CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
February 2011 (1)

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Donncadh Woods
European Commission, DG Competition

www.competitionpolicyinternational.com

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I. CONTEXT

Innovation and competitiveness are fundamental to the EU's Europe 2020 strategy.[3] Efficiency enhancing co-operation agreements between competitors, and in particular R&D and standardization agreements, can further innovation and competitiveness in Europe. Greater prosperity results from innovation and from using resources better, with knowledge as the key input. To make this transformation happen, Europe needs to use a number of tools, including competition to drive companies to innovate and co-operate in efficiency-enhancing projects. Horizontal co-operation agreements[4] can lead to substantial economic benefits, in particular if the companies involved combine complementary activities, skills, or assets. Such co-operations allow companies to respond to increasing competitive pressures in a changing market place driven by globalization. However, horizontal co-operation agreements can also lead to serious competition problems. This is, for example, the case where the cooperation increases the market power of the parties to an extent that enables them to increase prices, limit output, or reduce innovation efforts.

Horizontal co-operation agreements therefore require first an assessment aimed at establishing whether they are caught by Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) in light of their anticompetitive object or effects and, if so, whether they comply with all the conditions set out in Article 101(3) TFEU, so as to benefit from the legal exception provided for therein. Agreements falling under Article 101(1) TFEU that do not comply with Article 101(3) TFEU are null and void pursuant to Article 101(2) TFEU.

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[1] Commission Regulation (EU) No 1217/2010 of December 14, 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements (OJ L 335, 18.12.2010, p. 36.) ('the R&D Block Exemption Regulation') and Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements (OJ L 335, 18.12.2010, p. 43) ('the Specialisation Block Exemption Regulation'), and an accompanying set of guidelines (Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements; OJ C 11, 14.01.2011).

[2] Deputy Head of the Antitrust and Mergers Policy and Scrutiny Unit, European Commission, DG Competition. The views expressed in this paper are his own and do not necessarily reflect the position of the European Commission.

[3] Europe 2020 is a 10-year strategy proposed by the European Commission on March 3, 2010 and approved by the European Council on June 17, 2010 for reviving the economy of the European Union. It aims at "smart, sustainable, inclusive growth" with greater coordination of national and European policy. For further information see: http://ec.europa.eu/eu2020/index_en.htm

[4] ¶1 of the new Horizontal Guidelines provides, inter alia, that "….Co-operation is of a 'horizontal nature' if an agreement is entered into between actual or potential competitors. In addition, these guidelines also cover horizontal co-operation agreements between non-competitors, for example, between two companies active in the same product markets but in different geographic markets without being potential competitors."

Commission guidance in this area is given in the R&D and Specialisation Block Exemption Regulations ("BERs") as well as the accompanying Horizontal Guidelines.[5] On December 14, 2010, the European Commission adopted revised texts of the three instruments. The review was necessary because the previous versions of the R&D and Specialisation BERs expired in December 2010. The two BERs exempt R&D as well as specialization and joint production agreements from the EU's general ban on restrictive business practices contained in Article 101(1) TFEU, provided they meet all conditions set out in the regulations, which include a proxy for market power based on market-share thresholds.

The Horizontal Guidelines provide an analytical framework for the assessment of the most common types of horizontal co-operation agreements such as research and development agreements, production agreements—in particular those that fall outside the BERs—purchasing agreements, commercialization agreements, standardization agreements and standard terms, and information exchange. The basic approach of the Horizontal Guidelines and the two BERs is to allow competitor collaboration where it contributes to economic welfare without creating a risk for competition. These three texts update and further clarify the application of competition rules in this area so that companies can better assess whether their co-operation agreements are in line with the EU antitrust rules.

II. CONSULTATION AND EXPERTISE SOUGHT

Since the launch of the Horizontals Review in September 2008, a number of steps were taken to get input on both the perception of the present system and on potential aspects that could be improved. The main steps included: (1) consultation of stakeholders at the end of 2008/beginning of 2009, via a web based questionnaire; (2) meetings with Member States in the context of the European Competition Network; and (3) a public consultation on the draft texts launched in May 2010. 119 stakeholders submitted contributions during the public consultation.[6] The public consultation has generally shown broad support for the published drafts of the Horizontal Guidelines and the BERs. The main focus of stakeholders' comments was standardization and, to a lesser extent, the new chapter on information exchange. As regards the two BERs, the draft R&D BER was the focus of more attention than the draft Specialisation BER. All these comments allowed for further improvements and refinements of the texts prior to adoption of the final versions. A summary of the stakeholder input is available on DG COMP's web site.[7] The following paragraphs summarize some of the main issues raised by stakeholders and how these were addressed in the final texts.

