Important Projects of Common European Interest (IPCEIs)

Non-paper on the application of EU antitrust law

Disclaimer: this non-paper has been produced for the purpose of facilitating discussions on the formation and operation of IPCEIs. It does not bind the Commission and does not prejudge any future Commission assessment.

1. Introduction

(1) This note presents the main rules and guidance that are likely to be relevant for assessing the compliance of IPCEIs with EU antitrust law. It is provided for information purposes only and does not aim to be exhaustive or to provide guidance for the assessment of individual IPCEIs.[1] IPCEIs can involve a range of practices and can be implemented in a variety of market contexts. Each IPCEI must therefore be assessed on the basis of its particular facts. For a more exhaustive overview of the EU antitrust rules, see http://ec.europa.eu/competition/antitrust/legislation/legislation.html.

2. The self-assessment regime and overview of the main antitrust rules

2.1. Self-assessment by companies

(2) Companies active in the EU must self-assess the compliance of their conduct with the EU antitrust rules.[2] Companies are generally well placed to assess the legality of their conduct in such a way as to enable them to take informed decisions about whether to engage in an agreement or practice and in what form.

(3) Assessments under the EU antitrust rules are fact-specific. Agreements and practices must be assessed in their particular legal and economic context.

2.2. The main antitrust rules

(4) **Article 101(1) of the Treaty on the Functioning of the European Union** ('TFEU') prohibits agreements and concerted practices between undertakings[3] and decisions by

[1] The note is also not a guidance letter within the meaning of the Commission Notice on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union that arise in individual cases (guidance letters), OJ C 381/9, 4.10.2022.

[2] See Regulation 1/2003, recitals 2-8.

[3] The concept of 'undertaking' covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.

associations of undertakings that are capable of affecting trade between Member States and that have the object or effect of preventing, restricting or distorting competition, and in particular those which:

a) directly or indirectly fix purchase or selling prices or any other trading conditions;

b) limit or control production, markets, technical development, or investment;

c) share markets or sources of supply;

d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

(5) Article 101(3) TFEU provides an exception from the Article 101(1) prohibition for agreements which contribute to improving the production or distribution of goods or services or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefits, and which only impose restrictions that are indispensable for the attainment of those objectives and do not eliminate competition in respect of a substantial part of the products concerned.

(6) The Article 101(1) TFEU prohibition applies regardless of whether the anti-competitive agreement is concluded between companies that operate at the same level of the supply chain (horizontal agreements) or between companies operating at different levels (vertical agreements).[4]

(7) In addition, **Article 102 TFEU** prohibits companies that hold a dominant position on a relevant market from abusing that position, for example by limiting production, markets or technical development, imposing unfair sale or purchase prices or unfair trading conditions, or applying discriminatory conditions to other trading parties, thereby placing them at a competitive disadvantage. A dominant position may be held by a single undertaking (single dominance) or by two or more undertakings (collective dominance).

(8) Regulation 1/2003 is the main implementing regulation for Articles 101 and 102 TFEU. It sets out the enforcement powers of the Commission, the national competition authorities and national courts.[5]

---

[4] See Article 101 Investigations - European Commission.

[5] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 001, 4.1.2003.

(9) The Commission has issued guidelines and notices to assist companies with the self-assessment of their agreements. Depending on the scope and objectives of a particular IPCEI, the Commission Block Exemption Regulation on Research and Development Agreements may apply (see below). In addition, the Commission's Horizontal Guidelines[6] provide guidance for assessing the compliance of these and other types of cooperation between companies operating at the same level of the supply chain. The Horizontal Guidelines are summarized in Section 2.2.1 below. The Commission's Guidelines on vertical agreements and those on technology transfer agreements may also be relevant and are summarized in Sections 2.2.2 and 2.2.3 respectively.

(10) Other legislation and guidelines may also provide guidance for the implementation of the IPCEI.[7] The following sections provide an overview of these rules on a non-exhaustive basis. For more detailed information, please refer to the text of the rules.

