

REVISION OF THE HORIZONTAL BLOCK EXEMPTION REGULATIONS AND HORIZONTAL GUIDELINES – OVERVIEW OF MAIN PROPOSED CHANGES

1. INTRODUCTION

- (1) On 1 March 2022, the Commission published for stakeholder consultation the draft revised block exemption regulations on research and development agreements ('R&D BER') and specialisation agreements ('Specialisation BER'), together referred to as 'HBERs' and the accompanying Guidelines on horizontal cooperation agreements ('Horizontal Guidelines'). The HBERs will expire on 31 December 2022.
- (2) Pro-competitive horizontal cooperation in the form of R&D and specialisation agreements covered by the HBERs is essential for the digital and green transition and can contribute to the resilience of the internal market. The HBERs establish that R&D and specialisation agreements fulfilling certain conditions are exempted from the application of Article 101(1) of the Treaty because they are presumed to meet the exemption requirements of Article 101(3) of the Treaty. The HBERs therefore create a safe harbour for those categories of agreements.
- (3) The Horizontal Guidelines provide guidance on how to interpret and apply the HBERs and how to self-assess compliance with Article 101(1) and Article 101(3) of the Treaty for R&D and specialisation but also for other types of horizontal cooperation agreements that the HBERs do not exempt. This includes purchasing, commercialisation, standardisation and standard terms agreements but also more generally exchanges of information.
- (4) The purpose of the consultation is to gather stakeholder feedback on the proposed (i) draft revised HBERs and (ii) draft revised Horizontal Guidelines. The proposed changes aim to address the issues identified in the evaluation, as set out in the Commission Staff Working Document published on 6 May 2021.¹
- (5) The evaluation showed that the HBERs and Horizontal Guidelines make it easier for companies to cooperate in ways which are economically desirable and without adverse effects from the point of view of competition policy. They promote competition and offer legal certainty to companies in the conception and implementation of their horizontal cooperation agreements. The HBERs and Horizontal Guidelines also met their objective of simplifying administrative supervision by the Commission, the national competition authorities ('NCAs') and national courts.
- (6) The evaluation, however, also show that HBERs and Horizontal Guidelines are not fully adapted to economic and societal developments of the last ten years, such as digitisation and the pursuit of sustainability goals. Some of the provisions in the HBERs were considered rigid and complex, while other provisions were considered unclear and difficult to interpret by companies. The level of legal certainty provided by the Horizontal Guidelines was found to be uneven for the different types of horizontal cooperation agreements covered.

¹ See Commission Staff Working Document, Evaluation of the Horizontal Block Exemption Regulations, SWD(2021)103 final of 6 May 2021, https://ec.europa.eu/competition-policy/system/files/2021-05/HBERs_evaluation_SWD_en.pdf

- (7) Since the launch of the impact assessment phase in June 2021², the Commission has gathered further evidence on the areas for improvement. It ran an open public consultation and several targeted consultations on specific types of horizontal cooperation agreements. The Commission also organised stakeholder workshops and commissioned five impact assessment support studies. Further evidence was collected through discussions with stakeholders and the NCAs. The draft revised HBERs and Horizontal Guidelines take into account all the evidence gathered so far. The public consultation on these drafts forms an integral part of the fact-finding carried out by the Commission. It will inform the impact assessment, on which the final versions of the revised HBERs and the revised Horizontal Guidelines will be based.
- (8) This explanatory note sets out the main changes proposed in the draft revised HBERs and Horizontal Guidelines, per type of agreement and explains how these changes aim to address the issues identified in the evaluation and thereby contribute to meeting the objectives of the HBERs and Horizontal Guidelines.

