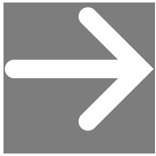
Competition law

Adoption of new European competition rules on efficient cooperation among competitors



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Let's talk

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The European Commission has approved on June 1st the new competition rules applicable to cooperation agreements among competitors. These rules describe the types of collaboration between competitors that can be considered competition law compliant, as they generate efficiencies and advantages for consumers.

These are the Block Exemption Regulation on R&D agreements; the Block Exemption Regulation on specialisation agreements[1]; and the Guidelines on horizontal cooperation agreements (the "Guidelines")[2].

Agreements among competitors that meet the conditions set forth in the Block Exemption Regulations on R&D and specialization agreements are competition law compliant. Otherwise, they may still be compatible, if the companies prove that their agreements generate sufficient advantages for consumers and efficiencies to compensate their restrictive effects on competition. The Guidelines accompanying the block exemption Regulations 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.

The Guidelines cover categories of agreements or concerted practices between competitors relating to the following matters: sustainability; exchanges of information; consortia and subcontracting agreements; joint production and specialization (if they do not fit into the Block Exemption Regulation, for example, because the combined market share of the parties exceeds 20 %); joint purchasing; joint commercialisation; R&D (if they do not fit into the Block Exemption Regulation, for example because the combined market share of the parties exceeds 25 %); standardization; and mobile telecommunications infrastructure sharing agreements.

1. On 2 June 2023, the Commission Regulation (EU) 2023/1067 of 1 June 2023 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements (C/2023/3448, OJ L 143, 2.6.2023, p. 20–26, available at the following link) and the Commission Regulation (EU) 2023/1066 of 1 June 2023 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 (C/2023/3443, OJ L 143, 2.6.2023, p. 9–19, available at the following link) were published. The new Regulations replace (i) Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of specialisation agreements (OJ L 335, 18.12.2010, p. 43); and (ii) Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of research and development agreements (OJ L 335, 18.12.2010, p. 36).
2. The new version of the Guidelines can be p. 1). downloaded via the following link. They have not been published in the Official Journal of the European Union. They replace the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (OJ C 11, 14.1.2011,

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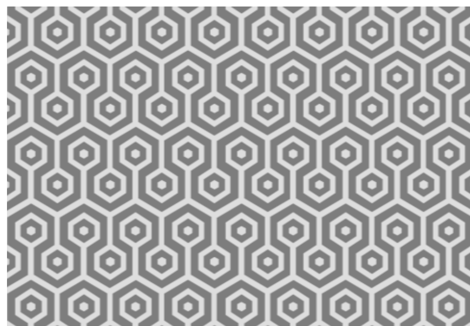


It also clarifies to what extent competition rules may be applied to the relationships between competing parent companies and their joint venture company.

These new rules do not represent a revolutionary departure from the competition rules previously in force. Of particular note is the inclusion in the new Guidelines of specific sections on sustainability, mobile telecommunications infrastructure sharing agreements, and the relationships between competing parent companies and their joint venture company. It also provides further guidance on the European Commission's interpretation of how competition rules apply to information exchanges, consortia and subcontracting.

In relation to all sections, the Guidelines update the interpretation of the competition rules taking into account the recent decisional practice of the European Commission and the case law of the European Courts; seek to ensure that these European competition rules are applied in a uniform manner by national competition authorities; provide greater clarity in the drafting of some paragraphs; take into account innovations derived from e-commerce and digitalisation; and aim to be useful not only for large corporations, but also for SMEs.

The Guidelines constitute an extensive 167-page document. This newsletter is limited to highlighting the main developments arising from these rules concerning sustainability; exchanges of commercially sensitive information; consortia and subcontracting; mobile telecommunications infrastructure sharing agreements; and the relationships between competing parent companies and their joint venture company.

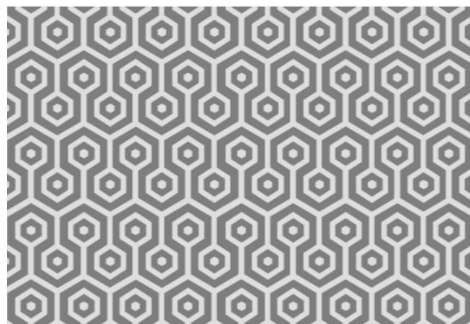
1. Sustainability/ ESG

This is the main novelty of the Guidelines. Agreements between competitors in favour of sustainable development (ESG) can be aimed at combating climate change, respecting human rights, promoting resilient infrastructure, reducing food waste, promoting healthy food or improving animal welfare. The European Commission provides guidance in its Guidelines on how various competitors can carry out these sectoral sustainability initiatives without the risk of committing a competition infringement.

The Guidelines state that, in the first place, agreements between competitors in favour of sustainability that do not affect competition parameters are compatible. This category includes agreements relating to the internal conduct of companies (such as an agreement between competitors whereby, in their respective offices, the temperature will not exceed X degrees in winter, no single-use plastics will be used and the use of printers will be limited). Databases with information on suppliers and distributors that abide by sustainability standards also fall into this category. This bucket also includes campaigns paid for by several competitors to raise consumer awareness of the environmental footprint of their products' consumption.

