An overview of competition issues impacting horizontal commercial agreements

Produced in partnership with K&L Gates LLP

EU competition law recognises that certain horizontal agreements can lead to substantial economic benefits, in particular if they combine complementary activities, skills or assets. Horizontal co-operation can be a means of sharing risk, saving costs, increasing investments, pooling knowhow, enhancing product quality and variety, and launching innovation faster—thereby delivering benefits for consumers and EU trade, as well as attractive commercial advantages for the companies concerned.

However, horizontal agreements can lead to competition law issues resulting in significant penalties and risks for participants, for example, where the parties agree to fix prices or output or to share markets, or if the co-operation enables them to maintain, gain or increase market power and, thereby, leads to negative market effects with respect to prices, output, product quality, product variety or innovation.

Accordingly, horizontal agreements should always be carefully reviewed to ensure that any restrictive provisions do not give rise to competition concerns. The assessment in Steps 1 and 2 below, together with an analysis of the potential for abuse of dominance, should always be carried out whenever such an agreement is contemplated or reviewed.

For competition law considerations applicable to commercial agreements between non-competitors.

Two step guide for assessing a horizontal agreement

Article 101(1) TFEU prohibits agreements the object or effect of which is to restrict competition.

References: Art 101 TFEU

However, Article 101(3) TFEU provides certain criteria for exemption from Article 101(1) TFEU, where an agreement results in pro-competitive efficiencies which outweigh its anti-competitive effects.

The European Commission has published guidelines intended to assist businesses in assessing the compatibility of an individual horizontal agreement with Article 101 TFEU.

References: EU horizontal cooperation guidelines

In addition, the Commission’s Horizontal Guidelines also define the characteristics of specific types of horizontal cooperation agreements and apply the assessment framework under Article 101 TFEU to each of these. They are:
- research and development ("R&D") agreements (see further, Research and development agreements)
- production agreements, including subcontracting and specialisation agreements (see further, Joint production agreements)
- purchasing agreements (see further, Joint purchasing agreements)
- commercialisation agreements (see further, Joint commercialisation agreements)
- standardisation agreements and standard terms (see further, Standardisation agreements), and
- information exchange (see further, Information exchange and disclosure-managing heightened competition risk).

The key assessment principles for each of these are summarised in quick reference guides below.

The assessment of whether a horizontal agreement infringes Article 101 TFEU or not consists of two main steps:

Step 1

Step 1 under Article 101(1) TFEU is to assess whether the agreement has an anti-competitive object or actual or potential restrictive effects on competition.
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Even if an agreement does not have an anti-competitive object, it might have an anti-competitive effect. This requires an appreciable adverse effect on at least one of the parameters of competition on the market (such as price, output, product quality, product variety or innovation) (see Assessing the anti-competitive effect of an agreement).

Step 2,

Step 2 under Article 101(3) TFEU, which only becomes relevant when an agreement is found to be restrictive of competition within the meaning of Article 101(1) TFEU, is to determine the pro-competitive benefits produced by the agreement and to assess whether those pro-competitive effects outweigh the restrictive effects on competition. If the pro-competitive effects do not outweigh a restriction of competition, Article 101(2) TFEU stipulates that the agreement will be automatically void.

Article 101(3) TFEU can be applied in individual cases (see Individual Exemptions under Article 101(3) TFEU).

In addition, a so-called ‘block exemption’ regulation might apply. The block exemption regulations of most relevance to horizontal agreements relate to R&D agreements and specialisation agreements (see quick reference guides below). If an agreement meets the criteria set out in one of these block exemptions, it will be automatically valid and enforceable.

Steps 1 and 2 for assessing a horizontal agreement under Article 101 TFEU are set out below.

Step 1: Assessing whether a horizontal agreement has an anti-competitive object or actual or potential restrictive effects on competition

First check whether Article 101(1) TFEU applies

It is necessary at the outset to check whether an exemption from Article 101(1) TFEU might apply.

