

## EU Guidelines on horizontal cooperation agreements

The Commission has revised the European Union (EU) competition rules on horizontal co-operation agreements. These guidelines are designed to help companies determine on a case-by-case basis whether their co-operation agreements are compatible with the revised competition rules by providing a framework for assessment under Articles 101(1) and 101(3) of the Treaty on the Functioning of the European Union.

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**Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to [horizontal co-operation agreements](#) [Official Journal C 11 of 14.1.2011].**

### SUMMARY

Cooperation is of a "horizontal nature" if an agreement or concerted practice is entered into between actual or potential competitors. These guidelines also cover horizontal co-operation agreements between non-competitors, for example between two companies active in the same product markets but in different geographical markets without being potential competitors. Often, horizontal co-operation can lead to substantial 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. On the other hand, horizontal co-operation can lead to competition problems where it causes negative market effects with respect to prices, output, innovation or the variety and quality of products. These guidelines provide an analytical framework for the most common types of horizontal co-operation agreements with a view to determining their compatibility with Article 101 of the Treaty on the Functioning of the European Union (TFEU).

These guidelines only apply to the most common types of cooperation: research and development (R&D) agreements, production agreements, purchasing agreements, commercialisation agreements, standardisation agreements and information exchange. Agreements that are entered into between companies at a

different level of the production or distribution chain (vertical agreements) are, in principle, dealt with in the [Block Exemption Regulation on vertical restraints](#) and the [Guidelines on vertical restraints](#). However, to the extent that vertical agreements are concluded between competitors, they must be assessed according to the principles applicable to horizontal agreements. Where horizontal agreements result in a concentration, the [Merger Regulation](#) applies.

The guidelines set out the criteria for assessing application of the competition rules under Article 101 TFEU. Article 101(1) TFEU is used to assess whether an agreement which is capable of affecting trade between European Union (EU) countries has an anti-competitive object or actual or potential restrictive effects on competition. If an agreement does restrict competition, Article 101(3) TFEU determines whether the pro-competitive benefits outweigh the restrictive effects on competition.

### **Assessment criteria under Article 101(1) TFEU**

Article 101(1) TFEU prohibits agreements which have as their object or effect the restriction of competition. For the purposes of these guidelines, 'restriction of competition' includes the prevention and distortion of competition. If an agreement has the object to restrict competition, that is to say that by its very nature it has the potential to restrict competition under Article 101(1) TFEU, then it is not necessary to examine the actual or potential effects of the agreement. If, however, a horizontal co-operation agreement does not restrict competition by object, actual and potential effects must be analysed to determine whether there are appreciable restrictive effects on competition. For there to be restrictive effects on competition under Article 101(1) TFEU, the agreement must have, or be likely to have an appreciable adverse impact on at least one of the parameters of competition on the market, such as price, output, product quality and variety, or innovation. Such an 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.

The **nature** of an agreement relates to factors such as the area and objective of co-operation, the competitive relationship between the parties and the extent to which they combine their activities. These factors determine which kinds of possible competition concerns can arise. Horizontal co-operation agreements may limit competition in several ways. For example, production agreements may give rise to a direct limitation of competition where the parties reduce output. The main competition concern pertaining to commercialisation agreements is price-fixing.

**Market power** is the ability to profitably maintain prices above competitive levels for a period of time or to profitably maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a period of

time. Market power can sometimes result from reduced competition between parties.

The starting point for the analysis of market power is the position of the parties in the markets affected by the co-operation. To carry out this analysis, the relevant market(s) have to be defined, using the [Commission's Notice on the definition of the relevant market](#), and the parties' combined market share calculated. If the combined market share is low, horizontal co-operation is unlikely to produce restrictive effects. Given the variety of co-operation agreements and the different effects they may cause in different market situations, it is impossible to indicate a general market share threshold above which sufficient market power for causing restrictive effects can be assumed.

Depending on the market position of the parties and the concentration in the market, other factors should be considered such as the stability of market shares over time, entry barriers, the likelihood of market entry, and the countervailing power of buyers/suppliers.

### **Assessment criteria under Article 101(3) TFEU**

Where a restriction of competition under Article 101(1) has been proven, Article 101(3) can be invoked as a defence. [Regulation \(EC\) No 1/2003](#) puts the burden of proof on the undertaking invoking the benefit of this provision. There are four cumulative conditions which must be met for co-operation agreements to be exempted:

- the restrictive agreement must lead to **economic benefits**, such as improvements in the production or distribution of products or the promotion of technical or economic progress, i.e. efficiency gains;
- the restrictions must be **indispensable** to the attainment of the efficiency gains;
- **consumers** must receive a **fair share** of the resulting efficiency gains attained by indispensable restrictions;
- the agreement must offer the parties **no possible elimination of competition** in relation to a substantial part of the products in question.

Where these four criteria are met, the efficiency gains generated by an agreement can be considered to offset the restrictions of competition generated by it.

### **Information exchange**

The guidelines provide general principles on the competitive assessment of information exchange, including the assessment under Articles 101(1) and 101(3)

TFEU, which are applicable to all types of horizontal co-operation agreements which include the exchange of information. Information exchange takes various forms such as data shared directly between competitors, data shared indirectly through a common agency or a third party or through the companies' suppliers or retailers. Information exchange can be beneficial for companies, for example by helping companies save costs by reducing their inventories, as well as directly for consumers, for example by reducing their search costs and improving choice. It can, however, in certain situations also lead to restrictions of competition when it enables companies to be aware of their competitors' market strategies. Communication of information among competitors may constitute an agreement, a concerted practice, or a decision with the **object of fixing** prices or quantities. Such types of information exchanges will normally be considered and fined as **cartels**. Outside the area of cartels, information exchange is only considered to restrict competition by object where competitors exchange individualised information regarding intended future prices or quantities. Exchanges of all other types of information, including current prices, will not be treated as restrictions by object and will be assessed as to their restrictive effects on competition.

### **Types of co-operation agreement**

The guidelines also define the characteristics of certain types of cooperation agreement and apply the assessment framework under Articles 101(1) and 101(3) TFEU described above to each of the following types of agreements:

- R&D agreements;
- production agreements;
- purchasing agreements;
- commercialisation agreements;
- standardisation agreements.

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