

COMPETITION & REGULATORY NEWSLETTER

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European Commission adopts new horizontal block exemption Regulations and Guidelines

On 1 June 2023, the European Commission [published](#) its long-awaited revised Research and Development Block Exemption Regulation (the R&D BER) and revised Specialisation Block Exemption Regulation (the Specialisation BER) (together, HBERs), alongside revised Guidelines on horizontal cooperation (the Guidelines). Whilst the HBERs seek to facilitate “essential” horizontal cooperation in the form of R&D and specialised production, the Guidelines provide guidance on how to interpret and apply not only the HBERs, but also other types of horizontal cooperation agreements, including agreements pursuing sustainability objectives.

Together, the new HBERs and the Guidelines represent the culmination of a review process that began in early 2021. They purport to provide undertakings with clearer and up-to-date guidance to help them assess the compatibility of their horizontal cooperation agreements with EU competition law.

Background

Horizontal cooperation agreements are entered into by undertakings that are competitors on a market, for the purpose of cooperating in certain areas, such as R&D and specialisation in production. The HBERs provide for a framework that exempts these agreements from the application of Article 101(1) TFEU (which prohibits agreements between undertakings and concerted practices which have the object or effect of distorting competition) where they fulfil certain conditions, because they are presumed to satisfy the conditions for exception under Article 101(3) TFEU. The HBERs therefore create a ‘safe harbour’ for these categories of agreements.

R&D and Specialisation agreements

The changes to both revised HBERs aim to make cooperation in R&D and specialisation easier for companies by providing adequate legal certainty. To this end, the new rules simplify the grace period which applies when the parties’ market shares increase above the market share thresholds. During this time, their agreement will continue to benefit from the block exemption, notwithstanding the increase. This period is now two calendar years in all cases.

Furthermore, the revised HBERs provide greater clarity and flexibility around the calculation of the market share threshold; the market share may be calculated based on sales data from the three preceding calendar years, where the parties’ sales data for the preceding calendar year does not represent their true position on the relevant market.

R&D agreements: changes to the R&D BER and the Guidelines

The new rules give greater prominence to the protection of innovation competition. The Commission clarifies that it will give better protection to innovation competition because

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whilst the parties to an R&D agreement may not compete in existing product or technology markets, they may nonetheless compete in innovating to win new markets.

Specialisation agreements: changes to the Specialisation BER and the Guidelines

The Specialisation BER *inter alia* expands the definition of ‘unilateral specialisation agreements’ to cover agreements that include more than two parties; a change which is of particular relevance to SMEs. In addition, all types of horizontal subcontracting agreements (in other words, not only those with a view to expanding production) can now benefit from the safe harbour.

The Guidelines

The Guidelines provide guidance on how to apply the HBERs, as well as on how to assess the competition law compliance of numerous other common types of cooperation agreement, including information exchange, production, joint purchasing, commercialisation, and standardisation agreements. Some key changes include the following:

- *Mobile telecommunications infrastructure sharing agreements*: the Guidelines introduce a new section on this type of agreement.
- *Joint purchasing agreements*: the Guidelines clarify that they apply to all sectors. It is further clarified that the Guidelines apply not only to actual joint purchases, but also to joint negotiations. Further, the Guidelines expand on the distinction between buyer cartels (as ‘by object’ restrictions) and joint purchasing agreements (generally assessed as restrictions ‘by effect’).
- *Commercialisation agreements*: this chapter includes a specific section on bidding consortia and provides guidance on the assessment of consortia agreements between undertakings that would be capable of making independent bids.
- *Information exchange*: the Guidelines provide for a new assessment structure, in order to facilitate self-assessment. The relevant chapter has also been adapted to cover recent developments such as digitalisation and therefore includes new guidance on e.g. exchange of digital content and data; indirect information exchange via an online platform or facilitated by an algorithm; as well as offering expanded guidance on many different types of data sharing.
- *Sustainability agreements*: particularly notable is the new chapter on sustainability agreements. The chapter provides a framework for companies to self-assess the compatibility of their joint sustainability initiatives with EU competition law. We discuss this chapter in more detail in a [separate briefing](#).

Next steps

The revised HBERs will enter into force on 1 July 2023 and will be valid for 12 years. There is a two-year transition period, during which agreements that do not meet the conditions of the new HBERs, but which meet the conditions of one of the previous HBERs (which expire on 30 June) will remain block-exempted. The Guidelines will enter into force once they have been published in the Official Journal of the EU.

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OTHER DEVELOPMENTS

ANTITRUST

Hong Kong Competition Commission proposes to accept commitments offered by online food delivery platforms

On 1 June 2023, the Hong Kong Competition Commission (HKCC) commenced its [consultation](#) on the commitments offered by Foodpanda and Deliveroo, the leading online food delivery platforms in Hong Kong.