- Independent parties. Article 101 TFEU only applies to agreements between two or more independent undertakings, so an agreement will generally be safe from scrutiny under Article 101 TFEU, if the parties form part of the same corporate group or economic entity (or if the parties have a true agency relationship, insofar as the principal carries the commercial risks) (see The construct of parental company liability).
- Appreciable effect on trade. Article 101 TFEU only applies to those horizontal agreements which may appreciably affect trade between EU Member States. Accordingly, many agreements having only a minimal impact on EU trade will escape scrutiny under EU competition rules. The European Commission’s Notice on agreements of minor importance provides that the European Commission will not investigate an agreement where:

References:

EU Notice on agreements of minor importance

> the parties are small or medium-sized enterprises (SMEs) with fewer than 250 employees and annual turnover not exceeding EUR 50 million or assets not exceeding EUR 43 million; or
> in the case of larger companies, the parties’ combined market shares do not exceed 10% for agreements between actual or potential competitors or 15% for agreements between non-competitors (the 10% threshold also applies where it is difficult to classify the agreement as being between competitors or non-competitors).

- Requirements under national legislation. Article 101 TFEU does not apply if anti-competitive conduct is required of companies by national legislation, or if the latter creates a legal framework which precludes all scope for competitive activity on their part. However, companies remain subject to Article 101 TFEU if a national law merely encourages or makes it easier for them to engage in anti-competitive conduct. In other words, the fact that public authorities encourage a horizontal co-operation agreement does not necessarily mean that it is permissible under Article 101 TFEU.

However, an agreement can only benefit from the De Minimis Notice if it does not include any so-called ‘hardcore’ restrictions. These include price-fixing and market-sharing restrictions, and are considered further below. In addition, note that national competition rules might apply even if an agreement is minor enough to be exempted under EU law (see Assessing the anti-competitive effect of an agreement).

Second—consider the relationship between the contracting parties

The Horizontal Guidelines recognise that some categories of horizontal agreements are not, by their very nature, likely to infringe Article 101(1) TFEU.

This is normally true for cooperation that does not imply a coordination of the parties’ competitive behaviour in the market, such as:

- cooperation between non-competitors
- cooperation between competing companies that cannot independently carry out the project or activity covered by the cooperation, or
- cooperation concerning an activity which does not influence the relevant parameters of competition (price, costs, output etc).

These categories of cooperation will only come under Article 101(1) TFEU if they involve companies with significant market power and are likely to cause foreclosure problems with respect to third parties. See further Remember Article 102 below.
Third—ensure that the agreement does not contain any hardcore restrictions

As mentioned above, restrictions of competition by object are those that by their very nature have the potential to restrict competition. These agreements are presumed to have negative market effects and so it is not necessary to examine the actual or potential effects of an agreement on the market once its anti-competitive object has been established.

A restriction of competition by object exists where an agreement contains one or more ‘hardcore’ restrictions. The most prominent types of hardcore restrictions in horizontal agreements are described below.

In agreements between competitors—restrictions which, directly or indirectly, have as their object:

• price fixing—ie restrictions on one or more competitors’ ability to determine price and which therefore directly or indirectly seek to curtail or reduce price competition. Such restrictions include provisions for the charging of uniform prices, collective resale price maintenance agreements, obligations not to offer discounts, the adoption of common accounting procedures, and open pricing information schemes. Provisions which can directly or indirectly facilitate price fixing (eg which facilitate the sharing of price-related information) also risk falling foul of the law.

• market sharing—ie provisions under which the parties agree to apportion particular markets (eg territories or customer groups) between themselves. For example, an agreement cannot state that each competitor will have exclusivity over a specific territory or customer group and the others will not poach on its ‘patch’.