2.2.1. General principles applicable to cooperation between competitors

(11) Competition policy fosters innovation and plays a role in promoting it. Efficiency-enhancing cooperation agreements, in particular research and development agreements, technology licensing agreements and standardisation agreements, are essential for enhancing innovation and competitiveness in the EU. Innovation and a more efficient use of resources result in greater prosperity. Commission antitrust guidelines recognise the benefits of innovation and help companies to design their cooperation projects in a way that complies with antitrust rules.

(12) **Cooperation between competing companies can lead to economic benefits where it is a means of sharing risk, making cost savings, increasing investments, pooling know-how, enhancing product quality and variety and launching innovation faster**. Cooperation between competitors can also be a means to address shortages and disruptions in supply chains or reduce dependencies on particular products, services or technologies. However, cooperation between competitors can also raise competition concerns in cases where it leads to negative effects on prices, output, innovation or the variety or quality of products. The Horizontal Guidelines provide an analytical framework for assessing the compliance with Article 101 TFEU of the most common types of cooperation agreements between competitors.[8]

---

[6] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, OJ C 259/1, 21.7.2023.

[7] For a general overview of EU antitrust legislation, see Legislation - European Commission.

[8] The Horizontal Guidelines are without prejudice to the interpretation the Court of Justice of the European Union may give to the application of Article 101 to horizontal cooperation agreements.

(13) The Horizontal Guidelines cover only the most common types of cooperation, namely research and development agreements, production agreements, purchasing agreements, commercialisation agreements, standardisation agreements and information exchange.

(14) Supply agreements between companies that operate at different levels of the production or distribution chain (vertical agreements) are, in principle, covered by the Commission Block Exemption Regulation on Vertical Agreements[9] and the Vertical Guidelines[10] (see Section **Error! Reference source not found.**). However, where vertical agreements are made between competitors, they must first be assessed according to the principles applicable to horizontal agreements. Where horizontal agreements result in a concentration, the Merger Regulation[11] applies.

2.2.1.1. General principles

(15) Article 101(1) TFEU prohibits agreements that have as their object or effect the restriction of competition. If a horizontal cooperation agreement has the object of restricting competition, namely it reveals, by its very nature, a sufficient degree of harm to competition, then it is not necessary to examine the actual or potential effects of the agreement on the market. If, however, the agreement does not restrict competition by object, it is necessary to analyse the actual and potential effects of the agreement to determine whether there are appreciable restrictive effects on competition. For there to be restrictive effects within the meaning of Article 101(1) TFEU, the agreement must have, or be likely to have, an appreciable negative impact on at least one of the parameters of competition, such as price, output, product quality, product variety or innovation. This assessment of restrictive effects must be made in relation to the actual legal and economic context in which competition would occur in the absence of the agreement (namely the IPCEI).

(16) Chapter 1 of the Horizontal Guidelines describes the economic benefits and the competition concerns that can arise from cooperation agreements between competitors, and provides an analytical framework for assessing these agreements under Article 101 TFEU, including guidance for assessing:

a) whether the conduct in question amounts to an agreement or concerted practice within the meaning of Article 101 TFEU;

---

[9] Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(1) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 134, 11.5.2022

[10] Guidelines on vertical restraints, OJ C 248, 30.6.2022.

[11] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004.

b) whether the parties to the agreement are actual or potential competitors;

c) whether the agreement restricts competition by object or by effect, including the factors that must be taken into account in order to establish each of these categories of restriction;

d) whether restrictions in the agreement constitute ancillary restraints[12] and therefore fall outside Article 101(1) TFEU;

e) whether the agreement meets the four conditions of the Article 101(3) exception, and

f) whether the agreement falls outside Article 101 TFEU because it is not capable of appreciably affecting trade between Member States or does not appreciably restrict competition.

