June 2023

EU Competition Law Newsletter

Highlights

— Commission adopts revised Horizontal Block Exemption Regulations and Horizontal Guidelines

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On June 1, 2023, the Commission published revised Research & Development and Specialization Block Exemption Regulations ("R&D BER" and "Specialization BER", together the "HBERs")[1], as well as revised Guidelines on Horizontal Cooperation ("Horizontal Guidelines").[2] The new HBERs exempt certain agreements from the prohibition of Article 101(1) of the Treaty on the Functioning of the EU ("TFEU"), subject to specific conditions, and accordingly create a so-called "safe harbor" for certain forms of horizontal cooperation. Relatedly, the Horizontal Guidelines aim to guide undertakings in the interpretation and application of the revised HBERs, and thereby in their assessment of "various common types of horizontal cooperation agreements".[3]

The revised HBERs were published following an extensive four-year review process that started back in 2019.[4] And while the Commission's review found that the 2010 HBERs[5] and Horizontal Guidelines[6] enabled cooperation in an economically desirable way, it also demonstrated that there was still room for improvement.[7] The main objective of the new HBERs and Horizontal Guidelines is to address "the economic and societal developments of the last ten years," notably the green and digital transition.[8]

[1] Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, OJ 2023 L 143/9 ("the revised R&D BER"); Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialization agreements, OJ 2023, L 143/20 ("the revised Specialization BER").

[2] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, pending publication in the Official Journal.

[3] European Commission, Explanatory note on the main changes proposed for the horizontal block exemption regulations and horizontal guidelines, para. 3, available at: Explanatory note on the revised HBERs and Horizontal Guidelines.

[4] European Commission, EU Competition rules on horizontal agreements between companies – evaluation, available on the Commission's Have your say portal.

[5] Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, OJ 2010 L 335/36 ("the 2010 R&D BER"); Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialization agreements, OJ 2010 L 335/43 ("the 2010 Specialization BER").

[6] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ 2011 C 11/1.

[7] Explanatory note on the revised HBERs and Horizontal Guidelines, paras 5-6.

[8] *Ibid*., para. 6.

The new HBERs will enter into force on July 1, 2023, and will supersede the 2010 HBERs, which are set to expire on June 30, 2023. This article highlights some of the key changes brought about by the revised package.

The revised HBERs

The Commission introduces a number of notable changes in the revised HBERs:

— ***Revocation powers.*** The revised HBERs now grant the Commission and national competition authorities the power to revoke the benefit of an individual exemption if its effects are incompatible with Article 101(3) TFEU.[9]

— ***Revised method for calculation of market shares.*** The revised HBERs (R&D and Specialization) clarify the method for calculating market shares to benefit from an exception. While market shares are to be calculated in principle based on sales data of the preceding calendar year, an average of the three preceding calendar years should be considered if this is more representative of the parties' actual market position.[10]

— ***Simplified grace period.*** The revised HBERs (R&D and Specialization) simplify the period during which the parties can continue to benefit from the safe harbor if their market shares exceed the exemption thresholds (*i.e.*, the "grace period"). This is now two consecutive calendar years following the year in which the relevant threshold was first exceeded.[11]

— ***Expansion of scope.*** The revised R&D BER clarifies that parties to an R&D agreement that do not compete on markets for existing products or technologies may nonetheless be competitors in innovation.[12] This change seeks to protect innovation competition in cases where it may not be possible to apply the regulation's market share thresholds.[13] Under the revised Specialization BER, unilateral specialization agreements concluded among more than two parties can now benefit from an exemption.[14] Unilateral specialization agreements were previously defined only by reference to two parties.[15] This change will likely be of special interest to SMEs which—due to their limited size and resources—may often require more than two parties for an effective specialization agreement.[16]

The Horizontal Guidelines

The Horizontal Guidelines are designed to guide businesses in the assessment of their horizontal forms of cooperation. The revised text sought to provide "clearer and up-to date guidance", including by adding references to the latest case law and additional practical examples.[17] This is reflected in the length of the revised guidelines, which now span more than 150 pages, and has doubled in size compared to the previous version.