• restrictions on output or sales—ie quotas and other provisions restricting the quantities of goods or services to be produced, bought or supplied by competitors. Some agreements involving restrictions on production may be beneficial (eg R&D agreements, joint production agreements, specialisation agreements and standardisation agreements). However, where provisions restrict output without producing any efficiencies they will be prohibited (see further Step 2: Assessing whether any pro-competitive effects outweigh the restrictive effects on competition below). Look out also for provisions requiring or allowing for the exchange of production, capacity, sales or customer information, or ‘compensation’ provisions (eg which provide for the payment of compensation for compliance with production quotas).

In agreements between non-competitors—restrictions which, directly or indirectly, have as their object:

• price fixing and resale price maintenance—ie restrictions on a counter-party’s ability to determine the price at which it resells a product or service to customers, in particular, the setting of a fixed or minimum resale price (there are limited exceptions for maximum or recommended resale prices, provided these are not taken to be actual prices). Illegal resale price maintenance can be achieved by indirect means, for example, by fixing the distribution margin or the maximum level of discount the counter-party may grant from a prescribed price level, by making rebates or the reimbursement of costs subject to the observance of a given price level; by linking the prescribed resale price to the resale prices of competitors; or by threats, warnings, or sanctions for failure to observe a set price.

• certain territorial or customer sales restrictions—ie provisions or measures preventing or disincentivising a counter-party from making passive sales (ie in response to unsolicited requests) to customers outside a specific territory or customer group. These can include express obligations such as an explicit prohibition on sales, or an obligation to refer any orders received from customers outside the reserved territory or customer group to other companies. They can also include indirect measures, such as incentives or disincentives (eg ‘compensation’/bonus schemes linked to compliance), less favourable terms as compared with other counter-parties or the threat of sanctions for non-compliance.

Some limited exceptions to this prohibition exist, namely restrictions preventing:

• active sales to territories or customers reserved to exclusive distributors
• sales by wholesalers to end users
• sales by members of a selective distribution system to unauthorised distributors, and
• sales of components, sold to the buyer for use in manufacturing goods, to competitors of the supplier.

Note that if the agreement in question is an R&D or specialisation agreement, the terms of the relevant block exemption should be consulted to ensure none of the specific hardcore restrictions identified in those block exemptions are present. See further, quick reference guides below.

Fourth—consider whether there are any appreciable adverse effects on competition

Even if an agreement does not contain a hardcore restriction (and thus no anti-competitive object is presumed), it is necessary to ensure that it does not have a potentially anti-competitive effect (see Assessing the anti-competitive effect of an agreement. For this analysis it is not sufficient that the agreement limits competition between the parties. It must also be likely to affect competition in the market to such an extent that negative market effects as to prices, output, innovation or the variety or quality of goods and services can be expected.

Whether the agreement is able to cause such negative market effects depends on the economic context, taking into account:

• the nature and content of the agreement
• the parties’ combined market power, and
• other structural factors.

Each of these factors is considered in turn.
The nature and content of the agreement

The nature and content of an agreement relates to factors such as the area and objective of the cooperation, the competitive relationship between the parties and the extent to which they combine their activities. These factors indicate the likelihood of the parties coordinating their behaviour in the market.

As a general rule:

- In some cases the nature of the cooperation indicates from the outset the applicability of Article 101(1) TFEU. This is the case for agreements that have as their object a restriction of competition by means of price fixing, output limitation or sharing of markets or customers—ie the hardcore restrictions discussed above.
- Certain categories of agreements are less risky from a competition law perspective than others, because they are less likely to include restrictions with respect to prices and output. These include most R&D agreements and cooperation agreements to set standards or improve environmental conditions. If these types of agreements have negative effects at all, these are likely to be on innovation or the variety of products. They may also give rise to foreclosure problems. See further Remember Article 102 below.
- Other types of cooperation such as agreements on production or purchasing typically cause a certain degree of commonality in costs. If this degree is significant, the parties may, more easily, coordinate market prices and output. See further quick reference guides below.

Parties’ combined market power

Regard should be had to how an agreement might increase or strengthen the parties’ market power.

