



The New EU Competition Rules Regarding Vertical Restraints and the Proposed Revision of the Rules Regarding Horizontal Cooperation Agreements

Filippo Amato and Marcus Pollard

Jones Day – Brussels (Belgium)

Amidst the ongoing enforcement of EU competition law, and the challenges it faces in the current economic climate, various significant law, policy and leadership changes have marked the year 2010. In February, Joaquín Almunia became the new Commissioner responsible for EU competition policy for the next five years, replacing Neelie Kroes. Commissioner Almunia has since proven to be as tough as Commissioner Kroes. In April, the European Commission (“Commission”) adopted Regulation 330/2010¹ and an accompanying set of revised guidelines (“Guidelines”)² addressing “vertical restraints,” *i.e.*, restrictions embodied in agreements between entities operating at different levels of a production and/or distribution chain, and relating to the conditions under which the parties may purchase and sell goods or services. In May, the Commission issued for public comment two draft regulations and a draft set of guidelines regarding horizontal cooperation agreements. The package of proposed amendments is not a radical remaking of the applicable rules and guidance, but more a reflection of the development of Commission practice and the need for greater guidance as to certain issues, including information exchange and standards setting. The Commission will adopt the final text of these regulations and guidelines before the year’s end. The changes regarding vertical restraints and the proposed revision of the rules regarding horizontal cooperation agreements are detailed below.

Vertical restraints

Regulation 330/2010 replaced, as of June 1, 2010, the previous regulation³ and guidelines regarding vertical restraints.⁴ The new regime will remain in force until May 2022.⁵ As did its predecessor, Regulation 330/2010 establishes a “safe harbor” (or “block exemption”) from the application of the prohibition in Article 101(1) of the Treaty on the Functioning of the European Union (“TFEU”)⁶ as to the most common forms of vertical restraints (exclusive distribution, exclusive purchasing, selective distribution, franchising) where those restraints satisfy certain conditions. As explained below, aside from the addition of a new market share threshold for qualifying for the safe harbor, and the modification of the definition of “selective distribution,” Regulation 330/2010 is virtually identical to its predecessor. The Guidelines contain the most significant new details reflecting the Commission’s view as to allowable restrictions on Internet sales, the legal effects of “hard-core” restraints, up-front access payments, and category management agreements.

Additional market share threshold.

Like the previous block exemption regulation, Regulation 330/2010 provides a “safe harbor” for vertical agreements satisfying the following conditions: (i) the supplier’s market share does not exceed 30 percent in the market in which it sells the relevant goods or services; and (ii) the agreement does not effect an unreasonable restraint on competition, such as resale price maintenance or absolute territorial protection (*i.e.*, hard-core restraints).⁷ Regulation 330/2010 also includes a new condition: the buyer’s market share must not exceed 30 percent of the relevant market “on which it purchases the contract goods or services.”⁸ This is a major shift compared to the draft regulation on vertical restraints published by the Commission in July 2009, which envisaged to calculate the 30% market share threshold of the buyer in relation to “any of the relevant markets affected by the agreement.”

The Commission's change of approach arose from the business and the legal community's concern that such a broadly defined threshold would result in a significant loss of legal certainty.

Selective distribution.

Under the abrogated block exemption regulation, a distribution system was "selective" if the supplier selected its distributors on the basis of specified criteria and prevented them from reselling to any unauthorized (*i.e.*, non-selected) distributor across the EU. In contrast, Regulation 330/2010 provides that suppliers can only prevent members of a selective distribution network from selling to unauthorized distributors "*within the territory reserved by the supplier to operate that system,*"⁹ *i.e.*, the territory "*where the system is currently operated or where the supplier does not yet sell the contract products.*"¹⁰ Thus, it now constitutes a hard-core restraint to prohibit members of a selective distribution network from making sales to unauthorized distributors in EU markets where such a system is not operated.

Hard-core restraints.

