Impuestos Indirectos

New rules on agreements between competitors

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Summary of the main developments contained in the draft Guidelines on horizontal cooperation agreements of the European Commission regarding joint ventures, consortia, subcontracting agreements and mobile infrastructure sharing agreements.

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The European Commission has recently published draft competition rules that will have a very significant impact on agreements between competitors. These are the draft revised (i) Block Exemption Regulation on R&D agreements (C(2022)1161) ; (ii) Block Exemption Regulation on specialisation agreements (C(2022)1160) ; and (iii) Guidelines on horizontal cooperation agreements (C(2022)1159) . These rules shape the business policies and contractual clauses of many "horizontal" initiatives between competitors, a very broad category that includes agreements on areas such as (i) joint purchasing; (ii) joint commercialisation; (iii) information exchanges; (iv) standardization; (v) sustainability; (vi) joint R&D; (vii) specialization; etc.

Under both the current and future regulatory framework, agreements between competitors that fulfil the conditions set out in the Block Exemption Regulations on joint R&D and specialisation agreements shall be compatible with the competition rules. Otherwise, they may still be compatible, if the companies prove that their agreements generate sufficient advantages for consumers and efficiencies to compensate for their restrictive effects on competition. The Guidelines accompanying the Block Exemption Regulation provide guidance for this self-assessment analysis on benefits, efficiencies and the counterbalancing of restrictive effects. They also provide guidance on the compatibility with the competition rules of agreements between competitors other than joint R&D and specialisation agreements.

These draft Guidelines explain how several categories of cooperation agreements should be designed to ensure that they comply with competition law. In this newsletter we will limit ourselves to describing the main developments contained in the draft Guidelines on horizontal cooperation agreements, only with regard to (i) the conduct between competing parent companies that share a joint venture; (ii) consortia and subcontracting agreements; and (iii) mobile infrastructure sharing agreements.

In other separate newsletters we will refer to the main issues related to (i) exchanges of information; and (ii) sustainability.

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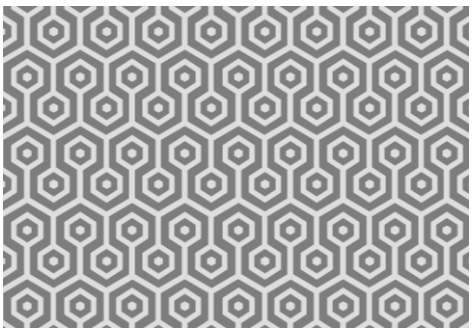


1. Conduct between competing parent companies that share a joint venture.

When two competing companies set up a joint venture, they may have to notify the transaction as a concentration before the competition authorities. As long as they maintain this stable link of collaboration, they will have to make sure that their partnership does not unchain competition rules infringements. The draft Guidelines on horizontal cooperation agreements provide guidance on these issues.

Competition rules do not apply in the framework of a parent/subsidiary relationship. Likewise, the draft Guidelines indicate that competition rules do not apply to the relationship between the parent/s that exercise decisive influence over the joint venture and the latter, in relation to their activity in the market where the joint venture is active.

Nevertheless, competition rules will apply to agreements: (i) between the parent companies to create the joint venture; (ii) between the parents to alter the scope of the joint venture; (iii) between the parents and the joint venture outside the product and geographic scope of the activity of the joint venture; and (iv) between the parents without involvement of the joint venture, even concerning the relevant market where the joint venture is active.

On the other hand, if the joint venture commits an infringement of the competition rules, the liability for payment of the fine may be extended jointly and severally to the parent companies, to the extent that it is shown that the parent companies exercised decisive influence over the joint venture.

2. Consortia and subcontracting agreements.

In the field of public and private tenders, the bidding companies may decide to cooperate through a consortium or a subcontracting agreement. These agreements do not restrict competition if they allow the companies involved to participate in projects that they could not undertake individually. This can be the case of companies that produce different goods or services that are complementary. Another possibility is when the undertakings involved - although all active in the same markets - cannot carry out the contract individually, for example due to the size of the contract or its complexity.

