

European Commission

# **EU Competition Law**

## **Rules Applicable to Antitrust Enforcement**

### **Volume 1: General rules**

**Situation as at 1st April 2011**

**COMPETITION HANDBOOKS**

Brussels, 2011

# EU Competition law

## Rules applicable to Antitrust Enforcement – General rules

Situation as at 1st April 2011

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Luxembourg, Publications Office of the European Union, 2011

ISBN – 978-92-79-19537-2

doi 10.2763/49141

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*Printed in Belgium*

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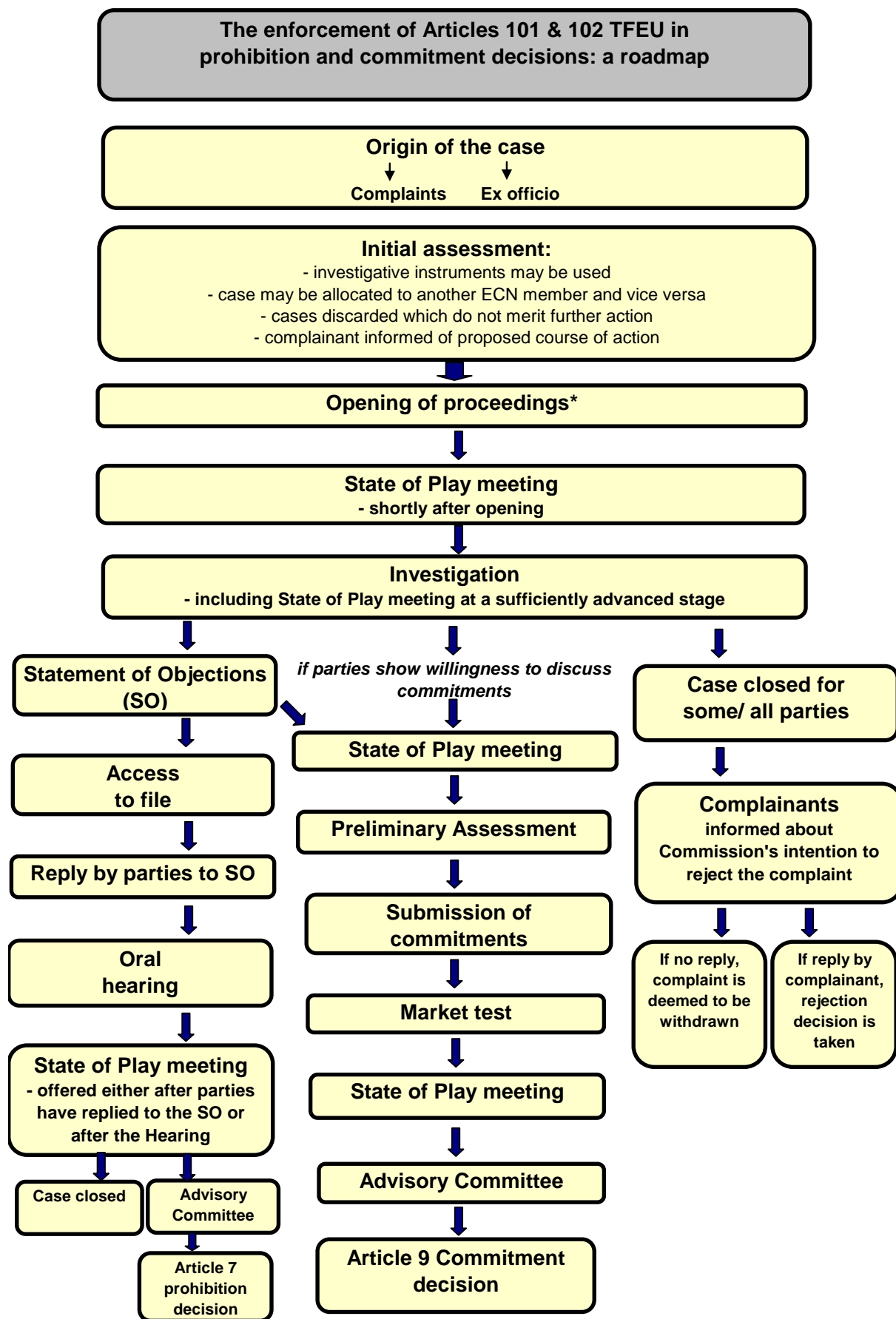
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## **A. OVERVIEW**







\* With the exception of cartel proceedings, where the opening of proceedings normally takes place simultaneously with the adoption of the SO



**B. PROVISIONS OF THE TREATY  
ON THE FUNCTIONING  
OF THE EUROPEAN UNION (TFEU)**

## **B.1. Core provisions**

### *Article 101 (ex Article 81 TEC)*

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

***Article 102 (ex Article 82 TEC)***

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

***Article 106 (ex Article 86 TEC)***

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

## **B.2. Other relevant provisions**

### ***Article 3***

1. The Union shall have exclusive competence in the following areas:

- (a) customs union;
- (b) the establishing of the competition rules necessary for the functioning of the internal market;
- (c) monetary policy for the Member States whose currency is the euro;
- (d) the conservation of marine biological resources under the common fisheries policy;
- (e) common commercial policy.

2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

### ***Article 14 (ex Article 16 TEC)***

Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.

### ***Article 103 (ex Article 83 TEC)***

1. The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament. 2. The regulations or directives referred to in paragraph 1 shall be designed in particular:

- (a) to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 by making provision for fines and periodic penalty payments;
- (b) to lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;
- (c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 101 and 102;

- (d) to define the respective functions of the Commission and of the Court of Justice of the European Union in applying the provisions laid down in this paragraph;
- (e) to determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article.

***Article 104 (ex Article 84 TEC)***

Until the entry into force of the provisions adopted in pursuance of Article 103, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the internal market in accordance with the law of their country and with the provisions of Article 101, in particular paragraph 3, and of Article 102.

***Article 105 (ex Article 85 TEC)***

1. Without prejudice to Article 104, the Commission shall ensure the application of the principles laid down in Articles 101 and 102. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

2. If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision. The Commission may publish its decision and authorise Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation.

3. The Commission may adopt regulations relating to the categories of agreement in respect of which the Council has adopted a regulation or a directive pursuant to Article 103(2)(b).

