MEMO/10/676

Brussels, 14 December 2010

Competition: Commission adopts revised competition rules on horizontal co-operation agreements

Frequently asked questions

A. General Questions

1. What are horizontal co-operation agreements?

"Horizontal co-operation agreements" are agreements concluded between competitors (as opposed to *vertical* agreements which are between companies at different levels in the supply chain), for example with a view to co-operate on research and development, production, purchasing, commercialisation, standardisation, or exchange of information. Horizontal co-operation can be pro-competitive and lead to substantial economic benefits, allowing companies to respond to increasing competitive pressures and a changing market place driven by globalisation. However, where the parties have market power, horizontal co-operation can also lead to serious competition problems.

2. What are the new rules for the assessment of horizontal co-operation agreements under EU competition law?

Just like the regime they replace, the new rules consist of a set of two Block Exemption Regulations (BERs) and guidelines, the "Horizontal Guidelines". While the two BERs exempt certain research and development (R&D) agreements and specialisation as well as joint production agreements, the scope of the Horizontal Guidelines is much wider. The Horizontal Guidelines describe the framework for the analysis of the most common forms of horizontal co-operation such as agreements in the areas of R&D, production, purchasing, commercialisation, standardisation, standard terms, and information exchange.

3. What does it mean that an agreement is "block exempted"?

Certain categories of agreements concluded between companies that have limited market power (reflected in a market share not exceeding 25% in case of joint R&D agreements between competitors or not exceeding 20% in case of specialisation or joint production agreements) and that respect certain conditions set out in the Commission's BERs, can be presumed to have no anticompetitive effects or, if they do, the positive effects will outweigh any negative ones. Based on this positive presumption, agreements falling under a BER are exempted from the EU's ban on restrictive agreements and business practices (Article 101(1) of the TFEU). The safe harbour market thresholds for horizontal agreements are lower than the 30% threshold for vertical agreements between non-competitors. This is simply because agreements between competitors have a higher potential to harm competition than agreements between non-competitors.

With a 25% market share threshold, R&D agreements are the most favourably treated category of horizontal agreements as such agreements can lead to substantial efficiencies because they stimulate innovation.

For R&D, specialisation or joint production agreements concluded by companies whose market shares exceed the above mentioned thresholds, there is no such automatic exemption, but there is also no presumption that the agreement is illegal: it is necessary to assess the agreement's negative and positive effects on the market. The Commission's Horizontal Guidelines that accompany the R&D and Specialisation BERs assist in making this assessment.

B. Horizontal Guidelines

4. What are the main general changes introduced?

The main changes that have been introduced in the Horizontal Guidelines are a substantial revision of the standardisation chapter and a new chapter on information exchange.

The new Horizontal Guidelines also reflect the need for self-assessment, introduced by Regulation 1/2003 on the application of the EU competition rules, which abolished the former notification system under which companies had to notify their horizontal co-operation agreements to the Commission, which had the sole power to grant an exemption. Nowadays, companies need to assess themselves whether an agreement infringes Article 101(1) TFEU and, if so, whether the exemption conditions of Article 101(3) TFEU are met. To this end, the Horizontal Guidelines provide a clear methodology of how to assess horizontal co-operation agreements under EU competition rules as well as many practical examples.

5. What is the main message of the standardisation chapter?

The purpose of this chapter is to give guidance on how to ensure that the process of selecting industry standards is competitive and that, once the standard is adopted, access is given on "fair, reasonable and non-discriminatory" (FRAND) terms to interested users. Experience in the last 10 years has shown that in practice many of the complaints and cases related to standard-setting arise because of a lack of transparency during the selection process, notably in the context of intellectual property rights. This is why the chapter now focuses on trying to avoid certain of these problems by laying down clear guidance on the standard-setting process, so as to ensure that the specific benefits of standard setting are passed on to industry and consumers. To this end, the revised standardisation chapter sets out the criteria under which the Commission will not take issue with a standard-setting agreement ('safe harbour'). These criteria include: (i) that the procedure for adopting the standard is unrestricted with participation open to all relevant competitors on the market; (ii) transparency to ensure that stakeholders are able to inform themselves of upcoming, on-going and finalised work and for standards involving IPR, and (iii) a balanced IPR policy with good faith disclosure of those IPRs which are essential for the implementation of a standard, and 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").

6. How has the Commission taken account of stakeholders' comments?

The public consultation showed an overwhelming interest for the revision of the standardisation chapter. The two most important points raised related to the fact the safe harbour should not lead to any "straight jacket effect" and that there is a need for more guidance for standard-setting organisations falling outside the safe harbour (see Q5). In response to this it has been made clearer that the only effect of falling outside the safe harbour is that self-assessment in accordance with the effects based part of the chapter is needed – i.e., there is no presumption of illegality outside the safe harbour. The part of the safe harbour relating to the disclosure of intellectual property rights (IPR) has also been clarified, e.g., it has now been made explicit that there is no need for patent searches. The chapter also contains much more guidance on agreements falling outside the safe harbour compared to the draft published in May.

7. How do the Horizontal Guidelines propose to assess the ex ante disclosures of most restrictive licensing terms?

One of the inherent problems of a standard-setting process is the uncertainty about the commercial terms that intellectual property rights holders will charge once the standard has been adopted and industry is locked in ("locked in" means that the costs in switching to another technology would be prohibitive). In order to solve this issue, most standard-setting organisations already require companies whose intellectual property rights would read on a standard to commit to licensing those rights on so called "FRAND" (fair, reasonable and non-discriminatory) terms. However, experience shows that disputes may arise as to the exact level of FRAND. Therefore, unilateral ex ante disclosures of the maximum terms that a company would charge if its technology were incorporated in a standard can, in certain cases, be one way of avoiding disputes. Industry and standard-setting organisations have however been cautious for fear of infringing competition law. The Horizontal Guidelines make it clear that such a system would normally not give rise to competition concerns.

