European Commission Publishes New Guidance on Assessment of Agreements Between Competitors Under EU Competition Rules

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On 14 December 2010, the European Commission published its New Horizontal Guidelines, which provide more detailed information on the assessment of cooperation agreements between actual and potential competitors, in particular concerning information exchange and standardization, as well as new Block Exemption Regulations on R&D and specialization agreements.

The European Commission has published new guidelines for the assessment of cooperation agreements between actual and potential competitors under EU competition rules. The Commission has also published two new Block Exemption Regulations on research and development (R&D) agreements and specialization agreements. The new guidelines are considerably more detailed than before. In particular, the new guidelines contain a new chapter on information exchange and an expanded chapter on standardization agreements.

Companies with business activities in Europe must ensure that their horizontal cooperation agreements are brought in line with the new guidance. The rules on information exchange and standardization provide more detailed guidance, although a number of questions remain. Agreements between competitors have always been at the forefront of enforcement initiatives, and companies need to be aware that the Commission and national competition authorities within the EU are likely to step up their enforcement efforts in this area under the new regime.

We provide an overview of the new guidelines as well as an in-depth analysis of the rules on information exchange and standardization before briefly touching upon the two new block exemption regulations.

Overview of the New Guidelines

On 14 December 2010, the Commission published its new Guidelines on the applicability of EU antitrust rules to horizontal cooperation agreements (the New Horizontal Guidelines or the New Guidelines).

The New Guidelines provide an analytical framework for the most common types of horizontal cooperation agreements, including R&D agreements, production agreements, purchasing agreements, commercialization agreements, standardization agreements and information exchange. The New Horizontal Guidelines will enter into force upon publication in the EU´s Official Journal, which is expected to occur within the next few days.

The New Guidelines retain the same basic structure as their 2001 predecessor. The New Guidelines provide an analytical framework but not a formalistic "checklist". The New Guidelines cover agreements between actual as well as potential competitors. The New Guidelines allude to the potential economic benefits of horizontal cooperation agreements, in particular if they combine complementary activities. They also caution, however, that horizontal cooperation agreements can lead to competition problems, in particular if the parties fix prices or output, share markets or if the cooperation enables the parties to maintain, gain or increase market power.

The analytical framework applied throughout the New Guidelines involves two steps of analysis. The first step of analysis assesses whether an agreements contains restrictions by object or has restrictive effects. Whether restrictive effects are present will depend on the nature and content of the agreement, the market power of the parties and other market characteristics. These points are fleshed out for each kind of cooperation agreement. The second step of analysis assesses whether a restrictive agreement may be exempted from the prohibition of EU antitrust rules, and involves the analysis of potential efficiencies, the pass-on to consumers and the overall effects on competition. According to the New Guidelines, efficiencies are to a large extent a question of the combination of complementary activities, assets and skills. By contrast, other cooperation agreements, even if they involve fixed costs savings, are less likely to result in benefits for consumers, according to the New Guidelines.

While retaining the same basic structure as the 2001 version, the substance of the guidelines has been revised extensively. The New Guidelines are considerably more detailed than before (335 instead of 198 paragraphs). In particular, they include a new chapter on "General principles on the competitive assessment of information exchanges". The chapter on "Standardization agreements" has been considerably expanded. On the other hand, the chapter on "Environmental agreements" has been eliminated from the guidelines and such agreements will now be assessed according to the principles spelt out in the other sections of the New Guidelines. Furthermore, the use of illustrative examples with the aim of providing more guidance on individual problems has been expanded in all sections of the New Guidelines.

Information Exchange

Information exchange between competitors is one area the New Guidelines deal with in much greater depth than ever before. The New Guidelines consider information exchange in two contexts: first, when the main economic function is the exchange of information itself; and second, when the exchange is part of another type of horizontal agreement, in which case assessment of the information exchange is carried out in combination with an assessment of the underlying horizontal agreement (for example, a cartel involving agreements to fix prices or quantities).

A simple exchange of information can constitute a concerted practice contrary to the EU competition rules if it reduces strategic uncertainty in the market, thereby facilitating collusion. In contrast to US antitrust rules, the

exchange of information by itself (without any other agreement) is regarded as restricting competition in the EU where it enables undertakings to be aware of market strategies of their competitors so as to reach a common understanding on coordination in the market.

Even one company unilaterally disclosing strategic information to competitors (*e.g.*, via email or at meetings) can amount to a breach of the competition rules. Unless the recipient responds with a clear statement that it does not wish to receive such data, the Commission may presume that this information has been accepted and the receiver has adapted its market conduct accordingly.

Of particular concern is exchange between competitors of individualized data on intended pricing or quantities. Private exchanges between competitors of their individualized intentions on future prices or quantities would normally be considered as cartel behavior and subject the parties to potential fines.

The Commission will assess an information exchange by comparing it with the likely competitive situation that would prevail in the absence of that exchange. The characteristics of the particular market will be considered—whether the market is sufficiently transparent, concentrated, simple, stable and/or symmetric. The characteristics of the information exchange itself will also be considered in order to determine whether the information supplied is "strategic", covers a "sufficiently" large part of the market, and is aggregated or individualized. Other characteristics that will be considered include "age" of data (*e.g.*, whether it is historical vs. recent), the frequency of information exchange, and whether the data is public or non-public. Thus, for example, frequent exchanges between competitors of recent, individualized strategic data, covering a large part of a tight, stable, transparent, symmetric and non-complex market are regarded as being likely to have restrictive effects on competition.