Pursuant to Article 4 of Regulation 330/2010 (which is substantially identical to Article 4 of the previous block exemption regulation), an agreement effecting the following hard-core restraints cannot benefit from the safe harbor: resale price maintenance; territorial and customer restrictions (with some exceptions); restrictions on selling to end-users imposed on authorized retailers in a selective distribution system; restrictions on cross-supplies within a selective distribution system; and restrictions that prevent component suppliers from selling the components they produce to independent repair or service providers.

According to the Guidelines, any vertical agreement effecting these restraints is deemed *per se* contrary to Article 101(1) TFEU, and is unlikely to satisfy the exemption conditions of Article 101(3) TFEU.¹¹ However, the parties may plead an efficiency defense under Article 101(3) TFEU in an individual case.¹² This is a major shift compared to the previous guidelines, which did not establish a presumption of incompatibility with Article 101(1) TFEU of agreements containing hardcore restraints.

*Internet sales.*¹³

In its previous vertical restraint guidelines, the Commission made clear that: (i) Internet sales/promotions are presumed to constitute a form of "passive" sales, and therefore cannot be prohibited except where they constitute a form of "active" sales into an exclusively allocated territory or customer group;¹⁴ (ii) no outright ban on Internet sales/promotions can be imposed unless objectively justified; and (iii) the supplier may require quality standards for the use of an Internet site to resell its goods, just as the supplier may require quality standards for a shop or for advertising and promotion in general. The Commission reiterated this approach in the recently adopted Guidelines, but added various clarifications:

- The requirement that distributors have "*one or more brick and mortar shops or showrooms as a condition for becoming a member of its distribution system,*" does not constitute a hard-core restraint, but a standard for use of the Internet that falls within the block exemption as long as Regulation 330/2010's other conditions are satisfied.¹⁵ A supplier may change this condition during the lifetime of its distribution agreements (for instance, requiring the opening of additional offline retail outlets) as long as the changes do not have "*the object to directly or indirectly limit the online sales by the distributors.*"¹⁶

- The following restrictions are considered restrictions of passive sales and therefore hard-core restraints: (i) requiring an exclusive distributor to make its website either inaccessible, or transactions through such website impossible, for customers exclusively allocated (or residing in territories exclusively allocated) to another distributor; (ii) requiring a distributor to limit the proportion of overall sales made over the Internet (without excluding, however, the possibility that a supplier may require a buyer to sell at least a certain absolute amount, in value or volume, of the products offline to ensure an efficient operation of its brick and mortar shop); and (iii) requiring a distributor to pay a higher price for products intended to be resold by the distributor online than for products intended to be resold offline, without prejudice to the possibility of offering the distributor a “fixed fee” to support its offline or online sales efforts.¹⁷
- “Active” selling into a territory occurs when the seller pays a search engine or online advertising provider to display advertisements specifically to users in a particular territory.¹⁸
- A supplier may impose Internet quality standards on its authorized retailers, but those standards must be proportionate, *i.e.*, such standards should be “overall equivalent to the criteria imposed for the sales from the brick and mortar shop” and should not consist of obligations that “dissuade appointed dealers from using the [I]nternet” to reach additional customers.¹⁹
- “A supplier may require that its distributors use third party platforms to distribute the contract products only in accordance with the standards and conditions agreed between the supplier and its distributors for the distributors’ use of the internet. For instance, where the distributor’s website is hosted by a third-party platform, the supplier may require that customers do not visit the distributor’s website through a site carrying the name or logo of the third-party platform.”²⁰
- Although it is a hard-core restriction to require distributors to pay higher prices for products they intend to resell online than for products they intend to resell offline (“dual pricing”), the Guidelines provide that “in some specific circumstances, such an agreement may fulfill the conditions of Article 101(3).”²¹ This may occur where “selling online leads to substantially higher costs for the manufacturer than offline sales, [because, for example], when offline sales include home installation by the distributor but online sales do not, the latter may lead to more customer complaints and warranty claims for the manufacturer.”²²
- The Regulation’s safe harbor can be withdrawn “where the characteristics of the product do not require selective distribution or do not require the applied criteria, such as for instance the requirement for distributors to have one or more brick and mortar shops,”²³ or where cumulative foreclosing effects result from parallel networks of selective distribution systems.²⁴

Upfront access payments and category management agreements.

