EUROPEAN COMMISSION ADOPTS UPDATED BLOCK EXEMPTION REGULATIONS AND GUIDELINES ON AGREEMENTS BETWEEN COMPETITORS

On 1 June 2023 the European Commission (the "Commission") adopted its revised Horizontal Block Exemption Regulations comprising the Research and Development Agreements ("R&D") Block Exemption Regulation and Specialisation Agreements Block Exemption Regulation and updated Horizontal Guidelines on co-operation agreements between competitors (Guidelines) including a new chapter on sustainability agreements and an updated chapter on information exchange agreements with a focus on algorithms and conduct of meetings.

The revised Guidelines are more detailed than the previous version and are intended to provide clearer and more extensive guidance for companies to understand the compatibility of their horizontal cooperation agreements, i.e., agreements with competitors, with EU competition law including practical examples.

The updated Guidelines contain a new chapter outlining the Commission's position on sustainability agreements, as well as updated guidance on information exchange agreements and other types of agreements between competitors, such as joint purchasing, commercialisation, bidding consortia, standardisation agreements and agreements on standard terms of supply. The Regulations entered into force on 1 July 2023 and the Horizontal Guidelines will apply once they have been published in the EU's Official Journal[1].

This briefing will focus in particular on the new chapter on sustainability agreements and the updated chapter on information exchange agreements in the Guidelines.

Sustainability Agreements

One of the highly anticipated additions in the Guidelines is the chapter on sustainability agreements, i.e. agreements between competitors that pursue sustainability objectives, irrespective of the form of the cooperation. Sustainability objectives include but are not limited to:

- addressing climate change, for example through the reduction of greenhouse gas emissions;
- reducing pollution;
- limiting the use of natural resources;
- upholding human rights;
- ensuring a living income;
- fostering resilient infrastructure and innovation;
- reducing food waste;
- facilitating a shift to healthy and nutritious food; and
- ensuring animal welfare

The Commission states that competition law enforcement contributes to sustainable development by ensuring effective competition, which spurs innovation, increases the quality and choice of products, ensures an efficient allocation of resources, reduces the costs of production, and so contributes to consumer welfare. Sustainability agreements will only raise competition concerns if they entail restrictions of competition by object or lead to appreciable actual or likely negative effects on competition. Agreements that restrict competition cannot escape the prohibition of anti-competitive agreements simply by referring to a sustainability objective. Where sustainability agreements restrict competition, they may still be compatible with the EU competition rules if they qualify for an exemption.

Sustainability agreements that are unlikely to raise competition concerns

Where sustainability agreements do not negatively affect parameters of competition, such as price, quantity, quality, choice or innovation, they are not capable of raising competition law concerns. The Commission provides the following examples of sustainability agreements which fall outside the scope of the prohibition of sustainability agreements:

- agreements that aim solely to ensure compliance with sufficiently precise requirements or prohibitions in legally binding international treaties, agreements or conventions;
- agreements relating to internal corporate conduct, for example measures to eliminate single-use plastic from business premises, or not to exceed a certain ambient temperature in buildings, or to limit the volume of printed internal documents;
- agreements to set up a database containing general information about suppliers that have (un) sustainable value chains (for example, suppliers that respect labour rights or pay living wages; use (un)sustainable production processes; or supply (un) sustainable inputs, or information about distributors that market products in a(n) (un)sustainable manner, but which do not forbid or oblige the parties to purchase from such suppliers or to sell to such distributors);
- agreements between competitors relating to the organisation of industry-wide awareness campaigns or campaigns raising customers' awareness of the environmental impact of their consumption.

Assessment of sustainability agreements under the prohibition of anti-competitive agreements

A sustainability agreement which is used to disguise an agreement which has the object of restricting competition, such as price fixing, market sharing or customer allocation, or limitation of output or innovation, will fall within the prohibition of anti-competitive agreements, subject to the possibility of exemption (see below).

If a sustainability agreement does not have the object of restricting competition, whether it may appreciably affect competition will depend on the following factors:

- the market power of the parties participating in the agreement;
- the degree to which the agreement limits the decision-making independence of the parties on the main parameters of competition;
- the market coverage of the agreement;
- the extent to which commercially sensitive information is exchanged in the context of the agreement; and
- whether the agreement results in an appreciable increase in price or an appreciable reduction in output, variety, quality or innovation.