As mentioned, EU law generally recognises that where the parties do not have market power, the effects of co-operation are unlikely to be anti-competitive.

Factors that contribute to the parties’ combined market power include their market shares, brand strength, bargaining power, goodwill, intellectual property (eg patent) portfolio and so on.

Conversely, the respective market positions of their competitors should also be taken into account in determining whether the agreement will impact negatively on competition to a significant degree. Conversely, the respective market positions of their competitors should also be taken into account in determining whether the agreement will impact negatively on competition to a significant degree.

Other structural factors

Other factors that should be taken into account in this assessment include:

- countervailing buyer or supplier power
- barriers to entry in the relevant market; and
- other features of the market which may make a reduction of competition more likely (eg a declining market or failing firms).

Step 2: Assessing whether any pro-competitive effects outweigh the restrictive effects on competition

If, following the assessment at Step 1, it appears that Article 101(1) TFEU is breached by the agreement, it is necessary to analyse whether it delivers sufficient benefits for exemption under Article 101(3) TFEU. See Individual Exemptions under Article 101(3) TFEU.

An agreement which meets all of the following criteria will escape invalidity and liability under Article 101(1) TFEU:

- Firstly—the agreement improves the production or distribution of goods or promotes technical or economic progress. This means that the agreement must result in efficiency gains which enable, for example, cheaper and/or higher quality goods to be produced, or faster innovation. The Commission’s Article 101(3) Guidelines set out the information necessary in order to substantiate a claim of efficiency gains, including the nature of the claimed efficiencies, the causal link between the agreement and the efficiencies, the likelihood and magnitude of the efficiencies and how and when such efficiencies would be achieved. Speculative or general claims will not suffice.

References:

EU Article 101(3) guidelines

- Secondly—the agreement allows consumers a fair share of the resulting benefit. The Article 101(3) Guidelines apply specific principles to different types of benefits that can be passed on (eg a distinction is drawn between cost benefits and other benefits such as higher quality products).
- Thirdly—the agreement does not impose on the parties restrictions which are not indispensable to the attainment of the efficiency objectives. In other words, the restrictions are reasonably necessary to achieve the efficiency gains and are the least restrictive means possible of doing so.
- Fourthly—the agreement does not afford the parties the possibility of eliminating competition in respect of a substantial part of the product market in question. This is particularly concerned with a situation where one of the parties is dominant or becomes dominant as a result of the agreement, see Remember Article 102 below.

In addition, if you are preparing or reviewing an R&D or specialisation agreement, check to see that it complies with the specific requirements of the relevant block exemption to ensure that it is automatically exempted.

Remember Article 102 TFEU

Where one of the parties enjoys a dominant market position, it is important to consider whether the horizontal agreement might give rise to an abuse of dominance under Article 102 TFEU.

References:

Art 102 TFEU
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Article 102 TFEU prohibits the abuse of a dominant position within the EU or in a substantial part of it (eg nationally or regionally) in so far as it may affect trade between Member States.

In particular, consider whether the horizontal agreement could result in a party acquiring or strengthening its market power, such that competitors or potential competitors (including upstream or downstream) risk being foreclosed—ie their market access possibilities are restricted, eg through restrictions on access to raw materials, technology or knowhow.

Even if an agreement does not contain the hardcore restrictions described above, the risk of potential or actual anti-competitive effects are much greater where it enjoys or will acquire market power and could be seen to be abusing this through the horizontal agreement.

**Horizontal cooperation quick reference guides**

The Horizontal Guidelines provide detailed guidance on how the assessment framework under Article 101(1) and (3) TFEU should be applied to six specific types of cooperation, namely:

- research and development ('R&D') agreements (see further, Research and development agreements)
- production agreements (see further, Joint production agreements)
- purchasing agreements (see further, Joint purchasing agreements)
- commercialisation agreements (see further, Joint commercialisation agreements)
- standardisation agreements and standard terms (see further, Standardisation agreements), and
- information exchange (see further, Information exchange and disclosure-managing heightened competition risk).