The Guidelines address two categories of vertical restraints not addressed in the previous vertical restraint guidelines: (i) upfront access payments²⁵ and (ii) category management agreements.²⁶ The safe harbor covers both categories of agreements where the market share thresholds set in Regulation 330/2010 are not exceeded.²⁷ Where those thresholds are exceeded, suppliers and distributors must self-assess the legality of these agreements based on the Guidelines.

Horizontal cooperation

In 2001, the Commission adopted a set of guidelines addressing horizontal cooperation agreements,²⁸ as well as two block exemption regulations creating a safe harbor from the application of Article 101 TFEU for certain categories of research and development agreements (“R&D Regulation”)²⁹ and production agreements (“Production Agreements Regulation”).³⁰ As a prelude to the 2004 shift from a notification/exemption regime to a self-assessment regime, the Commission sought to provide in the Horizontal Guidelines both clarity and transparency regarding the application of Article 101 TFEU with regard to cooperation between competitors. The Horizontal Guidelines cover the broad range of “co-operation” agreements including, for example, agreements relating to production, purchasing and commercialization – as well as R&D and standardization.

However, the Horizontal Guidelines are not comprehensive, and the R&D Regulation and Production Agreements Regulation will both expire at the end of 2010. The Commission reviewed those rules for those reasons. In May 2010, it published the Draft Revised Horizontal Guidelines, the Draft Revised R&D Regulation and the Draft Revised Production Agreements Regulation,³¹ which have been open for both stakeholder and public consultation. The final version is expected to be published before year end. After a decade in which it often resolved issues absent any formal decision, the Commission’s stated aim for the Draft Revised Horizontal Guidelines is to update and clarify a number of key aspects of its policy as to cooperation agreements under Article 101 TFEU.

As compared to the current Horizontal Guidelines, the most significant changes proposed in the Draft Revised Horizontal Guidelines address: (i) information exchange between competitors; (ii) standardization agreements; and (iii) standard contractual terms. Some minor amendments and clarifications with respect to the current block exemption regulation are also proposed in both the Draft Revised Production JV Regulation and Draft Revised R&D Regulation. All of these changes are detailed below.

Information exchange.

The competition law risks of exchanging information among competitors have long been an important concern of the business community. While the Commission’s decisional practice and the EU Court of Justice’s case law³² have addressed the issue, formal Commission guidelines have not.³³ The Draft Revised Horizontal Guidelines address this lacuna with a new chapter on information exchange.

The Draft Revised Horizontal Guidelines propose to treat as a per se infringement of Article 101 TFEU the exchange of information between competitors of highly sensitive data such as “*individualized data regarding intended future prices or quantities*”³⁴ or any other data capable of revealing future intentions regarding prices or quantities. Conversely, where the information at issue is not highly sensitive, a thorough assessment of the relevant circumstances would be necessary to assess the effect on competition. Such an assessment would account for a series of factors, namely:

- How many companies are involved; if the companies account for less than ten percent of the relevant market, there are normally no concerns in this context.³⁵
- The conditions of the market concerned. Companies exchanging information are more likely to reach a collusive outcome in markets that are transparent, concentrated, simple, stable and symmetric.³⁶