Sustainability agreements that restrict competition either by object or effect can still benefit from an exemption if the parties are able to demonstrate that the four cumulative conditions for an exemption are satisfied (see below).

1 As at the time of writing the Regulations and Horizontal Guidelines have not yet been published in the Official Journal, however a link to the finalised revised Horizontal Guidelines can be found here **2023_revised_horizontal_guidelines_en.pdf (europa.eu)**. You can also find the finalised R&D Agreements Block Exemption Regulation here **Commission Regulation (EU) 2023/1066** and finalised Specialisation Agreements Block Exemption Regulation here **Commission Regulation (EU) 2023/1067**.

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Sustainability Standardisation Agreements

The Guidelines discuss a subset of sustainability agreements under which competitors may agree to adopt and comply with certain sustainability standards, known as sustainability standardisation agreements, which may include quality marks or labels. Such agreements include where competitors agree to:

- phase out, withdraw or replace non-sustainable products with sustainable ones;
- harmonise packaging materials to facilitate recycling or harmonise packaging sizes to reduce waste;
- purchase only production inputs that have been manufactured in a sustainable manner; or
- agree on certain standards to improve animal welfare.

The Commission considers that sustainability standardisation agreements often have positive effects on competition. They may contribute to sustainable development by enabling the development of new products or markets, increasing product quality or improving conditions of supply or distribution. In particular, by providing information about sustainability matters (for example via labels), sustainability standards empower consumers to make informed purchase decisions and therefore play a role in the development of markets for sustainable products.

But in some circumstances the Commission considers that sustainability standards may restrict competition. This can occur, for example, through price coordination, foreclosure of alternative standards, and the exclusion of, or discrimination against certain competitors.

The Commission considers that restrictions by object would include:

- an agreement between competitors on how to pass on to customers increased costs resulting from the adoption of a sustainability standard in the form of increased sale prices;
- an agreement to fix the prices of products including the standard;
- an agreement between the parties to a sustainability standard to pressurise competing third parties to refrain from marketing products that do not comply with the standard; and
- agreements between competitors to limit technological development to the minimum sustainability standards required by law, instead of cooperating to achieve more ambitious environmental goals.

The Commission considers that sustainability standardisation agreements are unlikely to produce appreciable negative effects on competition if the following six cumulative conditions are satisfied (soft safe harbour):

- The procedure for developing the sustainability standard must be transparent, and all interested competitors must be able to participate in the process leading to the selection of the standard;
- The sustainability standard must not impose on undertakings that do not wish to participate in the standard any direct or indirect obligation to comply with the standard;
- In order to ensure compliance with the standard, binding requirements can be imposed on the participating undertakings, but they must remain free to apply higher sustainability standards;
- The parties to the sustainability standard must not exchange commercially sensitive information that is not objectively necessary and proportionate for the development, implementation, adoption or modification of the standard;

- Effective and non-discriminatory access to the outcome of the standard-setting process must be ensured. This includes allowing effective and non-discriminatory access to the requirements and conditions for using the agreed label, logo or brand name, and allowing undertakings that have not participated in the process of developing the standard to adopt the standard at a later stage;
- The sustainability standard must satisfy at least one of the following two conditions:

(a) The standard must not lead to a significant increase in the price or a significant reduction in the quality of the products concerned;

(b) The combined market share of the participating undertakings must not exceed 20 % on any relevant market affected by the standard.

Failure to comply with one or more of the above conditions of the soft safe harbour does not create a presumption that the sustainability standardisation agreement restricts competition. However, if one or more of these conditions is not met, it is necessary to carry out an individual assessment of the agreement.

The Commission considers that a sustainability standardisation agreement is more likely to promote the attainment of a sustainability objective if it provides for a mechanism or monitoring system to ensure that undertakings adopting the sustainability standard comply with the requirements of the standard.

Exemption criteria for sustainability agreements

A sustainability agreement that restricts competition can benefit from an exemption if the parties are able to show that four cumulative conditions are satisfied:

- Efficiency gains (for example, less polluting technologies or better quality products);
- Indispensability (the restrictions must be indispensable to achieve the benefits and objective of the agreement and not extend beyond this);
- Consumers (ie direct and indirect customers of the products covered by the agreement) must receive a fair share of the claimed benefits; i.e. the benefits deriving from the agreement outweigh the harm caused by the agreement, so that the overall effect on consumers in the relevant market is at least neutral. Such benefits may include for example improved product quality or a price reduction due to cost efficiencies. The fact that benefits to consumers are delayed does not exclude an exemption. But the greater the delay, the greater must be the efficiencies to compensate;
- No elimination of competition.