***Article 119 (ex Article 4 TEC)***

1. For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.

2. Concurrently with the foregoing, and as provided in the Treaties and in accordance with the procedures set out therein, these activities shall include a single currency, the euro, and the definition and conduct of a single monetary policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Union, in accordance with the principle of an open market economy with free competition.

3. These activities of the Member States and the Union shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments.

*Article 346 (ex Article 296 TEC)*

1. The provisions of the Treaties shall not preclude the application of the following rules:
  - (a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;
  - (b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.
2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply.



## **C. GENERAL RULES**

This document is meant purely as a documentation tool and the institutions do not assume any liability for its contents

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**COUNCIL REGULATION (EC) No 1/2003**

**of 16 December 2002**

**on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty**

**(Text with EEA relevance)**

(OJ L 1, 4.1.2003, p. 1)

Amended by:

Official Journal

		No	page	date
► <b><u>M1</u></b>	Council Regulation (EC) No 411/2004 of 26 February 2004	L 68	1	6.3.2004
► <b><u>M2</u></b>	Council Regulation (EC) No 1419/2006 of 25 September 2006	L 269	1	28.9.2006



**COUNCIL REGULATION (EC) No 1/2003**

**of 16 December 2002**

**on the implementation of the rules on competition laid down in  
Articles 81 and 82 of the Treaty**

**(Text with EEA relevance)**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 83 thereof,

Having regard to the proposal from the Commission <sup>(1)</sup>,

Having regard to the opinion of the European Parliament <sup>(2)</sup>,

Having regard to the opinion of the European Economic and Social Committee <sup>(3)</sup>,

Whereas:

- (1) In order to establish a system which ensures that competition in the common market is not distorted, Articles 81 and 82 of the Treaty must be applied effectively and uniformly in the Community. Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 81 and 82 (\*) of the Treaty <sup>(4)</sup>, has allowed a Community competition policy to develop that has helped to disseminate a competition culture within the Community. In the light of experience, however, that Regulation should now be replaced by legislation designed to meet the challenges of an integrated market and a future enlargement of the Community.
- (2) In particular, there is a need to rethink the arrangements for applying the exception from the prohibition on agreements, which restrict competition, laid down in Article 81(3) of the Treaty. Under Article 83(2)(b) of the Treaty, account must be taken in this regard of the need to ensure effective supervision, on the one hand, and to simplify administration to the greatest possible extent, on the other.
- (3) The centralised scheme set up by Regulation No 17 no longer secures a balance between those two objectives. It hampers application of the Community competition rules by the courts and competition authorities of the Member States, and the system of notification it involves prevents the Commission from concentrating its resources on curbing the most serious infringements. It also imposes considerable costs on undertakings.
- (4) The present system should therefore be replaced by a directly applicable exception system in which the competition authorities and courts of the Member States have the power to apply not only Article 81(1) and Article 82 of the Treaty, which have direct applicability by virtue of the case-law of the Court of Justice of the European Communities, but also Article 81(3) of the Treaty.

<sup>(1)</sup> OJ C 365 E, 19.12.2000, p. 284.

<sup>(2)</sup> OJ C 72 E, 21.3.2002, p. 305.

<sup>(3)</sup> OJ C 155, 29.5.2001, p. 73.

(\*) The title of Regulation No 17 has been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Articles 85 and 86 of the Treaty.

<sup>(4)</sup> OJ 13, 21.2.1962, p. 204/62. Regulation as last amended by Regulation (EC) No 1216/1999 (OJ L 148, 15.6.1999, p. 5).

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- (5) In order to ensure an effective enforcement of the Community competition rules and at the same time the respect of fundamental rights of defence, this Regulation should regulate the burden of proof under Articles 81 and 82 of the Treaty. It should be for the party or the authority alleging an infringement of Article 81(1) and Article 82 of the Treaty to prove the existence thereof to the required legal standard. It should be for the undertaking or association of undertakings invoking the benefit of a defence against a finding of an infringement to demonstrate to the required legal standard that the conditions for applying such defence are satisfied. This Regulation affects neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Community law.
- (6) In order to ensure that the Community competition rules are applied effectively, the competition authorities of the Member States should be associated more closely with their application. To this end, they should be empowered to apply Community law.
- (7) National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States. They should therefore be allowed to apply Articles 81 and 82 of the Treaty in full.
- (8) In order to ensure the effective enforcement of the Community competition rules and the proper functioning of the cooperation mechanisms contained in this Regulation, it is necessary to oblige the competition authorities and courts of the Member States to also apply Articles 81 and 82 of the Treaty where they apply national competition law to agreements and practices which may affect trade between Member States. In order to create a level playing field for agreements, decisions by associations of undertakings and concerted practices within the internal market, it is also necessary to determine pursuant to Article 83(2)(e) of the Treaty the relationship between national laws and Community competition law. To that effect it is necessary to provide that the application of national competition laws to agreements, decisions or concerted practices within the meaning of Article 81(1) of the Treaty may not lead to the prohibition of such agreements, decisions and concerted practices if they are not also prohibited under Community competition law. The notions of agreements, decisions and concerted practices are autonomous concepts of Community competition law covering the coordination of behaviour of undertakings on the market as interpreted by the Community Courts. Member States should not under this Regulation be precluded from adopting and applying on their territory stricter national competition laws which prohibit or impose sanctions on unilateral conduct engaged in by undertakings. These stricter national laws may include provisions which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings. Furthermore, this Regulation does not apply to national laws which impose criminal sanctions on natural persons except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced.
- (9) Articles 81 and 82 of the Treaty have as their objective the protection of competition on the market. This Regulation, which is adopted for the implementation of these Treaty provisions, does not preclude Member States from implementing on their territory national legislation, which protects other legitimate interests provided that such legislation is compatible

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with general principles and other provisions of Community law. In so far as such national legislation pursues predominantly an objective different from that of protecting competition on the market, the competition authorities and courts of the Member States may apply such legislation on their territory. Accordingly, Member States may under this Regulation implement on their territory national legislation that prohibits or imposes sanctions on acts of unfair trading practice, be they unilateral or contractual. Such legislation pursues a specific objective, irrespective of the actual or presumed effects of such acts on competition on the market. This is particularly the case of legislation which prohibits undertakings from imposing on their trading partners, obtaining or attempting to obtain from them terms and conditions that are unjustified, disproportionate or without consideration.