The key principles applicable to these forms of cooperation are summarised below.

**Research and Development ('R&D') Agreements**

R&D agreements vary in form and scope, and range from outsourcing certain R&D activities to the joint improvement of existing new technologies and cooperation concerning the research, development and marketing of completely new products.

EU competition law generally accepts that certain contractual restrictions on the parties’ independence may be necessary in order to encourage joint R&D initiatives, which are important in driving innovation in markets.

Moreover, the Horizontal Guidelines provide that R&D agreements are only likely to give rise to restrictive effects on competition where the parties have market power on the existing markets and/or competition with respect to innovation is appreciably reduced.

References:
EU horizontal cooperation guidelines, para 133

Accordingly, the Horizontal Guidelines provide that most R&D agreements will not fall within Article 101(1) TFEU. In particular, the following types of agreement will generally not fall foul of Article 101(1) TFEU—however careful consideration must always be given to the parties’ positions in the market(s) and whether innovation in a new or existing market could be reduced or slowed down as a result of the cooperation:

References:
EU horizontal cooperation guidelines, para 129

- agreements relating to co-operation in R&D at an early stage, far removed from the exploitation of possible results

References:
EU horizontal cooperation guidelines, para 129

- R&D agreements between non-competitors

References:
EU horizontal cooperation guidelines, para 130

- agreements where the parties are not able to carry out the necessary R&D independently, for instance, due to their limited technical capabilities

References:
EU horizontal cooperation guidelines, para 130

- agreements with parties that are not active in the exploitation of results (eg specialised companies, research institutes or academic bodies), and

References:
EU horizontal cooperation guidelines, para 131

- ‘pure’ R&D agreements, that is, R&D agreements where joint R&D is carried out but which do not contemplate the joint exploitation of possible results by means of licensing, production or marketing.

References:
EU horizontal cooperation guidelines, para 132

For more detail on the assessment of R&D agreements, see further Research and development agreements.

**R&D Block Exemption**

Note, in addition, that the European Commission has also adopted a specific block exemption regulation under Article 101(3) TFEU in respect of R&D agreements (the ‘R&D Block Exemption’)

References:
Regulation 1217/2010

This provides automatic exemption for an R&D agreement that complies with the following conditions:

- the agreement falls within one of the defined categories in the R&D Block Exemption
- if the parties are competitors or potential competitors, their combined market share does not exceed 25% of the relevant market for the products capable of being improved or replaced by the contract products; and
- the agreement does not contain any hardcore restrictions.

These restrictions, contained in the block exemption, include:

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References:
Regulation 1217/2010, art 5

- non-compete obligations restricting the parties from carrying out R&D independently or with third parties in an unrelated field at any time
- non-compete obligations restricting the parties from carrying out R&D in the same or related field after the completion of the joint R&D
- restrictions on the parties’ output or sales (although an agreement can restrict a party’s freedom to manufacture products or supply services which compete with the products or services developed under the R&D agreement, but only for the duration that the parties have agreed to jointly exploit the results)
- restrictions on active sales of products or services developed under the R&D agreement (except where territories have been exclusively allocated between the parties); and
- with limited exceptions, restrictions on granting licences to third parties to exploit the results of the R&D.

Production agreements

Production agreements vary in form and scope, and can provided that production is carried out by only one party or by two or more parties.

The Horizontal Guidelines recognise that companies can produce jointly by way of a joint venture (ie a jointly controlled company) or by looser forms of co-operation in production such as horizontal subcontracting agreements where one party (the ‘contractor’) entrusts to another party operating at the same level of the market (the ‘subcontractor’) the production of a product.