- The strategic value of the data. The Draft Revised Horizontal Guidelines provide that “sharing of strategic data can give rise to restrictive effects on competition if it reduces the parties’ decision-making independence by decreasing their incentives to compete.”³⁷ Strategic data include, for example, “production costs, capacities, investments, technologies, R&D programs and results.”³⁸
- Whether the information exchanged is public. The Draft Revised Horizontal Guidelines provide that the exchange of “genuinely public information,” *i.e.*, “information that is equally easy (*i.e.* costless) to access for everyone,” is unlikely to infringe Article 101.³⁹
- Whether the information exchanged is comprised of individualized (as opposed to aggregated) data. The Draft Revised Horizontal Guidelines provide that “the exchange of individualized data facilitates a common understanding on the market, and punishment strategies by allowing the coordinating companies to single out a deviator or entrant.”⁴⁰
- The age of the data. Whether non-current data is innocuous depends on the characteristics of the market at issue. For example, the Draft Revised Horizontal Guidelines provide that “data can be considered as historic if it is several times older than the average length of contracts in the industry.”⁴¹
- The frequency of the information exchange. The Draft Revised Horizontal Guidelines provide that “frequent exchanges of information that facilitate both a better common understanding of the market and monitoring of deviations increase the risks of a collusive outcome.”⁴²

Standardization agreements.

In light of its experience during the last decade,⁴³ the Commission’s proposed new guidance as to standardization agreements⁴⁴ focuses on transparency regarding intellectual property rights “by laying down clear guidance on the standard setting process and on the means of preventing a misuse of such process.”⁴⁵

The Commission thus proposes to introduce some measure of assistance for standard-setting organizations (“SSOs”) by detailing its views as to the range of standard-setting activities and broadly creating a safe harbor for their creation and operation. In particular, the Draft Revised Horizontal Guidelines provide that SSO agreements fall outside the Article 101(1) prohibition when: (i) participation in the process (and the process itself) is transparent and unrestricted;⁴⁶ (ii) SSOs maintain procedures to ensure stakeholders’ access to information regarding ongoing and finalized work;⁴⁷ and (iii) there are binding rules to prevent misuse of the process through holdups and abusive royalty rates.⁴⁸

As to intellectual property rights in particular, standards fall outside of Article 101(1) where access to them is allowed on fair, reasonable and non-discriminatory (“FRAND”) terms.⁴⁹ The Commission proposes a range of different methods to assess such terms. The license fees charged prior to adoption of the standard are described as “particularly relevant.”⁵⁰ The Commission also proposes to clarify that “unilateral *ex ante* disclosures of the maximum terms a company would charge if its technology was incorporated into a standard would not give rise to competition concerns.”⁵¹ Furthermore, the Draft Revised Horizontal Guidelines refer to the need for parties engaging in standard-setting to establish rules requiring good faith disclosure of any intellectual property rights that may be essential to implementation of the standards at issue.⁵²

However, practitioners and companies involved in standard setting have criticized this section of the Draft Revised Horizontal Guidelines.⁵³ For example, there is still no guidance as to the extent to which Article 101 is infringed when parties seek to agree to royalty rates themselves, even if the parties assess the FRAND nature of the terms consistent with the Commission's proposed methodology.⁵⁴ Furthermore, the standardization guidance in Article 101(3) is sparse at best, as compared to the exemption guidance in Article 101(3) for other types of agreements.

Standard contractual terms.

The Draft Revised Horizontal Guidelines propose to add guidance regarding the application of Article 101 to the use of standard terms and conditions (of sale or purchase) by, for example, trade associations or groups of competitors.

The Commission's proposed approach suggests that the establishment of standard terms would not constitute a restraint of competition, where the process is transparent and unrestricted, and the terms are non-binding and accessible to all.⁵⁵ However, standard terms may constitute a per se restriction of competition in two instances: (i) where the terms are part of a broader restrictive agreement, e.g., "an agreement whereby a national association of manufacturers sets a standard and puts pressure on third parties not to market products that do not comply with the standard"⁵⁶; or (ii) where the standard terms are aimed at influencing the key parameters of competition, e.g., prices charged to consumers.⁵⁷

The Draft Revised Production Agreements Regulation.

