

NEW GUIDELINES ON AGREEMENTS WITH COMPETITORS

London

Paris

Rouen

Brussels

Geneva

Piraeus

Dubai

Hong Kong

Shanghai

Singapore

Melbourne

Sydney

The European Commission (“the Commission”) adopted new rules on Horizontal Co-operation agreements on 14 December 2010. The adoption of the rules came at the end of a process which saw the circulating of a questionnaire to the Member States and a consultation with stakeholders in 2008, and a public consultation which took place in May and June 2010.

Horizontal Co-operation agreements (“the co-operation agreements”) are agreements entered into between actual or potential competitors operating at the same level of production or distribution in the market. There are six general categories of co-operation agreements including Research and Development (“R&D”); Production; Purchasing; Commercialisation; Standardisation, industry standard terms; and Information Exchange (“IE”).

The new co-operation agreement rules revised and clarified the R&D Block Exemption Regulations (BERs), the Specialisation BERs and the Horizontal Guidelines. The Regulations

exempt from the competition rules certain R&D, specialisation and production agreements that are unlikely to cause competition concerns and, along with the Horizontal Guidelines, they point companies to ways in which they can co-operate without falling foul of antitrust laws through the provision of self-assessment factors.

The new BERs came into force on 1 January 2011 and will be valid until 31 December 2022. There will be a transitional period of two years for agreements exempted under the old BERs, which will continue to benefit from exemption until 31 December 2012.

R&D block exemption regulation

The new Research & Development BER, Regulation No 1217/2010 on the applicability of Article 101(3) TFEU to certain categories of R&D agreements, provides for an updating of the previous rules. The new BER introduces an extension of the Regulation’s scope, a relaxation of Article 5 and the removal of a



provision covering the disclosure of Intellectual Property Rights (IPRs) included in the May 2010 draft.

The BER is no longer restricted only to covering R&D activities carried out jointly. The Commission has extended the scope of the R&D BER to cover “paid for research”, where one party to an agreement finances the R&D activities carried out by the other party.

The joint exploitation agreements, nevertheless, have also been reviewed. The Commission has introduced further flexibility through the addition of joint exploitation agreements with exclusive licensing. As such, a scenario where only one party can produce and distribute the products subject to the co-operation agreement on the basis of an exclusive licence granted by the other parties is now covered.

The black list contained in Article 5 has been relaxed and shortened. Active sales restrictions are now possible without time limits for territories or customers exclusively allocated to the other party to the agreement, the previous seven year limit having been removed. The use of the R&D results, as exclusively allocated to each party to the agreement, can now be permanent. However, passive sales restrictions with regard to territories and customers are considered to be hardcore restrictions.

For the purposes of interpreting the Commission’s intentions, and to understand its policy when approaching this revision, it is important to note that a section relevant to the disclosure of Intellectual Property Rights (IPRs) which was included in the draft version of the revised BER has been removed

in the adopted version. Effectively, an obligation to disclose existing and pending IPRs, in as far as they are relevant for the exploitation of the results by the other parties, has been removed.

Specialisation block exemption regulation

The new Specialisation BER, Regulation No 1218/2010, covers the applicability of Article 101(3) TFEU to certain categories of specialisation agreements.

The Commission did not believe that the Specialisation BER should be fundamentally modified. The main change is that the new specialisation block exemption clarifies that where the products concerned by a specialisation or joint production agreement are intermediary products that one or more of the parties use captively for the production of certain downstream products which they also sell, the exemption is conditional upon falling within the relevant market share threshold downstream.

Horizontal Guidelines

The new Horizontal Guidelines revised those existing on the applicability of Article 101 TFEU to co-operation agreements, providing a framework for the analysis of the most common forms of horizontal co-operation agreements. These Guidelines, albeit not binding on the Courts, provide valuable insight into the relevant criteria to consider when undertaking the self-assessment of horizontal agreements.

The new Guidelines, which came into force on 14 January 2011 when they were published in the Official

Journal, principally add a chapter on information exchanges and introduce expanded advice on standard terms in agreements.

Information exchange

Information exchange (IE) includes the sharing of data directly or indirectly between competitors, through a common agency as through a trade association, through a third party and by means of publishing.

This new chapter sets out the factors that are relevant when assessing the competitive outcome of information exchanges and, in this process, focuses on scenarios where the exchange of information creates or has the potential to create risk-free conditions and where this exchange facilitates collusion. These factors will be applied and are relevant to a case by case assessment approach by the Commission.

The main competition concern on IE is where there is the existence of collusion. This will be the case where the information exchange creates mutually consistent expectations on uncertainties present in the market and leads to a common understanding on the terms of coordination, where it enables transparency in the market allowing the monitoring of deviation from collusive outcomes and retaliation against new entrants.

