



## I. Introduction

On June 1<sup>st</sup>, 2023, in a significant development for EU competition law, the European Commission (“EC”) adopted its long-awaited revised **Research & Development Block Exemption Regulation (“R&D BER”)** and **Specialisation Block Exemption Regulation (“Specialisation BER”)** (the Horizontal Block Exemption Regulations, “HBERs”), alongside the revised **Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union (“TFEU”) to cooperation agreements between competitors (“Horizontal Guidelines”)**. The new rules introduce important changes to adapt to the challenges of the digital economy and emphasize sustainability objectives.

According to the **EC’s Press Release** “the revised HBERs and Guidelines provide businesses with clearer and up-to-date guidance to help them assess the compatibility of their horizontal cooperation agreements with EU competition rules”.

The HBERs grant a “safe harbor”, i.e., they block-exempt R&D and specialisation agreements between competitors from the application of EU competition rules, when the parties to the agreement meet certain market share thresholds and the agreement does not contain hard core restrictions. The Horizontal Guidelines explain how the HBERs are expected to apply in practice. Furthermore, the Horizontal Guidelines provide guidance in assessing several other types of horizontal cooperation agreements, including purchasing agreements, commercialization agreements, information exchange agreements, standardization agreements, standard terms agreements and sustainability agreements.

The HBERs and Horizontal Guidelines are also important for the assessment of horizontal cooperation agreements affecting the Greek market, since if the agreement may affect trade between Member States, EU competition rules are also applicable. In any event, the Hellenic Competition Commission (“HCC”) will rely on the HBERs and the Guidelines in its assessment.

The HBERs will enter into force on July, 1<sup>st</sup> 2023 (with a two-year transition period for pre-existing agreements that meet the conditions of the current regulations), while the Horizontal Guidelines will do so following their publication in the Official Journal of EU.

## II. Key Points – Main Changes

Below we provide an overview of the key points addressed in the revised rules, highlighting their implications for businesses.

### A. Overview

- **Digital Market Focus:** The revised rules recognize both the importance of fostering innovation and collaboration among companies and the unique challenges posed by digital markets. They provide clearer guidance on permissible cooperation in R&D activities, reflecting the EC's commitment to ensuring fair competition in the rapidly evolving digital economy.
- **Sustainability Objectives:** The revised rules acknowledge the significance of sustainability goals. They allow for the assessment of agreements between competitors that contribute to environmental and social objectives, subject to certain conditions. This demonstrates the Commission's dedication to fostering sustainability within the EU and encouraging pro-competitive cooperation towards common environmental and social goals.

The HCC is also at the **forefront of sustainability initiatives**. **On October 4<sup>th</sup> 2022**, it has launched its dedicated sustainability sandbox, an instrument that provides a supervised space for experimentation with innovative business ideas and aspires to encourage businesses to try out novel business formats aiming at achieving sustainability goals. Businesses can apply to the HCC through its sandbox for the evaluation of their respective business proposal. The HCC will evaluate ex ante such business ideas increasing legal certainty for implicated parties. In addition to the sandbox, the new Article 37A of Greek Competition Law 3959/2011, as amended in January 2022, may also consider various sustainability objectives. This provision allows the adoption of a no-action letter in the presence of significant positive effects for sustainability and the wider public interest.

## B. Horizontal Block Exemption Regulations

### ⇒ *Research & Development Block Exemption Regulation*

- The revised rules (R&D BER and Chapter 2 of the Horizontal Guidelines) emphasize the protection of innovation competition and introduce articles on the powers of the EC and national competition authorities (NCAs) to withdraw the benefit of the block exemption in individual cases (Article 29 Regulation 1/2003).
- They also improve clarity and flexibility with respect to the calculation of market shares (which may be calculated based on an average of the three preceding calendar years, in cases where data for the preceding calendar year is not representative) and simplify the grace period which is applicable when the parties' market shares increase above the exemption threshold.

### ⇒ *Specialisation Block Exemption Regulation*

- The revised rules (Specialisation BER and Chapter 3 of the Horizontal Guidelines) cover more types of production agreements concluded by more than two parties. SMEs may benefit from this change since given their size and limited resources, an effective specialization agreement may require cooperation between more than two parties.
- Like the revised rules for R&D agreements, the revised rules for Specialisation agreements also improve clarity and flexibility with respect to the calculation of market shares, simplify the grace period applicable when parties' market shares increase above the exemption threshold and introduce articles on the EC and NCAs power to withdraw the benefit of the block exemption in individual cases.

## C. Horizontal Guidelines

The revised Horizontal Guidelines address emerging challenges and provide clarity on key areas. Key points include:

- **Agreements between Joint Ventures ("JV") and their Parent Companies:** The Horizontal Guidelines state that, in light of the relevant case law, pursuant to which, in so far as the parent companies exercise decisive influence over their JV, they can be held liable for its infringements, the EC will not apply Article 101 TFEU to agreements between parent companies and their JV, to the extent that the agreement affects the relevant market in which the JV is active.

- Mobile Telecommunications Infrastructure Sharing Agreements: The Horizontal Guidelines introduced a new section on such agreements in the chapter on Production Agreements.
- Joint Purchasing: The revised chapter of the Horizontal Guidelines on Purchasing Agreements explains the distinction between joint purchasing and buyer cartels. It also clarifies the scope of joint purchasing, gives more prominence to possible anti-competitive effects on the upstream supply side and provides guidance on certain joint negotiating tactics.
- Bidding Consortia: The revised chapter of the Horizontal Guidelines on Commercialisation Agreements includes a new section on bidding consortia and guidance on the distinction with bid rigging. Relevant **Guidance** has also been issued by the HCC in April 2022.
- Information exchange: Recognizing the increasing importance of data sharing as a business strategy in the digital economy, the Horizontal Guidelines shed light on information exchange practices among competitors, noting that the relevant chapter has been rewritten to incorporate recent case law and enforcement developments. The chapter (a) includes guidance regarding the concept of “commercially sensitive information”, unilateral disclosure of such information, indirect information exchange via a third party (e.g., platform operator, optimization tool provider, a shared algorithm etc.), and (b) proposes/introduces measures that companies can take to reduce the risk of competition law infringements (e.g. the use of “clean teams”).
- Sustainability Objectives: The Horizontal Guidelines emphasize the EC’s commitment to sustainable development goals. Notably, reflecting the objectives of the European Green deal, the Horizontal Guidelines now include a new chapter on horizontal agreements relating to sustainability objectives by recognizing that certain agreements aimed at achieving environment or social objectives can contribute to the overall welfare of society. Sustainability agreements that do not negatively affect parameters of competition, such as price, quantity, quality, choice or innovation are not capable of raising competition law concerns and therefore fall outside the scope of Article 101. The chapter provides for some indicative examples of such agreements and introduces a “soft safe harbor” for sustainability standardization agreements that meet cumulatively the criteria set therein.

### III. Conclusion

The EC's revised HBERs and Horizontal Guidelines mark an important milestone in shaping the competition law landscape within the EU. By providing updated and comprehensive guidance, the revised rules strike a balance between fostering innovation, promoting sustainable practices and ensuring fair competition. Businesses should carefully analyze the revised regulations in order to ensure compliance and take advantage of the exemptions they offer, while remaining mindful of potential antitrust risks.

*If you would like more information concerning how your business may be affected by the new rules, please do not hesitate to contact our competition law team.*

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