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# What should be learned from the new eu rules on horizontal cooperation agreements?

**In many aspects, the year 2010 has been the year of the modernization of EU competition and antitrust rules. Indeed, in the wake of the adoption of new rules on vertical cooperation agreements[1] and on certain categories of industry-specific agreements[2], two additional horizontal agreements block exemption regulations ("New Regulations") were adopted on December 14, 2010[3], followed by the publication of new guidelines ("New Guidelines") in January 2011[4].**

While the New Regulations apply specifically to certain categories of Research & Development agreements on the one hand and to certain categories of specialization agreements on the other hand, the New Guidelines have a much broader scope of application and apply to agreements entered into between competitors (horizontal cooperation agreements) in general.

The New Regulations entered into force on January 1, 2011.

Yet, during a transitional period of two years, the New Regulations shall not apply to agreements already in force as of December 31, 2010 that meet the conditions for exemption provided for in the previously applicable regulations.

This article will focus on the main amendments made to the previously applicable rules.

## 1. The New Regulations

On the whole, the New Regulations pursue the same objectives as the previous ones: they aim at describing the conditions in which a (R&D or specialization) agreement falling under the scope of Article 101§1 of the Treaty on the Functioning of the European Union ("TFEU") can benefit from an exemption under Article 101§3

TFEU. It should be specified at this stage that the parties to an agreement are eligible for an automatic exemption only if their market share does not exceed 25% in case of R&D agreements and 20% in case of specialization agreements.

### 1.1 Exemption Regulation n°1217/2010 applicable to R&D agreements

The scope of the previous exemption regulation has been extended: R&D agreements are now more likely to benefit from an exemption.

- Henceforth, exemptions can be granted not only to R&D activities carried out jointly but also to so-called "*paid-for research and development activities*" (i.e. R&D activities carried out by one party and financed by the other)[5]. Concerning these "ordered research activities", the market share to be taken into account to assess whether the 25% threshold is reached is the combined market share of the financing party and of all parties with which it has entered into R&D agreements with regard to the same contract products and contract technologies[6] .
- More types of joint exploitation of R&D results (including when one of the parties has been granted by the other an exclusive license for the territory of the EU) are eligible for exemption.

## 1.2 Exemption Regulation n°1218/2010 applicable to specialization agreements

The exemption used to cover only specialization agreements where one or several parties would cease manufacturing certain products. From now on, the exemption may apply even if one party ceases the production only partially.[7] As such, a party may decide to shut down one of its factories and/or sub-contract the production and maintain its eligibility for exemption.

When the specialization agreement concerns so-called "intermediary" products, i.e. products used in the production of certain downstream products, Regulation n°1218/2010 considers that the 20% market share threshold must be measured on the downstream market in which such intermediary products are used in order to avoid any potential foreclosing of competitors on such downstream market.

If the party that will use the intermediary product on the downstream market holds more 20% of said market, exemption will not apply[8].

## 2. The New Guidelines

The New Guidelines apply to a wide variety of agreements: information exchange agreements, R&D agreements, production agreements, commercialization agreements, purchase agreements and standardization agreements.

They have been drafted in a more legible and accessible editorial style to help companies better assess the positive and negative market effects of the horizontal agreements to which they are a party. Horizontal agreements exceeding the defined market share threshold are not necessarily illegal if, on a case-by-case analysis, it is established that they have a positive impact on the market.

The New Guidelines are, therefore, a very useful tool that enables companies to assess themselves the positive/detrimental effects of their agreements on the market.

The most important changes brought forth by the New Guidelines concern standardization (or standard-setting) agreements and exchanges of information.

## 2.1 Substantial modification of the chapter on standardization (or standard-setting) agreements

As per the New Guidelines, standardization agreements have as their primary objective "*the definition of technical or quality requirements with which current or future products, production processes, services or methods may comply*". Standardization can take different forms, from standards adopted by recognized European or national standards bodies to agreements between independent companies. This is about quality standards, regardless of their origin[9].

In the New Guidelines, the European Commission recalls why standardization agreements can, by virtue of their object or effect, be considered as anti-competitive as per Article 101§1 TFEU.

Standardization agreements, the stated objective of which is to exclude competitor (notably by explicitly foreclosing technologies that are competing with that retained for the standard) will constitute restrictions of competition by object.

