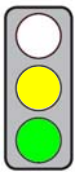
HORIZONTAL GUIDELINES

Status: 18 October 2010

MAIN ISSUES

Objective of the Communication: The Guidelines are intended to make it easier for undertakings to assess themselves whether or not their intended horizontal agreements infringe the ban on cartels of Art. 101(1) TFEU.

Parties affected: Undertakings, competition authorities



Pros: The detailed explanations and newly added instructions regarding information exchange and standard terms facilitate the entrepreneurial self-assessment of horizontal agreements and thus foster competition.

Cons: (1) The Guidelines partly lack clarity and precise wording.

(2) The statements on the "abuse of a dominant position within the internal market" (Art. 102 TFEU) are misplaced in "Guidelines for the applicability of Article 101".

CONTENT

Title

Draft SEC(2010) 528 of 4 May 2010 for a **Communication** from the Commission **on the Guidelines on the applicability of Article 101** of the Treaty on the Functioning of the European Union **to horizontal co-operation agreements**

Brief Summary

Note: the numbers refer to the Draft Guidelines.

- **Objective**
  - Under horizontal agreements, undertakings co-operate at the same level in the value-added chain ("competitors"). The aim of such co-operations is to strengthen their competitive position and to share competitive risks (No. 2).
  - The aim of the non-binding Guidelines is to facilitate the undertakings' review of:
    - whether or not a horizontal co-operation is anticompetitive and infringes the ban on cartels (Art. 101 (1) TFEU) and
    - if in that case an exemption is applicable (Art. 101 (3) TFEU).

    The reference values are "legal and economic criteria" (No. 7).
  - The guidelines refer to the "most common types of horizontal co-operation agreements" (No. 5):
    - research and development agreements,
    - production agreements including subcontracting and specialisation agreements,
    - purchasing agreements,
    - commercialisation agreements and
    - standardisation agreements including standard terms.
  - Moreover, the Guidelines contain explanations on "information exchange" between undertakings which are relevant in terms of competition law.

- **Scope**
  - The Guidelines cover the "most common" horizontal agreements between actual or potential competitors (Nos. 1 and 10). Vertical agreements between competitors must also be assessed in line with the principles of the Guidelines where "the effects of the agreement on the market and the possible competition problems can be similar to horizontal agreements" (No. 12).
  - The Guidelines do not apply to mergers and joint ventures pursuant to the Merger Control Regulation [Art. 3 of the Regulation (EC) No. 139/2004] (No. 6).
  - The Guidelines do not apply to undertakings which form a "single economic entity" and are therefore not independent from each other as defined in Art. 101 ((1) TFEU (No. 11).
  - The following forms are not deemed independent:
    - "parent company" and "subsidiary" if the parent company exercises a "decisive influence" on the subsidiary;
    - subsidiaries over which "decisive influence" is exercised by the same parent company ("sister companies") and
    - "joint ventures" where the parent companies "jointly exercise decisive influence".

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- **Content and structure**
  - Subdivided chapter-by-chapter, the Guidelines contain general and agreement-specific explanations of the assessment of horizontal agreements for goods and services ("products") (No. 8). In carrying out assessments, the explanations of the "General Guidelines" of Art. 101 (3) TFEU (ex-Art. 81 (3) TEC) (2004/C 101/08) are to be taken into account (No. 19).
  - The Guidelines first introduce the general principles for assessment pursuant to Art. 101 TFEU, which apply to all horizontal agreements (No. 20 et sqq.). The explanations on "information exchange" (No. 54 et sqq.) are equally applicable to all types of horizontal agreements and should therefore be included in each assessment (cp. No. 53).
  - All chapters contain explanations regarding the definition of the particular agreement, relevant markets and the antitrust acknowledgement pursuant to Art. 101 (1) and (3) TFEU. Moreover, they list concrete examples with facts and analysis.
  - Block Exemption Regulations (BER) exist for horizontal agreements in the field of research and development (R&D) [(EC) No. 2659/2000] and for specialisation agreements [(EC) No. 2658/2000]. In these areas the Guidelines are of a complementing nature (No. 8).
  - In the case of agreements on co-operation at different stages ("integrated co-operation"), the "most upstream indispensable building block" is relevant when deciding which chapter of the Guidelines serves as a basis for assessing the integrated co-operation and also which exemptions are applicable (No. 13).
    - For instance, R&D agreements are normally concluded before the joint production agreements and therefore the chapter on R&D applies (No. 14). In view of the subsequent activities, the chapters affecting integrated co-operation are to be taken into account (No. 13).
    - If the parties agree on a joint production "in any event, i.e. irrespective of the joint R&D" so that the "effects of the co-operation would largely relate to the joint production", then the chapter on production agreements would be applicable (No. 14).

