

## The new Horizontal Guidelines – No Major Changes for R&D Agreements

*On 1 June 2023, the European Commission (“Commission”) adopted the final version of its new horizontals package, comprising revised Block Exemption Regulations on Research and Development Agreements and Specialisation Agreements and revised Guidelines on horizontal cooperation agreements (“Horizontal Guidelines”). The new Block Exemption Regulations and Horizontal Guidelines have replaced the existing equivalent instruments dating from 2010/2011, and became effective as of 1 July 2023.*

*In a series of VBB Client Alerts, we examine key aspects of the Commission’s new horizontals package. In this Client Alert, we look at the treatment of R&D agreements in the new Horizontal Guidelines and R&D Block Exemption Regulation. For such agreements, the Commission evaluated proposals to both tighten and loosen the existing rules during its consultation process. However, the final package largely maintains the status quo, with only minor changes versus the prior rules.*

### **What rules apply to R&D agreements?**

The Horizontal Guidelines and the R&D Block Exemption Regulation set out the framework for the assessment of R&D agreements under EU competition law (specifically Article 101 TFEU). This guidance applies to many different types of R&D agreements, for example (i) agreements for joint R&D by the parties (with each contributing expertise or resources), or R&D conducted by a single party and funded by the other party, (ii) agreements between competitors or non-competitors, (iii) agreements for improvement of existing products or technologies, or the creation of entirely new products/technologies, and (iv) agreements solely for R&D, or also for joint exploitation of the results.

Applying the principles set out in the Horizontal Guidelines and R&D Block Exemption Regulation, companies can assess both whether they may lawfully engage in the R&D agreement, and whether key terms in the R&D agreement are compliant with EU competition law (e.g. concerning access to results of the R&D and pre-existing knowhow, exclusivity and non-compete provisions, control of pricing, allocation of territories, and limits on active and passive sales). As there is practically no case law addressing such agreements, the Horizontal Guidelines and R&D Block Exemption Regulation provide the best available source of guidance and legal certainty for companies and their advisors considering R&D agreements.

## ***Do companies need to be concerned about these rules?***

As acknowledged in the Commission's consultation documents, there have been very few investigations by competition authorities in the EU concerning R&D agreements, with the authorities admitting that they have little, if any, experience applying competition rules to R&D agreements. This reflects the fact that most R&D agreements are pro-competitive, and therefore unlikely to ever be subject to scrutiny by competition authorities or potential fines.

Companies engaging in R&D agreements nevertheless are well advised to check the compliance of their agreements with EU competition law. Non-compliance may have the effect that key provisions in R&D agreements are not legally enforceable. In the event of a dispute between collaboration partners, a party may seek to rely on competition law to avoid complying with a contractual provision, or as a defence in litigation. It is therefore important for companies to check the compliance of the provisions in their R&D agreements with the requirements set out in the Horizontal Guidelines and R&D Block Exemption Regulation.

## ***What are the key changes in the new rules?***

The new R&D Block Exemption Regulation and the chapter of the Horizontal Guidelines on R&D agreements only include a few relatively minor changes:

- **Calculation of Market Share Thresholds.** Consistent with the existing rules, the new R&D Block Exemption Regulation includes market share thresholds for R&D agreements among competitors, above which the parties will not qualify for the Block Exemption. While the key market share threshold of 25% remains unchanged, the new R&D Block Exemption Regulation introduces a principle that, if the parties' market shares in the preceding calendar year are not representative of their market position, market shares must be calculated as an average of the shares for the three preceding calendar years.
- **Joint Setting of Prices or Sales Targets.** Under the existing and new R&D block exemption regulations, an R&D agreement will not qualify for the exemption if it includes any "hardcore restrictions". Such hardcore restrictions include the fixing of prices or the setting of sales targets for the products resulting from the R&D. However, both the existing and new block exemptions include an exception allowing joint fixing of prices or sales targets.

In the new R&D Block Exemption Regulation, the wording of the applicable exception is slightly modified, and provides that joint setting of prices / sales targets will qualify for the exception if exploitation is conducted jointly and includes joint distribution of the contract products or joint licensing of the contract technologies. While the existing R&D Block Exemption includes similar wording, the specific terminology and definitions for what qualifies as a "joint" activity differs from the prior version. These changes may be relevant for parties seeking to structure future R&D collaborations in a manner that allows joint setting of prices or sales targets.

- **Definition of Passive Sales.** Under the existing and new R&D block exemption regulations, provisions that would restrict "passive" (unsolicited) sales may also constitute hardcore restrictions. Consistent with recent changes to the rules applicable to Vertical Agreements, the new R&D Block Exemption Regulation specifies that the definition of "passive sales" also includes sales resulting from participation in public procurement or responding to private invitations to tender.

## ***Did the Commission finally implement its intention to introduce stricter rules to protect competition for innovation?***

During the consultation process, the Commission proposed to tighten the application of the R&D Block Exemption Regulation to protect competition for innovation. Specifically, the Commission proposed to include an additional condition for the block exemption, that it will only apply if there are at least three or more competing and comparable R&D efforts by third parties. This additional condition attracted significant criticism during the consultation process as being unworkable in practice, particularly as companies may not have information about their competitors' R&D efforts necessary to determine whether they meet this requirement. Ultimately, the Commission did not include this proposed change.

## ***Are the rules the same in the EU and UK?***

Following the departure of the UK from the EU, the UK has adopted a new R&D Agreements Block Exemption Order, which came into force earlier this year. While the UK's R&D Block Exemption Order is largely similar to the EU R&D Block Exemption Regulation, significant differences exist. For example, the UK Order includes the additional – controversial – condition (ultimately abandoned in the EU, as discussed above) that the exemption will only apply to R&D agreements among competitors if there are at least three or more competing and comparable R&D efforts by third parties. There are also differences in the wording of the conditions under which jointly setting prices or sales targets will not constitute a hardcore restriction, as well as the definitions of active and passive sales. Consideration of these differences and the specific requirements in the UK will be particularly important for R&D agreements involving parties based in the UK, governed by UK law, or having an impact on the UK market.

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