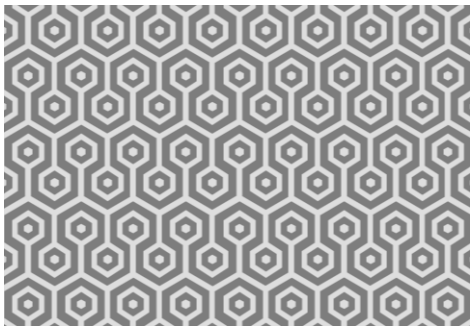
The assessment of whether the parties can each compete in a tender individually, thus being competitors, depends firstly on the requirements included in the tender rules. However, the mere theoretical possibility of carrying out the contractual activity alone does not automatically make the parties competitors: there must be a realistic assessment of whether an undertaking will be capable of completing the contract on its own, considering the specific circumstances of the case, such as the size and abilities of the company, and its present and future capacity assessed in light of the evolution of the contractual requirements.

Even when the consortium or the subcontracting agreement concerns competitors, it may generate efficiencies in the form of lower prices, but also better quality, a broader offer or faster manufacturing of the products subject to the tender. Collaboration can be justified if the joint participation to the tender allows the parties to submit an offer that is more competitive than the offers they would have submitted alone (in terms of prices and/or quality) and the benefits in favour of the consumers and the contracting entity outweigh the restrictions to competition.

There is not a general presumption that subcontracting by the successful bidder to another bidder in the same procedure constitutes collusion between the

1.The draft Regulation is available by clicking on the following link.
2.The draft Regulation is available by clicking on the following link..

3. The draft Guidelines are available by clicking on the following link.



operators in question and they may demonstrate the opposite.

In contrast to the above, a consortium or subcontracting agreement will not be permitted by the competition rules when it implements a cartel agreement (bid-rigging).

3. Mobile infrastructure sharing agreements.

Telecommunications operators with mobile networks often cooperate to increase the profitability of deploying their networks. They can share (i) their basic site infrastructure (masts, cabinets, antennas or power supplies, known as “passive sharing”); (ii) the Radio Access Network (“RAN”) equipment at the sites such as base transceiver stations or controller nodes (“active RAN sharing”); or (iii) their spectrum, such as frequency bands (“spectrum sharing”).

The Commission recognises potential benefits from mobile infrastructure sharing agreements arising from cost reductions or quality improvements. They allow faster roll-out of: (i) new networks and technologies; (ii) wider coverage; or (iii) denser network grids.

The draft Guidelines set out the following principles for assessing the compatibility of these agreements with the competition rules:

- Passive sharing is unlikely to give rise to restrictive effects on competition, as long as the network operators maintain a significant degree of independence and flexibility in defining their business strategy, the characteristics of their services and network investments.

- Active RAN sharing agreements may be more likely to give rise to restrictive effects on competition because they are likely to affect not only coverage but also independent deployment of capacity.

- Spectrum sharing agreements are a more far-reaching cooperation and may restrict the parties’ ability to differentiate their retail and/or wholesale offers even further and directly limit competition between them.

In order for a mobile infrastructure sharing agreement to be considered as being unlikely to have restrictive effects under competition law, it would have to comply with the following:

- Operators control and operate their own core network and no disincentives exist preventing the operators to individually/unilaterally deploy their infrastructure, upgrade and innovate should they wish to do so.

- Operators maintain independent retail and wholesale operations (technical, commercial and other decision making independence). This includes the freedom of operators to set prices for their services, to determine the product/bundle parameters, to follow independent spectrum strategies and to differentiate their services based on quality and other parameters.

- Operators do not exchange more information than is strictly necessary for the mobile infrastructure sharing to operate and necessary barriers to information exchange have been put in place

4. Entry into force.

The European Commission has launched a public consultation on the draft Guidelines on horizontal cooperation agreements. Once its final version is published in the Official Journal of the European Union, it is expected to enter into force on January 1st, 2023. The same will happen with the Block Exemption Regulations on joint R&D and specialization agreements.