

Trade and Investment

ICC Commission on Competition

ICC TASK FORCE ON THE NEW EU HORIZONTAL COMPETITION RULES

Terms of Reference

Context

The EU Commission ("Commission") is in the process of revising the EU competition rules on horizontal cooperation agreements, which cover arrangements in connection with R&D, production, purchasing, commercialisation, and standardisation, as well as information exchange. The current rules include: (i) two Horizontal Block Exemption Regulations, *i.e.* Commission Regulation (EU) No 1217/2010 (the Research & Development Block Exemption Regulation) and Commission Regulation (EU) No 1218/2010 (the Specialisation Block Exemption Regulation) ("HBERs"), which came into force in 2011, are due to expire on 31 December 2022; and (ii) Guidelines on horizontal cooperation agreements ("HGL"), which provide binding guidance on the Commission for the interpretation of the HBERs, and for the application of Article 101 of the Treaty to other horizontal agreements which fall outside the scope of the HBERs.

Importance to global business

The HBERs and the HGL have contributed to promoting competition in the EU by providing a reasonable degree of legal certainty for the most common horizontal arrangements. However, in certain areas the HBERs and HGL have lacked clarity, and therefore their practical relevance has been limited. Moreover, the existing rules do not provide an adequate framework to deal with major trends and developments which have emerged since their adoption, and which inherently involve a degree of horizontal cooperation, notably digitalisation and the pursuit of sustainability goals. The new rules are expected to bridge the gap by enhancing legal certainty, including in connection with recent trends and developments.

Alignment with strategic ICC priorities

This topic represents a significant development in EU competition law. Providing global business with the right tools and guidance is one of the pillars of ICC's mission in addressing the needs of the real economy.

Envisaged output

The Task Force will produce a report aimed at describing the new rules to the ICC global membership. The report will seek to highlight in particular the areas of improvements, the anticipated practical challenges in the application of the new rules,

as well as any potential areas of uncertainty.

Presently, the Commission has published an Inception Impact Assessment which provides an initial overview of the key policy issues and areas that it is planning address in the revised HBERs and HGL.¹ The Commission is expected to publish first drafts of the revised HBERs and HGL in Q1/Q2 2022².

It is anticipated that the report will consider, in particular, the following topics and areas of concern raised by stakeholders, insofar as addressed by the new rules:

Information exchange

- Updated guidance on information exchange, including as a result of market developments such as digitalisation, as well as developments in the EU and, where relevant, national case law and enforcement practice over the last ten years;

R&D agreements

- Clarification of the relevant definitions that apply to R&D agreements so as to facilitate the compatibility assessment, including by small and medium sized enterprises (“SMEs”);
- Clarification/simplification of the relevant requirements and conditions for exemption, including to facilitate the conclusion of R&D agreements by a wider pool of market participants;
- Amendments/clarifications regarding the application of the market share threshold, including with respect to R&D agreements concluded in high-technology markets and SMEs;

Specialisation agreements

- Amendments/clarifications regarding the applicable market share threshold and safe harbours;
- Widening of the scope of the Specialisation BER to include further types of agreements;
- Clarification/simplification of the relevant requirements and conditions for exemption, as well as other clarifications requested by stakeholders (e.g., in connection with subcontracting agreements);

Purchasing agreements

- Amendments/clarifications regarding the applicable market share threshold and safe harbours;
- Amendments/updates in light of the digitisation of the economy and the emergence of retail alliances in the EU;
- Clarifications of the boundaries between joint purchasing agreements and buyer cartels;

¹ Commission, *Inception Impact Assessment*, 7 June 2021, Ref. Ares (2021) 3714309.

² Timing to be confirmed.

Commercialisation agreements

- Amendments/clarifications of the guidance on joint bidding and consortia;
- Amendments/clarifications regarding the applicable market share threshold;

Standardisation agreements

- Improved guidance on standardisation, including on topics such as the interpretation of FRAND licensing terms and how to address licensing disputes in practice; cooperation outside of standardisation bodies and in the standard-setting process; meaning of the safe harbour condition to provide a commitment to offer to license essential IPR 'to all third parties' on FRAND terms;

Major trends and developments

- Guidance on horizontal cooperation resulting from new market developments, including in particular the pursuit of sustainability goals, digitisation (e.g., data pooling and data sharing arrangements), and potentially other developments identified by respondents to the public consultation, such as recent developments in the EU case law as regards the concept of single economic entity, the changing standardisation landscape; the need for infrastructure sharing to roll out new technologies, or the emergence of dual distribution.

Objectives

This topic is relevant to a broad range of stakeholders. Using the paper as a springboard for discussion, the ICC Global Competition Commission will explore opportunities to organise conferences (or webinars) in each key jurisdiction to help companies understand the impact of the new EU rules on their daily business.

Audience

This project will be of interest to a wide range of private and public stakeholders who rely on the horizontal rules in their business, and more generally to all global stakeholders looking to gain insight into the new rules.

Timeframe

The Task Force aims to finalise the report in Q3 2022. A first version will be prepared ahead of the Commission's publication of the first drafts of the revised HBERs and HGL in Q1/Q2 2022.