- (10) Regulations such as 19/65/EEC <sup>(1)</sup>, (EEC) No 2821/71 <sup>(2)</sup>, (EEC) No 3976/87 <sup>(3)</sup>, (EEC) No 1534/91 <sup>(4)</sup>, or (EEC) No 479/92 <sup>(5)</sup> empower the Commission to apply Article 81(3) of the Treaty by Regulation to certain categories of agreements, decisions by associations of undertakings and concerted practices. In the areas defined by such Regulations, the Commission has adopted and may continue to adopt so called 'block' exemption Regulations by which it declares Article 81(1) of the Treaty inapplicable to categories of agreements, decisions and concerted practices. Where agreements, decisions and concerted practices to which such Regulations apply nonetheless have effects that are incompatible with Article 81(3) of the Treaty, the Commission and the competition authorities of the Member States should have the power to withdraw in a particular case the benefit of the block exemption Regulation.
- (11) For it to ensure that the provisions of the Treaty are applied, the Commission should be able to address decisions to undertakings

<sup>(1)</sup> Council Regulation No 19/65/EEC of 2 March 1965 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to certain categories of agreements and concerted practices (OJ 36, 6.3.1965, p. 533). Regulation as last amended by Regulation (EC) No 1215/1999 (OJ L 148, 15.6.1999, p. 1).

<sup>(2)</sup> Council Regulation (EEC) No 2821/71 of 20 December 1971 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to categories of agreements, decisions and concerted practices (OJ L 285, 29.12.1971, p. 46). Regulation as last amended by the Act of Accession of 1994.

<sup>(3)</sup> Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to certain categories of agreements and concerted practices in the air transport sector (OJ L 374, 31.12.1987, p. 9). Regulation as last amended by the Act of Accession of 1994.

<sup>(4)</sup> Council Regulation (EEC) No 1534/91 of 31 May 1991 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector (OJ L 143, 7.6.1991, p. 1).

<sup>(5)</sup> Council Regulation (EEC) No 479/92 of 25 February 1992 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (Consortia) (OJ L 55, 29.2.1992, p. 3). Regulation amended by the Act of Accession of 1994.

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or associations of undertakings for the purpose of bringing to an end infringements of Articles 81 and 82 of the Treaty. Provided there is a legitimate interest in doing so, the Commission should also be able to adopt decisions which find that an infringement has been committed in the past even if it does not impose a fine. This Regulation should also make explicit provision for the Commission's power to adopt decisions ordering interim measures, which has been acknowledged by the Court of Justice.

- (12) This Regulation should make explicit provision for the Commission's power to impose any remedy, whether behavioural or structural, which is necessary to bring the infringement effectively to an end, having regard to the principle of proportionality. Structural remedies should only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. Changes to the structure of an undertaking as it existed before the infringement was committed would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking.
- (13) Where, in the course of proceedings which might lead to an agreement or practice being prohibited, undertakings offer the Commission commitments such as to meet its concerns, the Commission should be able to adopt decisions which make those commitments binding on the undertakings concerned. Commitment decisions should find that there are no longer grounds for action by the Commission without concluding whether or not there has been or still is an infringement. Commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case. Commitment decisions are not appropriate in cases where the Commission intends to impose a fine.
- (14) In exceptional cases where the public interest of the Community so requires, it may also be expedient for the Commission to adopt a decision of a declaratory nature finding that the prohibition in Article 81 or Article 82 of the Treaty does not apply, with a view to clarifying the law and ensuring its consistent application throughout the Community, in particular with regard to new types of agreements or practices that have not been settled in the existing case-law and administrative practice.
- (15) The Commission and the competition authorities of the Member States should form together a network of public authorities applying the Community competition rules in close cooperation. For that purpose it is necessary to set up arrangements for information and consultation. Further modalities for the cooperation within the network will be laid down and revised by the Commission, in close cooperation with the Member States.
- (16) Notwithstanding any national provision to the contrary, the exchange of information and the use of such information in evidence should be allowed between the members of the network even where the information is confidential. This information may be used for the application of Articles 81 and 82 of the Treaty as well as for the parallel application of national competition law, provided that the latter application relates to the same case and does not lead to a different outcome. When the information exchanged is used by the receiving authority to impose sanctions on undertakings, there should be no other limit to the use of the information than the obligation to use it for the purpose for which it was collected given the fact that the sanctions imposed on undertakings are of the same type in all systems. The rights of defence enjoyed by undertakings in the various systems can be considered as sufficiently equivalent.

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However, as regards natural persons, they may be subject to substantially different types of sanctions across the various systems. Where that is the case, it is necessary to ensure that information can only be used if it has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority.

- (17) If the competition rules are to be applied consistently and, at the same time, the network is to be managed in the best possible way, it is essential to retain the rule that the competition authorities of the Member States are automatically relieved of their competence if the Commission initiates its own proceedings. Where a competition authority of a Member State is already acting on a case and the Commission intends to initiate proceedings, it should endeavour to do so as soon as possible. Before initiating proceedings, the Commission should consult the national authority concerned.
- (18) To ensure that cases are dealt with by the most appropriate authorities within the network, a general provision should be laid down allowing a competition authority to suspend or close a case on the ground that another authority is dealing with it or has already dealt with it, the objective being that each case should be handled by a single authority. This provision should not prevent the Commission from rejecting a complaint for lack of Community interest, as the case-law of the Court of Justice has acknowledged it may do, even if no other competition authority has indicated its intention of dealing with the case.
- (19) The Advisory Committee on Restrictive Practices and Dominant Positions set up by Regulation No 17 has functioned in a very satisfactory manner. It will fit well into the new system of decentralised application. It is necessary, therefore, to build upon the rules laid down by Regulation No 17, while improving the effectiveness of the organisational arrangements. To this end, it would be expedient to allow opinions to be delivered by written procedure. The Advisory Committee should also be able to act as a forum for discussing cases that are being handled by the competition authorities of the Member States, so as to help safeguard the consistent application of the Community competition rules.
- (20) The Advisory Committee should be composed of representatives of the competition authorities of the Member States. For meetings in which general issues are being discussed, Member States should be able to appoint an additional representative. This is without prejudice to members of the Committee being assisted by other experts from the Member States.
- (21) Consistency in the application of the competition rules also requires that arrangements be established for cooperation between the courts of the Member States and the Commission. This is relevant for all courts of the Member States that apply Articles 81 and 82 of the Treaty, whether applying these rules in lawsuits between private parties, acting as public enforcers or as review courts. In particular, national courts should be able to ask the Commission for information or for its opinion on points concerning the application of Community competition law. The Commission and the competition authorities of the Member States should also be able to submit written or oral observations to courts called upon to apply Article 81 or Article 82 of the Treaty. These observations should be submitted within the framework of national procedural rules and practices including those safeguarding the rights of the parties. Steps should therefore be taken to ensure that the Commission and the competition authorities of the Member States are kept sufficiently well informed of proceedings before national courts.