2. R&D AGREEMENTS - CHANGES PROPOSED FOR THE DRAFT REVISED R&D BER AND ACCOMPANYING CHAPTER OF THE HORIZONTAL GUIDELINES

- (9) The evaluation showed that the text of the R&D BER is not sufficiently adapted to agreements for the development of new products, technologies and processes and for R&D efforts directed primarily towards a specific aim or objective (so-called ‘R&D poles’). To ensure a continued effective protection of competition, the draft revised R&D BER proposes to no longer exempt such agreements where less than three competing R&D efforts would remain in addition to and comparable with those of the parties to the R&D agreement.
- (10) To make it easier for companies to cooperate in R&D agreements, to provide adequate legal certainty and to simplify administrative supervision, the draft revised R&D BER also proposes to:
 - a. simplify the grace period which applies if market shares increase above the threshold for exemption;
 - b. add some new definitions and clarify the wording of existing ones;
 - c. calculate market shares on the basis of the preceding calendar year or the average of the three preceding years depending on the market (the current R&D BER only foresees the preceding calendar year as calculation basis);
 - d. slightly modify the definition of ‘potential competitors’ to take out the reference to a small but permanent increase in prices;
 - e. introduce a withdrawal article based on existing language in the recitals of the R&D BER.
- (11) In addition, the draft revised Horizontal Guidelines propose a new section explaining the application of the R&D BER to help companies in better understanding the way it works and the various concepts and definitions that are used therein.

² An inception impact assessment was published on 7 June 2021, available here: https://ec.europa.eu/competition-policy/system/files/2021-06/HBERs_inception_impact_assessment.pdf

3. SPECIALISATION AGREEMENTS - CHANGES PROPOSED FOR THE DRAFT REVISED SPECIALISATION BER AND ACCOMPANYING CHAPTER OF THE HORIZONTAL GUIDELINES

- (12) In order to clarify the uncertainty relating to the scope of the Specialisation BER that was highlighted in the evaluation, the draft revised Specialisation BER proposes to expand the definition of ‘unilateral specialisation agreements’ to cover more than two parties (the current Specialisation BER strictly refers to agreements between two parties). Furthermore, the draft revised texts propose that horizontal subcontracting agreements, in general and not only those with a view to expanding production, can benefit from the safe harbour of the Horizontal Guidelines.
- (13) Additional changes proposed in the draft revised Specialisation BER and Horizontal Guidelines aim to make it easier for companies to cooperate in specialisation agreements, to provide adequate legal certainty and to simplify administrative supervision. To this end, the draft revised Specialisation BER proposes to:
- a. simplify the grace period which applies if market shares increase above the threshold for exemption;
 - b. add some new definitions and clarify the wording of existing ones;
 - c. calculate market shares on the basis of the preceding calendar year or the average of three preceding years depending on the market (the current BER only foresees as basis the preceding calendar year);
 - d. slightly modify the definition of ‘potential competitors’ to take out the reference to small but permanent increase in prices;
 - e. introduce a withdrawal article, based on existing language in the recitals of the Specialisation BER;
 - f. make it clearer how the market share threshold applies if the agreement concerns intermediary products.
- (14) In addition, the draft revised Horizontal Guidelines propose:
- a. a new section explaining the application of the Specialisation BER to help companies in better understanding the way it works and the various concepts and definitions that are introduced therein, as well as
 - b. guidance on network sharing agreements – as a specific illustration of production agreements where services are involved.

4. MAIN CHANGES PROPOSED TO THE OTHER CHAPTERS OF THE HORIZONTAL GUIDELINES

4.1. The introduction to the Horizontal Guidelines

- (15) The introductory Chapter to the draft revised Horizontal Guidelines proposes:
- a. a restructuring to ensure a more logical flow and also to reflect the addition of a Chapter on sustainability agreements. The Chapter is aligned with the draft Vertical Guidelines to ensure coherence;
 - b. additional guidance to assist undertakings in their self-assessment of their agreements under Article 101(1) of the Treaty, specifically regarding:
 - i. the determination of the centre of gravity of horizontal cooperation agreements;

- ii. key concepts (undertaking, association of undertakings, concerted practice, etc.), in line with relevant case law;
 - iii. the application of Article 101(1) to joint ventures and their parents, reflecting developments in the case law.
- c. additional guidance on restrictions by object and by effect, to include recent case law.