8. Why is disclosure of intellectual property rights beneficial before the adoption of a standard?

In certain industries, technologies incorporated in a standard are likely to be protected by intellectual property rights (in particular, patents). The use of such IPR requires the permission of their owner, who also has the right to charge for the use of its IPR. Where different technologies are competing in order to be included in the standard, industry needs to be aware of which patents are relevant for each of the potential technologies, to be able to make an informed choice between alternative technologies. No or unclear disclosure obligations may furthermore give incentives to "patent ambushes", i.e. companies hiding patents until industry is locked in and thereafter refusing to license or request exorbitant fees.

9. How do the Horizontal Guidelines propose to interpret "FRAND" in the context of EU competition law?

The Horizontal Guidelines clarify that there are various methods to assess the level of FRAND in the context of standard-setting in case of a dispute. Particularly relevant are the licensing fees charged at an earlier stage, prior to the adoption of the standard.

10. Why does the standardisation chapter now also deal with standard terms?

The recent review of the Insurance Block Exemption Regulation (http://ec.europa.eu/competition/sectors/financial_services/legislation.html) revealed that the use of standard terms in contracts was not specific to the insurance industry. The specific exemption for co-operation on standard insurance policy conditions has therefore not been renewed. Indeed, agreements on standard terms are found in various industries such as banking or energy and there seems to be a demand for guidance on when such agreements risk infringing competition law. Therefore, the standardisation chapter now also contains guidance and examples on standard terms.

11. What is the content of the new chapter on information exchange?

Information exchange can be pro-competitive when it enables companies to gather general market data that allow them to become more efficient and better serve customers. However, there are also situations where the exchange of market information can be harmful for competition, for instance when companies use sensitive information to coordinate. The new chapter on information exchanges in the Horizontal Guidelines is the first Commission document to give clear and comprehensive guidance on how to assess the compatibility of information exchanges with EU competition law and will therefore play a significant practical role for businesses and their legal advisors.

In particular, the chapter on information exchange sets out that the exchange between competitors of individualised information regarding intended future prices or quantities is to be considered as having as its object the restriction of competition. Such exchanges are the most likely to lead to negative effects for consumers because they allow competitors to increase prices without incurring the risk of losing market shares or triggering a price war during the period of adjustment to new prices. This type of information exchange is also the most likely to be taking place for anticompetitive reasons. The subsequent part of the chapter provides guidance for the assessment of the restrictive effects and efficiencies of such information exchanges that do not aim at restricting competition (e.g. for statistical or benchmarking purposes), i.e. the vast majority of information exchanges. To this end, the chapter describes various factors relevant for the assessment and their interplay. Finally, the chapter contains a number of practical examples which will help businesses and their legal advisors to assess typical information exchange scenarios.

12. Why is there no longer a separate chapter on environmental agreements in the Horizontal Guidelines?

Standard-setting in the environment sector – which was what the environmental chapter in the previous Horizontal Guidelines effectively dealt with – is more appropriately dealt with in the standardisation chapter. The removal of the chapter does not imply any downgrading for the assessment of environmental agreements. On the contrary, instead of having a chapter addressing a narrow aspect of environmental standards, the Commission now makes it clear that environmental agreements are to be assessed under the relevant chapter of the Horizontal Guidelines, be it R&D, production, commercialisation or standardisation. Moreover, appropriate examples have been inserted in the R&D and production chapters.

13. When do the Horizontal Guidelines enter into force?

The Horizontal Guidelines will enter into force as soon as they have been published in the Official Journal of the EU, which should take place in the coming days.

C. R&D Block Exemption Regulation

14. What are the main changes?

Most changes of the R&D BER simply provide more clarity and legal certainty. In addition, the scope of the R&D BER has been expanded to also cover what is often referred to as "paid for research", i.e., a scenario where one party merely finances the R&D activities of the other party . Moreover, the possibility for the parties to jointly exploit the results has also been broadened. Parties to an R&D can now also avail themselves of the R&D BER where only one party sells the contract products in the EU on the basis of an exclusive license by the other party (which will often have the right to sell the contract products in areas outside the EU).

In order to ensure that a party's intellectual property rights do not unduly impair the exploitation of the results of an R&D agreement by the other parties ("patent ambush"), the draft of the R&D BER published in May specified that an exemption under the R&D BER should only be available if prior to starting the research and development all parties agree that they will disclose in an open and transparent manner their existing and pending intellectual property rights relevant for the exploitation of the results by the other parties. However, during the public consultation it has become apparent that there is no practical need for such a disclosure obligation as, in particular, potential patent ambushes in the context of R&D agreements can be adequately addressed by the parties through private contractual arrangements.

The new R&D BER enters into force on 1 January 2011, with a transitional period of 2 years, during which the previous BER will remain in force for such agreements that fulfil its conditions but do not fall under the new BER.

D. Specialisation Block Exemption Regulation

15. What are the main changes?

The Specialisation BER clarifies that its benefit applies to specialisation agreements, even 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 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 also sell, the exemption is also conditional upon a 20% market share threshold downstream. In such a case, merely looking at the parties' market position at the level of the intermediary product would ignore the potential risk of closing off inputs for competitors at the level of the downstream products. Consequently, such a specialisation or joint production agreement should not benefit from a BER but should be subject to an individual assessment.

The new Specialisation BER enters into force on 1 January 2011, with a transitional period of 2 years.