

Kluwer Competition Law Blog

European Commission Changes its Policy on Providing Guidance on Questions of Competition Law

Till Steinvorth (Noerr LLP) · Wednesday, October 26th, 2022

Background

In 2004, the European Union modernised the rules and procedures that govern the enforcement of its competition law. The entry into force of Council Regulation (EC) No 1/2003 on 1 May 2004 brought about the most comprehensive reform of the enforcement rules since they were first laid down in 1962. The EU moved from a system of centralised notification and authorisation to a decentralised system where the Treaty's provisions on competition law (Articles 101 and 102 TFEU) have become directly and fully applicable. In particular, an agreement that is covered by the prohibition in Article 101(1) TFEU due to its anti-competitive effects but meets the conditions for an exemption in Article 101(3) TFEU is now directly valid and enforceable, without the need for a prior decision to that effect. The modernised system of competition law allows, and also requires, companies to assess for themselves the legality of their agreements and practices and whether efficiencies and consumer benefits outweigh any restriction of competition. Companies are usually in a good position to conduct such a self-assessment. However, the flipside of the abolition of the notification system is that companies have lost the option of applying for an official exemption from the Commission which would confirm the validity of an agreement under EU competition law. Despite the considerable body of case law from the courts and guidance documents issued by the competition authorities, there often remains a degree of uncertainty regarding the validity and legality of individual contracts and agreements. To alleviate the uncertainties and risks for businesses created by the modernised system of enforcement, Regulation 1/2003 has authorised the Commission to issue, on its own initiative, non-infringement decisions where it finds that this is in "Community public interest" (Article 10). However, recourse to such decisions is limited to "exceptional cases" (Recital 14), and it appears that none have ever been taken. The Commission also published a notice offering informal guidance to undertakings in cases presenting "novel or unresolved questions" ("**2014 Notice**", EU OJ C 101, 27/4/2004, p. 78 [[Background](#)]). But again, the requirements for obtaining such informal guidance were stringent and strictly interpreted by the Commission, and consequently, this option was hardly ever used. Following the experiences of the COVID-19 health crisis, where the Commission issued a couple of comfort letters, the Commission appears to have realised that businesses require guidance from the competition authorities in more situations than originally envisaged

in the 2014 Notice or in Article 10 of Regulation 1/2003. It thus relaxed the requirements for informal guidance in a new notice published on 3 October 2022 ("**New Notice**", C(2022) 6925 final [[Background](#)]).

Details

Although the Commission generally has the ability to issue informal guidance to individual undertakings, the New Notice still emphasises that this ability should not interfere with the self-assessment principle of Regulation 1/2003, and that any informal guidance should be compatible with the Commission's enforcement priorities. The Commission has, therefore, set up a "filter" consisting of two tests that must be passed before it even considers a request for a guidance letter:

- **Novel or unresolved question:** Whereas, under the 2014 Notice, it was necessary that a question had not yet been clarified by the case law of the European courts in order to be considered "novel", the New Notice potentially lowers the required degree of uncertainty so that it is now enough to show a lack of "sufficient" clarity from the case law or from publicly available general guidance at the EU level.
- **Interest in providing guidance:** It is necessary for the Commission to find that public clarification of the applicability of EU competition law by means of a guidance letter "would provide added value with respect to legal certainty".

Regarding the interest test, the New Notice lists several elements that need to be taken into account in this regard; the second element is new compared to the 2004 Guidance Notice:

- Economic importance of the goods or services concerned;
- Whether the objectives of the agreement or the practice in question are relevant for the achievement of the Commission's priorities or EU interests;
- Magnitude of the investments made or to be made;
- Whether the agreement or practice in question is widely used in the EU.

The New Notice further clarifies that the Commission will not "normally" consider a request for guidance if the questions raised are similar or identical to issues raised in a case pending before the European Court of Justice, or if they are the subject of proceedings pending with the Commission, a national court of a national competition authority.

Finally the New Notice includes instructions on how to request advice, in particular on the information to be included in a request letter. In contrast to the 2004 Notice, it is specified that applicants should include their own preliminary assessment of (i) why the request raises new or unresolved questions; (ii) why there is an interest in providing guidance; and (iii), to the best of their abilities, how EU competition law should be applied in the case at hand.

Regarding the effects of a guidance letter, it is clarified that an applicant remains responsible for assessing the applicability of EU competition law, and that the clarification provided by the Commission depends on the accuracy and truthfulness of

information provided by the applicant. A guidance letter does not create any rights or obligations, and it may be modified or revoked by the Commission if the public interest so requires. Furthermore, a guidance letter is not binding on the courts or the competition authorities of the Member States, which are also empowered to apply EU competition law. Moreover, the fact that a guidance letter has been issued does not preclude the Commission from subsequently investigating that same agreement or practice in a procedure under Regulation 1/2003. However, the Commission assures companies that it will not impose a fine if a company has relied in good faith on a guidance letter.

Conclusion

While the 2004 Notice laid down strict requirements for the issuance of guidance letters, these criteria have been relaxed somewhat by the New Notice. In particular, the Commission now has more flexibility to respond to a wider range of issues with guidance letters where it deems it relevant to the achievement of the Commission's priorities and the EU's interests. In addition, the notion of "novel" issues has been broadened a little. Most importantly, in its press release on the New Notice, the Commission expressed the view that it would apply more "flexible conditions" with the aim of "increasing legal certainty, to the benefit of businesses" ([Conclusion](#)). Therefore, we are hopeful that the Commission will apply this tool more often than in the past.

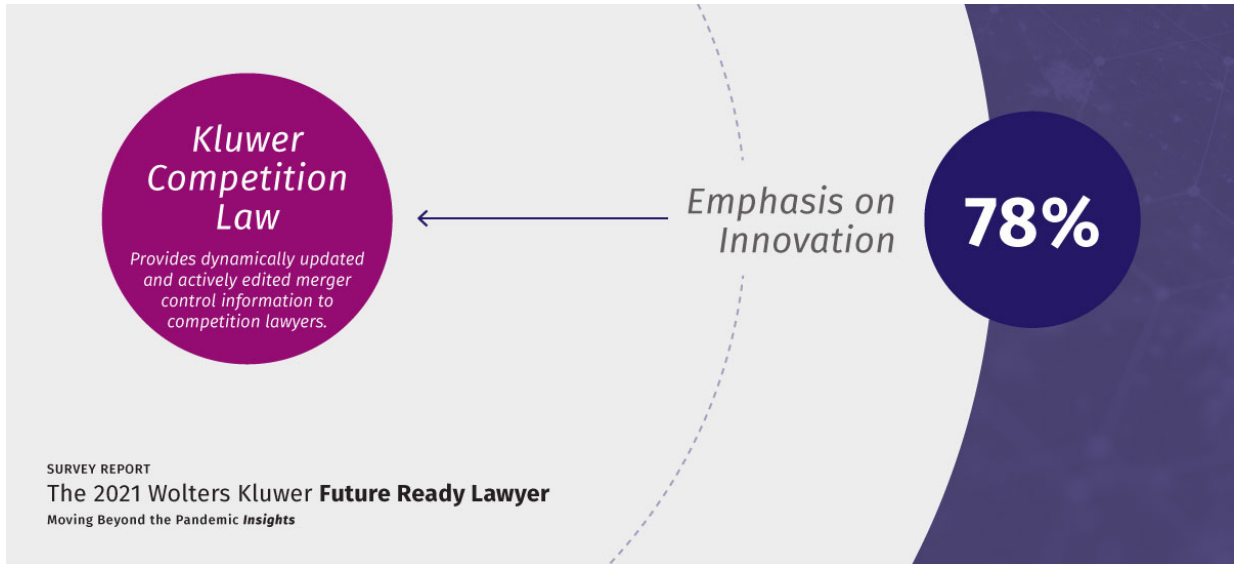
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