The New Guidelines also recognize that an information exchange can have pro-competition effects through efficiency gains. Examples given include information on perishable goods sales, past behavior of consumers in the insurance and banking (credit) context, best-seller lists for books, or publicly accessible information for consumers on actual prices. However, if the information exchange can be done through an exchange of less individualized data, such as through rankings, then this lesser method should be used. Finally, the efficiency gains must be passed on to consumers. The New Guidelines note that this is more likely to happen when the market power of the parties involved in the information exchange is low.

Data centres, trade associations and others involved in information collection, correlation and dissemination, as well as those giving/receiving data from competitors (directly or indirectly), will need to reassess their position in the light of this new guidance.

Standardization Agreements

The new chapter on standardization agreements gives far more detailed guidance, drawing on the development of recent case law. On the other hand, the New Guidelines leave some very important questions unanswered: Are the horizontal guidelines the right approach to unilateral conduct such as hold-up and patent ambush? Are "fair, reasonable and non-discriminatory (FRAND) terms clear enough and suitable to standardization organizations? How do the rules apply to standardizations systems that follow a different model, such as technology pool-based standards? How can organizations identify "essential" intellectual property rights (IPR) to be disclosed?

Following the definition of "standards" in recent case law, the New Guidelines do not apply if the preparation and production of technical standards are completed by a public body. However, the New Guidelines are applicable to standards adopted by a European standards body recognized under Directive 98/34 insofar as the standard can be considered an agreement between undertakings, or a decision by an association of undertakings.

The New Guidelines identify the main competitive concerns of standardization agreements as the reduction in price competition, foreclosure of innovative technology, and exclusion of or discrimination against certain companies by prevention of effective access to the standard. In the context of exclusion/discrimination against certain companies, the Commission underlines the importance of prior disclosure of relevant IPR for effective access to the standard. Also, it cautions against the "abusive" use of IPR in a standard-setting context, such as so-called patent ambush and hold-up scenarios, which have been the Commission's focus since the IPCom and Rambus cases.

In addition to targeting standards that are intended to facilitate cartels for attack, "any agreements to reduce competition by using the disclosure of most restrictive licensing terms prior to the adoption of a standard" fall under restrictions by object under the New Guidelines and are thus likely to be presumed to be a cartel. It seems that the difference between the disclosure prohibited and the *ex ante* disclosure welcomed under the New Guidelines is basically whether the disclosure is unilateral. Joint negotiation or discussion on royalty rates between competitors will be, in principle, caught by EU antitrust rules, but individual *ex ante* disclosure will not. Discussions on patent pools and the decision to license IPR on royalty-free terms are excluded from the scope of restriction by object.

Probably the most controversial changes in the chapter concern the safe harbour provisions. Standardization agreements with restrictive effects may fall in a safe harbour if the following four conditions are all fulfilled: (i) the participation in standard setting is unrestricted; (ii) the procedure of the standard setting is transparent; (iii) there is no obligation to comply with the standard; and (iv) access to the standard on FRAND terms is provided. With respect to the fourth condition, in case of standards involving IPR, the New Guidelines require *ex ante* good faith disclosure of potentially essential IPR. In comparison with the draft texts, some explanations are given as regards the extent of participants' disclosure efforts. A participant will not be required to disclose IPR applications and a simple declaration

that he is likely to have IPR claims will suffice. The disclosure need not be done at the beginning of the standard setting, but should be done at some point in the course of the standard setting. When a participant has no IPR relying on the potential standard, there is no obligation to issue a statement to that effect.

An *ex ante* irrevocable commitment in writing to license essential IPR on FRAND terms (FRAND commitment) will also be required in case of standards involving IPR to satisfy the fourth condition. In addition, an assignor of IPR must make sure the assignee respects a FRAND commitment. It is not the standard-setting organization but participants themselves who verify whether licensing terms are FRAND. When a royalty bears no reasonable relationship to the economic value of the IPR, the royalty will be regarded as excessive and non-FRAND. The New Guidelines also suggest the use of an independent expert assessment as an alternative method to measure whether the royalty is unfair or unreasonable.

The competition-restricting effects of standardization agreements depend on the possibility of developing alternative standards or products that are not in conformity with the standard. As other determining factors, the following are also referred to: accessibility to the standard, openness of the participation process, market shares, discrimination against any participant, types of IPR disclosure models and unilateral ex ante disclosures of licensing terms. The pro-competitive effects of unilateral upfront disclosure of maximum royalty rates are recognized and agreements providing for such disclosure will not, in principle, restrict competition. The New Guidelines list four relevant markets for purposes of assessing the effects of standardization agreements on competition: (i) the product or service markets; (ii) the relevant technology market (new); (iii) the market for standard setting; and (iv) a distinct market for testing and certification. The New Guidelines therefore add a new relevant market (the relevant technology market) to the three relevant markets staked out in the 2001 Guidelines.

New Block Exemption Regulations

On the same day the Commission published the New Guidelines, it also adopted two new “block exemption” regulations (new BERs): the “New R&D BER” for research and development agreements and the “New Specialization BER” for specialization agreements.

These two new BERs will replace the current texts, which will expire on 31 December 2010. While the structure of the previous BERs have been retained, the new BERs contain some changes of note. In particular, the Commission has considerably extended the scope of the New R&D BER, which now not only covers R&D activities carried out jointly but also so-called “paid-for research" agreements where one party finances the R&D activities carried out by the other party. In addition, the New R&D BER gives parties more scope to jointly exploit the R&D results. The Commission has also introduced a second market share threshold in the New Specialization BER.

The regulations will enter into force on 1 January 2011, with a transitional period of two years. During that period the previous laws will remain in force for agreements that fall within the scope of the existing rules.