New EU Competitors Cooperation Framework: Stricter on Information Exchange, Broader on Joint Sustainability Agreements

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If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Bill Batchelor
Partner / Brussels, London
32.2.639.0312
bill.batchelor@skadden.com

Andreas Kafetzopoulos
Counsel / Brussels
32.2.639.0306
andreas.kafetzopoulos@skadden.com

Senior professional support lawyer **Caroline Janssens** contributed to this article.

One Manhattan West
New York, NY 10001
212.735.3000

Avenue Louise 480
1050 Brussels, Belgium
32.2.639.0300

On June 1, 2023, the European Commission (EC) adopted a revised legal framework that block-exempts research and development (R&D)[1] and specialisation agreements[2] between competitors from the prohibition of anticompetitive agreements under Article 101(1) of the Treaty on the Functioning of the EU when certain conditions are met. It also incorporated revised accompanying guidelines that clarify how to interpret the block exemption regulations and self-assess other cooperation agreements between competitors not covered by the safe harbor, including those involving information and data exchange, green and sustainability transition, joint production and commercialisation, joint purchasing, bidding consortia and standardisation.[3]

The two new block exemption regulations will enter into force on July 1, 2023, with a two-year transition period for prior existing agreements running through June 30, 2025. The revised guidelines will enter into force following their publication in the *Official Journal of the EU*.

Key Points

- **Information sharing:** Under the revised guidelines, any information sharing likely to align competitive conduct is considered impermissible, even if the information sharing is 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.
- **Specialisation agreements:** The specialisation block exemption has expanded the definition of "unilateral specialisation agreements" to also cover agreements concluded by more than two parties.
- **Joint purchasing:** The revisions distinguish illegal buyer cartels (*i.e.*, collusion on purchase prices) and bid rigging from joint purchasing agreements, which may be deemed permissible when the combined shares of the parties are below certain thresholds 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 unable to bid individually for a project are generally lawful. However, the guidance warns that the ability to compete 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.
- **Mobile networks and sustainability agreements:** The revised guidelines also cover mobile network infrastructure sharing and offer a detailed assessment of the legality of industry environmental and social sustainability initiatives. They conclude that such initiatives may be lawful even if they lead to some price increases or decreases in output. However, they must be indispensable for meeting environmental and social goals, and also must generate consumer benefits.

[1] 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 of June 1, 2023 (the revised R&D Block Exemption).

[2] 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 of June 1, 2023 (the revised Specialisation Block Exemption).

[3] Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-Operation Agreements of June 1, 2023 (the revised Guidelines).

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- **Protecting "innovation competition":** The EC and national competition authorities of the EU member states can withdraw the benefit of the revised R&D block exemption in individual cases where an R&D agreement would substantially restrict innovation competition.

Information Sharing

The guidelines on the exchange of information have been revised substantially and broaden the scope of what constitutes an exchange of commercially sensitive information to reflect the latest case law and decisional practice. It brings more clarity on:

- The concept of commercially sensitive information.
- The types of information exchange that may constitute restrictions of competition by object.
- Potential pro-competitive effects of data pools.
- Indirect forms of information exchange, including hub-and-spoke arrangements.
- Anticompetitive signalling via public announcements.
- Practical measures that companies can take to avoid infringements, such as limiting the scope of the exchange, using clean teams or independent trustees, and public distancing.

While the 2010 guidelines considered and fined as cartels the direct or indirect sharing of information on future prices or quantities between 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 recent pricing, auction results or strategic plans. The revised guidelines also note that legitimate activities that occur in the context of 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.[4]

The revisions reflect the importance of data sharing to inform decision-making through the use of big data analytics and machine-learning techniques. They clarify that exchanges of commercially sensitive information between 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 information technology company to which various competitors have access could amount to collusion.

The text also addresses the question of access to commercially sensitive information where needed for competition. The exchange of such strategic information is permissible, but only if the information is made accessible in a nondiscriminatory manner. Parties are encouraged to implement measures to restrict access to the information, control how it is used and limit the exchange to what is necessary through, for example, the use of 'clean teams' or trustees to receive and process information. For data-sharing agreements, such as data pools, participants should only have access to their own information and the final, aggregated information of other participants.[5]

An information exchange will be deemed illegal when the information is commercially sensitive and 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 between actual or potential competitors, and if it creates efficiency gains that can easily be passed on to consumers, it will more likely be permitted.[6]

