

Revised Regime for Horizontal Agreements

Introduction

The European Commission has adopted two new block exemptions for Research and Development agreements and Specialisation agreements. They replaced the previous block exemptions from 1 January 2011 and contain transitional provisions for agreements that met the previous criteria for exemption. The Commission has also published new guidelines ("the Guidelines") for the assessment of horizontal co-operation agreements between competitors.

Horizontal co-operation agreements can lead to substantial economic benefits particularly if they combine complementary activities, skills or assets. They can be a means to share risk and cost, increase consumer choice and lead to faster innovation. However, they may lead to competition problems if the parties were, for instance, to agree to fix prices or output or to share markets. The Guidelines together with the block exemptions provide a framework to analyse most common types of horizontal co-operation agreements in order to give companies the necessary freedom to cooperate whilst minimising the risk of agreements that are harmful to industry and to consumers.

Revised guidelines

The main changes as compared with the previous guidelines published in 2000 are:

- a substantial review of the standardisation chapter, introducing more transparency to the process of standard-setting; and
- a new chapter on information exchange which attempts to explain when an exchange of information is good or bad for competition. In particular, this new chapter provides clarity on the treatment of information exchanges depending on whether the information is strategic, public or private, aggregated or individualised and future, current or historic.

Standardisation

The new standardisation chapter in the Guidelines outlines in more detail than previously the conditions under which the process of selecting industry standards will fall outside of the prohibition of anti-competitive agreements set out in Article 101(1) TFEU.

The Guidelines set out criteria under which the Commission will not take issue with a standard-setting agreement, including the following key points:

- the procedure for adopting the standard must be

unrestricted with participation open to all relevant competitors on the market;

- effective access to the standard on fair, reasonable and non-discriminatory terms; and
- in the case of intellectual property, a clear and balanced IP policy, adapted to the particular industry, with good faith disclosure of those IP rights which are essential for the implementation of a standard.

Standardisation agreements which do not comply with these criteria are not necessarily illegal, but they will need to be individually assessed in order to determine *inter alia* whether there are robust objective justifications for more restrictive terms than those set out in the Guidelines.

Information exchange

The previous guidelines published in 2000 did not contain any guidance on the assessment of information exchange between competitors. A new chapter is included in the Guidelines to correct this omission.

The Guidelines indicate that the European Commission's main competition concerns in relation to information exchange are collusive behaviour (e.g. where information exchanges facilitate co-ordination between competitors) and anti-competitive foreclosure (e.g. where information exchanges operate to exclude potential competitors and new entrants from the market).

The Guidelines state clearly that a breach of competition law is likely to occur if parties exchange information on their individualised intentions regarding their future conduct with respect to price or quantities. In terms of whether other exchanges of information will constitute a restriction of competition, the Commission will examine in particular:

- the characteristics of the information exchanged: The Commission will focus on whether it is strategic information; the extent of the market it covers; whether it is aggregated or individualised; the age of the data; the frequency of the exchanges; and, whether the data is publicly available.
- the characteristics of the relevant market: The Guidelines note that '*companies are more likely to achieve a collusive outcome in markets which are sufficiently transparent, concentrated, non-complex, stable and symmetric. In those types of markets companies can reach a common understanding on the terms of coordination and successfully monitor and punish deviations.*'

Specialisation block exemption regulation

A specialisation agreement is a unilateral or reciprocal agreement where one or both parties agree to cease production of certain products and agree to purchase them from another party. The new Specialisation block exemption is very similar to its predecessor.

However, it does clarify that it will continue to apply even where one of the parties to the agreement only partly ceases production. This means that, where a company operating several production sites and closes one (but not all) of them to outsource the production of the closed site, it can still benefit from the block exemption.

The other significant change introduced by the new Specialisation block exemption is that the definition of relevant market has been amended. Where the specialisation products are intermediary products which one or more of the parties use for the production of downstream products, the relevant market includes the product and geographic markets to which the downstream product belongs. The exemption only applies on condition that the combined market share of the parties does not exceed 20% on any relevant market.

R&D block exemption regulation

Consumers can generally be expected to benefit from R&D through the introduction of new or improved products or services, quicker launch of products or reduction in prices. Provided that agreements only contain restrictions which are indispensable to achieving the positive effects generated by R&D then they will contribute to maintaining effective competition and will benefit from the exemption contained in the Regulation.

The R&D block exemption has been extended. It now covers "paid-for-research" agreements where one party finances the R&D activities carried out by the other party. In addition the new block exemption gives parties more scope to jointly exploit the results of their research.

One of the conditions for exemption is now that all parties must have full access to the final results of the research including any resulting IP rights and knowhow. Where parties limit their rights of exploitation, access to the results for the purposes of exploitation may legitimately be limited and this takes account of

the fact that academic researchers and others that supply research and development as a service are not normally active in the exploitation of the results and may agree to confine their use of any results for the purposes of further research. The block exemption also contains provisions allowing parties to compensate each other for access to the results for the purposes of further research provided that the compensation is not so high as to effectively impede access.

Two restrictions which were previously considered hard core restrictions will now be dealt with as excluded restrictions, firstly no-challenge clauses relating to the validity of IPR protecting the R&D and, secondly, obligations not to grant licences to third parties to manufacture the contract technologies (unless the exploitation of the results of the R&D by at least one of the parties is provided for in the R&D agreement).

Conclusion

Companies which have Research and Development agreements in the EU will need to consider the effect of the new block exemption on their existing agreements and take the block exemption into account for all new activities. The new Guidelines are to be welcomed as they provide detail for the assessment of cooperation between competitors and in particular, the inclusion of the chapter on information exchange will be useful. The Guidelines have now been published in the Official Journal and, therefore, are now in force.

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