Newsletter, 17 January 2011

European Commission adopts revised rules on Horizontal Cooperation Agreements

Revised Guidelines and Block Exemption Regulations on R&D and Specialisation

In December 2010 the European Commission ("Commission") adopted a revised set of rules for the assessment of cooperation agreements between actual or potential competitors[1] clarifying the application of EU competition on the so called "horizontal" (as opposed to vertical) agreements and providing enhanced and more detailed guidance to companies on how to self-assess the legality of cooperation agreements with their competitors.

The revised set of rules comprises of the Block Exemption Regulations ("BERs") on research and development ("R&D")[2] and specialisation[3] agreements and accompanying *Guidelines on Horizontal Cooperation Agreements* ("Horizontal Guidelines")[4] replacing the previous Regulations and Guidelines which entered into force ten years ago. While the revised rules do not radically change the existing regime, they introduce some new elements and interpretative guidance, in particular as regards R&D, standardisation and specialisation agreements. With more than 100 additional paragraphs, the Guidelines are considerably longer due to the inclusion of a new chapter on information exchange, more economic-based explanations and additional case studies.

Following extensive stakeholder and public consultations[5], the two revised BERs entered into force on 1 January 2011 for a duration of 12 years. The BERs provide for a transitional period of two years until end-2012 during which the previous laws will remain in force for agreements that fall within their scope, but not within the new BERs. The Horizontal Guidelines, which are non-binding to other bodies than the European Commission, entered into force with their publication in the EU's Official Journal last week.

Following a short remark on the competitive nature of horizontal cooperation agreements and on the general methodology of BERs, this Newsletter will highlight the Commission's key amendments in the revised texts.

Horizontal Cooperation Agreements

Companies of all industries and business sectors enter into joint ventures or other cooperative arrangements with competing businesses in order to achieve efficiencies by sharing risks, saving costs, increasing investments, pooling know-how or by enhancing product quality and variety. These agreements are generally concluded with a view to cooperate in areas such as R&D, production, purchasing, commercialisation, standardisation, standard terms or to exchange information.

Pro- and anticompetitive effects

Cooperation agreements between actual or potential competitors can lead to substantial benefits for consumers in form of lower prices, more choice and improved products and allow companies to better respond to the global competitive pressure. However, where the cooperation enables the parties to maintain, gain or increase market power, there is the risk that such agreements restrict competition and

[1] Press release IP/10/1702 of 14/12/2010.
[2] Commission Regulation No 1217/2010 of 14 December 2010, Official Journal L 335, 18/12/2010, p. 36.
[3] Commission Regulation No 1218/2010 of 14 December 2010, Official Journal L 335, 18/12/2010, p. 43.
[4] Guidelines on the applicability of Art. 101 TFEU to horizontal cooperation agreements, Official Journal C 11, 14/01/2011, p. 1.
[5] The replies to the consultations are available at the Commission's website at http://ec.europa.eu/competition/antitrust/legislation/horizontal.html.

lead to collusion on or foreclosure of the market, thereby resulting in higher prices, less choice or less innovation to the detriment of consumers.[6]

With the revision of the horizontal rules the Commission pursues a balanced approach aiming to promote innovation and competitiveness in Europe. Competition Commissioner Almunia stated: "*The new Guidelines and Block Exemption Regulations will give companies the necessary freedom to cooperate in a globalised market place, while at the same time minimising the risk of agreements that are harmful to industry and to consumers.*"[7]

General Legal Framework

BERs automatically exempt certain categories of (horizontal and vertical) agreements between companies with limited market power from the prohibition on restrictive agreements and business practices of Art. 101 (1) Treaty on the Functioning of the European Union ("TFEU") (and equivalent national competition laws), provided that certain conditions set out in the Regulations, namely market share thresholds[8] and the absence of hardcore restrictions, are satisfied.

Agreements falling outside the scope of the BERs may still benefit from the exemption of Art. 101 (3) TFEU. Companies, however, need to assess themselves whether the pro-competitive effects outweigh the restrictive effects of their agreement so that the conditions of Art. 101 (3) TFEU are met.[9] The Horizontal Guidelines accompanying the BERs provide vital guidance for companies in making this assessment.

Research & Development

R&D agreements are generally a favourably treated category of horizontal agreement as they can lead to substantial efficiencies by stimulating innovation. The safe harbour market share threshold for agreements between competing undertakings of 25% on the relevant product and technology market was maintained in the revised text.