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- (22) In order to ensure compliance with the principles of legal certainty and the uniform application of the Community competition rules in a system of parallel powers, conflicting decisions must be avoided. It is therefore necessary to clarify, in accordance with the case-law of the Court of Justice, the effects of Commission decisions and proceedings on courts and competition authorities of the Member States. Commitment decisions adopted by the Commission do not affect the power of the courts and the competition authorities of the Member States to apply Articles 81 and 82 of the Treaty.
- (23) The Commission should be empowered throughout the Community to require such information to be supplied as is necessary to detect any agreement, decision or concerted practice prohibited by Article 81 of the Treaty or any abuse of a dominant position prohibited by Article 82 of the Treaty. When complying with a decision of the Commission, undertakings cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement.
- (24) The Commission should also be empowered to undertake such inspections as are necessary to detect any agreement, decision or concerted practice prohibited by Article 81 of the Treaty or any abuse of a dominant position prohibited by Article 82 of the Treaty. The competition authorities of the Member States should cooperate actively in the exercise of these powers.
- (25) The detection of infringements of the competition rules is growing ever more difficult, and, in order to protect competition effectively, the Commission's powers of investigation need to be supplemented. The Commission should in particular be empowered to interview any persons who may be in possession of useful information and to record the statements made. In the course of an inspection, officials authorised by the Commission should be empowered to affix seals for the period of time necessary for the inspection. Seals should normally not be affixed for more than 72 hours. Officials authorised by the Commission should also be empowered to ask for any information relevant to the subject matter and purpose of the inspection.
- (26) Experience has shown that there are cases where business records are kept in the homes of directors or other people working for an undertaking. In order to safeguard the effectiveness of inspections, therefore, officials and other persons authorised by the Commission should be empowered to enter any premises where business records may be kept, including private homes. However, the exercise of this latter power should be subject to the authorisation of the judicial authority.
- (27) Without prejudice to the case-law of the Court of Justice, it is useful to set out the scope of the control that the national judicial authority may carry out when it authorises, as foreseen by national law including as a precautionary measure, assistance from law enforcement authorities in order to overcome possible opposition on the part of the undertaking or the execution of the decision to carry out inspections in non-business premises. It results from the case-law that the national judicial authority may in particular ask the Commission for further information which it needs to carry out its control and in the absence of which it could refuse the authorisation. The case-law also confirms the competence of the national courts to control the application of national rules governing the implementation of coercive measures.



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- (28) In order to help the competition authorities of the Member States to apply Articles 81 and 82 of the Treaty effectively, it is expedient to enable them to assist one another by carrying out inspections and other fact-finding measures.
- (29) Compliance with Articles 81 and 82 of the Treaty and the fulfilment of the obligations imposed on undertakings and associations of undertakings under this Regulation should be enforceable by means of fines and periodic penalty payments. To that end, appropriate levels of fine should also be laid down for infringements of the procedural rules.
- (30) In order to ensure effective recovery of fines imposed on associations of undertakings for infringements that they have committed, it is necessary to lay down the conditions on which the Commission may require payment of the fine from the members of the association where the association is not solvent. In doing so, the Commission should have regard to the relative size of the undertakings belonging to the association and in particular to the situation of small and medium-sized enterprises. Payment of the fine by one or several members of an association is without prejudice to rules of national law that provide for recovery of the amount paid from other members of the association.
- (31) The rules on periods of limitation for the imposition of fines and periodic penalty payments were laid down in Council Regulation (EEC) No 2988/74 <sup>(1)</sup>, which also concerns penalties in the field of transport. In a system of parallel powers, the acts, which may interrupt a limitation period, should include procedural steps taken independently by the competition authority of a Member State. To clarify the legal framework, Regulation (EEC) No 2988/74 should therefore be amended to prevent it applying to matters covered by this Regulation, and this Regulation should include provisions on periods of limitation.
- (32) The undertakings concerned should be accorded the right to be heard by the Commission, third parties whose interests may be affected by a decision should be given the opportunity of submitting their observations beforehand, and the decisions taken should be widely publicised. While ensuring the rights of defence of the undertakings concerned, in particular, the right of access to the file, it is essential that business secrets be protected. The confidentiality of information exchanged in the network should likewise be safeguarded.
- (33) Since all decisions taken by the Commission under this Regulation are subject to review by the Court of Justice in accordance with the Treaty, the Court of Justice should, in accordance with Article 229 thereof be given unlimited jurisdiction in respect of decisions by which the Commission imposes fines or periodic penalty payments.
- (34) The principles laid down in Articles 81 and 82 of the Treaty, as they have been applied by Regulation No 17, have given a central role to the Community bodies. This central role should be retained, whilst associating the Member States more closely with the application of the Community competition rules. In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, this Regulation does not go beyond what is necessary in order to achieve its objective, which is to allow the Community competition rules to be applied effectively.

<sup>(1)</sup> Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ L 319, 29.11.1974, p. 1).