The current Production Agreements Regulation exempts three types of agreements, but only where the combined market share of the parties does not exceed 20 percent and the agreement does not embody any hard-core restraint. The three types of agreements include:

- Unilateral specialization agreements, where one firm ceases to sell certain goods or services in favor of the other firm.
- Reciprocal specialization agreements, where each firm ceases to sell certain goods or services in favor of the other firm.
- Joint production agreements, where the firms undertake to jointly sell their products and/or services.

The Draft Revised Production Agreements Regulation proposes to add a second condition for the application of the safe harbor where the products concerned by the joint production agreement are intermediary products which one or more of the parties uses for the production of certain downstream products which they also sell. In such scenarios, the parties' combined market share on the downstream market cannot be more than 20 percent if they seek to avail of the safe harbor.⁵⁸

The current Production Agreements Regulation is unclear as to the extent to which one party to a production agreement may partially cease production without forfeiting reliance on the safe harbor. The Draft Production Agreements Regulation clarifies that, explaining, for example, that where a company has two production plants for a particular product and chooses to close one, thereby outsourcing the output of the closed plant, the company may still invoke the Regulation's safe harbor provision.⁵⁹

Another amendment clarifies the definition of "potential competitor," which is significant in that the market threshold only applies to cooperation between competitors and "potential competitors." The Draft Specialisation block exemption regulation defines "potential competitor" as one that is realistically likely to enter the relevant market within the next three years.

The Draft Revised R&D Regulation.

The EU has long sought to support science, technology, research and innovation. To that end, the Commission has, since the early 1980s, adopted a series of block exemption regulations that encourage research and development agreements. The current R&D Regulation exempts three types of agreements: joint R&D and joint exploitation of such R&D; joint exploitation; and simple joint R&D agreements. Such exemptions are subject to a market share threshold when the parties to the agreement are competitors,⁶⁰ and to the condition that the agreement effects no hard-core restrictions, as defined by the Regulation.

The Draft Revised R&D Regulation proposes few changes to the current Regulation.⁶¹ The most significant proposed change entails a disclosure requirement for parties, who must reveal to each other any existing or pending intellectual property rights relating to the use of the results of the R&D. The Commission's justification for the requirement is that it will prevent parties from unduly impairing the use of the results by other parties.⁶²

The Commission's proposal also clarifies the hard-core restrictions that may result in agreements falling outside the safe harbor of block exemption. For example, the Draft Revised R&D Regulation specifies that passive sales restrictions on customers (and not only restrictions on territories) are a form of hard-core restriction.⁶³ Furthermore, like that in the Production Agreement Regulation, *see supra*, the definition of a "potential competitor" is clarified to include those who may enter the market within three years. Potential entrants should thus be included in calculating the market share for the purpose of applying the safe harbor.⁶⁴

Conclusion

Regulation 330/2010 and the new Guidelines on Vertical Restraints will have significant impact on business in the EU, particularly in the distribution sector. The Regulation provides for a grace period for suppliers and distributors whose agreements fell within the safe harbor of the previous Regulation as of May 31, 2010. Those firms must comply with the new Regulation by May 31, 2011. Nevertheless, they must promptly review their EU distribution arrangements to ensure timely legal compliance with the new and detailed provisions of this new antitrust regime for the distribution of products into and within the EU.

As to the revised regulations and guidelines regarding certain types of horizontal cooperation agreements, the proposed changes are generally unremarkable. The Commission has taken this opportunity to sensibly reflect its decisional practice over the past decade and to assist businesses and their counsel with clarification in a number of areas, and new guidance, for example, with regard to information exchange and standard setting. The Commission has until the end of 2010 to adopt the package of regulations and guidance, and both businesses and practitioners await the final texts to assess their true value and impact on the application of Article 101 TFEU.