2.2.1.2. Rules on exchange of information between competitors

(17) **Information exchange is a common feature of many competitive markets and may generate various types of efficiency gains. It may solve problems of information asymmetry, thereby making markets more efficient.** In recent years, data sharing has gained in importance as a means to inform company decision making, for instance through the use of big data analytics and machine learning techniques. Moreover, companies may improve their internal efficiency by benchmarking against each other's best practices. Sharing of information may also help companies to save costs by reducing their inventory and enabling quicker delivery of perishable products to consumers. Information exchange may also enable firms to develop new or better products or services or to train algorithms on a broader, more meaningful basis. Furthermore, information exchanges may directly benefit consumers by reducing their search costs and improving choice.[13]

(18) The main principle of competition is that each company should determine its economic conduct on the relevant market independently. This principle does not prevent companies from adapting themselves intelligently to the existing or anticipated conduct of their competitors or to customary conditions existing in the market. It does, however, preclude any direct or indirect contact between competitors of such a kind as either to influence the conduct on the market of an actual or potential competitor or to reveal to such a competitor the conduct which an undertaking has decided to follow itself or

---

[12] Restrictions of the commercial autonomy of one or more of the parties that are objectively necessary to implement an otherwise neutral or pro-competitive cooperation and which are proportionate to the objectives of that cooperation.

[13] See §373 of the Horizontal Guidelines.

contemplates adopting on the market, where the object or effect of those contacts is to give rise to conditions of competition which do not correspond to the normal conditions of the market in question.[14]

(19) **By artificially increasing transparency between competitors, the exchange of commercially sensitive information can facilitate coordination of companies' behaviour and lead to restrictions of competition.** This can happen in various ways. First, the exchange of commercially sensitive information can allow a company to signal to its competitors the conduct that it would find desirable for those competitors to follow, or that itself would adopt in reaction to the competitors' conduct.[15] Second, exchanges of commercially sensitive information may allow companies to reach a common understanding on the terms of coordination.[16] Third, such exchanges can be used as a means to increase the internal and external stability of an anti-competitive agreement or concerted practice, by making the market sufficiently transparent to enable the participating companies to monitor deviations from the agreement or practice, and thus to know when to retaliate and against whom, or to monitor possible market entry, and thus which new entrant to target.[17]

(20) **Exchanges of commercially sensitive information may be prohibited under Article 101(1) TFEU where they are likely to influence the commercial strategy of competitors, thereby creating or being capable of creating conditions of competition that do not correspond to the normal conditions of the market in question**, regard being had to the nature of the products or services offered, the size and number of the companies involved and the volume of that market.[18] This is the case when the exchange of information reduces uncertainty regarding the operation of the market in question.

(21) **Commercially sensitive information**: This concerns information that in markets with effective competition is important for a company to protect in order to maintain or improve its competitive position on the market. <u>Information on pricing</u> is generally considered commercially sensitive. Other categories of potentially commercially sensitive information include <u>information on costs, capacity, production, quantities, market shares, customers, plans to enter or exit markets, or information on other</u>

[14] See §374 of the Horizontal Guidelines.

[15] See §377 of the Horizontal Guidelines.

[16] See §378 of the Horizontal Guidelines.

[17] See §§379-380 of the Horizontal Guidelines.

[18] See §384 of the Horizontal Guidelines.

important elements of a firm's strategy that companies active in a genuinely competitive market would not have an incentive to reveal to each other.[19]

(22) Information that is generally not commercially sensitive includes, for example, information relating to: the general functioning or state of an industry; public policy or regulatory matters (which could be used, for example in industry-wide public relations or lobbying initiatives); non-confidential technical issues relevant to the industry in general, such as standards or health and safety matters; general, non-proprietary technology and related issues, such as the characteristics and suitability of particular type of equipment (but not a particular company's plans regarding the adoption of specific equipment or technology); general promotional opportunities relevant to the industry in general (but not a particular company's promotional plans). It also includes non-strategic educational, technical or scientific data that results in consumer benefits, and non-strategic information needed to build new business partnerships between companies.[20] Information that has been put in the public domain for legitimate reasons – and therefore has become readily accessible (in terms of access costs) to all competitors and customers – is usually not commercially sensitive.[21]

(23) **Aggregated versus individualised information**:[22] Information exchange is less problematic where data is aggregated, that is where the attribution of individualised company-level information is sufficiently difficult or uncertain.

