1. Context

On 14 December 2010, the European Commission adopted new rules and guidelines for the assessment of horizontal co-operation agreements under EU competition law. This new regime consists of a set of guidelines, the so-called “Horizontal Guidelines”, and two Block Exemption Regulations (BER) regarding research and development agreements on the one hand and specialisation and joint production agreements on the other hand.

Horizontal co-operation agreements, i.e. agreements concluded between companies operating at the same level of the supply chain, such as agreements to co-operate on research and development, production, purchasing, commercialisation, standardisation, and exchange of information, can lead to substantial economic benefits, in particular if the companies involved combine complementary activities, skills or assets. Such co-operations allow companies to achieve various types of efficiencies and to respond to changing market environments. However, they can also lead to serious competition problems, in particular where they increase the market power of the parties to an extent that enables them to increase prices, limit output or reduce innovation efforts. The Commission’s approach enshrined in the new rules is to leave companies maximum freedom to co-operate, while at the same time protecting competition from types of co-operation which are harmful to consumers.

Under EU competition law, horizontal co-operation agreements first require an assessment to establish whether they fall under Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) due to their anticompetitive object or effects and, if so, secondly, whether they comply with all the conditions set out in Article 101(3) TFEU, in order to benefit from the legal exception provided for therein. Agreements falling under Article 101(1) TFEU which do not comply with Article 101(3) TFEU are null and void pursuant to Article 101(2) TFEU.

Prior to adopting the final texts, the Commission had published drafts of the revised Guidelines and BERs for public consultation in May and June 2010. A total of 119 stakeholders submitted contributions during the public consultation. This allowed the Commission to further improve and refine the texts prior to adopting the final versions. Many comments made by stakeholders found their way into the final texts – which shows the usefulness of the concept of public consultations in the EU decision making process and, on a broader level, that the Commission takes a constructive dialogue with stakeholders seriously.

The new EU competition rules on horizontal co-operation agreements should be seen as an evolution, not a revolution. Their aim is to provide comprehensive guidance and adequate legal certainty for companies wishing to co-operate with competitors. Whilst the Commission’s view on how competitors can co-operate has not fundamentally changed since the previous rules were put in place in 2000, the new Horizontal Guidelines are more detailed and user-friendly than the previous ones. Key features of the reform include the insertion of a new chapter on information exchange in the Horizontal Guidelines, a substantial revision of the chapter on standardisation agreements, and the revised BER for R&D agreements.

2. Main features of the EU’s new “Horizontal Regime”

A properly functioning system for standard-setting is vital for the European economy as a whole and for the information, communication and telecoms (ICT) sector in particular. The Horizontal Guidelines promote a standard-setting system that is open and transparent, and thereby increases the visibility of licensing costs for intellectual property rights (IPRs) used in standards. In doing so it attempts to strike a balance between the sometimes contradictory interests of companies with different business models (from the pure innovator to the pure manufacturer) involved in the standard-setting process. The system will thus provide sufficient...
Incentives for further innovation and at the same time ensure that the traditional benefits from standardisation are passed on to consumers.

In practical terms, the chapter on standardisation agreements contains certain criteria, which, if fulfilled by standard-setting organisations, provide comfort that the Commission will not take issue with a standard-setting agreement (safe harbour). These criteria include: (i) no obligation to comply with the standard, (ii) the procedure for adopting the standard is unrestricted with participation open to all relevant competitors on the market, (iii) transparency to ensure that stakeholders are able to inform themselves of upcoming, on-going and finalised work, (iv) effective access to the standard, and (v) for standards involving IPR, a balanced IPR policy, with a requirement for all IPR holders that wish to have their technology included in the standard to provide an irrevocable commitment to license their IPR on fair, reasonable, and non-discriminatory terms ("FRAND commitment") and, if the standard is not royalty-free, a good faith disclosure of those IPRs which are essential for the implementation of the standard. However, these criteria are not a "straight-jacket": failure to meet them does not mean that a standardisation agreement infringes EU competition rules. Consequently, the Commission gives detailed guidance for those standard-setting organisations whose rules do not meet the safe harbour criteria, in order to allow them to assess whether their agreements are in line with EU competition law.

