



FAROS

New rules on horizontal cooperation agreements: 10 takeaways

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COMPETITION

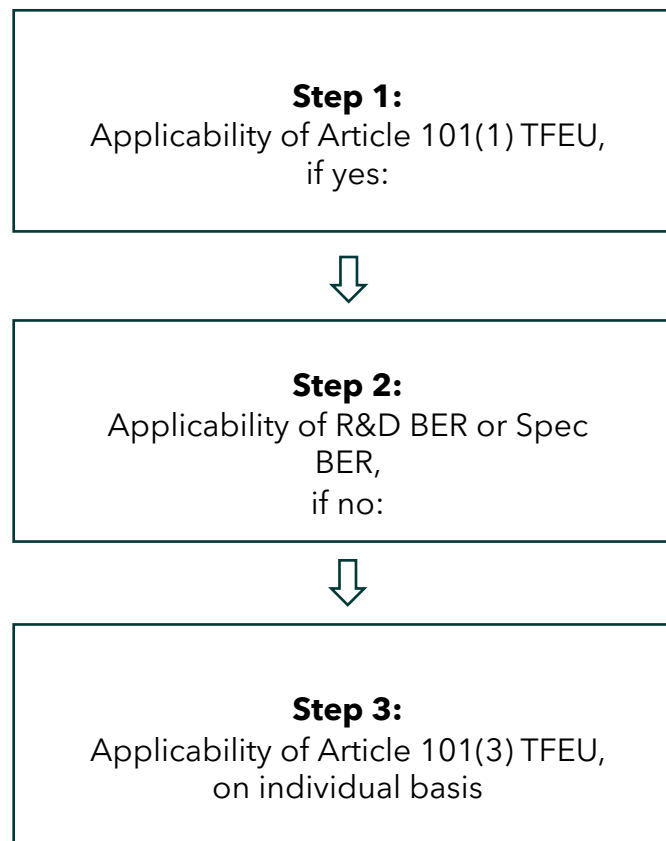
DATA PROTECTION

COMPLIANCE



Building blocks

Analytical framework



Step 1: Application of Article 101(1) TFEU

- Horizontal agreement involving **at least two independent undertakings**
- **Restriction** of competition **by object or effect**
 - Object: by their very nature and based on duly established experience harmful to the proper functioning of normal competition
 - Effect: reduction of decision-making independence
- **Effect on trade** between Member States (Effect on Trade Guidelines)
- **De minimis** (De Minimis Notice)

Step 1: Application of Article 101(1) TFEU

- **Government compulsion**
- **Ancillary restraints**
- **Objective justification**

Step 2: Block Exemption Regulation

- **Automatic exemption** pursuant to **Article 101(3) TFEU**
 - R&D BER
 - Specialisation BER
 - [VBER]

Step 3: Application of Article 101(3) TFEU

- **Four cumulative conditions**

- 1) Efficiency gains
- 2) Indispensability
- 3) Pass-on to consumers
- 4) No elimination of competition

Complexity – Other guidance, legislation and case-law

- **Market Definition Notice**
- **VBER** – Article 2(4) and Article 2(7) VBER
- **Vertical guidelines**
- **Merger Regulation**
- **Article 102 TFEU**
- **Specific rules**

Complexity – Combination of cooperation agreements

- **HBERs**
- General rule: **combination** of the applicable **chapters**
- Particular conduct: **centre of gravity**
 - Starting point of the cooperation
 - Degree of integration