(24) **Age of the information**:[23] The exchange of historic information is unlikely to lead to a collusive outcome, as it is unlikely to be indicative of competitors' future conduct or to provide a common understanding on the market. Whether information is historic depends on the specific characteristics of the relevant market; the frequency of sale and purchase negotiations in the sector, and the age of the information typically relied on in the sector for the purpose of business decisions.

(25) **Unilateral and public disclosure**:[24] A situation in which one company discloses commercially sensitive information to its competitors reduces strategic uncertainty as to the future operation of the market for those competitors and increases the likelihood of limiting competition and of collusive behaviour. The fact that the disclosure takes place through a public announcement (for example, through a post on a publicly accessible

[19] See §385 of the Horizontal Guidelines.

[20] See §386 of the Horizontal Guidelines.

[21] See §388 of the Horizontal Guidelines.

[22] See §391 of the Horizontal Guidelines.

[23] See §§393-394 of the Horizontal Guidelines.

[24] See §§396-400 of the Horizontal Guidelines.

website, a statement at a public event or in a newspaper) does not in itself exclude the possibility that the disclosure may constitute a concerted practice within the meaning of Article 101(1) TFEU.

(26) **Indirect information exchange**:[25] Exchanges of commercially sensitive information between competitors can take place via a third party, such as a third-party service provider (including a platform operator or optimisation tool provider), a common agency (for instance, a trade organisation), a supplier or customer, or a shared algorithm. As with direct information exchanges, an indirect exchange may also reduce uncertainty about the actions of competitors and lead to a collusive outcome on the market.

(27) **Frequency of the information exchange**:[26] Frequent exchanges of information that facilitate both a better common understanding of the market and monitoring of deviations increase the risks of a collusive outcome.

(28) **Market characteristics**:[27] The likelihood that an information exchange will result in restrictive effects on competition depends on the characteristics of the relevant market. Relevant characteristics include, among others, the level of transparency of the market, the number of companies active in the market (market concentration), the existence of barriers to entry, whether the product or service concerned by the exchange is homogenous, whether the companies involved are similar (the complexity of the market), as well as the stability of the conditions of supply and demand on the market.

(29) **Measures to reduce the risk of competition law infringements**:[28] Competitors that wish (or need) to exchange commercially sensitive information should implement measures to restrict access to the information and control how it is used. Companies can, for example, use 'clean teams' or an independent trustee to receive and process information. Companies should also consider limiting the exchange to what is strictly necessary for the intended purpose.

(30) **Efficiencies**:[29] In certain cases, information exchange may lead to efficiency gains which need to be weighed against any anti-competitive effects of the exchange.

[25] See §§401-404 of the Horizontal Guidelines.

[26] See §405 of the Horizontal Guidelines.

[27] See §§412 of the Horizontal Guidelines.

[28] See §§406-411 of the Horizontal Guidelines.

[29] See §425 *et seq.* of the Horizontal Guidelines.

2.2.1.3. *Research and Development agreements*

(31) Research and Development ('R&D') agreements vary in form and scope. They include agreements to outsource R&D activities, agreements to jointly improve existing products or technologies, and agreements to research, develop and market completely new products. The cooperation can take the form of an agreement or a jointly controlled company. R&D cooperation may affect competition in existing markets, but also competition in innovation and new product markets. This is the case where R&D cooperation concerns the development of new products or technology which either may – if they emerge – one day replace existing ones, or which are being developed for a new intended use and will therefore not replace existing products but create a completely new demand.

- *The R&D Block Exemption Regulation*

(32) The R&D Block Exemption Regulation[30] exempts certain categories of R&D agreement from the prohibition in Article 101(1) TFEU, subject to specific conditions. In other words, it provides a legal safe harbour. The objectives of the block exemption are to promote research and development, protect competition and provide legal certainty for companies.

(33) The R&D Block Exemption Regulation covers:

a) joint R&D[31] relating to products or technologies, including joint exploitation of the results (for example, production and/or distribution of the resulting products or exploitation of the resulting intellectual property rights);

b) paid-for R&D[32], including joint exploitation of the results;

c) joint exploitation of the results of joint or paid-for R&D performed under a previous agreement between the same parties.