The revised Horizontal Guidelines increase legal certainty through important clarifications on existing guidelines and the introduction of new guidance on fast-growing areas.[18] For example, the expanded guidance includes an updated chapter on information exchange, which provides for a new assessment structure of information

[9] Revised R&D BER, Art. 10-11; Revised Specialization BER, Art. 6-7.

[10] Revised R&D BER, Art. 7; Revised Specialization BER, Art. 4; *see also* 2010 R&D BER, Art. 7(a)-(c); 2010 Specialization BER, Art. 5(a)-(c).

[11] Revised R&D BER, Art. 6(5); Revised Specialization BER, Art. 4(d). (Previously, the length of the grace period depended on the increase in market share. *See* 2010 R&D BER, Art. 7(d)-(e); 2010 Specialization BER, Art. 5(d)-(e).)

[12] Revised R&D BER, recital 16; Horizontal Guidelines, para. 99; Explanatory note on the revised HBERs and Horizontal Guidelines, para. 9.

[13] Explanatory note on the revised HBERs and Horizontal Guidelines, para. 9.

[14] Revised Specialization BER, Art. 1(1)(1)(a).

[15] 2010 Specialization BER, *supra,* Art. 1(1)(b).

[16] Explanatory note on the revised HBERs and Horizontal Guidelines, para. 12.

[17] Commission Press Release IP/23/2990, "Antitrust: Commission adopts new Horizontal Block Exemption Regulations and Horizontal Guidelines," June 1, 2023.

[18] Explanatory note on the revised HBERs and Horizontal Guidelines, *supra*, para. 274.

exchanges between horizontal competitors[19] and addresses recent case law and digital developments.[20]

Another noteworthy change is the introduction of a new chapter on sustainability agreements.[21] This chapter addresses the most common forms of sustainability agreements and outlines those that likely fall outside the scope of Article 101(1) TFEU.[22] It also explains how agreements falling under the scope of Article 101(1) TFEU could benefit from an Article 101(3) TFEU exception,[23] underlining that a mere reference to a sustainability objective is insufficient to escape the prohibition.[24]

In addition to introducing a new chapter, the revised guidelines supplement previously existing sections. Notably, the chapter on commercialisation agreements now clarifies the rules pertaining to bidding consortia (*i.e.*, cooperation between undertakings to submit a joint bid in a procurement competition)[25] and introduces—in light of the EU digital transformation—guidance on sharing agreements for mobile telecommunications infrastructure.[26]

Conclusion

The long-awaited revised HBERs and Horizontal Guidelines show that the Commission has sought to provide undertakings with clear and updated tools that can effectively serve as a guide when navigating the complex waters of the application of Article 101 TFEU to the various forms of horizontal cooperation.

Any horizontal cooperation agreements concluded on or after the entry into force of the HBERs on July 1, 2023, must be assessed against these new rules.[27] A transitional period until June 30, 2025, is foreseen for horizontal agreements concluded before July 1, 2023 which fall within the remit of the 2010 HBERs.[28]

[19] *Ibid.*, para. 434.

[20] *Ibid.*, for example, paras. 367-368.

[21] Revised Horizontal Guidelines, chapter 9.

[22] *Ibid.*, section 9.2.

[23] *Ibid.*, section 9.4.

[24] *Ibid.*, para. 521.

[25] *Ibid.*, section 5.4.

[26] Defined as "[a]greements where mobile telecommunications network operators share parts of their network infrastructure, operating costs, and the cost of subsequent upgrades and maintenance." *See* Revised Horizontal Guidelines, *supra*, para. 258.

[27] Commission Press Release IP/23/2990, "Antitrust: Commission adopts new Horizontal Block Exemption Regulations and Horizontal Guidelines," June 1, 2023.

[28] Revised Specialisation BER, Art. 8 and Revised R&D BER, Art. 12.