Safe harbours

Safe harbours

Type of agreement	Market share	Time period	Other factors
10% de minimis			
R&D	<p><u>Joint R&D</u></p> <p>→ Combined market share of the parties < 25 % on the relevant product and technology markets</p> <p><u>Paid-for R&D</u></p> <p>→ Combined market share of the financing party and all the parties with which the financing party has entered into R&D agreements with regard to the same contract products or contract < 25 % on the relevant product and technology markets</p>	<ul style="list-style-type: none"> ▪ Exemption continues to apply for 7 years from the time the contract products or contract technologies are first put on the market within the internal market ▪ After 7-year period: exemption continues to apply as long as the combined market does not exceed 25 % on the relevant markets to which the contract products or contract technologies belong ▪ If the combined market share does not exceed the relevant threshold at the end of the 7-year period, but subsequently rises above that threshold, the exemption shall continue to apply for a period of 2 consecutive calendar years following the year in which the relevant market share threshold was first exceeded 	

Safe harbours

Type of agreement	Market share	Time period	Other factors
10% de minimis			
<p>Specialisation</p>	<ul style="list-style-type: none"> ▪ Exemption shall apply on condition that the combined market share of the parties < 20 % on the relevant market(s) to which the specialisation products belong ▪ Specialisation products are intermediary products that are fully or partly used captively by one or more of the parties as inputs for the production of downstream products, which they also sell → exemption shall only apply if both of the following conditions are fulfilled: <ul style="list-style-type: none"> (i) the parties' combined market share < 20 % on the relevant market(s) to which the specialisation products belong; (ii) the parties' combined market share < 20 % on the relevant market(s) to which the downstream products belong 	<ul style="list-style-type: none"> ▪ If the market shares are initially < 20 %, but subsequently rise above that level in at least one of the relevant markets, the exemption continues to apply for a period of 2 consecutive calendar years following the year in which the 20 % threshold was first exceeded 	

Soft safe harbours

Type of agreement	Market share	Time period	Other factors
10% de minimis			
Purchasing	<ul style="list-style-type: none"> ▪ No absolute market share threshold ▪ Market power unlikely if members of the arrangement have: <ul style="list-style-type: none"> (i) a combined market share < 15 % on the relevant purchasing market(s) + (ii) a combined market share < 15 % on the relevant selling markets 	/	<ul style="list-style-type: none"> ▪ market concentration; ▪ profit margins; ▪ closeness of competition; ▪ nature of the products subject to the purchasing arrangement and; ▪ possible countervailing seller power of suppliers
Commercialisation	<ul style="list-style-type: none"> ▪ Market power unlikely if members of the agreement have: <ul style="list-style-type: none"> (i) a combined market share < 15 % in the markets where they jointly commercialise the contractual products 	/	

Soft safe harbours

Type of agreement	Market share	Time period	Other factors
10% de minimis			
Sustainability	/	/	/
Sustainability standardisation agreements	/	/	<p>Negative effects on competition unlikely when 6 cumulative conditions are met:</p> <ol style="list-style-type: none"> 1. Transparent procedure for developing the standard + unlimited participation of all interested competitors in the process leading to the selection of the standard; 2. No obligation to comply with the standard on undertakings that do not wish to participate; 3. Participating undertakings remain free to apply higher standards; 4. No exchange of CSI beyond what is objectively necessary and proportionate for the development, implementation, adoption or modification of the standard; 5. Effective and non-discriminatory access to the outcome of the standard-setting process; 6. No significant increase in price/reduction in quality as a result of the standard or the combined market share of the participating undertaking does not exceed 20 %



Notion of competitor

Notion of competitor

- **Important** notion
- **Actual** and **potential** competitors

Notion of potential competitor

- *“An undertaking is considered as a potential competitor of another undertaking if, in the absence of the agreement, it is **likely** that the former, **within a short period of time**, would **undertake the necessary additional investments or other necessary switching costs** to **enter the relevant market** on which the latter is active” (para 16 HG)*
- **“Short period of time”:**
 - Depends on the legal and economic context and the facts of the case at hand (fn 16 HG)
 - Party to a horizontal cooperation agreement vs. third party
 - R&D and specialisation: less than 3 years

