

Insights

EUROPEAN COMMISSION PUBLISHES DRAFT COMPETITOR COLLABORATION BLOCK EXEMPTIONS AND GUIDANCE

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The European Commission (“EC”) is consulting on new rules for collaborations between competitors by inviting comments on two draft Horizontal Block Exemption Regulations on Specialisation and R&D (“HBERs”) and accompanying Horizontal Guidelines.

The new proposals follow the EC’s two year consultation on horizontal cooperation reform, in which respondents suggested that the existing rules, which are now over 10 years old, are no longer fit for purpose in light of number of socioeconomic changes, including digitisation and the green transition. The overarching theme of the feedback was that the existing rules were too rigid, did not appropriately recognise the benefits of competitors working together and did not appropriately balance the competition risks associated with different modes of collaboration.

In light of this feedback, the EC’s proposals aim to provide more legal certainty and greater flexibility for businesses seeking to collaborate. The proposals also reflect case law developments since the current versions came into force.

Notably,

- The **R&D Block Exemption Regulation** would no longer extend to projects directed towards a specific aim/objective, where there would be fewer than three competing comparable R&D efforts.
- Within the **Specialisation Block Exemption Regulation**, the definition of “unilateral specialisation agreements” would be expanded to cover more than two parties, and the exemption would apply to horizontal subcontracting agreements in general (rather than just those aimed at expanding production).
- The **Horizontal Guidelines** have been updated extensively with a view to helping businesses more easily assess whether collaborative conduct would breach the Art 101(1) prohibition. Changes are proposed to clarify the legal treatment of common types of competitor collaboration, including commercialisation, standard setting and specialisation (including

mobile infrastructure sharing agreements), along with enhanced guidance on the topics of joint purchasing, information exchange and sustainability:

- **Joint purchasing agreements:** the guidelines are expanded to apply to joint negotiations and to all sectors, and provide enhanced guidance on the treatment of “by effect” and “by object” restrictions, including clarifying the distinction between joint purchasing arrangements and buyer cartels.
- **Information exchanges:** new guidance is proposed to help businesses identify when information is commercially sensitive (such as when it would be considered “genuinely public”) and when it may legitimately be shared with a competitor, including in an M&A and regulatory context.
- **Sustainability:** building on the EC’s 2021 Policy Brief, the draft includes widely anticipated new guidance on how competitors can cooperate to achieve sustainability goals, including greater clarity on when sustainability and sustainability standardisation agreements would not fall within the scope of Article 101(1) and when they may qualify for an individual exemption pursuant to Article 101(3).

Once finalised, the new HBERs and Horizontal Guidelines will enter into force on 1 January 2023.

In the UK, the Competition and Markets Authority (CMA) is due to publish its own proposals in the coming months. It is not yet clear to what extent the UK proposals will diverge from those of the EU, with any substantive differences set to create practical challenges for businesses active in both jurisdictions. The EC and CMA are also consulting on the block exemptions applicable to vertical agreements, with the new rules due to enter into force in June 2022. The Commission’s consultation is open until 26 April 2022 and this is likely to be the final opportunity to provide feedback. If you would like to discuss any aspect of the proposals, please speak to Andrew Hockley, Victoria Newbold, David Anderson or Julie Catala-Marty.

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MEET THE TEAM



Andrew Hockley

Sydney

andrew.hockley@bclplaw.com

[+44 20 3400 4630](tel:+442034004630)



Victoria Newbold

London

victoria.newbold@bclplaw.com

[+44 \(0\) 20 3400 4133](tel:+44(0)2034004133)



Dave Anderson

Brussels

david.anderson@bclplaw.com

[+32 \(0\) 2 792 2421](tel:+32(0)27922421)



Julie Catala Marty

Paris

julie.catalamarty@bclplaw.com

+33 (0) 1 44 17 77 95

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