In January 2022, the HKCC announced that it was investigating the conduct of the two platforms and invited restaurants to provide any relevant information, as we reported in our [previous newsletter](#). In its investigation, the HKCC found that certain contractual requirements imposed by the two platforms on their partnering restaurants may harm competition, potentially breaching the First Conduct Rule.

The clauses which raised concerns include clauses: (1) allowing the platforms to charge restaurants a lower commission rate if they work exclusively with the respective platform (Exclusive Terms); (2) restricting restaurants from, or penalising them for, switching from an exclusive partnership to a non-exclusive partnership with the platforms; (3) preventing restaurants from offering lower menu prices on their own direct channels (Narrow Price Parity Provisions, both platforms) and/or on competing online platforms (Wide Price Parity Provisions, Foodpanda only); and (4) requiring the restaurants using Foodpanda's delivery services to also use the pickup services (Tying Provisions, Foodpanda only). The HKCC considers that these provisions may hinder entry and expansion by new or smaller platforms and/or soften competition in the market, given Foodpanda and Deliveroo have a combined market share of more than 90 per cent in Hong Kong.

The platforms offered commitments pursuant to section 60 of the Competition Ordinance in exchange for the HKCC ceasing the investigation and not bringing the case to the Competition Tribunal. The key commitments include: (1) allowing partnering restaurants to partner with platforms with market shares lower than 10 per cent without breaching the Exclusive Terms; (2) making it easier for restaurants to switch from an exclusive partnership to a non-exclusive partnership; (3) removing the Narrow Price Parity Provisions; (4) removing the Wide Price Parity Provisions (Foodpanda only); and (5) removing the Tying Provisions (Foodpanda only).

The proposed commitments will remain in place for three years. During this period, if the market share of a platform falls below 30 per cent, the platform will be released from the commitments, except that Foodpanda will still be bound not to enforce any Wide Price Parity Provisions. The HKCC considers that the commitments, if accepted, would address its competition concerns. The consultation ends on 15 June 2023.

The approach taken by the HKCC shows that it continues to be willing to accept commitments instead of bringing the case to the Competition Tribunal in appropriate cases when the commitments proposed can address the HKCC's concerns and when a cartel is not involved. (See also our [previous newsletter](#) on another commitment case.)

SUBSIDY CONTROL

European Commission publishes Q&A on the EU Foreign Subsidies Regulation

On 6 June 2023, the European Commission published a [Q&A document](#) to assist companies in understanding their duties under the new [EU Foreign Subsidies Regulation](#) (the FSR). The FSR, which will start to apply on 12 July 2023, gives the Commission the power to investigate financial contributions granted by non-EU countries to undertakings active in the EU and to impose measures to redress distortive effects created by foreign subsidies. Under the FSR, parties will have to notify financial contributions received from non-EU countries prior to concluding a concentration or a public procurement procedure that satisfies certain thresholds.

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The Q&A document answers practical questions such as when and how parties can pre-notify a concentration, the treatment afforded to certain types of financial contributions, and practical information on the process for submissions and waiver requests. However, the Commission explains that the answers are not binding and that the text of the Q&A document may “*evolve from time to time*”.

Further clarity on the application of the FSR will be provided by the publication of the final version of the Implementing Regulation, which will include the notification forms for concentrations and public procurement. These documents are currently in [draft form](#), the final versions will be published before the Regulation comes into effect in July. Recent press reports suggest that the Commission is examining ways to reduce the administrative burden of the notification forms, which has been [welcomed](#) by several international trade associations.

The Commission has also said that all necessary practical information for pre-notification contacts and notifications, as well as the necessary templates (including powers of attorney), will be published on the Commission’s website prior to application of the FSR in July.

GENERAL COMPETITION

CMA issues response to UK Government AI White Paper

The UK Competition and Markets Authority (CMA) has published its [response](#) to the UK government’s consultation on its ‘AI Regulation: A Pro-Innovation Approach’ [white paper](#). The white paper, which was published in March 2023, sets out the government’s approach to the regulation of artificial intelligence (AI) in the UK. It proposes a tailored, context-specific strategy for AI regulation on a sector-by-sector basis (in contrast to the overarching AI legislation proposed by the European Commission in its Artificial Intelligence Act). However, the white paper does set out five principles that should be considered by regulators, including the CMA, which will apply across all sectors.

In its response, published on 1 June 2023, the CMA endorses the government’s tailored approach to AI regulation and supports the placing of AI regulation on a non-statutory footing in the first instance. The response considers the role that competition law and the CMA’s regulatory functions have to play in the government’s AI agenda and sets out how each of the five principles expounded in the white paper apply to the CMA’s current and future work. The CMA itself has already initiated work in this area, having [launched](#) an initial review into the impact of AI foundation models on consumers, businesses and the economy in May 2023 (as reported in a [previous edition](#) of our newsletter).

Further detail on the CMA’s response to the white paper can be found on our Slaughter and May blog [post](#) on this topic.

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