The factors to be considered are the market characteristics, the characteristics of the information that is exchanged, such as whether it is strategic information, information relating to market coverage, aggregated or



individualised data, the relevance of the data, the frequency of the exchange and whether it is publicly available.

The Guidance recognises that IEs can be pro-competitive. It is noted that IEs are a common feature of competitive markets and, in order to make good decisions, firms need this information. It is also recognised that they may generate various types of efficiency gains.

Certain categories of efficiency gains are expressly covered by the Guidance and relate to the benchmarking of performance against best practices in the industry, facilitating production allocation towards high-demand markets or low cost companies by enabling substantial cost savings, limiting risk exposures and reducing search costs and benefits to consumers through the exchange of genuinely public information.

Restrictive effects depend on the interplay between the conditions of the market and the types and characteristics of IE, making it important not only to assess the initial market conditions but also to consider the changes made to these initial conditions by the IE.

For example, the guidelines set out that the markets most likely to have a collusive outcome are those that are transparent, concentrated, stable, less complex and symmetric. These market conditions can be varied by the information exchange effectively increasing the transparency, compensating for the asymmetry, buffering instability or reducing market complexity.

The Commission considers certain restrictions imposed by the IE to be restrictive by object. For such restrictions it may be especially difficult to argue that the criteria for exemption apply. Any information exchanges with the objective of restricting competition on the market will be considered restrictions of competition by object.

This is the case where the information exchanged relates to individualised future intentions on prices and quantities and there is furthermore a consideration that where the IE is private the exchange is more likely to be regarded unfavourably.

The Guidelines seek to strike a balance in order not to discourage pro-competitive information sharing. At the public consultation stage this chapter came under the close scrutiny of the Commission and stakeholders alike. It remains to be seen whether the final version of the guidelines successfully meets this vital balance.

Standard terms

The primary objective of a standardisation agreement is to define the technical and quality requirements with which current or

future products, production processes, services or methods may comply.

The amendments included in the revised Standard Terms chapter increase the clarity of factors to consider when dealing with the standard setting process and with industry standard terms, which are an integral part of standardisation agreements.

The “safe harbour” relating to the standard-setting process has been retained by the updated chapter and sets out three situations in which the EU prohibition of anti-competitive agreements would not apply. These are where the procedure for adopting the standard is open, providing unrestricted access to the standard, and transparent; where there is a clear and balanced IPR policy including good faith disclosure of essential IPRs, and irrevocable commitment to license on fair reasonable and non-discriminatory (FRAND) terms.

More guidance is provided when considering scenarios outside of the safe-harbour for which there is no presumption of illegality and which are, consequently, to be individually assessed.

“More guidance is provided when considering scenarios outside of the safe-harbour for which there is no presumption of illegality and which are, consequently, to be individually assessed.”



This is covered by the criteria provided and relevant to an effects-based approach. The relevant features here are the freedom to develop alternative standards and products, the availability of access to the standard by members or third parties, the market shares of the goods and services based on the standard, the extent of any discrimination against any participating or potential members, and whether there is a sufficiently transparent disclosure of any relevant IPRs. In the scenario where the standard terms are binding, the impact of this on product quality, variety and innovation in general terms needs to be assessed.

Forthcoming workshop

If you would be interested to attend an interactive workshop or seminar on the do's and don'ts of arrangements with competitors including exchanges of information, please contact **Anthony Woolich**, Partner, on +44 (0)20 7264 8033 or anthony.woolich@hfw.com, or **Konstantinos Adamantopoulos**, Partner, on +32 2 535 7861 or konstantinos.adamantopoulos@hfw.com, or **Eliza Petritsi**, Partner, on +44 (0)20 7264 8772 or eliza.petritsi@hfw.com, or your usual contact at HFW.

HFW news

We are delighted to announce the recruitment of two new partners to our EU competition and regulatory team. **Konstantinos Adamantopoulos**, who specialises in EU trade law, EU competition law and State aid, is based in our Brussels office, while **Eliza Petritsi** is based in our London office together with **Anthony Woolich** and his team. Eliza specialises in all aspects of EU competition, state aid, international trade, and EU regulatory law.

Lawyers for international commerce hfw.com

HOLMAN FENWICK WILLAN LLP
Friary Court, 65 Crutched Friars
London EC3N 2AE
T: +44 (0)20 7264 8000
F: +44 (0)20 7264 8888

© 2011 Holman Fenwick Willan LLP. All rights reserved

Whilst every care has been taken to ensure the accuracy of this information at the time of publication, the information is intended as guidance only. It should not be considered as legal advice.

Holman Fenwick Willan LLP is the Data Controller for any data that it holds about you. To correct your personal details or change your mailing preferences please contact Craig Martin on +44 (0)20 7264 8109 or email craig.martin@hfw.com