Certain standard-setting organisations may wish to enable their members to unilaterally disclose, prior to setting a standard, the most restrictive licensing terms that they would charge for their IPRs if those were to be included in the standard. Such a system could enable a standard-setting organisation and the industry to make an informed choice not only on quality but also on price when selecting which technology should be included in the standard. The Commission assures standard-setting organisations that such a system would not normally infringe EU competition rules.

Information exchange can be pro-competitive when it allows firms to become more efficient and serve customers better. It also enables consumers to make better informed choices when deciding which product to purchase. However, there are also situations where the exchange of market information can be harmful for competition, in particular when companies use strategic information to coordinate their conduct on the market, leading to consumer harm. The new chapter on information exchange in the Horizontal Guidelines is the first Commission document to give comprehensive guidance on how to assess the compatibility of information exchanges with EU competition law and it will therefore play a significant practical role for businesses and their legal advisors.

The information exchange chapter gives guidance regarding four key topics. Firstly, the chapter provides guidance on when information exchanges can fall within the scope of Article 101 TFEU. In particular, this section discusses the notion of a “concerted practice” in the context of information exchanges. Moreover, the chapter provides a clear definition of when information exchanges are considered to have an anti-competitive object, which is the case when competitors exchange individualised information regarding intended future prices or quantities. Exchanges of this type are the most efficient (cost-free) tool for coordination as they do not expose companies to the risk of losing market share during the period of attempted coordination. Companies are also unlikely to exchange such intentions for pro-competitive reasons. As regards the potential restrictive effects on competition to which information exchanges may give rise, the chapter explains that the main competition concerns relate to facilitating collusion. The chapter sets out the various factors that are relevant for the assessment and the interplay between these factors. A key question for the analysis is whether the data exchanged are “strategic” in nature. Only the exchange of strategic data (i.e. data that reduce strategic uncertainty in the market) can modify the characteristics of the relevant market in such a way that it becomes susceptible to collusion. Naturally the most strategic data relate to individualised prices and quantities, but depending on the nature of competition other types of data can also be strategic. Other relevant factors include assessing whether the data exchanged are public or non-public, whether the exchange takes place in public or in private, whether the exchanged data are aggregated or individualised, the age of the data, and the frequency of the exchange. Finally, the chapter also describes the types of efficiencies which exchanges of information may precipitate. Lastly, the chapter contains a number of practical examples to help businesses assess typical information exchange scenarios.

With a view to facilitating innovation in Europe, the Commission has considerably extended the scope of the 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 merely finances the R&D activities carried out by the other party. In addition, the new Regulation gives parties more scope to jointly exploit the R&D results. Under the new regulation, for example, it is possible that only one party produces and distributes the products resulting from the joint R&D on the basis of an exclusive licence.
by the other party. Moreover, the list of “hardcore restrictions” has been streamlined and it has been made clear that restrictions on active sales to territories not exclusively allocated to one party are considered hardcore and can therefore not benefit from the BER. It has furthermore been clarified that passive sales restrictions with regard to customers, and not only those with regard to territories, are also considered hardcore restrictions.

The scope of the Specialisation BER, which covers both specialisation and joint production agreements, has been slightly extended so that its benefit also applies to specialisation agreements where one of the parties to the agreement only partly ceases production. This enables a company that has two production plants for a certain product to close down one of its plants, outsource the output of the closed plant, and still avail of the Specialisation BER. The Specialisation BER also provides that, where the products concerned by a specialisation or joint production agreement are intermediary products which one or more of the parties use captively for the production of certain downstream products which they sell, the exemption is also conditional upon a 20% market share threshold downstream. In such a case, looking only at the parties’ market position at the level of the intermediary product would fail to recognise the potential risk of closing off inputs for competitors at the level of the downstream products. Consequently, such a specialisation or joint production agreement will not benefit from the Specialisation BER, but will be subject to an individual assessment.

3. Conclusion

With the new EU competition rules on horizontal co-operation agreements, the Commission reaffirms its commitment to the path that it has been vigorously pursuing for more than a decade – an economics-based approach to competition law assessment. This does not mean less legal certainty for companies and their legal advisors. On the contrary, the new rules are based on solid economic principles that are predictable and therefore provide clear guidance to undertakings and their legal advisors.