(34) The R&D Block Exemption Regulation also covers provisions on the assignment or licensing of intellectual property rights if those provisions are necessary to implement the R&D agreement and are not its main aim.

(35) R&D agreements can only benefit from the block exemption if they meet certain conditions. First, the agreement must provide that all the parties have full access to the

---

[30] Commission Regulation (EU) 2023/1066 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.

[31] The R&D is carried out by a joint team, organisation or undertaking, or is allocated between the parties by way of specialisation, or is jointly entrusted to a third party.

[32] The R&D is performed by one party and financed by another party.

final results of the R&D, including any resulting intellectual property rights and know-how, for the purposes of further R&D and exploitation.[33] However, where the parties agree to limit their rights of exploitation, access to the results for the purposes of exploitation may be limited accordingly.

(36) Second, where the R&D agreement does not provide for joint exploitation of the results of the R&D, each party to the agreement must have access to any pre-existing know-how of the other parties, if this know-how is indispensable for the exploitation of the results.

(37) Third, any joint exploitation may only concern results that are protected by intellectual property rights or constitute know-how and which are indispensable for the manufacture of the contract products or the application of the contract technologies.

(38) Where the parties to the R&D agreement are actual or potential competitors in markets for the supply of existing products that are capable of being improved, substituted or replaced by the products resulting from the R&D agreement, the exemption applies only if the parties' combined market share does not exceed 25 % on the relevant product and technology markets at the date of the agreement.[34]

(39) Where the parties to the R&D agreement are not competitors, the block exemption applies for the duration of the joint or paid-for R&D (no market share threshold).

(40) Where the parties jointly exploit the results of the joint or paid-for R&D, the exemption continues to apply for seven years after the contract products or contract technologies are first put on the market in the EU. The exemption continues to apply thereafter as long as the combined market share of the parties does not exceed 25 % on the relevant markets to which the contract products or contract technologies belong.[35]

(41) The block exemption does not apply to R&D agreements that contain certain 'hardcore' restrictions,[36] specified in the Block Exemption Regulation, namely restrictions which aim to:

[33] There is an exception from this condition for R&D agreements with research institutes, academic bodies and undertakings that provide R&D as a commercial service without normally being active in the exploitation of results – the R&D agreement may restrict the exploitation rights of these organisations.

[34] For paid-for R&D agreements, the 25 % threshold applies to the combined market share of the financing party and all the parties with which it has entered into R&D agreements relating to the same contract products or technologies.

[35] For paid-for R&D agreements, the 25 % threshold applies to the combined market share of the financing party and all the parties with which it has entered into R&D agreements relating to the same contract products or technologies.

[36] Hardcore restrictions in Commission antitrust block exemption regulations are generally restrictions of competition by object within the meaning of Article 101(1) TFEU.

- restrict the freedom of the parties to carry out R&D in an unrelated field;

- restrict the freedom of the parties to pursue R&D in a related field after the completion of the R&D agreement concerned;

- limit output or sales, subject to certain exceptions in the case of joint production or distribution.

(42) The block exemption also does not apply to the following obligations in R&D agreements ('excluded restrictions'), which therefore require an individual compliance assessment under Article 101 TFEU:

- the obligation not to challenge the validity of related intellectual property rights after completion of the R&D;

- the obligation not to grant licences to third parties to manufacture the contract products or to apply the contract technologies, unless the agreement provides for the exploitation of the results by at least one of the parties and such exploitation takes place in the internal market vis-à-vis third parties.

(43) The Horizontal Guidelines[37] provide guidance on the interpretation of the R&D Block Exemption Regulation and for the individual assessment of R&D agreements that fall outside the block exemption.[38] Such agreements do not necessarily restrict competition and, if they do, they may generate efficiencies that meet the four conditions of the Article 101(3) exception.

2.2.1.4. *Telecommunications infrastructure-sharing agreements*

(44) The Horizontal Guidelines provide guidance for the assessment under Article 101 TFEU of mobile telecommunications infrastructure-sharing agreements ('network-sharing agreements').[39] These agreements can reduce the costs of network rollout and maintenance for network operators, which may create benefits for consumers in the form of higher quality or more choice of services and/or lower prices. The guidance explains that, unless they are used as a tool to engage in a cartel, network-sharing agreements do not, in principle, restrict competition by object. However, they may produce restrictive effects, in particular the resulting limitation of infrastructure competition may limit competition for the provision of mobile telecoms services, at the wholesale and retail level.

