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On 1 July 2023, the European Commission (EC) implemented the revised horizontal block exemption regulations (HBERs) on research and development (R&D) and specialisation agreements respectively, as well as the revised Guidelines on horizontal cooperation (Horizontal Guidelines), which will remain in force until 30 June 2035.

The new Horizontal Guidelines provide clarity and up-to-date **guidance on information exchange** between competitors, both in terms of clarifying existing concepts and in shedding more light to issues not previously covered, such as the use of algorithms, indirect forms of information exchange, including hub-and-spoke and unilateral disclosure through public announcements. There is also a new section with practical guidance on how to reduce the risk of competition law infringements in the context of information exchange.

The EC recognises that **information exchange** is a common feature of many competitive markets and can result in various types of **efficiencies** by addressing information asymmetries, ensuring informed decision making, benchmarking against best practices and developing new or better products or services.

However, a key principle of competition law is that undertakings must act independently on the market. This does not prevent undertakings from adapting intelligently to the conduct of their competitors on the market, but it does prevent any direct or indirect contact between undertakings (by way of agreement, concerted practice or decision by an association of undertakings) that is likely to influence the commercial strategy of competitors.

The new Horizontal Guidelines identify two main **competition law concerns** that may arise from information exchanges, namely:

- **the facilitation of collusive outcomes**, through artificially increased transparency between rivals; this may arise, e.g., where commercially sensitive information is disclosed that allows undertakings to signal their future behavior in the market or to increase the internal stability of an anti-competitive agreement or concerted practice; and
- **the facilitation of market foreclosure**, via the exchange of information that is strategically important in order to compete on the market, if the exchange covers a significant share of the relevant market; this would place market players that do not take part in the exchange, at a significant competitive disadvantage compared to their competitors that exchange this information.

The Horizontal Guidelines also stress that **Article 101(1) TFEU will apply if an exchange of commercially sensitive information is likely to influence the commercial strategy of competitors**. This is notably the case where the exchange reduces uncertainty regarding a competitor's future or recent actions in the market, and regardless of whether the companies

involved in the exchange are granted a benefit through their cooperation.

The nature of the information exchanged

The Guidelines provide additional guidance on the **nature of the information** exchanged, which is necessary for all companies seeking to self-assess information exchange agreements, e.g., commercially sensitive information, age of information, aggregation of information/data etc.

With regard to the **commercial sensitivity** of the relevant information, data on pricing, costs, capacity, production, quantities, market shares, customers and business strategy is the main core of commercially sensitive information. In this regard, it is not relevant whether the exchanged information is incorrect or misleading. On the other hand, public information that is readily accessible, in terms of costs, to competitors and customers is usually not deemed as commercially sensitive. That said, an additional information exchange between competitors may further reduce strategic uncertainty in the market.

In general, the exchange of **old and historical data** should not raise competition concerns. However, this must be assessed on a case-by-case basis, paying particular attention to the relevance of the information and whether it has lost its commercially sensitive nature. This will differ between industries and sectors. The Horizontal Guidelines also note that exchanges of **individualised information** are more likely to facilitate a common understanding on the market between competitors than the exchange of aggregated information, provided the information exchanged in aggregated form cannot be attributed to a particular undertaking.

Unilateral and indirect exchange of information

Article 101(1) TFEU applies to bilateral or multilateral exchanges of commercially sensitive information between competitors. However, it is important to note that it will also, under certain circumstances, apply to a unilateral disclosure or to an indirect information exchange.

The revised Horizontal Guidelines clarify that the unilateral disclosure of commercially sensitive information **could lead to an infringement** of the competition rules where a competitor requests or at least accepts the information, acts on it and where there is a causal link between the disclosure and the subsequent conduct. The EC gives some examples of means of unilateral disclosure, namely through (chat) messages, emails, phone calls or input in an algorithmic tool.

If an undertaking **receives competitors' commercially sensitive information**, it is presumed that recipient will act upon it and adapt its market conduct accordingly. This is a rebuttable legal presumption, but the undertaking concerned will need to take active steps to rebut it, by, for example, publicly distancing itself or reporting it to the relevant authorities. Finally, disclosure through **public announcements** by, for example, unilaterally advertising prices or commenting on market events, does not exclude the risk of a competition law infringement, as it may be a way for competitors to signal intentions as to their future behaviour on the market.

The Horizontal Guidelines also cover the case of **indirect information exchange**, i.e. an exchange of commercially sensitive information among competitors that is performed **via a third party**, such as a trade association, a supplier, a customer, or through service provider, e.g. a platform operator or a shared algorithm, such as real-time price monitoring tools.

