

RocaJunyent Informs

Competition Law Department
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The Commission adopts new rules applicable to cooperation agreements between competitors ("horizontal agreements")

As of 1 June 2023, the European Commission has adopted new antitrust rules applicable to commercial cooperation agreements between competitors (so-called "horizontal" agreements) at the European level.

In essence, this involves the updating of **two block exemption Regulations for horizontal agreements (RECH) in the field of research and development (R&D) and specialisation agreements**. In addition, **New Guidelines on the application of competition rules to horizontal collaboration agreements** have also been adopted.

Article 101.1 of the Treaty on the Functioning of the European Union (TFEU) prohibits agreements between competitors that have a restrictive object or effect on competition, such as price fixing or market sharing. However, there are cooperation agreements between competitors that may be compatible with the single market, because of the positive effects they can generate, and which would counteract the negative impact on consumers. Examples include collaboration in R&D, joint production of certain technologically complex goods, the creation of joint purchasing or sales platforms that facilitate

SMEs' access to certain markets, consortia or joint ventures that allow more companies to bid for certain public contracts, etc.

Hence, there are rules, such as the RECH, which provide for **an exemption from the prohibition** for certain types of commercial cooperation agreements between competitors, provided that certain conditions are fulfilled.

On the other hand, the revised Horizontal Guidelines provide companies **with clearer and more up-to-date guidance** for assessing the compatibility of their horizontal co-operation agreements with existing EU competition rules. It should be recalled that in the field of Competition, the so-called "self-assessment" applies, so that it is not possible to go to the public authorities to seek authorisation or to confirm the legality of our initiatives before they are implemented.

The main novelties of this reform include the following:

- ☐ As regards **specialisation agreements**, the scope of application of the RECH has been extended to cover more types of joint production or specialisation agreements concluded by two or more parties. The parties' maximum market share criterion for the application of the exemption to such agreements has also been made more flexible.
- ☐ In the field of **R&D agreements**, the calculation of maximum market shares is also clarified and clearer guidance is provided as to the application of this particular exemption. In addition, the protection of competition in pure innovation (e.g. so-called "R&D poles") is prioritised.
- ☐ The Commission's new Horizontal Guidelines reflect the latest European case law on restrictions to free competition arising from agreements between competitors.

In particular, the Guidelines provide new guidance on potentially permissible **joint production** agreements (e.g. joint use of mobile telecommunications infrastructure), **joint purchasing** agreements (where buyers negotiate the terms of purchase jointly, although each buyer purchases separately), joint **commercialisation agreements** (sales platforms) or **standardisation** agreements (e.g. quality standards).

The Guidelines also address particularly sensitive issues such as **bidding consortia** (the famous UTEs) and the rules that must be respected in order to avoid collusion in tendering procedures (public or private).

The Commission's guidelines on agreements for the **exchange of sensitive information between competitors** have also been reformulated in an attempt to increase legal certainty for the public regarding this type of conduct, which often borders on the legal and the prohibited (think of the numerous initiatives of sectoral associations requiring the exchange of detailed data between companies, statistical work, benchmarking activities, etc.).

This chapter of the Guidelines has been specially adapted to cover new forms of data exchange - e.g. by digital means - and to provide clearer recommendations as to the possible use of protocols to avoid legal infringement (such as so-called "clean teams" in mergers between competitors, for example).

Another notable new feature of the Guidelines is that for the first-time **sustainability agreements** are explicitly addressed, with guidance on the criteria that companies can follow when assessing the compatibility of their joint sustainability initiatives with competition rules. Consider, for example, co-operation agreements between competitors on reducing industrial waste or energy consumption. All of this in the interest of making progress towards the UN Sustainable Development Goals.

The new RECHs enter into force on 1 July 2023 and provide for a transitional period of two years for companies that do not comply with the new exemption conditions to duly adapt their existing agreements. They are scheduled to run until the end of June 2035.

The new rules adopted by the European Commission are available [here](#).