- **In particular: information exchange**
  - The exchange of business information between competitors – notably the direct data exchange, exchange through third parties or publication – can have pro-competitive effects and lead to "significant efficiency gains" (No. 58). However, it can also have restrictive effects if information on future pricing or production conduct is involved in order to "be aware of the market strategies" of competitors (No. 58).
  - The classification of information exchange as pro-competitive or anti-competitive depends on the "characteristics of the market in which it takes place (such as concentration, transparency, stability, complexity etc)", as well as on the "type of information" (such as the nature of information and the exchange frequency) (No. 58).
  - Each information exchange can be relevant in terms of competition law if it forms (parts of) the basis of an agreement, a decision by an association of undertakings or a concerted action pursuant to Art. 101 (1) TFEU, notably
    - as part of horizontal agreements (No. 57), or
    - to monitor cartel agreements between undertakings (No. 59).
  - If there is neither an agreement nor a decision by an association of undertakings, a concerted action can be considered if a practical cooperation is "knowingly substituted for the risks of competition" and a "unilateral action" by one undertaking can be excluded (No. 56).

- **In particular: standardisation agreements and "standard terms"**
  - The Guidelines contain within one chapter instructions on the assessment of agreements regarding
    - the standards with which technical requirements and quality standards for products, procedures and processes are set and
    - "standard terms" (meaning standard terms and conditions of sale or purchase) elaborated by a trade association or directly by the competitors of an industry (e.g. standard terms forming the basis of an insurance agreement),

    each with specific explanations.
  - Standards can have anticompetitive effects if during the standard development an undertaking does not disclose its existing or pending intellectual property rights (e.g. patents or patent application): if, for instance, for a later application of the standard excessive licence fees are charged, access to the patented technology and therefore the application of the standard is restricted (No. 284).
    - The Guidelines recommend a "good faith disclosure" of the intellectual property rights in standardisation procedures. This will protect competing undertakings from "abusing market power". Right holders should "make reasonable efforts" to identify which of their intellectual property rights could be relevant for the potential standard (No. 281).
    - Holders of "essential intellectual property rights in technology" should undertake to provide an application of the standard "on fair, reasonable and non-discriminatory" license terms ("FRAND commitment") (No. 282).
    - The Guidelines describe different methods for identifying whether or not license fees "bear a reasonable relationship to the economic value of the patents" (No. 284 et sqq.).

Changes Compared to the Status Quo

- These are the first Guidelines to include the information exchange between undertakings. To date, explanations on information exchange existed only in relation to maritime transport services.
- The Guidelines specify the application of competition rules to agreements between joint ventures and their parent companies.
- The question of which chapters of the Guidelines are applicable to mixed agreements no longer depends on the main focus of a cooperation ("centre of gravity") but the "most upstream indispensable building block" during the different stages of the co-operation.
- For the first time, the Guidelines contain explanations of the connection between standards and intellectual property rights which is relevant in terms of competition law.
- In its chapter on standardisation, the Guidelines contain for the first time a provision on "standard terms and conditions of sale".
- The Guidelines no longer treat environmental agreements within a separate chapter but integrate them into the chapter on standardisation.

Policy Context

The Commission plans to revise the provisions on horizontal agreements and Group Exemption Regulations (BER) as the existing rules expire on 31 December 2010. To this end, it has submitted a package that contains not only the revised version of the horizontal guidelines but also revised versions of the BER for Specialisation Agreements [(EC) No. 2658/2000] (cp. CEP Policy Brief) and the BER for Research and Development Agreements (R&D) [(EC) No. 2659/2000] (cp. CEP Policy Brief). The final versions are to be adopted by the Commission by the end of 2010 after taking into account the submitted consultation statements. The provisions on vertical agreement have already been revised: on 1 July the updated BER on general vertical agreement entered into force [Regulation (EU) No. 330/2010; cp. CEP Policy Brief] and the revised BER on vertical agreements in the motor vehicle sector [Regulation (EU) No. 460/2010; cp. CEP Policy Brief]. Both Regulations are accompanied by guidelines [(2010/C 130/01) for vertical agreements, (2010/C 138/05) for agreements in the motor vehicle sector].

Options for Influencing the Political Process

Leading Directorate General: DG Competition

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

Horizontal co-operations can help undertakings to boost their competitiveness. In particular small and medium-sized undertakings can profit from economies of scale and scope and lower risks without having to forfeit their independence and flexibility. **The revision of the horizontal Guidelines** is to be welcomed in principle, as their detailed explanations and additions, such as the chapter on information exchange, **make it easier for undertakings to assess horizontal agreements themselves**; they provide more legal safety and thus have a pro-competitive effect. However, **the** conveyed **degree of legal safety is limited due to the non-binding nature of the Guidelines**.