Information Exchange Agreements

In its updated chapter on information exchange the Commission focuses amongst other things on algorithms. It states that the treatment of pricing algorithms under EU competition law is based on two important principles:

- If pricing practices are illegal when implemented offline, there is a high probability that they will also be illegal when implemented online.
- Firms involved in illegal pricing practices cannot avoid liability on the ground that their prices were determined by algorithms. Just like an employee or an external consultant working under a firm's "direction or control", an algorithm remains under the firm's control, and therefore the firm is liable even if its actions were informed by algorithms.

On unilateral disclosure of commercially sensitive information the Commission explains that a situation where one undertaking discloses commercially sensitive

information to a competitor, which requested it or at least accepts it, can constitute a concerted practice where the competitor acts upon the disclosure and provided there is a link of cause and effect between the disclosure and the competitor's subsequent conduct on the market. Unilateral disclosure can occur, for example, via (chat) messages, emails, phone calls, input in a shared algorithmic tool and meetings. It is irrelevant whether only one undertaking unilaterally discloses commercially sensitive information or whether all the participating undertakings disclose the information.

The Commission states that where an undertaking receives commercially sensitive information from a competitor during a meeting or other contact, that undertaking will be presumed to take account of such information and to adapt its market conduct accordingly, unless it publicly distances itself (for example, by responding with a clear statement that it does not wish to receive such information) or reports it to the competition authorities.

Thus, participation in a meeting where one undertaking discloses its pricing plans to its competitors-without those competitors publicly distancing themselves-is likely to be caught by the EU competition rules, even in the absence of an explicit agreement to raise prices. Similarly, introducing a pricing rule in a shared algorithmic tool (such as a rule to match the lowest price on a particular online platform or shop plus 5 per cent, or to match the price of a particular competitor minus 5 per cent), is also likely to be caught by the EU competition rules, even in the absence of an explicit agreement to align future pricing.

On indirect information exchange the Commission makes clear that exchanges of commercially sensitive information between competitors can take place via a third party, such as a platform operator or optimisation tool provider, a common agency such as a trade association, supplier or customer, or a shared algorithm. Depending on the facts, the participating competitors and the third party may all be held liable for such collusion.

On measures to reduce the risk of competition law infringements, the Commission encourages the use of "clean teams" or trustees to receive and process information. A clean team generally refers to a restricted group of individuals within an undertaking who are not involved in the undertaking's commercial operations and are bound by strict confidentiality protocols regarding the commercially sensitive information. A clean team or trustee can ensure that the information provided for the cooperation is exchanged exclusively on a need-to-know basis and in an aggregated manner. Similarly, undertakings that manage a data pool should also ensure that only information that is necessary for the implementation of the legitimate purpose of the data pool is collected.

The Commission explains that undertakings can take further measures to reduce the risk that commercially sensitive information is exchanged during interactions with (potential) competitors. Prior to planned contacts, undertakings should carefully review the agenda and purpose of the meeting or call to ensure that potential risks concerning the exchange of commercially sensitive information are identified in advance and that appropriate measures are taken to avoid them. Undertakings may also decide to attend the meeting(s) or call(s) accompanied by a lawyer specialised in competition law. During contacts, participants should stick to the agenda and, if commercially sensitive information is disclosed or exchanged, they should raise objections, ensure that their objections are recorded in the minutes of the meeting or call and publicly distance themselves if the exchange of information occurs despite their objections (see below). Ensuring that accurate minutes are produced and circulated soon after each contact may allow undertakings to quickly identify whether commercially sensitive information was inadvertently exchanged and immediately raise objections to the minutes.

During contacts, an undertaking can publicly distance itself from any anti-competitive exchange of commercially sensitive information by making its opposition clear to the other participants in the exchange. To establish whether an undertaking has actually distanced itself, what is important is the understanding held by the other participants in the exchange regarding the intentions of the distancing undertaking. For example, an undertaking that wishes to distance itself can state immediately and expressly that they cannot participate in discussions on the subject in question and ask that the subject be changed at once. If the objection and request is ignored, the undertaking should immediately leave the meeting or call in a manner that makes the reason for its departure apparent to all present. Undertakings should ensure that their objections and departure are recorded in any shared minutes of the meeting or, if there are no such minutes, record their departure in their own notes of the contact.

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