References:
EU horizontal cooperation guidelines, paras 150 and 151
EU horizontal cooperation guidelines, para 132

In addition to subcontracting agreements with a view to expanding production, horizontal subcontracting agreements can comprise:

- ‘unilateral specialisation agreements’, where one party agrees to fully or partly cease production of certain products or to refrain from producing those products and to purchase them from the other party, which agrees to produce and supply the products, and
- ‘reciprocal specialisation agreements’, where two or more parties agree, on a reciprocal basis, to fully or partly cease or refrain from producing certain but different products and to purchase those products from the other parties, which agree to produce and supply them

References:
EU horizontal cooperation guidelines, para 152

The Horizontal Guidelines provide that production agreement may raise the following competition concerns:

References:
EU horizontal cooperation guidelines, paras 157-159

- production agreements (and, in particular, production joint ventures), can lead to a direct limitation of competition between the parties, because they may lead the parties to directly align output levels, quality, prices or other competitive elements
- production agreements may result in a collusive outcome through the parties’ coordination of their competitive behaviour as suppliers, and
- production agreements may lead to anti-competitive foreclosure of third parties in a related market (for example, the downstream market relying on inputs from the market in which the production agreement takes place).

The Horizontal Guidelines set out factors that need to be taken into account in determining whether these risks are likely to arise, including in particular the parties’ market shares, whether they are close competitors, whether customers have limited possibilities of switching suppliers, product and market characteristics (eg how dynamic a market is), the commonality of costs between the parties and so on.

References:
EU horizontal cooperation guidelines, paras 171-182

For more detail on the assessment of joint production agreements, see further Joint production agreements.

Specialisation Block Exemption

Provided it meets certain conditions, a joint production agreement, unilateral specialisation agreement, or reciprocal specialisation agreement may also benefit from automatic exemption under the Specialisation Block Exemption published by the European Commission. The key conditions for exemption are that:

References:
Regulation 1218/2010

- it falls within one of the defined categories in the Specialisation Block Exemption
- the parties’ combined market share on the relevant market does not exceed 20%; and
- it does not contain any hardcore restrictions. A hardcore restriction is any restriction which has the following objective

References:
Regulation 1218/2010, art 4

- the fixing of sales prices, except that in the context of a joint distribution arrangement or production joint venture, it is generally permissible to fix prices charged to immediate customers
- the limitation of output or sales, except that:
- in the case of a unilateral or reciprocal specialisation agreement, the parties can generally agree the amount of products to be supplied, and
- in the case of a joint production agreement, the parties
can agree to set the capacity and production volume of a production joint venture and sales targets, or
the allocation of markets or customers.

Purchasing agreements

These are agreements concerning the joint purchase of products. According to the Horizontal Guidelines, joint purchasing can be carried out by:
- a jointly controlled company
- by a company in which many other companies hold non-controlling stakes
- by a contractual arrangement or by even looser forms of cooperation.

Joint purchasing arrangements usually aim at the creation of buying power which can lead to lower prices or better quality products or services for consumers.

References:
EU horizontal cooperation guidelines, para 194

However, joint purchasing arrangements may give rise to the following competition law issues:
- restrictive effects on competition on the purchasing and/or downstream selling market or markets, such as increased prices, reduced output, product quality or variety, or innovation, market allocation
- anti-competitive foreclosure of competing purchasers (ie by limiting their access to efficient suppliers); and/or
- a collusive outcome, if they facilitate the coordination of the parties’ behaviour.

A number of factors need to be considered in assessing whether these issues may arise, including:
- the parties’ market power as suppliers and buyers. According to the Horizontal Guidelines, there is no absolute threshold above which it can be presumed that the parties to a joint purchasing arrangement have market power so that the agreement is likely to give rise to restrictive effects on competition within the meaning of Article 101(1) TFEU.

However, in most cases it is unlikely that market power exists if the parties have a combined market share not exceeding 15% on both the purchasing and selling market or markets. In any event, if the parties’ combined market shares do not exceed 15% on both the purchasing and the selling market or markets, it is likely that the conditions of Article 101(3) TFEU are fulfilled.