[37] See Chapter 2 of the Horizontal Guidelines.

[38] See §§111-149 of the Horizontal Guidelines.

[39] See Section 3.6 of the Horizontal Guidelines.

(45) The Horizontal Guidelines set out factors that may be relevant for the individual assessment of network-sharing agreements, including the type and depth of the sharing, its duration, geographic scope and market coverage, the structure of the relevant markets, and the number of similar agreements existing in those markets. The guidance then sets out four minimum conditions for a network-sharing agreement *not* to be considered likely to restrict competition within the meaning of Article 101(1) TFEU. These concern whether the participating operators retain their own independently-run core network; whether they maintain independent retail and wholesale operations; whether they retain the ability to pursue independent spectrum strategies, and whether any exchange of commercially sensitive information is limited to what is necessary for the network-sharing agreement to function.

(46) Lastly, the guidance categorises network-sharing agreements according to the likelihood that they will restrict competition. Three categories are identified: passive sharing agreements (low likelihood of a restrictive effects), active sharing agreements (higher likelihood) and spectrum-sharing agreements (likely to restrict the parties' ability to differentiate their retail and/or wholesale offers and directly limit competition between them).

2.2.1.5. <u>Standardisation agreements</u>

(47) Standardisation agreements define technical or quality requirements with which current or future products or services, production and distribution processes and value chain due diligence processes may comply. Standardisation agreements can cover various issues, such as grades or sizes of products, or specifications enabling compatibility or interoperability between products.[40]

(48) Standardisation agreements generally produce significant positive economic effects, for example by promoting economic interpenetration in the internal market and encouraging the development of new and improved products or markets and improved supply conditions. Standards thus generally increase competition and lower output and sales costs, benefiting the economy as a whole. Standards may maintain and enhance product quality, safety, provide information and ensure interoperability and compatibility, thus increasing value for consumers.[41]

---

[40] See §436 of the Horizontal Guidelines.

[41] See §439 of the Horizontal Guidelines.

(49) However, standardisation agreements made between competitors can also give rise to restrictive effects on competition, by restricting price competition or limiting or controlling production, markets, innovation or technical development.[42]

(50) Standardisation agreements that do not restrict competition by object must be assessed in their legal and economic context to determine whether they produce actual or potential restrictive effects.[43]

(51) Standardisation agreements will generally fall outside the scope of Article 101(1) TFEU if all of the following conditions are met, even if the parties to the agreement have market power:[44]

a) The standard-setting process leading to the selection of the standard must guarantee **unrestricted participation** for competitors.[45]

b) The standard-setting process must be **transparent**, to allow stakeholders to be effectively informed of upcoming, ongoing and finalised standardisation work at each stage of the development of the standard.[46]

c) The parties to the standardisation agreement must remain **free to develop alternative standards** or products that do not comply with the agreed standard.

d) Access to the standard must be granted on fair, reasonable and non-discriminatory ("**FRAND**") terms.[47]

(52) In the case of a standard involving IPR, a clear and balanced IPR policy,[48] adapted to the particular industry and the needs of the organisation in question, increases the likelihood that the implementers of the standard will be granted effective access.

2.2.1.6. Sustainability agreements

(53) Sustainability agreements refer to any horizontal cooperation agreement that pursues a sustainability objective, irrespective of the form of the cooperation. The notion of sustainability includes, but is not limited to, addressing climate change (for instance,

[42] See §§441-444 of the Horizontal Guidelines.

[43] See §448 of the Horizontal Guidelines.

[44] See §§449 and 451 of the Horizontal Guidelines. The non-fulfilment of these conditions does not create any presumption that the standardisation agreement restricts competition within the meaning of Article 101(1) TFEU or does not fulfil the conditions of the efficiency exception in Article 101(3) TFEU.

[45] See §452 of the Horizontal Guidelines.

