as a difficulty for SMEs.
4. Lack of clarity also results from the fact that production agreements are often mixed agreements involving cooperation in other levels of the production chain (i.e., R&D, information exchange, joint purchasing or joint commercialisation) and identifying the centre of gravity to determine which chapter of the HGL applies is not always an easy task.[105] This may also raise difficulties in the assessment of whether production agreements enjoy the benefit from the SBER.
5. SMEs are particularly affected by this scenario, as their lack of economic resources and legal functions (often entrusted to lawyers without specific knowledge of competition law) can hinder their capacity to conduct proper self-assessment exercises and therefore lead them to other forms of cooperation outside the scope of the SBER. Respondents in the CATI survey also pointed out the difficulties and the legal burden related to the self-assessment and the need for legal external support.
6. Amending the SBER by introducing size-of-company elements could undermine its market-power based logic.
7. SMEs reaching agreements between them face all the above challenges, but SMEs reaching agreements with larger companies face the dilemma of falling outside the protection granted by the SBER (because of the market presence already held by the larger party to the agreement) or entering into an agreement led by the other party (who has sufficient resources and legal knowledge to assess the cooperation), with a potential imbalance of the ideal arms-length negotiation.

Examples

The following examples may illustrate the findings summarised in Section 3.2.2.
Some agreements are conceptually similar to type 1 specialisation agreements but might be pursued by other structures such as purchasing commitments, whereby an entity (such as an SME) would source goods from a rival without any commitment to abandon production.

105 See Evaluation Support Study. 20 out of 33 relevant cases concerned mixed agreements also involving commercialisation, purchasing or information exchange agreements. The NCAs concluded that 13 of these 20 mixed agreements did not have as their center of gravity specialisation in production but were rather commercialisation or purchasing agreements.

Example 1. Company A, a manufacturer of electric power cables and accessory equipment (e.g., joints or terminations) wishes to specialise in the manufacture of cables and close its manufacturing plants for accessory equipment, which can be sourced from several rival firms, which do not require a commitment to interrupt production. While it is unlikely that Company A will re-enter the production of accessory equipment, it does not commit to cease production. This places its arrangement with rivals outside the scope of the SBER.
It is apparent that competitors will want to offer supplies because (i) refusing would leave those sales to a rival and (ii) they have no certainty that Company A's clients will turn to them if A does not obtain a source (as would be more likely in an oligopolistic market structure). Besides, Company A is likely to offer a competitive price to maintain its full range vis-à-vis its customers. The arrangement is therefore competitive but does not enjoy an exemption.

Example 2. Company Z, a provider of IT-based management services for companies (accounting, salary and inventory management) considers inefficient or not strategically relevant to develop a module for a reduced part of its customers that have specific needs (e.g., NGOs or sophisticated inventories). It agrees to source those modules from its rival Company Y, who agrees to redesign its solution incorporating a bespoke Application Programming Interface (APIs) to facilitate the integration of these modules with Z's customers.
No agreement to refrain from developing solutions is agreed, despite it being unlikely that Company Z would re-enter that (segment of) the market. Again, the absence of a commitment to abandon the market excludes these agreements from the application of the SBER.

Example 3. Company M, a manufacturer of windows and accompanying metallic frames, wishes to migrate to PVC-based technology but keep metallic frames on offer. It builds a new PVC technology plant but being unsure where markets will lead it maintains its manufacturing capacity for metal windows and sources from rivals. Again, it does not enter into any commitment to ramp down or stop production, and thereby the SBER is unavailable.

PART THREE: CONCLUSIONS

The main conclusion from the above analysis is that the SBER should be amended to correct technical and drafting inconsistencies and expand the reach of the exemption to cover agreements among, in particular, SMEs.

In that respect, we believe there is a risk that efficient cooperation among SMEs is currently left outside the reach of the SBER, without a clear efficiency-based justification.

We therefore pose the question of whether the current drafting of the SBER sufficiently caters for the specific needs of SMEs in particular. These, with their typically more limited resources, face more challenges to conduct the required self-assessment exercises and would therefore benefit from new wording or increased guidance.

In light of the above, **consideration of the following measures are suggested (i) for SMEs only and (ii) for the benefit of SMEs (but regardless of the companies' size)**.

Proposals for SMES only

Amending/completing the SBER on other forms of cooperation among SMEs

It is proposed to consider expanding the scope of the SBER to clarify that it would include agreements where at least a party is a SME concerning shared facilities such as warehouses, plants and machinery, logistic assets and distribution networks, joint inventory management, cross-supplies of raw materials or finished products among competitors and other cooperation mechanisms implemented through access agreements, even if in those cases the cooperation does not involve or reach to a jointly provided product or service.

Presumption of compliance with the market share threshold for SMEs

In order to improve certainty on the market share threshold for SMEs, it is proposed to provide a presumption that agreements between SMEs fall below the threshold. This could be coupled with an agile mechanism enabling the Commission, eventually upon request from a NCA, to withdraw that presumption.