News

Commission Updates

Commission Publishes DMA Compliance Report Template for Consultation

On June 6, 2023 the Commission launched a consultation[29] on a draft template for the compliance report that gatekeepers will have to submit under the Digital Markets Act[30] ("DMA").[31]

The Draft Compliance Report Under The DMA

The Commission will designate the so-called gatekeepers under the DMA by September 6, 2023. Gatekeepers under the DMA are companies that create bottlenecks between businesses and consumers, and have an entrenched position in digital markets.[32]

Upon designation, gatekeepers will have six months to provide the Commission with a report describing, in a detailed and transparent manner, the measures which they have implemented to comply with the DMA. In particular, the draft template for the compliance report requests gatekeepers to provide:

— **Information about the gatekeeper and its compliance function.**

— **Information on substantive compliance with the DMA obligations**, including: (i) how the gatekeeper assessed its compliance with the DMA (*e.g.*, whether it conducted an internal or external audit); and (ii) the measures the gatekeeper put into place to comply, supported by underlying data and internal documents. In particular, the template lists 19 categories of information that should be included "at minimum" for each measure in place, including *e.g.*, the situation prior to the implementation of the measure, the timeframe within which measure was implemented, its geographic scope, and the technical/engineering changes the measure required. This information must be provided in a separate and standalone annex for each core platform service of the reporting gatekeeper.[33]

— **Information about the role and function of the gatekeepers' head of compliance and compliance officers**, as well as the strategies and policies for managing and monitoring effective compliance.

Gatekeepers must also provide a non-confidential summary of the compliance report which will allow third parties to provide the Commission with "meaningful input" on the gatekeeper's compliance with the DMA.

Gatekeepers will have to update their compliance report annually.

Consultation and Enactment

The draft template lays out a catch-all approach to ensure effective compliance through the periodic reporting obligations under the DMA. Interested parties have until July 5, 2023 to submit their observations on the Commission's draft template for the compliance report—only two days after the deadline for undertakings to

[29] The consultation and the draft template for the compliance report are available on the Commission's website, at https://ec.europa.eu/eusurvey/runner/dma_compliance.

[30] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828, O.J. 2022 L 265/1.

[31] *See* Commission News, "DMA: Commission launches a consultation on the template for compliance report," June 6, 2023, accessible here.

[32] Specifically, a company will be designated as a "gatekeeper" under the DMA if it meets the three cumulative thresholds set out in Article 3(3) DMA: *i.e.*, (i) it has a significant impact on the internal market; (ii) it provides a core platform service which is an important gateway for business users to reach end users; and (iii) it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future.

[33] Core platform services are types of online services that act as a gateway between a large number of users and businesses. Article 2(2) DMA contains a list of such services, which includes search engines, social networks, operating systems, web browsers, online advertising services, and cloud computing services.

notify the services which may lead them to be designated as gatekeepers under Article 3 DMA.[34] This consultation will enable the Commission to finalize the template compliance report.

The Commission expects the DMA compliance reports to play an important role in assessing gatekeepers' effective compliance with the DMA obligations.[35] The Commission can also rely on these reports to decide whether to use its investigatory powers and open proceedings to potentially adopt a non-compliance decision.[36]

While burdensome for gatekeepers, these first reports are expected to shape their reporting obligations and likely ground gatekeepers' relations with the Commission. Acting in the context of a paradigm shift in the regulation of digital markets, the Commission should ensure that its enforcement responsibility is balanced with the principles of proportionality and necessity.

Commission Conditionally Approves the Acquisition of Lagardère by Vivendi

On June 9, 2023, following an in-depth investigation, the Commission approved Vivendi's acquisition of Lagardère (the "Transaction"), subject to divestment conditions.[37]

Background

Vivendi and Lagardère are French global media and entertainment groups. Vivendi and Lagardère thus carry out activities such as book publishing, magazines, audiovisual content, press and radio, video games or advertising.

Vivendi notified the Transaction to the Commission on October 24, 2022 and the Commission opened an in-depth investigation on November 30, 2022.