Notion of potential competitor

▪ **Elements to consider:**

- Firm intention and an inherent ability to enter the market (no insurmountable barriers)
- Sufficient preparatory steps taken
- Real and concrete possibilities to enter (not just wish or hypothetical possibility)
- Structure of the market and the economic and legal context
- Perception of an undertaking that is established on the market



Sustainability

Sustainability

- **No** separate **BER**
- **No safe harbour**
 - Except for sustainability standardisation agreements (para 549 HG)
- **Not a distinct category** of horizontal cooperation agreements
 - Reference to relevant chapter of HG
 - Inconsistency: most favourable regime (para 525 HG)
- Certain **extra guidance** in chapter, but **no certainty**



R&D

R&D Agreements

- **Self-assessment article 101(1) TFEU**
- **Regulation 2023/1066**
- **Self-assessment article 101(3) TFEU**

Structure of Regulation 2023/1066

- **"Entry conditions"** (art. 3-4-5)
- **Market share limits** (art. 6-7)
- **Black list** (art. 8)
- **Excluded restrictions** (art. 9)

Take away! Paid-for R&D

- **Involvement of a funder** (not performing R&D)
 - **What cooperation is covered?** = art. 1(1)(13) Reg. - para 63 HG
- **Importance of distinction = calculation of market shares** (art. 6(1)(b) Reg.)



Specialisation

Specialisation agreements (production + distribution)

- **Self-assessment article 101 TFEU**
- **Regulation 2023/1067**

Structure of Regulation 2023/1067

- **White list** (art. 2(3) and 2(4))
- **Market share limit** (art. 3-4)
- **Black list** (art. 5)

Take away! What is production specialisation under Regulation 2023/1067?

- **Unilateral specialisation**
- **Reciprocal specialisation**
- **Joint production**
- **Important:**
 - Parties active in same product market (not necessarily same geographic market)
 - Not necessary to close factories - reduction of production volume suffices (para 189 HG)
 - Parties supply each other

Non-horizontal specialization (see footnote 149 HG)

- **VBER/Vertical Guidelines**
- **Commission notice of 1978 concerning its assessment of certain subcontracting agreements**



Joint purchasing

Joint purchasing

- **No block exemption regulation**
- **Horizontal Guidelines** (para 273 and full HG)

Joint purchasing

- Concept of **buyer cartels** defined (para 279 HG)
- **Pass-on to consumers** (para 307 HG) - Porta investigation

Joint purchasing - buyer cartels

- **Key features =**

- Absence of joint negotiations vis-à-vis the supplier
- Coordination of competitive behavior on the purchase markets (e.g., fixing or coordination of purchase prices)
- Influence individual negotiations through practices such as coordination of negotiation strategies or exchanges on status of negotiations

Joint purchasing - Porta

- **Context**
- **Approach adopted and lessons learned**



Bidding consortia

General principles

- **Type** of commercialisation agreement
- Cooperation to submit a **joint bid in a procurement competition**
- **New**: separate **sub-chapter**

Participants

- Application of **Article 101(1) TFEU**
 - Realistic capability to participate
 - Bid for a project
 - Bid for parts (lots)
 - More parties than necessary
- **By object**
 - Ability to participate individually & no significant degree of integration
 - But not: more parties than necessary



Information exchange

Broader 'by object' box

- **General principles** (1.2.4)
 - By their very nature and based on duly established experience harmful to the proper functioning of normal competition
 - Strict interpretation
 - Sufficiently reliable and robust experience

Broader 'by object' box

- **Specific application**

- Commercially sensitive information
- Exchange is capable of removing uncertainty as regards the timing, extent and details of the modifications to be adopted in their conduct on the market

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Standard terms and standardisation

Standard terms and standardisation

- **Former** standardisation **chapter** has been **split up**:
 - Standardisation
 - Standard terms and conditions for the sale or purchase of goods and services
- **Limited changes** have been made
 - Chapter 9: soft safe harbour
- **Application in practice**

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Ready for a deep dive?

Join us at our 'Round Table'

23/11/2023

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