Competition law does not, in principle, prevent customers from independently disclosing one supplier's pricing offer to another supplier with whom the customer is in a commercial negotiation. This must, however, be distinguished from a position where a customer is aware of an anti-competitive arrangement between different suppliers and exchanges information in order to

implement such an arrangement. Where a common manufacturer or supplier acts as a 'hub' to pass on information to several distributors or retailers, or where a distributor or retailer passes on commercially sensitive information to several suppliers, the indirect information exchange is referred to as a **'hub-and-spoke' arrangement**. An online platform can also act as a hub if it facilitates or enforces information exchanges between business users of the platform.

A case-by-case analysis of the role of each participant to such exchange, taking into account the level of awareness of the providers and recipients that the information will be exchanged between competitors, is necessary so as to determine whether the exchange of information constitutes an anti-competitive agreement and who bears liability in this regard.

Moreover, an indirect information exchange resulting in collusion can also take place through a **shared optimisation algorithm**, where commercially sensitive information is aggregated into a pricing tool that is made available by a single IT company and to which various competitors have access. The Horizontal Guidelines note that while using publicly available data to feed algorithmic software is legal, the aggregation of commercially sensitive information into a pricing tool offered by a single IT company to which various competitors have access could amount to collusion.

The Horizontal Guidelines provide specific guidance on the use of algorithms, noting that they may increase the risk of collusion. Algorithms may allow competitors to increase market transparency, to detect price deviations in real time and to implement more effective punishment mechanisms for such deviations. The Horizontal Guidelines then set out **two principles for the treatment of algorithms** under competition law. First, it is highly probable that pricing practices that are illegal offline will also be illegal online. Second, liability cannot be avoided by relying on the argument that prices were determined by algorithms.

Restriction of competition by object

Under the new Horizontal Guidelines, the definition of an information exchange that qualifies as a 'by object' restriction is much broader. Exchanges of information are regarded as anti-competitive by object only where it is unambiguous that, in view of their characteristics and without it being necessary to examine their effects, the criterion of the **reduction or removal of uncertainty** in the market is satisfied. In line with the CJEU's move away from a formalistic approach to the analysis of 'by object' restrictions, the Horizontal Guidelines recognise that any arguments put forward by the parties that the exchange is pro-competitive should be taken into account, provided that such pro-competitive effects are demonstrated, relevant and related to the information exchange in question and that the specific circumstances of the legal and economic context cast doubt on the presumed harmful nature of that agreement.

Measures to mitigate the risk of sensitive information exchange

Finally, a new section has been added giving guidance on measures that undertakings can adopt to restrict access to commercially sensitive information or to control how it is used. **Clean teams and trustees** are typically used in the context of M&A but can also be used when implementing horizontal cooperation agreements, in order to ensure that commercially sensitive information provided for the purpose of that cooperation is exchanged on a need-to-know basis only and in an aggregated form.

Also, when participating in **reciprocal data-sharing arrangements** such as a data pool, undertakings should only have access to their own information and to the final, aggregated information of other participants. Technical and practical measures should be taken to ensure that

a participant will not be able to access commercially sensitive information from other participants.

Furthermore, prior to **meeting with competitors**, an agenda setting out the purpose of the meeting or call should be available to ensure that any risks around the exchange of commercially sensitive information are identified in advance. Participants should stick to the approved agenda and it is also advisable to have a competition lawyer present to ensure discussions do not stray into areas they should not. Furthermore, during meetings with competitors, **precise minutes must be kept and distributed to the participants**. If participants in such a meeting consider that sensitive information is shared or exchanged, they should distance themselves from such an exchange, by making it clear that they cannot participate in such discussions and by asking for the subject to be changed, while making sure that their objections are recorded in the minutes.

Lastly, before disclosing commercially sensitive information in public, undertakings should ask themselves whether the information serves the legitimate purpose intended and whether the level of detail of the disclosure is necessary. When competitors are making public announcements revealing commercially sensitive information, other undertakings should also take steps to publicly distance themselves from the announcement.

Final thoughts

Assessing the antitrust risk resulting from information exchange between competitors has always been a tricky area for competition law practitioners; it is highly fact-specific and depends on a range of factors, including the nature of the information exchanged and the peculiarities of the affected markets.

In this regard, the new Horizontal Guidelines have been revised substantially in relation to the exchange of information (so as to reflect the most recent decisional practice and case law), and contain numerous useful practical examples, which will undoubtedly assist companies in self-assessing potential antitrust risks, including in particular in the context of new types of collaborations, such as algorithms, data sharing, benchmarking and public announcements.

That said, companies must review and update their existing and contemplated horizontal cooperation agreements in light of the new rules to ensure compliance with competition rules. Moreover, they should attempt to engage with the relevant competition authorities, which have recently shown willingness to offer advice/informal guidance on a case-by-case basis, in order to avoid legal uncertainty that may hold companies back when contemplating strategic plans.

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