A. Standard-setting

A well functioning system for standard-setting is vital for the European economy as a whole and, in particular, for the information, communication, and telecoms ("ICT") sector. 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 find a balance between the sometimes contradictory interests

[5] *See* footnote no. 1 for official titles and publication references.

[6] All non confidential submissions of stakeholders may be consulted at http://ec.europa.eu/competition/consultations/2010_horizontals/index.html

[7] An overview of the feedback received from stakeholders in the public consultation on the draft texts published in May 2010 is *available at* http://ec.europa.eu/competition/consultations/2010_horizontals/consultation_summary.pdf

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 standardization are passed on to consumers.

The comments on the standardization chapter focused mainly on two issues: refining the "safe harbor" set out in the published drafts and providing more guidance for standardization agreements falling outside the safe harbor. As regards the first point, a number of stakeholders emphasized that there is no "one size fits all" approach to IPR policies. The point was also made that the procedure for identifying and disclosing the relevant IPR set out in the safe harbor should not be overly burdensome and that it should be clarified that IPR disclosure does not require patent searches. As regards the second point, a large number of submissions pointed out, *inter alia*, that certain standard-setting bodies have policies based on the so-called "participation model" (i.e., where the IPR disclosure is replaced by a commitment in advance that the participants will license essential IPR on fair, reasonable, and non-discriminatory ("FRAND") terms) and that there is a need for guidance on the use of such policies.

The standardization chapter has been quite substantially revised in response to the input received in the public consultation. Consequently, the two main changes are the "refining" of the safe-harbor and that more guidance is given when the standard-setting agreement falls outside the safe-harbor. It has been made clearer that competition problems may only arise—and the safe harbor is only relevant—in case there is a risk that the standard in question will have market power ("restrictive agreements are most unlikely in a situation where there is effective competition between a number of voluntary standards"[8]). It has also been made clearer that standard-setting organizations are free to put in place different rules; the only effect of falling outside the safe harbor 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 harbor.[9]

The section on FRAND commitments set out in paragraph 285 of the Horizontal Guidelines has been clarified to make it clear that the IPR policy should allow IPR holders to exclude specified technology from the standard-setting process and thereby from the commitment to offer to license, providing that exclusion takes place at an early stage in the development of the standard.

The IPR disclosure part of the safe harbor has also been clarified. It has been made explicit that the good faith disclosure of IPR set out in paragraph 286 of the Horizontal Guidelines (based on "reasonable endeavors") potentially relevant to the standard does not in any way require the companies to do a patent search (which can be costly). Also, since the risks with regard to effective access are not the same when it comes to royalty-free standards, the

[8] *See* ¶277 of the new Horizontal Guidelines.

[9] ¶279 of the Horizontal Guidelines reads as follows: "The non-fulfilment of any or all of the principles set out in this section will not lead to any presumption of a restriction of competition within Article 101(1). However, it will necessitate a self-assessment to establish whether the agreement falls under Article 101(1) and, if so, if the conditions of Article 101(3) are fulfilled. In this context, it is recognised that there exist different models for standard-setting and that competition within and between those models is a positive aspect of a market economy. Therefore, standard-setting organisations remain entirely free to put in place rules and procedures that do not violate competition rules whilst being different to those described in paragraphs 280 to 286."

availability of the safe harbor does not require royalty free standard-setting organizations to introduce a system of IPR disclosures.

In addition, the Horizontal Guidelines now gives guidance on how to assess whether an agreement falling outside the safe harbor would risk infringing competition law.[10] Different factors such as whether the members remain free to develop alternative standards or products, how access is given to the standard and the result of the standard, whether participation is limited or not, and the market shares of the participants are described as relevant for assessing whether the standard-setting agreement could lead to a restrictive effect on competition. In the effects-based part it is made clear that in certain cases it might be efficient to have a restricted circle of participants when setting the standard[11] or that a standard-setting organization without an IPR disclosure (so called "participation model with FRAND") can be in compliance with Article 101.[12]

B. 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. It also enables consumers to make better-informed choices when deciding which product to purchase.[13] However, there are also situations where the exchange of market information can be harmful for competition.[14] 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 will, therefore, play a significant practical role for business and their legal advisors.

In the public consultation, stakeholder submissions on information exchange generally welcomed the new guidance provided. A number of stakeholders suggested further improvements, in particular that: (i) the chapter should provide more guidance as to when information exchange can constitute a concerted practice; (ii) the category of "restrictions by object" should be clarified and, in particular, not include any references to exchanges of current data; and (iii) there should be some safe harbors in the chapter dealing with potentially restrictive effects of information exchanges, mainly related to market coverage, concentration, and the type of data (e.g. genuinely public, aggregate and historic data).

