

CLIENT ALERT

European Commission Adopts New Antitrust Guidelines On Cooperation Between Competitors

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Today, December 14, 2010, the European Commission has adopted revised guidelines on the treatment of cooperation between competitors under EU antitrust rules. The main changes from previous Commission guidance concern standardization, information exchange and the treatment of joint ventures. The guidelines also cover joint R&D, production, distribution and purchasing.

The Commission also adopted new versions of two less frequently used block exemption (safe harbor) regulations: the R&D and joint production and specialization block exemptions.

Standardization

The Commission has substantially revised its guidance on standard-setting agreements, both from its previous guidelines and from the version of these guidelines that was put out to consultation in May 2010.

The guidance now sets out 'safe harbor' criteria for standard-setting agreements including (i) open participation for all relevant competitors (ii) transparency so that stakeholders can inform themselves on upcoming, on-going and finalized work and (iii) a balanced IPR policy with good faith disclosure of essential IP and a requirement that holders of essential IP irrevocably commit to licensing on FRAND (fair, reasonable and non-discriminatory) conditions.

The guidance also advocates ex ante disclosure of maximum licensing terms as a way to avoid disputes regarding the maximum FRAND fee and suggests methods for assessing the level of FRAND.

Information Exchange

The guidelines include a completely new chapter on information exchange. This represents the first comprehensive guidance from the Commission in relation to this issue. The guidance highlights, in particular, exchanges between competitors of individualized information on intended future prices or quantities as being, in effect, per se (so-called 'object') infringements.

Joint Ventures

The draft guidelines issued for consultation in May had included language indicating that agreements between joint ventures and their parent companies fell outside the scope of EU rules on anti-competitive agreements. Reports suggested that this language was highly controversial within the European Commission and it does not appear in the final version adopted today. However, the final guidelines still state that agreements between a company and a subsidiary over which it exercises "decisive influence" will not be considered an agreement between competitors and may fall outside EU rules. This language is broad enough to cover agreements between parent companies and at least some joint ventures.

The R&D block exemption

The scope of the R&D block exemption has been considerably extended. It now covers so-called 'paid-for research' agreements, where one party finances R&D carried out by another, as well as joint R&D. It also allows parties more scope to jointly exploit R&D results.

For more information, please contact the professionals listed below or your regular Crowell & Moring contacts.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Sean-Paul Brankin

Partner – Brussels

Phone: +32.2.282.1830

Email: sbrankin@crowell.com

Thomas De Meese

Partner – Brussels

Phone: +32.2.282.1842

Email: tdemeese@crowell.com