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- (35) In order to attain a proper enforcement of Community competition law, Member States should designate and empower authorities to apply Articles 81 and 82 of the Treaty as public enforcers. They should be able to designate administrative as well as judicial authorities to carry out the various functions conferred upon competition authorities in this Regulation. This Regulation recognises the wide variation which exists in the public enforcement systems of Member States. The effects of Article 11(6) of this Regulation should apply to all competition authorities. As an exception to this general rule, where a prosecuting authority brings a case before a separate judicial authority, Article 11(6) should apply to the prosecuting authority subject to the conditions in Article 35(4) of this Regulation. Where these conditions are not fulfilled, the general rule should apply. In any case, Article 11(6) should not apply to courts insofar as they are acting as review courts.
- (36) As the case-law has made it clear that the competition rules apply to transport, that sector should be made subject to the procedural provisions of this Regulation. Council Regulation No 141 of 26 November 1962 exempting transport from the application of Regulation No 17 <sup>(1)</sup> should therefore be repealed and Regulations (EEC) No 1017/68 <sup>(2)</sup>, (EEC) No 4056/86 <sup>(3)</sup> and (EEC) No 3975/87 <sup>(4)</sup> should be amended in order to delete the specific procedural provisions they contain.
- (37) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles.
- (38) Legal certainty for undertakings operating under the Community competition rules contributes to the promotion of innovation and investment. Where cases give rise to genuine uncertainty because they present novel or unresolved questions for the application of these rules, individual undertakings may wish to seek informal guidance from the Commission. This Regulation is without prejudice to the ability of the Commission to issue such informal guidance,

<sup>(1)</sup> OJ 124, 28.11.1962, p. 2751/62; Regulation as last amended by Regulation No 1002/67/EEC (OJ 306, 16.12.1967, p. 1).

<sup>(2)</sup> Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ L 175, 23.7.1968, p. 1). Regulation as last amended by the Act of Accession of 1994.

<sup>(3)</sup> Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 81 and 82 (The title of the Regulation has been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Articles 85 and 86 of the Treaty) of the Treaty to maritime transport (OJ L 378, 31.12.1986, p. 4). Regulation as last amended by the Act of Accession of 1994.

<sup>(4)</sup> Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector (OJ L 374, 31.12.1987, p. 1). Regulation as last amended by Regulation (EEC) No 2410/92 (OJ L 240, 24.8.1992, p. 18).

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HAS ADOPTED THIS REGULATION:

## CHAPTER I

### PRINCIPLES

#### *Article 1*

#### **Application of Articles 81 and 82 of the Treaty**

1. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which do not satisfy the conditions of Article 81(3) of the Treaty shall be prohibited, no prior decision to that effect being required.
2. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which satisfy the conditions of Article 81(3) of the Treaty shall not be prohibited, no prior decision to that effect being required.
3. The abuse of a dominant position referred to in Article 82 of the Treaty shall be prohibited, no prior decision to that effect being required.

#### *Article 2*

#### **Burden of proof**

In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.

#### *Article 3*

#### **Relationship between Articles 81 and 82 of the Treaty and national competition laws**

1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article 82 of the Treaty, they shall also apply Article 82 of the Treaty.
2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81 (3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.
3. Without prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 do not apply when the competition

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authorities and the courts of the Member States apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty.

**CHAPTER II****POWERS***Article 4***Powers of the Commission**

For the purpose of applying Articles 81 and 82 of the Treaty, the Commission shall have the powers provided for by this Regulation.

*Article 5***Powers of the competition authorities of the Member States**

The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions:

- requiring that an infringement be brought to an end,
- ordering interim measures,
- accepting commitments,
- imposing fines, periodic penalty payments or any other penalty provided for in their national law.

Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.

*Article 6***Powers of the national courts**

National courts shall have the power to apply Articles 81 and 82 of the Treaty.

**CHAPTER III****COMMISSION DECISIONS***Article 7***Finding and termination of infringement**

1. Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. If the Commission has a

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legitimate interest in doing so, it may also find that an infringement has been committed in the past.

2. Those entitled to lodge a complaint for the purposes of paragraph 1 are natural or legal persons who can show a legitimate interest and Member States.

*Article 8***Interim measures**

1. In cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative may by decision, on the basis of a *prima facie* finding of infringement, order interim measures.

2. A decision under paragraph 1 shall apply for a specified period of time and may be renewed in so far this is necessary and appropriate.

*Article 9***Commitments**

1. Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.

2. The Commission may, upon request or on its own initiative, reopen the proceedings:

- (a) where there has been a material change in any of the facts on which the decision was based;
- (b) where the undertakings concerned act contrary to their commitments; or
- (c) where the decision was based on incomplete, incorrect or misleading information provided by the parties.

*Article 10***Finding of inapplicability**

Where the Community public interest relating to the application of Articles 81 and 82 of the Treaty so requires, the Commission, acting on its own initiative, may by decision find that Article 81 of the Treaty is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Article 81(1) of the Treaty are not fulfilled, or because the conditions of Article 81(3) of the Treaty are satisfied.

The Commission may likewise make such a finding with reference to Article 82 of the Treaty.



## CHAPTER IV COOPERATION

### *Article 11*

#### **Cooperation between the Commission and the competition authorities of the Member States**

1. The Commission and the competition authorities of the Member States shall apply the Community competition rules in close cooperation.
2. The Commission shall transmit to the competition authorities of the Member States copies of the most important documents it has collected with a view to applying Articles 7, 8, 9, 10 and Article 29 (1). At the request of the competition authority of a Member State, the Commission shall provide it with a copy of other existing documents necessary for the assessment of the case.
3. The competition authorities of the Member States shall, when acting under Article 81 or Article 82 of the Treaty, inform the Commission in writing before or without delay after commencing the first formal investigative measure. This information may also be made available to the competition authorities of the other Member States.
4. No later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation, the competition authorities of the Member States shall inform the Commission. To that effect, they shall provide the Commission with a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action. This information may also be made available to the competition authorities of the other Member States. At the request of the Commission, the acting competition authority shall make available to the Commission other documents it holds which are necessary for the assessment of the case. The information supplied to the Commission may be made available to the competition authorities of the other Member States. National competition authorities may also exchange between themselves information necessary for the assessment of a case that they are dealing with under Article 81 or Article 82 of the Treaty.
5. The competition authorities of the Member States may consult the Commission on any case involving the application of Community law.
6. The initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty. If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority.

