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EU COMMISSION'S DRAFT GUIDELINES ON ASSESSMENT OF HORIZONTAL COOPERATION PROVIDE WELCOME CLARIFICATION AND GUIDANCE

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On 4 May 2010, the European Commission published for consultation a number of documents dealing with the assessment of co-operation between competitors (“**horizontal co-operation**”) under EU competition rules. These included revised guidelines on the assessment of horizontal co-operation in general (the “**Guidelines**”) and two specific “block exemption” regulations in the areas of research and development (“**R&D**”) and of specialisation in production (“**Specialisation**”) respectively. Existing exemptions in these areas will expire at the end of this year. The Commission is now inviting comments with a view to finalising its proposals in good time for adoption prior to the expiry of the current texts.

Whilst the guidelines and guidance documents are not binding on the Commission, they nevertheless provide invaluable insight to how the Commission will analyse horizontal co-operation. As the Commission points out, the draft Guidelines cannot provide specific answers for every possible scenario and nor are they intended to provide a “checklist” which can be applied mechanically. Rather the draft Guidelines present the analytical framework intended to assist businesses in self-assessing the compatibility of any given horizontal cooperation agreement.

The draft Guidelines are more detailed and considerably longer than those they are intended to replace. This alert focuses on two

of the most notable features of the draft Guidelines: (i) a new section on the assessment of information exchanges between competitors and (ii) a substantially revised and updated section on standard setting arrangements. The draft Guidelines include sections for the analysis of R&D, production, purchasing and commercialisation agreements between competitors.

Information exchanges

Both the business and legal communities requested updated guidance on how the competition rules are applied in practice to information exchanges between competitors (in the absence of any specific guidance, parties have until now been forced to rely on case law of the European Courts or certain sector-specific rules). Information exchange raises particular issues for business given its dual ability to deliver pro-competitive effects (e.g. as a result of significant efficiency gains) whilst increasing the dangers of anti-competitive co-ordination.

The draft Guidelines provide welcome guidance by setting out the methodology that should be used when assessing information exchanges and providing practical examples of where information exchange can be expected to fall outside the prohibition of Article 101(1) altogether, where the conditions of Article 101(3) for individual exemption are likely to be met and where information



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exchange is not only unlikely to meet the criteria for exemption, but also where the exchange is likely to be investigated and potentially ultimately fined as a cartel.

Standardisation agreements and standard terms

The draft Guidelines also respond to a growing demand for guidance on the specific competition risks entailed in standardisation. This section contains guidance on two points: (i) standardisation agreements, i.e. the definition of standard terms for all operators in an industry; and (ii) the setting of standard terms of sale and purchase to end customers between competitors in relation to substitute products. The draft Guidelines summarise the recent experiences of the Commission in this practice, especially in the area of intellectual property rights (“IPRs”) licensing.

The draft Guidelines contain several theories and examples of how standardisation can give rise to restrictive effects on competition by limiting or controlling production, markets, innovation or technical development. The Commission considers that participation in standard-setting should be transparent, should guarantee that all relevant actors can participate in the selection process and should avoid the misuse of the standardisation process through hold-ups and the charging of abusive royalty rates by IPR holders. In addition, after the industry has been locked-in to the standard, IPR holders should be obliged to license their rights on fair reasonable and non-discriminatory (“FRAND”) terms and not to impede the standard implementation process by refusing license requests or charging excessive fees.

Similar concerns apply to standard terms. More precisely, the draft Guidelines suggest that if parties remain free to use other terms when selling their product to the consumer (i.e. the standard terms are not binding) and for as long as these terms are transparent, there would be less restrictive effects on

competition. Again, whilst the benefits arising from standardisation may, under certain conditions, outweigh restrictive effects on competition, individual assessment on a case-by-case basis will nevertheless be required.

The consultation period is open until 25 June 2010. Corporations may wish to bring any concerns or comments on the draft Guidelines or any of the specific block exemptions to the attention of the Commission's Competition Directorate. The revised package of Guidelines and block exemptions is expected to be finalised and likely adopted in Q4 this year, to become effective from 1 January 2011.