References:
EU horizontal cooperation guidelines, paras 201, 202 and 208
- the number of suppliers in the market-foreclosure in particular is most likely if there are a limited number of suppliers and there are barriers to entry on the supply side of the upstream market, and

References:
EU horizontal cooperation guidelines, para 203
- other market factors which make anti-competitive conduct such as collusion easier eg a commonality of costs.

Remember: to the extent a joint purchasing arrangement involves both horizontal and vertical elements, it is important to have regard to both the Horizontal Guidelines and the competition law considerations applicable to vertical agreements. See further Competition issues impacting vertical commercial agreements.

For more detail on the assessment of joint purchasing agreements, see further Joint purchasing agreements.

Commercialisation agreements

Commercialisation agreements involve cooperation between competitors in the selling, distribution or promotion of their substitute products. They range from joint selling agreements which cover a joint determination of all commercial aspects related to the sale of a product (including price) to more limited agreements that only address one specific commercialisation function (eg distribution, after-sales service, or advertising).

Commercialisation agreements typically give rise to the following competition law risks:
- price fixing
- output limitation (because the parties may decide on the volume of products to be put on the market)
- market or customer sharing (eg where the parties’ production plants are located in different geographic markets), and
- the exchange of strategic information, which may result in a collusive outcome.

It is necessary to apply the general assessment criteria set out above, Step 1: assessing whether a horizontal agreement has an anti-competitive object or actual or potential restrictive effects on competition, in particular to ensure that the agreement contains no direct or indirect hardcore restrictions.

In addition, regard must be had to:
- the parties’ market positions. Provided there are no hardcore restrictions, the Horizontal Guidelines provide that commercialisation agreements between competitors can only have restrictive effects on competition if the parties have some degree of market power. In most cases, it is unlikely that market power exists if the parties have a combined market share not exceeding 15%. In any event, if the parties’ combined market share does not exceed 15% it is likely that the conditions of Article 101(3) TFEU are fulfilled.

References:
EU horizontal cooperation guidelines, para 240
- the characteristics of the relevant market, such as a commonality of costs between the parties, as these will affect the likelihood of collusion, and
• the type and extent of information shared. In most commercialisation agreements, some degree of sensitive information exchange is required in order to implement the agreement (eg on marketing strategy, pricing etc)-however consider whether this could give rise to a collusive outcome with regard to the parties’ activities within and outside the cooperation.

Remember: if the agreement is a distribution agreement, in addition to applying the assessment criteria in the Horizontal Guidelines, the principles of the Vertical Block Exemption might also need to be consulted. (The Vertical Block Exemption applies to non-reciprocal vertical agreements between competitors-See further Competition issues impacting vertical commercial agreements.

Standardisation agreements and standard terms

Standardisation agreements

Standardisation agreements have as their primary objective the definition of technical or quality requirements with which current or future products, production processes, services or methods may comply. Standardisation can take different forms, ranging from the adoption of standards by the recognised European or national standards bodies to agreements between independent companies.

References:
EU horizontal cooperation guidelines, para 257

Note, however, that the Horizontal Guidelines do not apply to the preparation and production of technical standards as part of the execution of public powers or related to the provision of professional services (eg rules of admission to a profession), which are governed by different legislation.

Standardisation agreements normally increase competition and lower output and sales costs, benefiting economies as a whole. In addition, standards may maintain and enhance quality, provide information and ensure interoperability and compatibility (thus increasing value for consumers).

However, in certain circumstances, they can give rise to restrictive effects on competition by potentially restricting price competition and limiting or controlling production, markets, innovation or technical development.

The general assessment criteria set out above, Step 1: assessing whether a horizontal agreement has an anti-competitive object or actual or potential restrictive effects on competition, need to be applied in order to determine whether a standardisation agreement might have an anti-competitive object or effect.