1. Commission Regulation (EU) No 330/2010 of 20 April 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, OJ L 102, 23.04.2010, at 1.
2. Commission Notice, Guidelines on Vertical Restraints, OJ C 130, 19.05.2010, at 1.
3. Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ L 336, 29.12.1999, at 21-25.
4. Commission Notice - Guidelines on Vertical Restraints, OJ C 291, 13.10.2000, at 1-44.
5. Article 9 of Regulation 330/2010 provides that suppliers and distributors whose agreements fall, on May 31, 2010, within the safe harbor of the former regulation must comply with the new Regulation only by May 31, 2011. This transitional period does not apply, in principle, to aspects of the Guidelines that reflect the Commission's new approach to certain issues, such as clarifications of the restrictions on Internet selling and advertising that are presumed to constitute hard-core restraints. It is unlikely, however, that during the transitional period the Commission will

enforce its new policy with respect to agreements containing restrictions that, under the former Guidelines, were not expressly defined as “hard-core” restraints.

6. The TFEU entered into force on December 1, 2009, replacing the EC Treaty. The provisions contained in Article 101 TFEU correspond to the provisions of Article 81 of the EC Treaty.
7. The full list of hard-core restraints is in Article 4 of Regulation 330/2010.
8. Article 3(1) of Regulation 330/2010 (emphasis added).
9. Article 1(1)(e), and Article 4(b) of Regulation 330/2010 (emphasis added).
10. Guidelines ¶ 55 (emphasis added).
11. Guidelines ¶¶ 47, 223.
12. Guidelines ¶¶ 47, 60.
13. For a detailed review of the changes introduced by the Guidelines as regards Internet sales see also F. Amato, *Internet Sales and the new EU Rules on Vertical Restraints*, CPI Antitrust Journal, June 2010(2),
14. “Active” sales are those resulting from a seller’s efforts to seek clients in a territory or within a customer group, such as: approaching individual customers via direct mail or visits; advertising in media or using any other promotional means specifically targeted at a customer group or at customers within a certain territory; or establishing a warehouse or distribution outlet in that territory. “Passive” sales are unsolicited sales.
15. Guidelines ¶ 54 (emphasis added).
16. *Id.* (emphasis added).
17. Guidelines ¶ 52.
18. Guidelines ¶ 53.
19. Guidelines ¶ 56 (emphasis added). The Guidelines further clarify that the criteria imposed for online sales need not necessarily be identical to those imposed for offline sales, but rather that they should “pursue the same objectives and achieve comparable results and that the difference between the criteria must be justified by the different nature of these two distribution modes. For example, in order to prevent sales to unauthorised dealers, a supplier can restrict its selected dealers from selling more than a given quantity of contract products to an individual end user.” *Id.* ¶ 56 (emphasis added).
20. Guidelines ¶ 54.
21. Guidelines ¶ 64 (emphasis added).
22. *Id.*
23. Guidelines ¶ 176. As to the issue of whether a product’s characteristics justify the use of a selective distribution system see, for example, the judgments of the General Court in Case T-19/92, *Groupement d’achat Edouard Leclerc v Commission* [1996] ECR II-1851, paras. 112-123, and Case T-88/92 *Groupement d’achat Edouard Leclerc v Commission* [1996] ECR II-1961, paras. 106-117.
24. Guidelines ¶ 188.
25. According to paragraph 203 of the Guidelines, upfront access payments “are fixed fees that suppliers pay to distributors in the framework of a vertical relationship at the beginning of a relevant period, in order to get access to their distribution network and remunerate services provided to the suppliers by the retailers. This category includes various practices such as slotting allowances (1), the so called pay-to-stay fees (2), payments to have access to a distributor’s promotion campaigns etc.”
26. According to paragraph 209 of the Guidelines, category management agreements “are agreements by which, within a distribution agreement, the distributor entrusts the supplier (the ‘category captain’) with the marketing of a category of products including in general not only the supplier’s products, but also the products of its competitors.”
27. Guidelines ¶¶ 203, 209.
28. Commission Notice – Guidelines on the applicability of Article 81 to horizontal cooperation agreements, OJ C3, 6.1.2001, at 2.
29. Commission Regulation (EC) No. 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements, OJ L 304 of 5 December 2000, at 7.
30. Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements, OJ L 304, 05.12.2000, at 3.
31. The draft texts are available at http://ec.europa.eu/competition/consultations/2010_horizontals.
32. See, for example, Judgments of the EU Court of Justice in Case C-7/95 P, *John Deere v Commission* [1998] ECR I-3111, Case C-194/99 P, *Thyssen Stahl v Commission* [2003] ECR I-10821 and Case C-8/08, *T-Mobile Netherlands BV*, Judgment of February 19, 2009 [unreported].
33. In the Commission Guidelines on the application of Article 81 of the EC Treaty to maritime transport services (OJ C 245, 26.9.2008, p. 2–14), the Commission outlined the principles of information exchange in the context of liner shipping. The Draft Revised Horizontal Guidelines constitute the Commission’s proposed consideration of the issue in the broader context.
34. Draft Revised Horizontal Guidelines ¶ 68 (emphasis added).
35. Draft Revised Horizontal Guidelines ¶¶ 71-72.
36. Draft Revised Horizontal Guidelines ¶¶ 73-80.