### *Article 12*

#### **Exchange of information**

1. For the purpose of applying Articles 81 and 82 of the Treaty the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.
2. Information exchanged shall only be used in evidence for the purpose of applying Article 81 or Article 82 of the Treaty and in respect of the subject-matter for which it was collected by the transmitting authority. However, where national competition law is applied in the same case and in parallel to Community competition law and

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does not lead to a different outcome, information exchanged under this Article may also be used for the application of national competition law.

3. Information exchanged pursuant to paragraph 1 can only be used in evidence to impose sanctions on natural persons where:

the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 81 or Article 82 of the Treaty or, in the absence thereof,

the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.

*Article 13***Suspension or termination of proceedings**

1. Where competition authorities of two or more Member States have received a complaint or are acting on their own initiative under Article 81 or Article 82 of the Treaty against the same agreement, decision of an association or practice, the fact that one authority is dealing with the case shall be sufficient grounds for the others to suspend the proceedings before them or to reject the complaint. The Commission may likewise reject a complaint on the ground that a competition authority of a Member State is dealing with the case.

2. Where a competition authority of a Member State or the Commission has received a complaint against an agreement, decision of an association or practice which has already been dealt with by another competition authority, it may reject it.

*Article 14***Advisory Committee**

1. The Commission shall consult an Advisory Committee on Restrictive Practices and Dominant Positions prior to the taking of any decision under Articles 7, 8, 9, 10, 23, Article 24(2) and Article 29(1).

2. For the discussion of individual cases, the Advisory Committee shall be composed of representatives of the competition authorities of the Member States. For meetings in which issues other than individual cases are being discussed, an additional Member State representative competent in competition matters may be appointed. Representatives may, if unable to attend, be replaced by other representatives.

3. The consultation may take place at a meeting convened and chaired by the Commission, held not earlier than 14 days after dispatch of the notice convening it, together with a summary of the case, an indication of the most important documents and a preliminary draft decision. In respect of decisions pursuant to Article 8, the meeting may be held seven days after the dispatch of the operative part of a draft decision. Where the Commission dispatches a notice convening the meeting which gives a shorter period of notice than those specified above, the meeting may take place on the proposed date in the absence of an objection by any Member State. The Advisory Committee shall deliver a written opinion on the Commission's preliminary draft decision. It may deliver an opinion even if some members are absent and are not represented. At the request of one or several members, the positions stated in the opinion shall be reasoned.

4. Consultation may also take place by written procedure. However, if any Member State so requests, the Commission shall convene a meeting. In case of written procedure, the Commission shall

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determine a time-limit of not less than 14 days within which the Member States are to put forward their observations for circulation to all other Member States. In case of decisions to be taken pursuant to Article 8, the time-limit of 14 days is replaced by seven days. Where the Commission determines a time-limit for the written procedure which is shorter than those specified above, the proposed time-limit shall be applicable in the absence of an objection by any Member State.

5. The Commission shall take the utmost account of the opinion delivered by the Advisory Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.

6. Where the Advisory Committee delivers a written opinion, this opinion shall be appended to the draft decision. If the Advisory Committee recommends publication of the opinion, the Commission shall carry out such publication taking into account the legitimate interest of undertakings in the protection of their business secrets.

7. At the request of a competition authority of a Member State, the Commission shall include on the agenda of the Advisory Committee cases that are being dealt with by a competition authority of a Member State under Article 81 or Article 82 of the Treaty. The Commission may also do so on its own initiative. In either case, the Commission shall inform the competition authority concerned.

A request may in particular be made by a competition authority of a Member State in respect of a case where the Commission intends to initiate proceedings with the effect of Article 11(6).

The Advisory Committee shall not issue opinions on cases dealt with by competition authorities of the Member States. The Advisory Committee may also discuss general issues of Community competition law.

#### *Article 15*

#### **Cooperation with national courts**

1. In proceedings for the application of Article 81 or Article 82 of the Treaty, courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules.

2. Member States shall forward to the Commission a copy of any written judgment of national courts deciding on the application of Article 81 or Article 82 of the Treaty. Such copy shall be forwarded without delay after the full written judgment is notified to the parties.

3. Competition authorities of the Member States, acting on their own initiative, may submit written observations to the national courts of their Member State on issues relating to the application of Article 81 or Article 82 of the Treaty. With the permission of the court in question, they may also submit oral observations to the national courts of their Member State. Where the coherent application of Article 81 or Article 82 of the Treaty so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States. With the permission of the court in question, it may also make oral observations.

For the purpose of the preparation of their observations only, the competition authorities of the Member States and the Commission may request the relevant court of the Member State to transmit or ensure the transmission to them of any documents necessary for the assessment of the case.

4. This Article is without prejudice to wider powers to make observations before courts conferred on competition authorities of the Member States under the law of their Member State.



**▼B***Article 16***Uniform application of Community competition law**

1. When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under Article 234 of the Treaty.

2. When competition authorities of the Member States rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission.

**CHAPTER V****POWERS OF INVESTIGATION***Article 17***Investigations into sectors of the economy and into types of agreements**

1. Where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market, the Commission may conduct its inquiry into a particular sector of the economy or into a particular type of agreements across various sectors. In the course of that inquiry, the Commission may request the undertakings or associations of undertakings concerned to supply the information necessary for giving effect to Articles 81 and 82 of the Treaty and may carry out any inspections necessary for that purpose.

The Commission may in particular request the undertakings or associations of undertakings concerned to communicate to it all agreements, decisions and concerted practices.

The Commission may publish a report on the results of its inquiry into particular sectors of the economy or particular types of agreements across various sectors and invite comments from interested parties.

2. Articles 14, 18, 19, 20, 22, 23 and 24 shall apply *mutatis mutandis*.

*Article 18***Requests for information**

1. In order to carry out the duties assigned to it by this Regulation, the Commission may, by simple request or by decision, require undertakings and associations of undertakings to provide all necessary information.

2. When sending a simple request for information to an undertaking or association of undertakings, the Commission shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which the information is to be provided, and the penalties provided for in Article 23 for supplying incorrect or misleading information.

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3. Where the Commission requires undertakings and associations of undertakings to supply information by decision, it shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which it is to be provided. It shall also indicate the penalties provided for in Article 23 and indicate or impose the penalties provided for in Article 24. It shall further indicate the right to have the decision reviewed by the Court of Justice.