Secondly, sustainability standardisation agreements that are based on principles of transparency and freedom of access comply with competition rules. They shall be compatible as long as they do not bind third parties alien to the initiative and protocols are established to limit exchanges of sensitive information. Participants should remain free to adopt higher sustainability standards individually. It is permissible for the joint sustainability standard to trigger a price increase (without agreements in this regard between the companies at stake). The increase should not be significant where the parties' combined market share exceeds 20 %.

Third, other sustainability agreements between competitors may be compatible with competition rules, even if they have restrictive effects on competition, if certain conditions (efficiency gains, indispensability and pass-on to consumers) are fulfilled. The sustainability agreement should lead to efficiency gains, such as reductions in production and distribution costs, increases in product variety and quality,



improvements in production or distribution processes, or increases in innovation. It could also shorten the time it takes to bring sustainable products to the market.

The indispensability condition will be particularly justified where consumers find it difficult to assess the future benefits that they will obtain from the sustainability agreement. For example, consumer goods manufacturers may agree to reduce packaging at the same time because, in the absence of such an agreement, it would be inevitable that consumers would continue choosing products presented in larger packages (even if they have the same content inside as those presented in smaller packages).

The third condition requires that consumers receive a fair share of the benefits. For example, because collaboration allows launching products that improve the consumer experience (increases in product quality). Other benefits may derive from the consumer feeling better for choosing a new sustainable product (even if the quality does not improve or the price increases). The collective benefits generated by the positive externalities of the agreement, in favour of society as a whole, are also positively valued. These collective benefits are relevant when consumers are initially unwilling to pay a higher price for a product made with an environmentally friendly but expensive technology. However, for this condition to be accepted as fulfilled, consumers must constitute a substantial part of the pool of beneficiaries.

The European Commission and national competition authorities are willing to offer advice to companies to assist them in assessing the compatibility of these sectoral sustainability initiatives.

2. Exchanges of commercially sensitive information

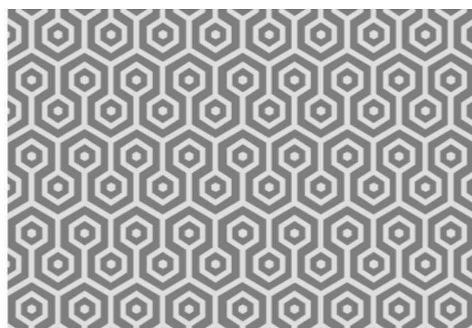
The Guidelines state that competitors should not exchange information on the following matters: current pricing and future pricing intentions; current and future production capacities; current and future commercial strategies; forecasts relating to current and future demand and sales; and future product characteristics which are relevant for consumers.

Exchanges of information between competitors on the following categories may also be problematic: costs; quantities produced/sold; market shares; customers; or plans to enter or exit the market.

Conversely, exchanges of information between competitors regarding the following data are compatible with competition rules data not relevant to decide on the market behaviour; public; historical; aggregated; or anonymised. Such data may relate to the general functioning or state of an industry, regulatory matters, or non-strategic technical or scientific or educational data. Consumers may also benefit from best-selling product lists or price comparison data.

Competitors may exchange information for a legitimate, non-anticompetitive purpose, such as in the following contexts: benchmarking, sale and purchase of companies, addressing a shortage of raw materials, sharing of customer (or other) risk information relevant to financial institutions/insurers, sustainability or anti-piracy initiatives.

In relation to the use of algorithms, the criteria for compatibility with competition rules for offline exchanges of information shall apply. Undertakings will be equally liable for the infringement even if it originates from the use of algorithms. Thus, if several competitors agree to coordinate their behaviour in the market by means of an algorithm, they will commit an infringement called "collusion by code". For example, if several competitors share an algorithm-based pricing software application and this application is based on the same formula (such as applying a rebate of X % off competitor Y's price) they are likely to committ a competition infringement. Equally problematic will be the transfer by several competitors of their commercially sensitive information to the same software company to create an algorithm-based application to assist them in making commercial decisions (e.g. on pricing).



Other relevant issues analysed in this section of the Guidelines concern unilateral public announcements referring to a company's future commercial policy and hub & spoke conducts.

3. Consortia and subcontracting

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 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 are each able to individually compete for each lot in a tender, 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, the financial risk of the project, the level of investments required and its present and future capacity, assessed in light of the contractual requirements.

For this compatibility analysis, it will be also relevant: the parties' combined market share; the likelihood of competing bids; the complementarity of the parties and integration of their resources/activities by the collaboration; the reasons behind the decision to cooperate; the alternative scenario to the collaboration (chances of success of individual bids); the outcome of previous comparable bids; and the compliance protocols in place.

