



# European Commission consults on new competitor co-operation rules

The European Commission has launched a formal consultation on the EU competition rules applicable to co-operation agreements between competitors. Its proposals would maintain the existing overall framework but include welcome new guidance on information exchange arrangements and on industry standard-setting agreements. The deadline for comments is 25 June.

The European Commission has launched a formal consultation on the EU competition rules applicable to co-operation agreements between competing businesses. The proposals apply to almost all business sectors and are of importance to any business that works with competitors, whether through joint ventures or other arrangements, to achieve efficiencies. The key legislation in this area expires on 31 December 2010 and the intention is that the new rules be adopted in time to enter into force at the start of 2011, with a transitional period of one year for agreements satisfying the existing block exemptions.

A review of these rules has been underway informally for some time now. Over a year ago the Commission published a questionnaire in which it sought views on the way in which the existing rules had functioned and on what changes might be desirable. Now draft replacement texts have been put out for consultation. They do reflect many of the points made by interested parties, but, notably, not the request (coming from many quarters) for the scope of the safe harbours provided for in the block exemptions to be extended by raising market share thresholds.

Announcing the proposals, Competition Commissioner Joaquín Almunia stressed their importance in facilitating the kind of competitor collaboration that promotes innovation and competitiveness in European companies. He emphasised the particular relevance of new guidance on standard-setting agreements in innovation industries.

## Background

The current legal framework consists of two block exemption regulations and accompanying guidelines. While they cannot provide substantial guidance on very complex arrangements, these texts are very useful to the extent that they provide a safe harbour, and set out a general framework of analysis, for fairly straightforward co-operation agreements between competitors.

The first regulation provides automatic exemption for a range of research and development (R&D) agreements from the prohibition on restrictive agreements set out in article 101(1) of the Treaty on the Functioning of the European Union (previously article 81 of the EC Treaty). It applies provided that certain conditions, including market share thresholds and the absence of certain 'hard-core' restrictions, are satisfied. The second provides a similar safe harbour for certain specialisation and joint production agreements.

The guidelines set out the Commission's framework for assessing whether various types of competitor co-operation agreements that fall outside the scope of the block exemptions infringe article 101(1) and, if so, whether they should benefit from exemption under article 101(3). The types of co-operation covered until now have been R&D, production and specialisation, joint purchasing and commercialisation, standardisation and environmental agreements.

The Commission's proposed revised block exemptions and guidelines, while not bringing radical change to the existing regime, do introduce some changes and some welcome additional guidance in some areas. The most important proposed changes and additions are considered below.

## **Proposed changes to the guidelines**

The proposed new guidelines are considerably longer than the existing ones, comprising 323 paragraphs instead of 198. This is largely due to the completely new section on information exchange and the much extended one on standard-setting (both described below). The text has also been adapted to provide more explicitly economics-based explanations and there are considerably more examples set out at the end of the individual sections than in the present text. There is also clarification of the application of the competition rules to agreements between joint ventures and their parents. It is emphasised that the guidelines should not be treated as a 'checklist' to be applied mechanically, as each case will turn on its own facts.

### **Information exchange**

Exchange of sensitive commercial information between competitors has always been frowned upon by the Commission and has in the past attracted significant fines. The European Court of Justice recently held in *T-Mobile* that a single exchange of information could constitute an 'object' infringement of article 101 (that is, an infringement of a type that does not require the competition authority or plaintiff to prove any actual anti-competitive effect), but the court has also recognised that information exchange between competitors can be pro-competitive.

The draft guidelines include a completely new section on information exchange and some of the other sections (for example, those dealing with joint production and purchasing) also deal with information exchange in the context of those types of agreement. The Commission states that such exchange can have restrictive effects on competition if it leads to co-ordination of competitive behaviour, or to market foreclosure of other competitors or of third parties. Certain types of exchange – and, in particular, those concerning future conduct on prices or quantities – often infringe article 101 'by object'. In other

cases all depends on the characteristics of the market (relevant factors include concentration, transparency, stability and complexity), and on the market coverage and type of information exchanged (eg commercial sensitivity, public availability). However, information exchange may be justified if it leads to intensification of competition or significant efficiency gains (eg allowing performance benchmarking, more efficient production allocation or better consumer information).