4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution shall supply the information requested on behalf of the undertaking or the association of undertakings concerned. Lawyers duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.

5. The Commission shall without delay forward a copy of the simple request or of the decision to the competition authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated and the competition authority of the Member State whose territory is affected.

6. At the request of the Commission the governments and competition authorities of the Member States shall provide the Commission with all necessary information to carry out the duties assigned to it by this Regulation.

*Article 19***Power to take statements**

1. In order to carry out the duties assigned to it by this Regulation, the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation.

2. Where an interview pursuant to paragraph 1 is conducted in the premises of an undertaking, the Commission shall inform the competition authority of the Member State in whose territory the interview takes place. If so requested by the competition authority of that Member State, its officials may assist the officials and other accompanying persons authorised by the Commission to conduct the interview.

*Article 20***The Commission's powers of inspection**

1. In order to carry out the duties assigned to it by this Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings.

2. The officials and other accompanying persons authorised by the Commission to conduct an inspection are empowered:

- (a) to enter any premises, land and means of transport of undertakings and associations of undertakings;
- (b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;
- (c) to take or obtain in any form copies of or extracts from such books or records;
- (d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;

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(e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers.

3. The officials and other accompanying persons authorised by the Commission to conduct an inspection shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection and the penalties provided for in Article 23 in case the production of the required books or other records related to the business is incomplete or where the answers to questions asked under paragraph 2 of the present Article are incorrect or misleading. In good time before the inspection, the Commission shall give notice of the inspection to the competition authority of the Member State in whose territory it is to be conducted.

4. Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 23 and 24 and the right to have the decision reviewed by the Court of Justice. The Commission shall take such decisions after consulting the competition authority of the Member State in whose territory the inspection is to be conducted.

5. Officials of as well as those authorised or appointed by the competition authority of the Member State in whose territory the inspection is to be conducted shall, at the request of that authority or of the Commission, actively assist the officials and other accompanying persons authorised by the Commission. To this end, they shall enjoy the powers specified in paragraph 2.

6. Where the officials and other accompanying persons authorised by the Commission find that an undertaking opposes an inspection ordered pursuant to this Article, the Member State concerned shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection.

7. If the assistance provided for in paragraph 6 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

8. Where authorisation as referred to in paragraph 7 is applied for, the national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask the Commission, directly or through the Member State competition authority, for detailed explanations in particular on the grounds the Commission has for suspecting infringement of Articles 81 and 82 of the Treaty, as well as on the seriousness of the suspected infringement and on the nature of the involvement of the undertaking concerned. However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with the information in the Commission's file. The lawfulness of the Commission decision shall be subject to review only by the Court of Justice.

*Article 21***Inspection of other premises**

1. If a reasonable suspicion exists that books or other records related to the business and to the subject-matter of the inspection, which may be relevant to prove a serious violation of Article 81 or Article 82 of the Treaty, are being kept in any other premises, land and means of

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transport, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned, the Commission can by decision order an inspection to be conducted in such other premises, land and means of transport.

2. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the right to have the decision reviewed by the Court of Justice. It shall in particular state the reasons that have led the Commission to conclude that a suspicion in the sense of paragraph 1 exists. The Commission shall take such decisions after consulting the competition authority of the Member State in whose territory the inspection is to be conducted.

3. A decision adopted pursuant to paragraph 1 cannot be executed without prior authorisation from the national judicial authority of the Member State concerned. The national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard in particular to the seriousness of the suspected infringement, to the importance of the evidence sought, to the involvement of the undertaking concerned and to the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in the premises for which the authorisation is requested. The national judicial authority may ask the Commission, directly or through the Member State competition authority, for detailed explanations on those elements which are necessary to allow its control of the proportionality of the coercive measures envisaged.

However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with information in the Commission's file. The lawfulness of the Commission decision shall be subject to review only by the Court of Justice.

4. The officials and other accompanying persons authorised by the Commission to conduct an inspection ordered in accordance with paragraph 1 of this Article shall have the powers set out in Article 20 (2)(a), (b) and (c). Article 20(5) and (6) shall apply *mutatis mutandis*.

## *Article 22*

### **Investigations by competition authorities of Member States**

1. The competition authority of a Member State may in its own territory carry out any inspection or other fact-finding measure under its national law on behalf and for the account of the competition authority of another Member State in order to establish whether there has been an infringement of Article 81 or Article 82 of the Treaty. Any exchange and use of the information collected shall be carried out in accordance with Article 12.

2. At the request of the Commission, the competition authorities of the Member States shall undertake the inspections which the Commission considers to be necessary under Article 20(1) or which it has ordered by decision pursuant to Article 20(4). The officials of the competition authorities of the Member States who are responsible for conducting these inspections as well as those authorised or appointed by them shall exercise their powers in accordance with their national law.

If so requested by the Commission or by the competition authority of the Member State in whose territory the inspection is to be conducted, officials and other accompanying persons authorised by the Commission may assist the officials of the authority concerned.

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**CHAPTER VI**  
**PENALTIES**

*Article 23*

**Fines**

1. The Commission may by decision impose on undertakings and associations of undertakings fines not exceeding 1 % of the total turnover in the preceding business year where, intentionally or negligently:

- (a) they supply incorrect or misleading information in response to a request made pursuant to Article 17 or Article 18(2);
- (b) in response to a request made by decision adopted pursuant to Article 17 or Article 18(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time-limit;
- (c) they produce the required books or other records related to the business in incomplete form during inspections under Article 20 or refuse to submit to inspections ordered by a decision adopted pursuant to Article 20(4);
- (d) in response to a question asked in accordance with Article 20(2)(e),
  - they give an incorrect or misleading answer,
  - they fail to rectify within a time-limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or
  - they fail or refuse to provide a complete answer on facts relating to the subject-matter and purpose of an inspection ordered by a decision adopted pursuant to Article 20(4);
- (e) seals affixed in accordance with Article 20(2)(d) by officials or other accompanying persons authorised by the Commission have been broken.

2. The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

- (a) they infringe Article 81 or Article 82 of the Treaty; or
- (b) they contravene a decision ordering interim measures under Article 8; or
- (c) they fail to comply with a commitment made binding by a decision pursuant to Article 9.