In addition, standardization agreement can also create anti-competitive effect if, for example, competitors are de facto prevented from accessing the standard, notably through prohibitive prices applied by companies owning Intellectual Property Rights ("IPR") that are essential to the standard.

In the chapter dedicated to standardization agreements, the New Guidelines set the requirements that standardization agreements must meet (so-called "safe harbor") to avoid being considered as anti-competitive:

- the procedure for adopting the standard must be unrestricted with participation open to all relevant competitors on the market;
- the procedure for adopting the standard must be transparent and allow stakeholders to be informed of upcoming, on-going or finalized standardization works;
- compliance with the standard must not be made mandatory;
- The IPR policy must be clear and balanced. In particular, access to the standard must be on fair,

reasonable, and non-discriminatory terms ("FRAND"). In addition, all IPR holders that wish to have their technology included in the standard should provide an irrevocable written commitment to disclose in good faith those IPRs which are essential for the implementation of the standard, in order to avoid so-called "patent ambush" practices.

Yet, it should not be inferred from the above that "there is no salvation outside the safe harbor"! Standard-setting agreements that do not meet the aforementioned safe harbor requirements are not necessarily presumed illegal.

The parties to a standard-setting agreement have always the possibility to perform a self assessment on the basis of the various examples provided in the New Guidelines and to demonstrate that their agreement generate significant efficiency gains (such as market interpenetration, interoperability, etc.) that are likely to make the agreement benefit from the exemption under Article 101§3 TFEU.

**2.2 New chapter on information exchange**

The New Guidelines also include a new chapter on information exchange. This chapter is very interesting since it discloses – finally – the European Commission's official position on the assessment of the compatibility between information exchange and competition law.

For competition concerns to be raised, the existence of reciprocal exchanges of information between competitors is not required: the disclosure by an economic operator of its future intentions or conduct on a market can be considered as a concerted practice. The New Guidelines recall that in this case the company receiving strategic data is presumed "*to have accepted the information and adapted its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such data*".

While exchanges of general market information between competitors can have positive effects on the market, exchanges of customized information such as information on prices or quantities must normally be considered as a restriction of competition by object under Article 101§1TFEU.

The New Guidelines also disclose the conditions in which information shared between competitors are likely to have anti-competitive effects. The following characteristics should be used when assessing the potential anti-competitive effects of an information exchange:

- content and characteristics of the information exchanged: are considered as strategic data any information on "*prices*", "*customer lists, production costs, quantities, turnovers*", or "*investments, technologies and R&D programs and their results*";
- the economic conditions on the relevant market: for example, the existence of an anti-competitive effect shall be more easily established in "*transparent*", "*concentrated*" markets where "*the demand and supply conditions are relatively stable*";
- Other factors are also taken into account: the individual/aggregate nature of the data, the age of the data, the frequency of the information exchange, the public/non-public nature of the information

exchanged and of the exchange itself, etc.

The New Guidelines also contain concrete examples, including in relation to efficiency gains or the conditions in which an exchange of information will not be considered an anti-competitive practice (when the exchanges is for statistical or comparison purposes only), to which companies should refer to when making an assessment of the horizontal agreements they have entered / or plan entering into.

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[1] Commission Regulation 330/2010 of April 20, 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.[2] Commission Regulation (EU) No 267/2010 of March 24, 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector; Commission Regulation (EU) No 461/2010 of May 27, 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector.

[3] 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 L335 of December 18, 2010, p. 36 and Commission Regulation (EU) No 1218/2010 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 specialization agreements , OJ L 335 of December 18, 2010, p. 43.

[4] Commission notice of January 6, 2001: Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, OJ C 11 of January 14, 2011, p. 1.

[5] Article 1§1. a), iv), v) and vi) of Regulation 1217/2010.

[6] Article 4§2.b) of Regulation 1227/2010.

[7] Article 1§1.b on unilateral specialization agreements; c for reciprocal specialization agreements of Regulation 1218/2010.

[8] Article 1§1 (i) of Regulation 1218/2010.

[9]The preparation and production of technical standards as part of the execution of public powers as well as standards related to the provision of professional services, such as rules of admission to a liberal profession, are not covered by the New Guidelines.

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