37. Draft Revised Horizontal Guidelines ¶ 81.
38. Draft Revised Horizontal Guidelines ¶ 81.
39. Draft Revised Horizontal Guidelines ¶ 82.
40. Draft Revised Horizontal Guidelines ¶ 85.
41. Draft Revised Horizontal Guidelines ¶ 86.
42. Draft Revised Horizontal Guidelines ¶ 87.
43. In particular, we refer to Case COMP/C-3/ 38 636 *Rambus* and Case COMP/39247 *Texas Instruments / Qualcomm*.
44. Draft Revised Horizontal Guidelines ¶¶ 252-323.
45. Commission Memo/10/63, Commission consults on new regime for assessment of horizontal co-operation agreements - Frequently asked questions, 4 May 2010.
46. Draft Revised Horizontal Guidelines ¶ 277.
47. Draft Revised Horizontal Guidelines ¶ 279.
48. Draft Revised Horizontal Guidelines ¶ 280.
49. Draft Revised Horizontal Guidelines ¶¶ 282-286.
50. Commission Memo/10/63, Commission consults on new regime for assessment of horizontal co-operation agreements - Frequently asked questions, 4 May 2010.
51. Commission Memo/10/63, Commission consults on new regime for assessment of horizontal co-operation agreements - Frequently asked questions, 4 May 2010.
52. Draft Revised Horizontal Guidelines ¶ 280.
53. See, for example, A. Layne-Farrar and J. Padilla, *Comments on the Commission's Draft Revised Horizontal Guidelines – Standardisation*, CPI Antitrust Journal, September 2010(1), and J. Holtz and T. Louko, *The Standard Setting Process and the European Commission's Draft Revised Horizontal Guidelines*, CPI Antitrust Journal, September 2010(1).
54. See, for example, ECLF Working Group on Horizontal Agreements, *Comments on the Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, European Competition Journal, August 2010, at 20 et seq.
55. Draft Revised Horizontal Guidelines ¶ 293.
56. Draft Revised Horizontal Guidelines ¶ 266.
57. Draft Revised Horizontal Guidelines ¶ 268.
58. Draft Revised Production Agreements Regulation, Articles 1(7) and 3.
59. Commission Memo/10/63, Commission consults on new regime for assessment of horizontal co-operation agreements - Frequently asked questions, 4 May 2010.
60. The R&D Regulation applies to agreements between non-competitors and to competitors whose combined market share is less than 25%.
61. The draft text is available at http://ec.europa.eu/competition/consultations/2010_horizontals/draft_rd_ber_en.pdf.
62. Commission Memo/10/63, Commission consults on new regime for assessment of horizontal co-operation agreements - Frequently asked questions, 4 May 2010.
63. See Draft Revised R&D Regulation, Articles 5-6.
64. See Draft Revised R&D Regulation, Article 1 and Article 7. The market share of a potential competitor is, by its very nature, speculative. However, the Draft Revised R&D Regulation allows parties to base the calculation on "estimates based on other reliable market information".

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