[46] See §453 of the Horizontal Guidelines.

[47] See §454 of the Horizontal Guidelines. For FRAND commitments in particular, see §§458-462 of the Horizontal Guidelines.

[48] As specified in paragraphs 456 and 457 of the Horizontal Guidelines.

through the reduction of greenhouse gas emissions), reducing pollution, limiting the use of natural resources, upholding human rights, ensuring a living income, fostering resilient infrastructure and innovation, reducing food waste, facilitating a shift to healthy and nutritious food, and protecting animal welfare.[49]

(54) Not all sustainability agreements between competitors fall within the scope of Article 101 TFEU. Where such agreements do not negatively affect parameters of competition, such as price, quantity, quality, choice or innovation, they are not capable of raising competition concerns and therefore fall outside Article 101.[50]

(55) Where sustainability agreements negatively affect one or more parameters of competition (for example, price, quantity, quality, choice, or innovation), they must be assessed under Article 101(1) TFEU.[51] Sustainability agreements that restrict competition within the meaning of Article 101(1), either by object or by effect, can still benefit from the exception provided by Article 101(3) if the parties can demonstrate that the four cumulative conditions of that provision are fulfilled.[52]

(56) **Sustainability standardisation agreements** are a sub-category of sustainability agreements and cover agreements between competitors to adopt and comply with certain sustainability standards aimed at (i) phasing out, withdrawing or replacing non-sustainable products and processes with sustainable ones, (ii) harmonising packaging materials to facilitate recycling or harmonising packaging sizes (and hence product content) to reduce waste, or (iii) purchasing only production inputs that have been manufactured in a sustainable manner.[53]

(57) **Soft safe harbour**:[54] Sustainability standardisation agreements are unlikely to produce appreciable negative effects on competition as long as the following six cumulative conditions are met:

i. The procedure for developing the sustainability standard must be transparent, and all interested competitors must be able to participate in the process leading to the selection of the standard;

[49] See §517 of the Horizontal Guidelines.

[50] See §527 of the Horizontal Guidelines.

[51] See §§532-533 of the Horizontal Guidelines.

[52] See §536 of the Horizontal Guidelines.

[53] See §538 of the Horizontal Guidelines.

[54] See §549 of the Horizontal Guidelines.

ii. The sustainability standard must not impose on companies that do not wish to participate in the standard any direct or indirect obligation to comply with the standard;

iii. To ensure compliance with the standard, binding requirements can be imposed on the participating companies, but they must remain free to apply higher sustainability standards;

iv. The parties to the standard must not exchange commercially sensitive information that is not objectively necessary and proportionate for the development, implementation, adoption or modification of the standard;

v. Effective and non-discriminatory access to the outcome of the standard-setting process must be ensured. This includes allowing effective and non-discriminatory access to the requirements and conditions for using the agreed label, logo or brand name, and allowing companies that have not participated in the development of the standard to adopt the standard at a later stage, and

vi. The sustainability standard must fulfil at least one of the following two conditions: (a) The standard must not lead to a significant increase in the price or a significant reduction in the quality of the products concerned; (b) The combined market share of the participating companies must not exceed 20 % on any relevant market affected by the standard.

(58) Failure to comply with one or more of the conditions of the soft safe harbour does not create a presumption that the sustainability standardisation agreement restricts competition within the meaning of Article 101(1) TFEU. However, if one or more of these conditions are not met, it is necessary to carry out an individual assessment of the agreement under Article 101.[55]

2.2.1.7. Other types of cooperation

(59) The Horizontal Guidelines also provide guidance on **purchasing agreements**[56] and **commercialisation agreements**.[57]

---

[55] See §552 of the Horizontal Guidelines.

[56] See §§273-316 of the Horizontal Guidelines.

[57] See §§317-365 of the Horizontal Guidelines.