The revised BER introduces several new interesting elements. Its scope has been expanded considerably. It provides for disclosure of intellectual property rights ("IPRs") and know-how and more flexibility as regards the exploitation of the R&D results.

"Paid-for research"

The BER now covers, in addition to joint research agreements, "paid-for research" agreements where one party merely finances the R&D activities carried out by the other party.[10] It remains to be seen whether this extension of scope indeed adds to legal certainty as most paid-for research agreements were so far considered not to fall within the scope of Art. 101 (1) TFEU in the first place.

Joint exploitation of R&D results

The joint exploitation of results, the "*natural consequence of joint research and development*"[11], can take forms of manufacture, exploitation of IPRs or the marketing of new products.

In order to justify the exemption under the BER, all parties should generally have full access to the final results of the joint R&D, comprising any arising IPRs and know-how for the purpose of further R&D and exploitation.[12] The access to the results may, however, be limited by way of specialisation in the context of exploitation pursuant to the rules set out in the BER.[13] If the contributions of the parties to the agreement are unequal in terms of value or nature, the BER now clarifies that the other party has to pay for obtaining access to the R&D results, as long as the payments are not so high to effectively impede such access.[14]

The BER furthermore establishes that where the agreement does not provide for any joint exploitation of the results, all parties to the agreement must be able to access any pre-existing know-how of the other party at a reasonable fee when it is indispensable for the exploitation of the results.[15]

The BER provides more flexibility for parties relating to the joint exploitation of R&D results: It remains applicable where only one party of

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6 Horizontal Guidelines, paras 2 et seq., 33 et seq.

7 Press release IP/10/1702 of 14/12/2010.

8 As agreements between competitiors have a higher potential to harm competition than agreements between non-competitors, the safe harbour market thesholds for horizontal agreements are lower than the 30% threshold for vertical agreements.

9 Horizontal Guidelines, para 48 et seq.

10 R&D BER, Recital 8.

11 R&D BER, Recital 9.

12 R&D BER, Art. 3 (2), Recital 11.

13 R&D BER, Art. 5 (b) (iii).

14 R&D BER, Art. 3 (2).

15 R&D BER, Art. 3 (3), Recital 12.

the R&D agreement sells the contract products in the EU on the basis of an exclusive licence by the other party (which will often have the right to sell the contract products in areas outside the EU).[16] The BER moreover clarifies that restrictions of the field of use do not constitute limitations of output or sales and are therefore no hardcore restriction.[17]

The revised text clarifies that where the joint exploitation of the results includes the joint distribution or the joint licensing of the contract products or technologies, the parties to the agreement are allowed to fix the prices or the licence fees charged to immediate customers or licensees respectively.[18]

The (former) prohibition to restrict active sales in exclusive territories seven years after the launch of the contract products on the Common Market is no longer mentioned in the list of hard-core restrictions. However, the R&D parties will have to bear in mind the maintained principle that the exemption under the BER initially only applies for seven years from the time the contract products are first put on the market if the results of the R&D agreement are jointly exploited.[19]

"Potential competitor"

"Potential competitors" are defined wider than in the previous BER and relating Guidelines now comprising all companies likely to enter the market within three years in case of a small but permanent increase in price.[20] As a consequence, more contracts will fall under the initial market share threshold of 25%.

Revised chapter in Horizontal Guidelines

The chapter on R&D agreements in the Horizontal Guidelines[21] has not been amended substantially. However, it now contains, e.g., additional guidance for calculating market shares on technology markets[22], more economic-based analyses[23] as well as additional case studies[24].

[16] R&D BER, Art. 6 (b).
[17] R&D BER, Recital 15.
[18] R&D BER, Art. 5 (c).
[19] R&D BER, Art. 4 (1).
[20] R&D BER, Art. 1 (1) (t).
[21] Horizontal Guidelines, chapter 3, paras 111-149.
[22] Horizontal Guidelines, para 125.
[23] E.g. Horizontal Guidelines, para 143, 146.
[24] Horizontal Guidelines, para 148.

Specialisation

Specialisation and joint production agreements[25] continue to be automatically exempted if the combined market share of the contractual parties are below 20% and if no hardcore restrictions (i.e. price fixing, limitation of output or sales, allocation of markets or customers) are included. Exempted are thus agreements containing exclusive purchase or exclusive supply obligations or agreements whereby the parties do not independently sell the specialisation products but agree on their joint distribution.[26]

The BER has, however, been modified in two respects:

Firstly, it now states that specialisation or joint production agreements concerning intermediary products which are being used captively for the production of certain downstream products by one or more of the parties to the agreement are only exempted by the BER if the parties' market shares at the level of the intermediary as well as of the downstream product do not exceed 20%.[27] Agreements not complying with both market share thresholds are not automatically exempted but subject to an individual assessment pursuant to Art. 101 (3) TFEU.