The final text of the Horizontal Guidelines addresses the first issue and contains a new section discussing when information exchange can amount to a concerted practice within the meaning of Article 101.[15] In addition, the notion of restrictions by object is further clarified.[16] However, as regards the desired safe harbors, it was not possible to provide absolute safe harbors in the area of information exchange because the competitive assessment of information exchange

[10] *See* ¶¶292 to 299 of the Horizontal Guidelines.

[11] *See* ¶295 of the Horizontal Guidelines.

[12] *See* ¶298 and 327 of the Horizontal Guidelines. ¶327 sets out a scenario where a standardization agreement without IPR disclosure would not infringe Article 101 TFEU.

[13] *See* ¶57 of the Horizontal Guidelines.

[14] *See* ¶58 of the Horizontal Guidelines.

[15] *See* ¶¶60 – 63, which draw on the case-law of the European Courts to give guidance on the distinction between unilateral acts and concerted practices.

[16] *See* ¶¶72 – 74 of the Horizontal Guidelines, where the focus is on "Information exchanges between competitors of individualised data regarding intended future prices or quantities …"

involves a number of interrelated factors such as the subject matter of the information, its aggregation, and age; as well as the characteristics of the market in which the exchange takes place such as its transparency, concentration, stability, etc. However, the revised guidelines provide more detailed guidance regarding the criteria that apply for the assessment of restrictive effects of information exchanges. Also, the new guidelines clarify the point that unless it takes place in a concentrated market, the exchange of aggregated data is unlikely to give rise to restrictive effects on competition.[17]

III. R&D BER

With a view to facilitating innovation in Europe, the Commission has considerably extended the scope of the R&D BER. As regards the R&D BER, stakeholders generally welcomed the many clarifications contained in the draft. As regards potential improvements, for various reasons many stakeholders suggested deleting the "disclosure obligation" which had been introduced in the text for public consultation. Such an obligation would have required the parties to agree that, prior to starting the research and development, all the parties disclose all their existing and pending intellectual property rights in as far as they are relevant for the exploitation of the results of the joint R&D by the other parties.[18]

Stakeholders also asked for more flexibility for the parties when engaging in joint exploitation of the results of their joint R&D activities, notably that the parties can, subject to the market share threshold and other conditions set out in the BER, decide that only one of them would actively market the products in the Union while the other party or parties focus on other areas.[19] Furthermore, stakeholders asked for the scope of the R&D BER to be extended to not only cover joint R&D activities but also paid-for research; that is to say, agreements where one party carries out the research and the other party merely finances it.[20]

All these points have been taken on board. The disclosure obligation is no longer contained in the final version of the R&D BER and its scope has been extended to cover paid for research and to allow the parties more flexibility with regard to the joint exploitation of the results of their R&D.

IV. CONCLUSION

With the new chapter on information exchange, a legal gap has been filled. Moreover, the chapter on standardization has been largely rewritten, the analytical framework in the

[17] *See* ¶89 of the Horizontal Guidelines.

[18] Drawing on its experience in the area of standardization, it was initially believed there could be a "*patent ambush*" problem in the context of joint R&D agreements, where two competitors combine their R&D activities and one of them has pre-existing essential intellectual property rights necessary for the exploitation of the results by the other party. However, it became apparent during the public consultation that initial concerns about patent ambushes in the context of joint R&D agreements, though theoretically correct, do not appear to reflect commercial reality. While the Commission and other competition authorities have dealt with patent ambushes in the area of standardization, there do not appear to have been any such cases in the context of R&D agreements. Importantly, the BER only covers agreements between competitors below a 25 percent market share threshold. Moreover, potential patent ambushes in the context of R&D agreements can be addressed by the parties through private contractual arrangements.

[19] The public consultation showed that such scenarios are common practice in some industries and are a prerequisite for some companies to enter into R&D agreements in the first place; i.e., necessary for them to innovate.

[20] As such agreements were not covered by the published drafts, many stakeholders felt that the Commission conveyed a negative message on the legality of such agreements, which are common in industry.

guidelines made clearer, and the examples updated. The scope and definitions of the two BERs have also been refined. Both companies and their advisers carrying out the assessment of their agreements under Article 101 TFEU (so called "self-assessment") and the Member States' national competition authorities and national courts empowered to apply Article 101 TFEU directly, should find these new guidelines more useful than their predecessor. While not underestimating the importance of the input and the legal and economic research carried out by personnel within the services of the Commission, the National Competition Authorities, and relevant National Ministries, the level of the improvements achieved would not have been possible without the significant stakeholder input made during this review.