Specialisation Agreements

Specialisation agreements concern cooperation where (i) one or more parties agree(s) to give up the manufacture of a particular product or preparation of a particular service and instead obtain(s) it only from the other party or parties, or (ii) two or more parties agree to have a product manufactured only jointly. The scope of the specialisation block exemption regulation has been broadened to include the definition of "unilateral specialisation" agreements to cover agreements that include more than two parties, clarifying that an effective specialisation may require the cooperation of more than two parties. This was not specified in the 2010 version of the framework.[7]

Joint Purchasing

Joint purchasing agreements concern the collective buying of products by several undertakings together (*i.e.*, through a collective purchasing organisation). Such agreements can be found in a broad variety of sectors, and they effectively involve the pooling of purchasing activities. The revised guidelines clarify that these agreements can consist of pooling actual purchases through a joint purchasing agreement or be limited to the joint negotiating of purchase prices, components of the purchase price or other terms and conditions with a supplier, leaving the actual purchase transactions to be concluded by each party individually based on the jointly negotiated prices and/or terms and conditions.[8]

The revised guidelines reinforce the distinction between joint purchasing agreements and buyer cartels. The former are generally

[4] Revised Guidelines, para. 372.

[5] *Ibid.*, paras. 406-411.

[6] *Ibid.*, paras. 425-428 et 434, which contains a self-assessment check list.

[7] Revised Specialisation Block Exemption, recital 8 and Art. 1-3.

[8] Revised Guidelines, paras. 273-274.

permitted when the parties' combined market shares do not exceed 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 agreement's effects on the market.[9]

In contrast, buyer cartels aim to collude on purchase prices — or parts of the prices, such as costs, wages, salaries, expenses, etc. — or to influence the buyers' individual negotiations with suppliers, and are automatically illegal. The revisions also indicate that the EC will treat agreements fixing employees' wages as an illegal cartel-type practice.[10]

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.[11]

Lastly, the revised guidelines provide a non-exhaustive list of factors that make it less likely that a purchasing arrangement entered into between buyers will amount to a buyer cartel. For example:

- The joint purchasing agreement makes it clear to suppliers that the negotiations are conducted on behalf of its members and binds them to the agreed terms and conditions of their individual purchases.
- The joint purchasing agreement purchases on behalf of its members.
- The members of the joint purchasing agreement have defined the form, scope and functioning of their cooperation in writing to allow *ex post* verification.

Although a written agreement will not shield the arrangement from competition law risk, the revised guidelines recommend it.[12]

Bidding Consortia

For the first time, the revised guidelines address 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.[13] The revised guidelines distinguish consortia from bid rigging — or collusive tendering — which is illegal.[14] 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 (*e.g.*, because of the size or complexity of the contract). Because such parties are not potential competitors for the project's implementation, there is no competition restriction. This can be the case of parties that produce complementary services for participating in the tender, or where firms, although all active in the same markets, cannot carry out the contract individually (*e.g.*, because of the size of the contract or its complexity).[15]

However, the revised text warns that the ability to compete 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.[16] Also, the revised guidelines clarify that agreements to subcontract to a losing bidder may raise concerns.[17]

Mobile Networks

The revised guidelines codify the EC'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 equipment at their sites, including base transceiver stations and controller nodes, or their spectrum, such as frequency bands.[18]

The revised framework 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 do 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.[19]

[9] *Ibid.*, paras. 279-283, 291.
[10] *Ibid.*, para. 279.
[11] *Ibid.*, para. 281.
[12] *Ibid.*, para. 282.
[13] *Ibid.*, para. 352.
[14] *Ibid.*, para. 348.
[15] *Ibid.*, para. 352.
[16] *Ibid.*, paras. 353-355.
[17] *Ibid.*, para. 349.
[18] *Ibid.*, paras. 258-259.
[19] *Ibid.*, para. 265.

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Sustainability Agreements

The revised guidelines reflect policy developments and offer a detailed assessment of the legality of industry environmental and social sustainability initiatives.[20] They conclude that cooperation agreements that pursue sustainability objectives may be lawful even if they lead to some price increases or decreases 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.

Innovation Competition

Lastly, the revised R&D block exemption regulation reinforces the protection of innovation competition by clarifying that parties to an R&D agreement that do not compete on markets for existing products or technologies may nonetheless be competitors in innovation. Although agreements that meet the R&D block exemption's conditions will only eliminate effective innovation competition in exceptional circumstances, the revised framework introduced the possibility for the EC and national competition authorities of the EU member states to withdraw the benefit of the R&D block exemption in individual cases where an R&D agreement would substantially restrict innovation competition.[21]

[20] *Ibid.*, paras. 515-603.

[21] Revised R&D Block Exemption, recital 21 and Art. 10(2)(e).