Alternatively, to facilitate that SMEs enter into specialisation agreements when they are not able to determine accurately their market share, an amendment of the HGL may also be useful, clarifying that it cannot be presumed that the anticompetitive object of a type 1 specialisation agreement is to restrict competition or that price agreements ancillary to joint distribution in the context of joint production agreements (type 2 specialisation agreements) have the object of restricting competition

It could also be presumed, that, outside the area of hardcore restrictions, Article 101 TFEU is unlikely to be infringed if SMEs entering in specialisation agreements compete with at least one non-SME company producing the products/providing the services object of the specialisation and: (i) it is not possible to have an accurate market share estimation for the relevant SMEs; and (ii) the information available indicates that non-SME companies have an aggregated market share of 50% or more in the relevant market. This presumption might be combined with a requirement that there is also at least a non-SME competing company in the downstream commercialisation market.

Issuing specific guidance for SMEs at EU level in cooperation with NCAs

SMEs need specific guidance to navigate competition law rules. If guidance for SMEs is included in the HGL, there is the risk that the message is lost along the way, as SMEs may lack resources to analyse these comprehensive but technically complex materials. Guidance specifically focusing on SMEs is therefore recommended. This guidance could be made public independently and could also be shared directly with representative associations of SMEs for the widest distribution possible. Guidance should not only focus on specialisation agreements but on all forms of allowed cooperation from the perspective of SMEs. This guidance, if made in the form of a Commission's Communication, may contain specific rules addressed to SMEs (similar to the safe harbours included in the HGL).

Given that SMEs are more likely to be affected by national competition laws, it would also be recommended that the Communication is drafted in close cooperation with NCAs, so that SMEs receive a coherent and coordinated message within the EU internal market. A recommendation from the European Competition Network ("ECN") may also be considered as a potential instrument for this purpose.

Proposals that would particularly benefit SMEs but are proposed not to depend on the size of the parties

Clarification on the treatment of cross-supplies and subcontracting agreements to expand production

As earlier discussed, there is a risk that agreements whereby an undertaking sources product form a rival without a commitment to reduce or abandon production are considered as requiring an exemption and being outside the scope of the SBER. In order to correct that situation, two main options may be put forward:

(a) One is to bring subcontracting to expand production within the scope of the SBER. This could be done by removing the requirement to reduce or abandon production and defining specialisation as any sourcing of products from rivals.

(b) The other option is the reverse – to amend the HGL including a clarification that subcontracting to increase production in itself is generally not restrictive of competition and thereby providing a safe harbour irrespective of market share.

It is submitted that the second alternative is preferable, besides more consistent with the 1978 Subcontracting Notice. In fact, this is also connected to the reality of a majority of subcontracting agreements entered into by SMEs, who just seek to enhance their market presence and can benefit from third parties' resources for the procurement of certain products or services.

That said, the HGL could usefully declare that, in the event the "centre of gravity" of the agreement in the sense of paragraphs 13 and 14 HGL was not a subcontracting relationship, the agreement would be examined under a different logic; this is, if it was apparent that the buyer was not merely complementing its production capacity but aligning its strategy with that of the supplier, the relationship should be looked at as one of joint production and not subcontracting.

This pronouncement could be generally applicable or limited to those agreements where SMEs were at least one of the parties, as it is less likely that these would produce anticompetitive effects than similar deals between non-SMEs and would be without prejudice to a different assessment of these relationships if their centre of gravity was revealed to be different to mere supplies.

Clarification with respect to the notion of joint production and joint distribution absent joint control

It is suggested that the notions of joint production and joint distribution in the SBER should be clearly defined and made more flexible. A specific option in that respect would be using the elements contained in the R&D BER, which allow parties to arrange production and distribution more flexibly.
This would allow to bring within the scope of the SBER different mechanisms of collaboration where the parties can materially influence the production and eventually the distribution plans, but without meeting the requirements of a joint controlled entity that would be applicable under merger control rules.
Moreover, this would provide legal certainty to collaborating undertakings and would not force them to create structures with more intense control mechanisms in order to be within the SBER.
Additionally, it is suggested that the HGL could include additional clarification on ancillary terms to horizontal cooperation, including potentially restrictive access terms and exclusivity requirements**.**

Amending the SBER to facilitate unilateral specialisation

It is suggested to pursue the policy option identified in the IIA by expanding the definition of unilateral specialisation to include more than two parties.[106] This option, currently under consideration for any company regardless of its size, would be particularly suited for SMEs, as a unilateral specialisation agreement may need more than two parties to produce sufficient economies of scale to be competitive.

Clarification on information exchanges

It is proposed that the HGL be revised to indicate that exchanges of information reasonably necessary to implement a valid specialisation agreement would not be separately examined under Article 101 TFEU, in line with paragraph 56 HGL. Information sharing beyond that limit may be examined separately. The current wording of paragraphs 181 and 182 HGL ("*more likely to meet the criteria of Article 101(3)*") seems to be too vague as to provide legal certainty to undertakings.

106 IIA, p. 3.

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