Despite the explanations regarding the relevant markets of horizontal agreements, the Guidelines cannot solve the problem that it is difficult for undertakings to identify these markets and to determine their market shares. Anti-competitive effects are not likely if the parties to an agreement remain below a certain market share threshold. Such market share thresholds are defined by BERs and the Guidelines for certain types of horizontal agreements. Nonetheless, the necessary economic analysis and data collection is complex and error-prone, particularly for small and medium-sized undertakings.

Impact on efficiency and Individual Freedom of Choice

The Guidelines have an efficiency-enhancing effect as they make it easier for undertakings to assess whether or not their horizontal agreements are in line with competition law.

Impact on Growth and Employment

Insignificant.

Impact on Europe as a Business Location

Insignificant.

Legal Assessment

More than ever, the horizontal Guidelines are of great practical value, for since the reinterpretation of Art 101 TFEU as a ban with legal exemption – implemented through the Regulation (EC) No. 1/2003 – undertakings have been obliged to assess their agreements themselves in terms of their conformity with competition law (Art. 101 TFEU). Through the omission of the registration of agreements, which leads to an ex-post supervision through the Commission, the demand for reliable assessment criteria enabling the ex-ante self-assessment of undertakings has grown enormously. **The Commission has responded to the undertakings' demand for more orientation by designing the chapters on the different types of horizontal agreements in a more detailed manner** and with a number of examples, as well as by including explanations on information exchange.

The practical relevance of the information exchange is high. Therefore, **it is appropriate that the Commission has met the demand** for legal safety in this field **by including a new chapter** with general explanations **on information exchange** at the same time as taking into account recent case-law.

Standard terms are relevant not only in the insurance sector but also occur in other sectors. Therefore, **it is appropriate to include information on the conformity of standard terms with competition law into the more general Guidelines** and to forego rules in the sector-specific insurance BER [(EU) No. 267/2010].

Furthermore, it is consistent to delete the separate chapter on environmental agreements, as it makes sense to integrate agreements on environmental standards into the chapter on standardisation agreements. In addition, also other chapters, such as the one on R&D agreements, can serve as basis for the assessment of environmental agreements.

Concerning the assessment criteria for the "integrated cooperation", however, the Guidelines lack the level of clarity necessary to ensure that undertakings are able to assess the conformity of co-operations with competition law. Hence, it is questionable whether or not the newly introduced "building block" test is more accurate for the decision on which chapter of the Guidelines is applicable to the assessment of a co-operation than the replaced "centre of gravity" test. For instance, the "building block" criteria "most upstream" and "indispensable" remain far too vague. Moreover, the Commission reserves an equally shaky corrective for cases where undertakings wish to conduct an agreement element "in any event", irrespective of other building blocks of the cooperation.

Relevant to cartel law in terms of standardisation are both the method of specifying standards and the later application thereof. Standardisation agreements represent a restriction on competition pursuant to Art. 101 (1) TFEU, since competing undertakings are thus restricted in terms of their competitive parameters. If standards are based on intellectual property rights, the right holders receive an instrument to regulate the market access, even up to market foreclosure.

Here the Guidelines do not make it sufficiently clear that an infringement of the ban on cartels of Art. 101 (1) TFEU is taken into account only for anti-competitive *interactions* of undertakings. *Unilateral* actions, such as concealing relevant intellectual property rights for standardisation or demanding inappropriate license fees for standard applications, cannot be covered by a cartel ban (Art. 101 AEUV) but can be covered by the ban on abusing a market-dominant position (Art. 102 TFEU). Here the Commission indirectly refers to the closed investigations into misuse of market power "Rambus" (COMP/38.636) and "Qualcomm" (COMP/39.247). In the chapter on standard agreements, the Guidelines mix somewhat dubiously two separate legal domains: **the explanations of the "abuse of a dominant market position" (Art. 102 TFEU) have no place in "Guidelines on the applicability of Art. 101" (the explicit title).** In addition, the assessment criteria for standardisation agreements do not make it clear when the ban on cartels is affected (Art. 101 TFEU) and when the prohibition of abuse (Art. 102 TFEU).

The Commission's call for a "good faith disclosure" of intellectual property rights in the standardisation process and the self-obliging FRAND declaration for "fair, reasonable and non-discriminatory" license fees **are characterised by inaccurate wording** and unreflected description of the blurred FRAND principle and the limits of a self-imposed commitment.

Conclusion

The revision of the Guidelines provides undertakings with better conditions for being able to self-assess the conformity of horizontal agreements with competition law, since they provide more detailed information on the different types of horizontal agreements and integrate explanations on information exchange and standard terms. The degree of legal safety conveyed by the Guidelines, however, is limited due to the non-binding nature of the Guidelines. Regarding the assessment criteria for "integrated co-operation" and the call for "good faith disclosure" of intellectual property rights, the Guidelines lack clarity and accurate wording. In the chapter on agreements on standards the Commission does not differentiate sufficiently between the ban on cartels (Art. 101 TFEU) and the prohibition of abuse of a dominant position (Art. 102 TFEU).