Secondly, the BER clarifies that it also applies to unilateral specialisation agreements where only one of the parties to the agreement partially ceases or refrains from producing certain products in favour of another party (e.g. outsourcing the output of only one plant).[28]

The newly introduced definition of "*potential competitor*" is the same as in the R&D BER.[29]

Information Exchange

The new chapter on information exchange in the Horizontal Guidelines provides for the first time comprehensive guidance on how to assess the compatibility of information exchanges between competitors with EU competition law.[30] The introduction of the chapter has attracted a lot of attention from stakeholders during the consultation phase. It does, however, not contain completely new

[25] The chapter on production agreements (chapter 4) can now be found in the Horizontal Guidelines in paras 150-193.
[26] Specialisation BER, Art. 2 (3) (a), (b).
[27] Specialisation BER, Recital 10.
[28] Specialisation BER, Art. 1 (b), (c).
[29] Specialisation BER, Art. 1 (1) (n).
[30] Horizontal Guidelines, chapter 2, paras 55-110.

elements, but more or less consolidates the Commission's existing guidance on information exchange laid down in the *Guidelines on the application of Article 81 of the EC Treaty to maritime transport services*[31] and the latest case law of the European courts.

The Commission acknowledges that information exchange is a common feature of many competitive markets and may generate various types of efficiencies. However, the exchange of information may also restrict competition when it enables companies to become aware of market strategies of their competitors, thereby facilitating collusion and anticompetitive foreclosure on the market.[32]

Agreement or concerted practice

The Horizontal Guidelines cover the various types of information exchange, from the direct communication between competitors to the indirect disclosure of information via a third party such as trade associations. The Commission explicitly clarifies that the unilateral disclosure of strategic information to a competitor can constitute a concerted practice in violation of competition law even if the other party does not provide information in exchange, but merely accepts the information: "*When a company receives strategic data from a competitor (be it in a meeting, by mail or electronically), it will be presumed to have accepted the information and adapted its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such data.*" [33]

Taking account of the ECJ judgment in *T-Mobile Netherlands*, the Horizontal Guidelines further emphasise that the attendance at a single meeting at which sensitive information is exchanged can constitute a concerted practice.[34]

Restriction by object

The Horizontal Guidelines clarify that the exchange of "*individualised data regarding intended future prices and quantities*"[35] or any other data capable of revealing future intentions regarding pricing or quantities between competitors is to be considered as having as its very nature the potential to restrict competition. It is noteworthy that the Commission acknowledges that an exchange of actual data may have pro-competitive reasons and is therefore not viewed as a restriction by object.[36]

Restriction by effect

If an exchange of information does not restrict competition by object, it may still be an infringement if it has restrictive effects on competition. The Commission sets out a number of factors to be considered on a case-by-case basis when analysing the effects of information exchange. Besides the specific economic conditions on the market (concentration, transparency, stability)[37], these factors include the specific characteristics of the information exchanged[38], such as:

- the strategic usefulness of the data,
- the market coverage of the data,
- whether the information is aggregated or individualized,
- the age of the data,
- the frequency of the information exchange,
- whether it is public/non-public information,
- whether the information is exchanged in public or not.

Not unexpectedly, the Commission does not introduce any numerical guidelines for the effects-based assessment of information exchange and only refers in a footnote to its ruling in, inter alia, *UK Agricultural Tractor Registration Exchange* where it indicated that one-year-old information was historic and did therefore not raise competition concerns.[39]

As regards public information the Commission uses a wording which seems unreasonably restrictive and which is not based on previous case law: "*In general*", the exchange of genuinely public information which is accessible to competitors and customers is "*unlikely to constitute an infringement of Art. 101*". However, if the additional exchange "*further reduces strategic uncertainty*" on the market, the exchange of publicly available data may give rise to restrictive effects on competition. [40]

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[31] Commission Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, Official Journal 2008, C 245/02, paras 43-58.
[32] Horizontal Guidelines, paras 57 et seq., 95 et seq.
[33] Horizontal Guidelines, para 62 with reference to EU case law.
[34] Horizontal Guidelines, para 62; ECJ judgment *in T-Mobile Netherlands*, C-08/08, Official Journal 2009, C 180/20, para 59.
[35] Horizontal Guidelines, para 74.
[36] Horizontal Guidelines, para 73.
[37] Horizontal Guidelines, paras 77-85.
[38] Horizontal Guidelines, paras 86-94.
[39] Commission Decision IV/31.370, para 50; Horizontal Guidelines, para 90.
[40] Horizontal Guidelines, para 92 et seq.