4.2. Joint Purchasing agreements (Chapter 4)

(16) In order to continue to meet its objectives, the Chapter on joint purchasing agreements proposes:

- a. a slightly restructuring to facilitate the self-assessment;
- b. additional clarifications on the types of joint purchasing arrangements, making it also explicit that the Chapter applies to all types of sectors. It is further clarified that the guidance applies not only to actual joint purchases but also to joint negotiations (including by licensees of a SEP license);
- c. to expand the guidance on *by object* restrictions under 101(1) clarifying the distinction between buyer cartels and joint purchasing agreements;
- d. updated guidance on *by effect* restrictions and adds a reference to case law, indicating that certain contractual provisions can fall outside 101(1) TFEU if objectively necessary for the joint purchasing arrangement;
- e. a clarification of the scenario of potential upstream harm to suppliers and sets out the circumstances in which it is less likely that lower prices will be passed on to consumers; provides an explanation on bargaining threats (and that these should also be assessed by effects);
- f. further explanations in the section on the assessment under 101(3) of pass-on to consumers.

4.3. Commercialisation agreements (Chapter 5)

(17) In order to continue to meet its objectives, the Chapter on commercialisation agreements in the draft revised Horizontal Guidelines proposes:

- a. additional guidance on the specific rules for commercialisation agreements in agricultural products;
- b. additional guidance on the main risks of output limitation in commercialisation agreements;
- c. further clarifications on the affected markets and on anticompetitive effects;
- d. a specific section on bidding consortia, and, in particular, on the assessment of consortia agreements between parties that would be able to take part individually in tenders, and on the analysis to be carried out in such cases.

4.4. Information exchange (Chapter 6)

(18) In order to continue to meet its objectives, the Chapter on information exchange in the draft revised Horizontal Guidelines proposes:

- a. a new structure, in order to facilitate the self-assessment;
- b. additional guidance in the introduction on the different types of information exchanges, including different types of data sharing;

- c. additional guidance in the introduction on exchanges in the context of acquisitions and on exchanges stemming from (EU) regulatory initiatives;
- d. an upfront identification of commercially sensitive information in the section on the assessment under 101(1) of the Treaty. This section is also expanded to include recent case law on so-called by object infringements;
- e. additional guidance on many concepts relevant for the self-assessment, notably on ‘genuinely public information/data’, aggregation of information/data, the age of information, unilateral disclosure, indirect information exchanges (incl. hub and spoke scenario’s and third party facilitators), and references to recent case law;
- f. new sections with guidance on measures to limit/control how data is used and on access to information collected.

4.5. Standardisation agreements (Chapters 7 and 8)

- (19) In order to continue to meet its objectives, the Chapter on standardisation agreements in the draft revised Horizontal Guidelines proposes to introduce:
- a. more flexibility in the effects analysis by allowing under certain circumstances more limited participation in the development of a standard ;
 - b. a requirement of more specific disclosure and accepting blanket disclosure as an exception/less effective way to achieve the two objectives of ensuring (i) an informed choice of the technology to be included in the standard and (ii) an effective access to the result of the standard;
 - c. a reference that standard development agreements providing for the ex-ante disclosure of a maximum accumulated royalty rate by all IPR holders will not, in principle, restrict competition within the meaning of Article 101(1). ;
 - d. more elements for conducting the assessment of whether a proposed licensee fee is FRAND;
 - e. references to the relevant framework of assessment for licensing negotiation groups in the joint purchasing Chapter;
 - f. a division of the existing Chapter into two Chapters – one on standardisation agreements (Chapter 7) and one on standard terms (Chapter 8).

4.6. Sustainability agreements (Chapter 9)

- (20) For the Horizontal Guidelines, a Chapter on sustainability agreements is proposed. The Chapter proposes a definition of sustainability agreements and explains when such agreements would not fall within the scope of Article 101(1). The Chapter also proposes guidance on how sustainability agreements will be assessed when they fall within the scope of that provision and may qualify for an individual exemption pursuant to Article 101(3).
- (21) Particular attention is proposed for agreements that set sustainability standards, as this is expected to be the most frequent form of cooperation for pursuing sustainability objectives and because sustainability standards are distinct from the types of technological standards discussed in Chapter 7.
