Proposed EU Competitor Cooperation Guidelines Tougher on Information Sharing, but Scope Provided for Sustainability Agreements

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The European Commission (Commission) is accepting public comment on its proposed revisions to European Union regulations and guidance on common competitor cooperation arrangements, which are due to expire on 31 December 2022. Cooperation agreements among existing or potential competitors (*i.e.*, horizontal cooperation agreements) include those regarding joint research and development (R&D), joint purchasing, joint production and commercialisation, information exchange and bidding consortia.

The revised horizontals framework (the revised Guidelines)[1] provides further guidance on how it will assess joint purchasing and information exchanges and includes employee wage-fixing as an illegal practice violating EU competition law. It also discusses what it will consider beneficial practices meriting exemption from the competition law rules provided certain conditions are met, including sustainability initiatives, data pooling and infrastructure sharing.

The consultation on the changes runs through 26 April 2022. The new rules would come into force on 1 January 2023, with a transition period for prior existing agreements running through 31 December 2024.

Key Takeaways

- **Joint purchasing**: The revisions distinguish buyer cartels (collusions on purchase prices) from joint purchasing agreements, which can be deemed permissible when the combined shares of the parties are low and/or joint purchasing achieves beneficial price reductions. The guidance specifically categorises joint wage-fixing as impermissible coordination.
- **Bidding consortia**: Consortia combining complementary suppliers that are not able to bid individually for a project are generally lawful. But the guidance warns that the competitive potential should be considered at the level where competition takes place (*i.e.*, at the individual lot level if lots are separate from the bid for the whole project), and that agreements to subcontract to a bidder in the event of a lost bid may raise concerns.
- **Information sharing**: Under the revised Guidelines, any information sharing likely to align competitive conduct is considered impermissible, even if the information sharing related to past pricing, auction results or strategic plans. The revised Guidelines also note that legitimate activities such as legislative lobbying could easily tip over into illegal collusion if companies signal how they intend to comply with new standards.
- **Mobile networks and sustainability agreements**: Codifying recent Commission decisions and policy developments, the revised Guidelines also cover mobile network infrastructure sharing and offer a detailed assessment of the legality of industry environmental and social sustainability initiatives. It concludes that the latter may be lawful even if it leads to some increases in price or decreases in output. However, such initiatives must be indispensable for meeting environmental and social goals, and they must generate consumer benefits.

Joint Purchasing

Joint purchasing agreements concern the collective buying of products by several undertakings together (*i.e.*, a collective purchasing organisation). Such agreements can be found in a broad variety of sectors, and they effectively involve the pooling of

[1] Draft Commission Regulation on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Certain Categories of Specialisation Agreements (EU Official Journal, 2022 C120/1); draft Commission Regulation 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 (EU Official Journal, 2022 C120/9); draft Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-Operation Agreements (the revised Guidelines).

purchasing activities. The revised Guidelines clarify that these agreements can consist of pooling actual purchases through the joint purchasing agreement or be limited to collectively negotiating the purchase price, or other terms and conditions, while leaving the actual purchasing to purchasing organisation's individual members.[2]

As noted above, the revised Guidelines reinforce the distinction between joint purchasing agreements and buyer cartels. The former are generally permitted when the parties' combined market shares are low, not exceeding 15% on either the buying or selling market (or both), and/or the joint agreement achieves beneficial price reductions and/or efficiency gains. A market share above that threshold in one or both markets is not an indication of illegality, but it requires a detailed assessment of the effects of the agreement on the market.[3]

In contrast, buyer cartels aim to collude on purchase prices (or parts of the prices, such as costs, wages, salaries, expenses, etc.) or collude to influence the buyers' individual negotiations with suppliers, and are automatically illegal. The revisions indicate the Commission will treat agreements fixing employees' wages as an illegal cartel-type practice.[4]

A buyer cartel may also exist where buyers agree to exchange commercially sensitive information among themselves about their individual purchasing intentions or negotiations with suppliers, outside any genuine joint purchasing arrangement that interacts collectively, on behalf of its members, with suppliers. Joint purchasing arrangements will be illegal if they serve as a tool to engage in a disguised cartel.[5]

Lastly, the revised Guidelines provide a nonexhaustive list of factors that may help firms assess whether or not the joint purchasing agreement they are party to amounts to a buyer cartel. Examples include whether the agreement has made it clear to suppliers that it jointly negotiates and binds its members on terms and conditions of their individual purchases or purchases jointly for them, or whether the parties have defined the form, scope and functioning of their joint purchasing agreement in writing to allow ex post verification. Although a written agreement will not shield the arrangement from competition law risk, the guidelines recommend it.[6]