The German Federal Cartel Office, as an authority that takes a relatively strict view on information exchange, generally welcomes the addition of the new chapter. However, the authority emphasises that "*purpose and effect*"[41] of the information exchanges as part of the cooperation should be taken sufficiently into account during the assessment of possible restrictive effects on competition.

Standardisation

The substantial revision of the Horizontal Guidelines' chapter on standardisation agreements has been strongly requested and been fiercely debated by stakeholders during the consultation process.[42] The guidance is especially relevant for companies in the information and communications technology sector where joint standard setting is key.

"Safe harbour"

The revised chapter sets out five criteria ("*non-prescriptive*" safe harbour[43]) under which standardisation agreements would normally fall outside the scope of Art. 101 (1) TFEU[44]:

- no obligation to comply with the resulting standard,
- unrestricted participation for competitors in the standard-setting process,
- transparent standard-setting process,
- access to the standard on "*fair, reasonable and non-discriminatory*" (FRAND) terms,
- if relevant: a clear and balanced IPR policy.

FRAND commitment

With the introduction of the FRAND commitment, the Commission wants to ensure an open, transparent standard-setting system avoiding anticompetitive conduct such as patent hold-ups. The assessment whether fees charged for access to IPRs are fair and reasonable should be based on "*whether the fees bear a reasonable relationship to the economic value of the IPR*"[45]. Unfortunately, instead of offering clear criteria, the Commission only refers to various methods for assessing whether the FRAND terms are met. It will therefore remain a matter of contract law to determine the exact terms of the FRAND commitment.[46]

The Horizontal Guidelines clarify that agreements providing for the unilateral disclosure of the most restrictive licensing terms, including the maximum loyalty rebates, prior to setting a standard will normally not lead to a restriction of competition within the meaning of Art. 101 (1) TFEU.[47] This will enable standard-setting organisations and the industry to make an informed choice on quality and price when selecting which technology to be included in a standard.

Standard terms

Though acknowledging the increasing use of standard terms (for the sale of goods or services to consumers) across industry sectors, the standardisation chapter only contains limited guidance on the inclusion of such terms in agreements. However, standard terms will usually not give rise to concerns if:

- competitors can unrestrictedly participate in the process of setting the terms,
- they are non-binding and effectively accessible for anyone,
- they are not likely to become a *de facto* industry standard,
- they do not relate to aspects of pricing (e.g. defining the type of rebates to be given).[48]

Centre of gravity

Horizontal agreements may combine different stages of cooperation, e.g. R&D and joint production or commercialisation of the results. The "centre of gravity test" of the 2001 Horizontal Guidelines determining the relevant chapter of the Guidelines to be applied to the integrated cooperation has been refined. While an agreement was so far analysed under one set of rules - dependant on the centre of gravity of the agreement, the revised Horizontal Guidelines provide that all chapters

[41] Comments by the Federal Ministry of Economics and Technology and the Federal Cartel Office on the draft Commission R&D BER, Specialisation BER and on the draft Horizontal Guidelines, 25/06/2010, p. 2.

[42] Chapter 7 of the Horizontal Guidelines, paras 257-335.

[43] Thomas Kramler, deputy head of DG Competition's technology unit at the ibc conference Standards and Patents, 16/11/2010, London: "*The safe harbour is not a straitjacket. [An action] can be perfectly legal for a standard setting organisation without complying with what is in the safe harbour*."

[44] Horizontal Guidelines, paras 281-286, 293.

[45] Horizontal Guidelines, para 288.

[46] Thomas Kramler, see footnote 41: "*The only thing that is required is a FRAND commitment. We are not determining exactly what that means. It's a matter of contract law*."

[47] Horizontal Guidelines, para 299.

[48] Horizontal Guidelines, paras 301-307.

pertaining to the different parts or types of cooperation will apply. However, where the relevant chapters contain different standards, e.g. as regards the safe harbour, the chapter applying to the part of the cooperation which constitutes the centre of gravity will prevail for the agreement as a whole.[49] The factors for determining the centre of gravity, firstly the starting point of the cooperation and secondly the degree of integration of the different stages which are combined, continue to apply.[50]

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[49] Horizontal Guidelines, para 13.
[50] Horizontal Guidelines, para 14, with examples.