In addition, the Horizontal Guidelines require an ‘effects-based assessment’ of the likely effects of the standard on the market(s) concerned to be carried out. The following factors should be taken into account in carrying out this assessment:

- whether the members of a standard-setting organisation remain free to develop alternative standards or products that do not comply with the agreed standard
- access to the standard
- the openness of the standard-setting process (including if stakeholders are kept informed and consulted on the work in progress), and
- the market shares of the goods or services based on the standard, and whether the agreement discriminates against any of the participating or potential members

References:
EU horizontal cooperation guidelines, paras 292-299

In particular, the Horizontal Guidelines set out the following circumstances, in which standardisation agreements will normally not infringe Article 101(1) TFEU:

- where the parties do not have market power. Restrictive effects are most unlikely in a situation where there is effective competition between a number of voluntary standards, or

References:
EU horizontal cooperation guidelines, para 277

In the case of standard-setting agreements which risk creating market power, where:

- participation in standard-setting is unrestricted (ie all competitors in the market(s) affected by the standard can participate in the process leading to the selection of the standard and voting rights/procedures are objective and non-discriminatory)
- the procedure for adopting the standard in question is transparent
- the standardisation agreement contains no obligation to comply with the standard, and
- the standardisation agreement provides access to the standard on fair, reasonable and non-discriminatory terms.

References:
EU horizontal cooperation guidelines, paras 280-283

Note that special additional guidelines apply in respect of standards involving intellectual property rights (IPR).

References:
EU horizontal cooperation guidelines, paras 284-291 and 298-299

For more detail on the assessment of standardisation agreements, see further Standardisation agreements.

Standard terms

Standard terms relate to the standard terms and conditions of sale or purchase elaborated in certain industries by a trade association or directly by the competing companies. Standard terms are covered by the Horizontal Guidelines to the extent that they establish standard conditions of sale or purchase of goods or services between competitors and consumers (and
not the conditions of sale or purchase between competitors) for substitute products. Standard terms elaborated individually by a company solely for its own use when contracting with its suppliers or customers are not horizontal agreements and are, therefore, not covered by the Horizontal Guidelines.

The establishment and use of standard terms must be assessed in the appropriate economic context and in the light of the situation on the relevant market. According to the Horizontal Guidelines, as long as participation in the actual establishment of standard terms is unrestricted for the competitors in the relevant market (either by participation in the trade association or directly), and the established standard terms are non-binding and effectively accessible for anyone, such agreements are not likely to give rise to restrictive effects on competition, subject to risks such as: the common application of standards resulting in a de facto alignment by competitors and therefore a limitation in product choice; a negative impact on product quality, product variety and innovation (in particular if the standard terms are binding on the entire market); and/or negative effects on competition relating to prices.

References:
EU horizontal cooperation guidelines, para 300-307

It is generally not justified to make standard terms binding and obligatory for the industry or the members of the trade association that established them. The possibility is not, however, ruled out in the Horizontal Guidelines that making standard terms binding may, in a specific case, be indispensable to the attainment of the efficiency gains generated by them.

References:
EU horizontal cooperation guidelines, para 320

Information exchange

It is important to remember that the exchange of information between competitors needs to be assessed in light of Article 101 TFEU, even if there is no formal agreement in place.

The exchange of market information may lead to prohibited restrictions of competition, in particular where it is liable to enable undertakings to be aware of market strategies of their competitors. The competitive outcome of information exchange depends on the characteristics of the market (such as concentration, transparency, stability, symmetry, complexity etc) as well as on the type of information that is exchanged.

References:
EU horizontal cooperation guidelines, para 58

Moreover, information exchange among competitors may:

• constitute an agreement, a concerted practice, or a decision by an association of undertakings with the object of fixing eg prices or quantities—such information exchange would normally be considered and fined as a cartel; or
• facilitate the implementation of a cartel by enabling companies to monitor whether the participants comply with the agreed terms—such information exchange would be assessed as part of the cartel.

References:
EU horizontal cooperation guidelines, para 59

For more detail on the assessment of agreements involving the exchange of information, see further Information exchange and disclosure—managing heightened competition risk.

References: