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# Assessment of Horizontal Co-Operation Agreements under EU Competition Law

## **Global Competition Law Centre**

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**Caveat:** all comments are personal and may not reflect the position of the European Commission



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## Structure of the Presentation

- What are horizontal co-operation agreements?
- The existing Horizontals Regime
- The ongoing Horizontals Review



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## Horizontal Co-Operation Agreements

- Agreements between companies active at the same level of the market
- Mainly: between actual or potential competitors
- vertical agreements between competitors: principles applicable



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## Horizontal Co-Operation Agreements

- R&D agreements
- Production agreements
- Purchasing agreements
- Commercialisation agreements
- Standardisation agreements
- A mix of some of these categories



## Horizontal Co-Operation Agreements

- Possibly: substantial economic benefits – combination of complementary activities, skills or assets
- Possibly: competition problems – e.g., disguised cartels, direct limitation of competition, collusion, foreclosure
- Approach: leave businesses maximum freedom to co-operate but safeguard competition



## The existing Horizontals Regime

- R&D and Specialisation Block Exemption Regulations – expire end of 2010
  - R&D BER: joint R&D incl. joint exploitation (<25% combined market share for competitors, no threshold for non-competitors)
  - Specialisation BER: specialisation incl. joint production (<20% combined market share)
- Horizontal Guidelines



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## Horizontals Review – State of Play

- Dec 2008 Questionnaire to stakeholders and Member States: no radical overhaul required, but need for more detailed guidance
- 4 May 2010: publication of revised drafts of Horizontal Guidelines and R&D and Specialisation BERs
- Comments: until 25 June 2010
- Final texts: by the end of the year



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# Horizontals Review - Guidelines

- Main areas of change:
  - Introduction
  - New: guidance on information exchange
  - Standardisation chapter
  - Incremental improvements in other chapters





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## Horizontal Guidelines - Introduction

- Framework for analysis
- Application of guidelines to integrated agreements clarified
- Treatment of joint ventures
- Notion of “restrictive effects on competition”



## Horizontal Guidelines – Introduction

- Restrictive effects on competition:
  - Actual or potential (=likely) appreciable adverse impact on prices, output, innovation, product quality or variety?
  - Reduction of the parties' decision-making independence
    - Contractual obligations
    - Change of incentives
  - Likelihood of restrictive effects on the market:
    - Nature and content of agreement
    - Market power and market characteristics
    - Necessity to identify the most likely counterfactual



## Information Exchange Chapter

- Guidance on information exchange
  - Strong stakeholder demand, complex economics, unclear case law
  - Restriction of competition by object within the context of information exchange
  - Guidance on assessing the effects of exchanges of information
  - Efficiencies (101.3 defence)



## Types of information exchanges:

- Ancillary to other horizontal agreements (production, standardization, R&D)
- Ancillary to an explicit collusion (sharing markets, price fixing)- monitoring device
- Pure information exchanges
- Direct or through third party collecting entity, which then disseminates the data



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## Information Exchange

- Concerns
  - collusive outcome on the market
  - common understanding about the terms of coordination or/and monitoring deviations
- Benefits
  - dealing with information asymmetries
  - dealing with unstable demand
  - Improving internal efficiencies
  - better choice for consumers



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## Information Exchange: Assessment of restrictive effects

- Characteristics of the relevant markets
- Characteristics of the information exchange
- How 2 modifies 1



## Standardisation

- “Safe harbour” regarding standard-setting process:
  - Unrestricted
  - Transparent
  - Clear and binding IPR policy
- Outside safe-harbour: individual assessment



## Standardisation

- Other important novelties:
  - Ex ante disclosure of “most restrictive licensing terms” (including maximum royalty fees) possible (but not mandatory)
  - Guidance on benchmarks for assessment of level of FRAND in case of dispute (in particular confirming ex ante – ex post benchmark)





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## New: Standard Terms

- Reasons for guidance on standard terms:
  - Standard policy conditions no longer covered by Insurance BER
  - Not specific to the insurance industry



## Standard Terms

- Generally, no restriction of competition if:
  - Participation in establishment of standard terms unrestricted and transparent; and
  - Standard terms non-binding and effectively accessible
- Unless: standard terms have a likely negative effect on prices, rebates etc.
- In addition, individual assessment if :
  - Binding;
  - Standard terms define the scope of product sold; or
  - Decisive part of transaction without defining scope

## Slide 18

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**sk4**

This one is also a bit crowded and difficult to follow both from the perspective of the speaker and the audience.

simeokn; 25/05/2010



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**Thank you for your  
attention!**