### **Industry standard-setting and standard terms**

Many industries rely on standardisation agreements that define technical or quality requirements for products or production processes, services or methods. In a much expanded section, the Commission proposes substantial new guidance on this topic and also on standard terms and conditions used within an industry. The Commission would also subsume into this section the existing separate section on environmental agreements.

It is explained that, while standardisation is frequently beneficial, it can also potentially restrict price competition and limit production, markets and innovation. Certain agreements, such as those putting pressure on third parties not to market products not using the standard, or excluding a competitor, will normally be prohibited. The same is true of agreements that use intellectual property rights (IPRs) to achieve joint price fixing, or standard terms that influence prices charged to customers.

Other types of agreement will be assessed for their likely effects on the market. Standardisation agreements will not raise competition issues provided that participation in the process is unrestricted and transparent, there is no obligation to comply with the standard and, where IPRs are involved, there is access for all third parties to the standard on 'fair, reasonable and non-discriminatory' (FRAND) terms. This last condition is newly introduced in the guidelines and aims to avoid hold-ups and the charging of abusive royalty rates. It will be very important in industries reliant on technology that is covered by patents and other industrial property rights.

Where there are restrictions on competition, these may be accepted where they are necessary to enable the marketing of products across all member states, or establish technical interoperability. They may also be justified where they reduce transaction costs or lead to

increased product quality or innovation. Where such efficiencies are argued, it will be important to ensure that the necessary information to apply the standard is available to all those wishing to enter the market, and that the standard-setting process is open and transparent and not biased towards one or several participants.

Standard terms will not often raise competition issues unless they are obligatory, in which case they may have a negative impact on price competition, or where they are widespread, in which case they may limit product variety. Where they do restrict competition, they may be justified on the basis that they enable customers better to compare different offers, reduce transaction costs or, in sectors involving complex contracts, facilitate entry.

## Proposed changes to the block exemptions

No major changes are proposed to the block exemptions. Notably, the market share thresholds (combined market share not exceeding 25 per cent for the R&D exemption and 20 per cent for the specialisation exemption) remain as before. However, in the case of the 20 per cent threshold, it is now specified that this must be met not only in respect of the specialisation product market but, where the product is also an intermediary product incorporated into other products by the parties, also in respect of those downstream product markets. Both exemptions include more definitions and specify that a 'potential competitor' is one that would make the necessary investments to enter the market for a product, technology or process concerned within three years.

There are some specific changes to the R&D block exemption. A new additional condition for application of this exemption is that the parties will have at the outset to agree to 'disclose all their existing and pending intellectual property rights insofar as they are relevant for the exploitation of the results by the other parties'. Also, the list of hard-core restrictions that prevent the application of the block exemption is to be shortened, and some of them adjusted. For example, the restrictions permitted on active and passive sales into certain territories or to certain customers are no longer different, depending on whether it is seven years from the first marketing of the contract products.

In addition, two restrictions that are currently classified as hard-core, and therefore take an agreement outside

the block exemption, are to be treated in future as simply not exempted. This means that their inclusion no longer removes the benefit of the block exemption from the rest of the agreement. The restrictions concerned are prohibitions on challenging IPRs and certain requirements not to grant third parties licences to manufacture contract goods or apply contract processes.

## Next steps

The Commission has requested comments on its proposals by 25 June. Once it has reviewed the submissions that it receives following this consultation, and taken into account the views of the member states and their competition authorities, it will adopt final versions of the two block exemptions and the guidelines. This process will determine EU distribution rules until December 2022, so it is very much in the interests of business to contribute to this debate, to ensure that the outcome matches their needs as closely as possible.

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