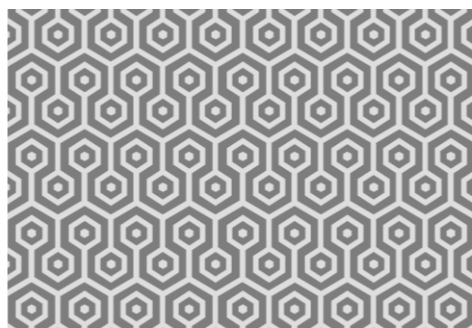
Even when the consortium or the subcontracting agreement is undertaken by competitors, it may generate efficiencies in the form of lower prices, better quality, a broader offer or faster manufacturing of the products subject to the tender. Collaboration can be justified if the joint participation to 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.

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).

4. Mobile infrastructure sharing agreements

Telecommunications operators with mobile networks often cooperate to increase the profitability of deploying their networks. They can share their basic site infrastructure (masts, cabinets, antennas or power supplies, known as “pass ive sharing”); the Radio Access Network (“RAN”) equipment at the sites such as base transceiver stations or controller nodes (“active RAN sharing”); or their spectrum, such as frequency bands (“spectrum sharing”). These agreements may involve a geographic allocation of the territories in which each operator will deploy its network.

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



The 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. Access to passive infrastructure should not be restricted.

• 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.
A mobile infrastructure sharing agreement will not have restrictive effects under competition law, if it complies with the following criteria:

• 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 firewalls to avoid information exchanges have been put in place.

5. Relationships between the competing parent companies and their joint venture company

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 Guidelines provide guidance on these issues.

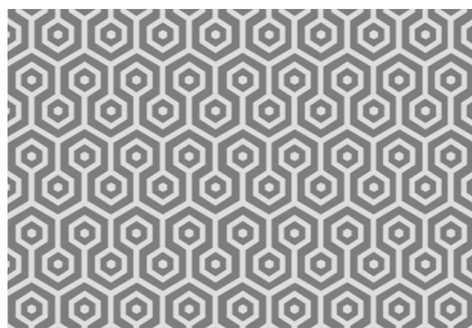
Competition rules do not apply in the framework of a parent/subsidiary relationship. Likewise, the Guidelines indicate that competition rules do not apply to the relationship between the parent/s that exercise decisive influence over the joint venture and the latter, in relation to their activity in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

Nevertheless, competition rules will apply to agreements: (between the parent companies to create the joint venture; between the parent companies to alter the scope of the joint venture; between the parent companies and the joint venture outside the product and geographic scope of the activity of the joint venture; and between the parent companies 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.

6. Other categories of agreements between competitors regulated by the new rules

The two Block Exemption Regulations and the Guidelines also regulate other categories of cooperation agreements between competitors. They do not offer major novelties compared to the previously existing European competition rules. These additional forms of cooperation relate to the following areas:



• Joint production and specialisation. They are covered by the Block Exemption Regulation on specialisation agreements and the Guidelines. The new Regulation extends the types of agreements that will be considered compatible with the competition rules in this area (e.g. when they are concluded between more than two undertakings). The combined market share threshold ensuring compatibility on the basis of the Regulation remains at 20%, while a more flexible method of calculating market shares is introduced. It also brings more clarity by adding new definitions and clarifying the wording of others.

• R&D agreements between competitors. They are governed by the Block Exemption Regulation on R&D agreements and the Guidelines. The combined market share threshold ensuring compatibility on the basis of the block exemption regulation remains at 25 %. A more flexible method of calculating market shares is introduced. It is clarified to what extent two operators can be considered competitors prior to the market launch of their products.

• Joint purchasing. The Guidelines identify the differences between a purchasing cartel (prohibited under the competition rules) and joint purchasing, which is compatible if it generates efficiencies and consumer benefits. The types of agreements that will be considered compatible with competition rules are extended (including cooperation to jointly negotiate advantageous purchase terms, even if the purchase orders are then placed separately by each party). Other new features include clarification of the negative effects that such agreements may have on suppliers (e.g. to give them scope for further investment); analysis of temporary stopping of purchasing orders; and more detail on the assessment of the pass-on of benefits to consumers (e.g. through lower retail prices).

• Sectoral standardisation, covered by the Guidelines. They clarify the circumstances in which open participation is required in the market affected by the standard to take part in developing / choosing the standard. Flexibility is added in this area, as it is made clear that some competitors may be excluded from standardisation in certain circumstances (e.g. if there is competition between several standards or if the restriction on the participants is limited in time and with a view to progress more quickly). Explanations are also provided on the need for companies participating in the standard to disclose the extent to which they have essential intellectual property rights over the technology included in the standard.

• Joint commercialisation agreements between competitors. The Guidelines explain in more detail the risks arising from output limitation, as well as the markets affected by such agreements and their possible restrictive effects on competition.

7.Entry into force

The two block exemption Regulations (on R&D and specialisation) will enter into force on July 1st and the Guidelines during July (the day after their publication in the Official Journal of the European Union). They are expected to remain in force for the next 12 years. Companies whose joint production / specialisation / joint R&D agreements are covered by the previously existing block exemption regulations will have a transitional period of two years to adapt them to the new rules.

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