Bidding Consortia

The revised Guidelines address for the first time bidding consortia, which refer to a situation where two or more parties cooperate to submit a joint bid in a public or private procurement competition. Bidding consortia are generally permitted if they are necessary and create efficiencies that are easily passed on to consumers, such as cheaper and better offers.[7] The revised Guidelines distinguish consortia from bid rigging (or collusive tendering), which is automatically illegal. A joint bidding consortium agreement is generally lawful if it allows parties to participate in projects that they would not otherwise be able to undertake individually (for example, because of the size or complexity of the contract). Because such parties are not potential competitors for implementation of the project, there is no competition restriction. This can be the case of parties that produce complementary services for the purposes of participation in the tender, or where firms, although all active in the same markets, cannot carry out the contract individually, for example because of the size of the contract or its complexity.[8]

However, the revised text warns that the capacity for competition should be considered at the individual lot level (if those lots are separate from the bid for the whole project). If it is possible that the parties to the consortium agreement could each compete individually in the bid (or if there are more parties to a consortium agreement than necessary), the joint bid may restrict competition.[9] Also, the revised Guidelines clarify that agreements to subcontract to a losing bidder may raise concerns.[10]

Information Sharing

The guidance on exchange of information has been revised substantially and broadens the scope of what constitutes an exchange of sensitive information. Where the 2010 Guidelines considered and fined as cartels the direct or indirect sharing of information on future prices or quantities among actual or potential competitors, the revised text sets out a stricter framework. Any information sharing likely to align competitive conduct may be deemed cartel-like collusion, even if this relates to past (recent) pricing, auction results or strategic plans. The revised Guidelines also note that legitimate activities that stem from regulatory initiatives, such as legislative lobbying, can easily tip over into illegal collusion if companies signal their market strategy or how they intend to comply with new standards.[11]

[2] Revised Guidelines, paras. 311-312.
[3] *Ibid.*, paras. 329-330.
[4] *Ibid.*, para. 316.
[5] *Ibid.*, para. 321.
[6] *Ibid.*, para. 319.
[7] *Ibid.*, para. 386.
[8] *Ibid.*, para. 391.
[9] *Ibid.*, paras. 392-394.
[10] *Ibid.*, para. 388.
[11] *Ibid.*, para. 411.

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The revisions reflect the importance of data sharing to inform decision-making through big data analytics and machine-learning techniques. They codify recent EU case law that exchanges of commercially sensitive information among competitors can take place via a service provider, an online platform or a shared algorithm such as a real-time, high-frequency, price-monitoring tool. The text notes that, while using publicly available data to feed algorithmic software is legal, the aggregation of sensitive information into a pricing tool offered by a single IT company to which various competitors have access could amount to collusion.

The text also addresses the question of access to data where strategic for competition and where it covers a large part of the relevant market but does not pose a risk of collusion. The exchange of such strategic information is permissible, but only if the information is made accessible in a nondiscriminatory manner. For data pools, participants should only have access to their own information and to the final aggregated information.[12]

An information exchange will be deemed illegal when the information is commercially sensitive and is capable of influencing the participants' conduct on the market. For other exchanges of information, a case-by-case assessment of the likely effect on competition will be needed. If the exchange of information does not exceed what is necessary for the legitimate cooperation among actual or potential competitors, and if it creates efficiency gains that can easily be passed on to consumers, it will more likely be permitted.[13]

Mobile Networks and Sustainability Agreements

The revised Guidelines codify the Commission's decisions and European courts' jurisprudence regarding production agreements concerning mobile infrastructure-sharing arrangements. Mobile network operators can agree to share some infrastructure elements, including basic site infrastructure such as masts, cabinets, antennas and power supplies. Mobile network operators can also share the radio access network (RAN) equipment at their sites, including base transceiver stations and controller nodes, or their spectrum, such as frequency bands.[14]

The draft recognises the benefits of such agreements, including cost reductions, and improvements to quality and network efficiencies. It considers that mobile infrastructure-sharing agreements, including possible spectrum sharing, are in principle permissible unless they serve as a tool to engage in an illegal cartel. However, the revisions note that such agreements have the potential to have restrictive effects on competition, and they set out broad principles for self-assessment. They recommend, at a minimum, that network operators remain independent in their operation and decision-making and do not exchange sensitive information.[15]

Finally, the revised Guidelines reflect policy developments and offer a detailed assessment of the legality of industry environmental and social sustainability initiatives.[16] They conclude that cooperation agreements that pursue sustainability objectives may be lawful even if they lead to some increase in price or decrease in output. However, to be lawful, such initiatives must be indispensable for meeting environmental and social goals, and they must generate consumer benefits. The revised Guidelines clarify when such benefits can be taken into account as qualitative or quantitative efficiency gains and be exempted from the prohibition on anticompetitive agreements.

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[12] *Ibid.*, paras. 440-442.

[13] *Ibid.*, paras. 457-461.

[14] *Ibid.*, paras. 296-297.

[15] *Ibid.*, paras. 302-304.

[16] *Ibid.*, paras. 541-620.