European Commission Issues Revised Rules on Horizontal Cooperation

December 16, 2010

On December 14, 2010, the European Commission released revised Guidelines for the Assessment of Horizontal Cooperation Agreements ("New Guidelines"). The European Commission also released a draft Regulation on the Application of Article 101(3) of the Treaty to Certain Categories of Research and Development Agreements ("New R&D Block Exemption") and a draft Regulation on the Application of Article 101(3) of the Treaty to Certain Categories of Specialization Agreements ("New Specialization Block Exemption") (together the "New Block Exemptions").

Both the New Guidelines and the New Block Exemptions are the result of a two year review process. The New Guidelines replace the 2001 Guidelines for the Assessment of Horizontal Cooperation Agreements ("Old Guidelines"), and the New Block Exemptions replace the 2000 Block Exemptions, which were expected to expire on December 31, 2010.

The New Block Exemptions will come into force on January 1, 2011, and expire on December 31, 2022. The New Block Exemptions, however, provide for a two year transitional period where the former Block Exemptions will continue to apply to those already existing agreements that satisfy the conditions of the former Block Exemptions but do not satisfy the conditions of the New Block Exemptions.

THE NEW GUIDELINES

The New Guidelines attempt to provide more clarity and greater detail to enable companies to determine for themselves whether any cooperation agreement with their competitors is legal. In this respect, the New Guidelines are substantially longer than the Old Guidelines.

The new analytical framework laid out by the European Commission to assess horizontal cooperation agreements encompasses two "key features," *i.e.*, the adoption of an entire section dedicated to information exchanges between competitors, and a substantially revised section on standard-setting.

Information Exchanges—The Old Guidelines did not address information exchanges at all, and the European precedents were too scarce to provide any real guidance. As such, the adoption of a section on information exchanges is a fundamental change for the legal and business communities.

The New Guidelines acknowledge that information exchanges may increase competition by solving "information asymmetries," saving companies' costs, and ultimately reducing consumers' "search costs." They, however, also stress out that information exchanges may lead

to anticompetitive effects, such as creating a collusive outcome, increasing the internal or external stability of an already existing outcome, or leading to competitors or third parties foreclosure.

The New Guidelines further provide the required analytical tools to enable companies to determine whether a proposed information exchange has an anticompetitive object or effect. First, the New Guidelines state that—in a nutshell—individualized data regarding future prices or quantities may not be exchanged between competitors as the object of such exchange would in principle be anticompetitive.

Second, the New Guidelines detail the criteria that may be used in assessing the potential anticompetitive effect of information exchanges. These criteria are: (1) the characteristics of the market in question (*e.g.*, whether it is transparent or not, or symmetrical or not); and (2) the characteristics of the information exchanged (*e.g.*, whether it is aggregated or disaggregated, actual or historic, strategic or not, or frequent or not). For each of these criteria, the New Guidelines provide a useful and detailed methodology for assessing their respective significance in the analysis of the potential anticompetitive effect of the exchange.

Standardization Agreements—As before, the New Guidelines address both standardization agreements and standard terms and conditions. They, however, aim at promoting "a standard-setting system that is open and transparent." As a result, the New Guidelines substantially modify the Old Guidelines.

The New Guidelines recognize that, in principle, standardization increase competition but they also point out the potential anticompetitive object or effect of such practice.

In this regard, the most noticeable aspect of the New Guidelines is the "safe harbor" for standard-setting agreements. The New Guidelines posit that standard-setting agreements leading to market power should not be considered anticompetitive as long as they obey by each of the following: (1) unrestricted participation to the standard-setting practice; (2) transparent procedure; (3) lack of mandatory compliance with the standard adopted; and (4) access to the standard on fair, reasonable and non discriminatory terms ("FRAND terms").

Furthermore, specific rules are dedicated to standard-setting agreements involving intellectual property rights ("IPR"). Companies willing to have their IPR as part of a standard shall essentially: (1) irrevocably commit—prior to the adoption of the standard—to license their IPR to all third parties on FRAND terms; and (2) companies participating in the standard-setting shall disclose in "good faith" their IPR that may be required to implement the standard.

Standard-setting agreements that do not meet all of the above-mentioned conditions fall outside the safe harbor threshold. For these agreements however, the New Guidelines provide a useful analytic framework.

THE NEW BLOCK EXEMPTIONS

The New Block Exemptions are essentially similar to the former Block Exemptions, though, unlike its predecessor, the New R&D Block Exemption not only covers joint research and development, with or without joint exploitation of the results, but also covers "paid-for" research and development, with or without joint exploitation of the results. According to the New R&D Block Exemption, "paid-for" research and development is defined as research and development carried out by one party and financed by another party.

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