2.2.2. Rules applicable to vertical supply agreements

(60) The **Block Exemption Regulation on Vertical Agreements** ('VBER')[58] provides a legal safe harbour from the Article 101(1) prohibition for certain supply and distribution agreements. Vertical agreements can improve the efficiency of the supply chain by facilitating coordination between the participating companies, leading to a reduction in transaction and distribution costs and an optimisation of sales and investment levels. Whether these efficiency-enhancing effects outweigh any anti-competitive effects resulting from restrictions in the vertical agreement depends on the degree of market power held by the parties to the agreement. Accordingly, the VBER applies to vertical agreements between non-competitors that do not contain certain severe restrictions of competition ('hardcore restrictions') and where the market share of each party to the agreement does not exceed 30 %.[59]

(61) The hardcore restrictions set out in the VBER[60] include the imposition by the supplier of resale price maintenance, territorial and customer sales restrictions (subject to certain exceptions for exclusive and selective distribution) and bans on the effective use of the internet to sell the contract products.

(62) The accompanying Vertical Guidelines[61] provide guidance on the interpretation of the VBER and for the individual assessment under Article 101 TFEU of vertical agreements that fall outside the block exemption. The Guidelines notably contain sections on exclusive and selective distribution and on various types of restriction of online sales.

2.2.3. Rules applicable to technology transfer agreements

(63) Technology licensing helps to spread innovation and enables companies to offer new products and services. It also strengthens incentives for research and development by creating additional revenue streams to recoup R&D costs. Technology licensing therefore plays an important role in economic growth and consumer welfare. However, technology licensing agreements can also be used to harm competition. For example, competing companies could use a licensing agreement to divide markets between them, or a powerful licensor could use licensing agreements to exclude the use of competing technologies.

---

58 Commission Regulation (EU) 2022/720 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 134, 11.5.2022.

59 There is no presumption that vertical agreements that exceed the market share thresholds restrict competition within the meaning of Article 101(1) TFEU or that they fail to meet the conditions of Article 101(3) TFEU.

60 See Article 4 of the VBER.

61 Guidelines on vertical restraints, OJ C 248, 30.6.2022.

(64) The Technology Transfer Block Exemption Regulation ('TTBER')[62] provides a legal safe harbour from the Article 101(1) prohibition for certain technology transfer agreements, namely bilateral agreements under which a licensor permits a licensee to use certain industrial property rights, including patents, design rights and software copyrights for the production of goods or services.

(65) The block exemption applies subject to a market share threshold (combined market share not exceeding 20 % for agreements between competitors and individual market shares not exceeding 30 % for agreements between non-competitors), as well as a list of hardcore restrictions.[63]

(66) The accompanying Technology Transfer Guidelines[64] provide guidance on the interpretation of the TTBER and for the individual assessment under Article 101 TFEU of technology transfer agreements that fall outside the block exemption. Whereas the TTBER applies only to bilateral agreements, the Technology Transfer Guidelines also cover certain multilateral arrangements, such as patent pools.

(67) Patent pools can facilitate the licensing of intellectual property rights, such as standard essential patents, by establishing a one-stop shop. In view of the pro-competitive potential of patent pools, the Technology Transfer Guidelines provide a soft safe harbour for the setting-up and operation of technology licensing pools that meet all the following conditions:[65]

a) participation in the pool creation process is open to all interested technology rights owners;

b) only essential technologies (which therefore necessarily are also complements) are pooled;

c) any exchange of commercially sensitive information is restricted to what is necessary for the creation and operation of the pool;

d) the pooled technologies are licensed into the pool on a non-exclusive basis;

---

62 Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements, OJ L 93, 28.3.2014.

63 The hardcore restrictions include pricing restrictions, output restrictions, market sharing restrictions, territorial and customer sales restrictions, and restrictions on the ability to carry out R&D. Separate hardcore lists apply for agreements between competitors and agreements between non-competitors. For more detail, see Article 4 of the TTBER.

64 Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, OJ C 89, 28.3.2014.

65 Technology pools that meet these conditions generally fall outside Article 101(1) TFEU, irrespective of the market position of the parties.

e) the pooled technologies are licensed out to all potential licensees on fair, reasonable and non-discriminatory ("FRAND") terms;

f) the parties contributing technology to the pool and the licensees are free to challenge the validity and the essentiality of the pooled technologies, and

g) the parties contributing technology to the pool and the licensee remain free to develop competing products and technology.