The case team's main concern was that both Vivendi (through Editis) and Lagardère (through Hachette Livre) were active on the entire book publishing value chain, from the acquisition of book publishing rights to the sale of books to retailers. Based on the extensive information and feedback from numerous market participants (including authors, editors, and book retailers) gathered during its in-depth review, the case team was concerned that the Transaction may strengthen Vivendi and Lagardère's position in the book publishing sector in EEA French-speaking countries.

The case team also raised concerns regarding the Transaction's potential impact in the French-speaking celebrity press magazine sector in EEA French-speaking countries.

Commission approval decision

To address the Commission's competition concerns, Vivendi offered a remedy package consisting in the divestment of Vivendi's publishing business in France (Editis) and of Vivendi's celebrity press magazine (Gala). These remedies, which will be monitored by an independent monitoring trustee, were approved by the Commission in its June 9, 2023 clearance decision.

The Commission will have to approve the acquirer of the divested business before the Parties can close the Transaction.

Court Updates

Commission v Luxembourg (C-457/21): Advocate General Kokott Sides with Amazon in State Aid Tax Ruling Case

On June 8, 2023, Advocate General Kokott delivered her opinion on the Commission's appeal of the General Court's judgment annulling the Commission's decision finding that Luxembourg had granted unauthorized State aid to Amazon in the form of a tax advantage.[38] Advocate General

[34] The template Form Gatekeeper Designation ("Form GD") is set out in Annex I of the Commission Implementing Regulation (EU) 2023/814 of 14 April 2023 on detailed arrangements for the conduct of certain proceedings by the Commission pursuant to Regulation (EU) 2022/1925 of the European Parliament and of the Council, O.J. 2023 L 102/6.

[35] Set out in Articles 5-7 DMA.

[36] Pursuant to Article 29(1) DMA.

[37] Commission Press Release IP/23/3136, "Mergers: Commission clears acquisition of Lagardère by Vivendi, subject to conditions," June 9, 2023.

[38] *Commission v. Luxembourg* (Case C-457/21 P), opinion of Advocate General Kokott, EU:C:2023:466.

Kokott's opinion endorsed the recent Court of Justice's findings in *Fiat*,[39] which confirmed that there is no EU-wide arm's length principle that the Commission can use as a standard of review for Member States' tax decisions under EU State aid rules. This opinion signals that the *Fiat* judgement will likely be the guide for ongoing and future tax ruling cases and investigations.

Background

As part of a restructuring of Amazon's European business in 2006, two Amazon entities established in Luxembourg, Amazon Europe Holding Technologies SCS ("LuxSCS") and Amazon EU Sarl ("LuxOpCo") entered into a license agreement. LuxOpCo, as the license holder, acquired the right to exploit certain intellectual property rights of LuxSCS in return for a royalty payment. In 2003, Amazon successfully applied to the Luxembourg tax authorities for a ruling concerning the calculation of the royalty fees. In practice, higher intra-company royalties result in lower corporate income tax in Luxembourg.

In October 2017, following a three-year investigation, the Commission found that the royalty calculation method that the Luxembourg authorities approved in their tax ruling misapplied the OECD arm's length principle. Consequently, the Commission concluded that the tax ruling conferred an illegal selective advantage of c. €250 million to LuxOpCo by lowering its corporate income tax liability between 2006 and 2014, which constituted an illegal State Aid.

Both Luxembourg and Amazon successfully appealed the Commission's decision to the General Court, which annulled the Commission's decision on grounds that the Commission could not demonstrate that the determination of the royalties by the Luxembourg tax authorities was erroneous.[40] The Commission appealed this ruling to the Court of Justice in July 2021.

Selective advantage in fiscal State aid

Under EU State aid rules, Member States cannot provide fiscal incentives that selectively benefit a business, save some narrowly-defined exceptions. To evaluate the selective nature of a tax measure, the first step is to determine the ordinary tax regime applicable in the Member State, *i.e.*, the "reference system". The second step is to assess whether the tax measure in question derogates from the reference system by treating differently comparable taxpayers.

The Advocate General's Opinion

Advocate General Kokott argued that the Commission's appeal should be dismissed because the Commission used the incorrect reference system in determining the existence of a selective tax advantage for Amazon.

Advocate General Kokott first argued that the ECJ has jurisdiction to assess whether the Commission used the correct reference system. Even though Luxembourg and Amazon did not directly challenge this determination,[41] this question is inextricably linked to the existence of a selective advantage and thus of an illegal State aid.[42] In addition, finding that the Commission used the incorrect reference system would not contravene the *non-ultra petita* ruling principle as this results in the annulment of the Commission's decision on the grounds that no selective advantage was granted, which is what Luxembourg and Amazon are seeking.[43]

Second, in substance, Advocate General Kokott concluded that the Commission could not use the OECD Transfer Pricing Guidelines as a

[39] *Fiat Chrysler Finance Europe and Ireland v. Commission* (Cases C-885/19 P and C-898/19 P) EU:C:2022:859 (the "Fiat Judgment"); *Luxembourg and Fiat Chrysler Finance Europe v. Commission* (Cases T-755/15 and T-759/15) EU:T:2019:670. For an analysis of the *Fiat* Judgement, *see* our November 2022 European Competition Law Newsletter, pp. 8–9.

[40] *Luxembourg v. Commission* (Case T-816/17) ECLI:EU:T:2021:252.

[41] *Commission v. Luxembourg* (Case C-457/21 P), opinion of Advocate General Kokott, EU:C:2023:466., paras. 57 and 60.

[42] *Ibid.*, para. 59.

[43] *Ibid.*, para. 62.

reference system because Luxembourgish law does not explicitly refer to these Guidelines. To the contrary, Luxembourg contended that it applied its own national transfer pricing rules which were applicable at the time and which were different from the OECD Guidelines.[44]

Lastly, should the Court of Justice decide that it does not have jurisdiction to review the determination of the reference system, Advocate General Kokott still recommended to dismiss the Commission's appeal, as the Commission did not demonstrate that the Luxembourg tax authorities manifestly misapplied the OECD Guidelines.[45]

Conclusion

The opinion closely follows the Court of Justice's reasoning in *Fiat*, which had reaffirmed Member States' autonomy in direct taxation matters and eroded the Commission's attempts at tackling inconsistent tax practices through the imposition of "objective" EU-wide standards *via* State aid rules. AG Kokott used the same arguments in her opinion in the *Engie* tax ruling case last May, advising the Court of Justice to annul the Commission decision ordering Luxembourg to recover €120 million in unpaid tax from Engie.[46] This implies that other ongoing tax ruling cases will likely be similarly impacted by *Fiat*, including the appeal before the Court of Justice in *Apple*[47] and at least three other Commission investigations.[48]

[44] *Ibid.*, paras. 66, 73-79.

[45] *Ibid.*, paras 97, 100, 103.

[46] *State aid implemented by Luxembourg to Engie* (Case COMP/SA.44888), Commission decision of June 20, 2018; *Engie Global LNG Holding and Others v. Commission* (Case T-516/18):EU:T:2021:251 (ECJ's decision is still pending).

[47] *State aid implemented in Ireland to Apple* (Case COMP/SA.38373), Commission decision of August 30, 2016 ("*Apple*"); and *Ireland and Apple v. Commission* (Cases T-778/16 and T-892/16) EU:T:2020:338 (appeal pending).

[48] *Alleged State aid implemented in Luxembourg to Huhtamäki* (Case COMP/SA.50400), Commission decision of March 7, 2019, initiating the formal investigation procedure; *Alleged State aid implemented in The Netherlands to IKEA* (Case COMP/SA.46470), Commission decision of December 18, 2017, initiating the formal investigation procedure; and *Alleged State aid implemented in the Netherlands to Nike* (Case COMP/SA.51284), Commission decision of January 10, 2019, initiating the formal investigation procedure.

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