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10 % of its total turnover in the preceding business year.

Where the infringement of an association relates to the activities of its members, the fine shall not exceed 10 % of the sum of the total turnover of each member active on the market affected by the infringement of the association.

3. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

4. When a fine is imposed on an association of undertakings taking account of the turnover of its members and the association is not solvent, the association is obliged to call for contributions from its members to cover the amount of the fine.

Where such contributions have not been made to the association within a time-limit fixed by the Commission, the Commission may require

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payment of the fine directly by any of the undertakings whose representatives were members of the decision-making bodies concerned of the association.

After the Commission has required payment under the second subparagraph, where necessary to ensure full payment of the fine, the Commission may require payment of the balance by any of the members of the association which were active on the market on which the infringement occurred.

However, the Commission shall not require payment under the second or the third subparagraph from undertakings which show that they have not implemented the infringing decision of the association and either were not aware of its existence or have actively distanced themselves from it before the Commission started investigating the case.

The financial liability of each undertaking in respect of the payment of the fine shall not exceed 10 % of its total turnover in the preceding business year.

5. Decisions taken pursuant to paragraphs 1 and 2 shall not be of a criminal law nature.

*Article 24***Periodic penalty payments**

1. The Commission may, by decision, impose on undertakings or associations of undertakings periodic penalty payments not exceeding 5 % of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision, in order to compel them:

- (a) to put an end to an infringement of Article 81 or Article 82 of the Treaty, in accordance with a decision taken pursuant to Article 7;
- (b) to comply with a decision ordering interim measures taken pursuant to Article 8;
- (c) to comply with a commitment made binding by a decision pursuant to Article 9;
- (d) to supply complete and correct information which it has requested by decision taken pursuant to Article 17 or Article 18(3);
- (e) to submit to an inspection which it has ordered by decision taken pursuant to Article 20(4).

2. Where the undertakings or associations of undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may fix the definitive amount of the periodic penalty payment at a figure lower than that which would arise under the original decision. Article 23(4) shall apply correspondingly.

**CHAPTER VII****LIMITATION PERIODS***Article 25***Limitation periods for the imposition of penalties**

1. The powers conferred on the Commission by Articles 23 and 24 shall be subject to the following limitation periods:

- (a) three years in the case of infringements of provisions concerning requests for information or the conduct of inspections;

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- (b) five years in the case of all other infringements.
- 2. Time shall begin to run on the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases.
- 3. Any action taken by the Commission or by the competition authority of a Member State for the purpose of the investigation or proceedings in respect of an infringement shall interrupt the limitation period for the imposition of fines or periodic penalty payments. The limitation period shall be interrupted with effect from the date on which the action is notified to at least one undertaking or association of undertakings which has participated in the infringement. Actions which interrupt the running of the period shall include in particular the following:
  - (a) written requests for information by the Commission or by the competition authority of a Member State;
  - (b) written authorisations to conduct inspections issued to its officials by the Commission or by the competition authority of a Member State;
  - (c) the initiation of proceedings by the Commission or by the competition authority of a Member State;
  - (d) notification of the statement of objections of the Commission or of the competition authority of a Member State.
- 4. The interruption of the limitation period shall apply for all the undertakings or associations of undertakings which have participated in the infringement.
- 5. Each interruption shall start time running afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a periodic penalty payment. That period shall be extended by the time during which limitation is suspended pursuant to paragraph 6.
- 6. The limitation period for the imposition of fines or periodic penalty payments shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice.

*Article 26***Limitation period for the enforcement of penalties**

- 1. The power of the Commission to enforce decisions taken pursuant to Articles 23 and 24 shall be subject to a limitation period of five years.
- 2. Time shall begin to run on the day on which the decision becomes final.
- 3. The limitation period for the enforcement of penalties shall be interrupted:
  - (a) by notification of a decision varying the original amount of the fine or periodic penalty payment or refusing an application for variation;
  - (b) by any action of the Commission or of a Member State, acting at the request of the Commission, designed to enforce payment of the fine or periodic penalty payment.
- 4. Each interruption shall start time running afresh.
- 5. The limitation period for the enforcement of penalties shall be suspended for so long as:

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- (a) time to pay is allowed;
- (b) enforcement of payment is suspended pursuant to a decision of the Court of Justice.

**CHAPTER VIII****HEARINGS AND PROFESSIONAL SECRECY***Article 27***Hearing of the parties, complainants and others**

1. Before taking decisions as provided for in Articles 7, 8, 23 and Article 24(2), the Commission shall give the undertakings or associations of undertakings which are the subject of the proceedings conducted by the Commission the opportunity of being heard on the matters to which the Commission has taken objection. The Commission shall base its decisions only on objections on which the parties concerned have been able to comment. Complainants shall be associated closely with the proceedings.

2. The rights of defence of the parties concerned shall be fully respected in the proceedings. They shall be entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets. The right of access to the file shall not extend to confidential information and internal documents of the Commission or the competition authorities of the Member States. In particular, the right of access shall not extend to correspondence between the Commission and the competition authorities of the Member States, or between the latter, including documents drawn up pursuant to Articles 11 and 14. Nothing in this paragraph shall prevent the Commission from disclosing and using information necessary to prove an infringement.

3. If the Commission considers it necessary, it may also hear other natural or legal persons. Applications to be heard on the part of such persons shall, where they show a sufficient interest, be granted. The competition authorities of the Member States may also ask the Commission to hear other natural or legal persons.

4. Where the Commission intends to adopt a decision pursuant to Article 9 or Article 10, it shall publish a concise summary of the case and the main content of the commitments or of the proposed course of action. Interested third parties may submit their observations within a time limit which is fixed by the Commission in its publication and which may not be less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

*Article 28***Professional secrecy**

1. Without prejudice to Articles 12 and 15, information collected pursuant to Articles 17 to 22 shall be used only for the purpose for which it was acquired.

2. Without prejudice to the exchange and to the use of information foreseen in Articles 11, 12, 14, 15 and 27, the Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information acquired or exchanged by them pursuant to this Regulation and of the kind covered by the obligation of professional secrecy. This obligation also applies to all represen-



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tatives and experts of Member States attending meetings of the Advisory Committee pursuant to Article 14.

## CHAPTER IX

**EXEMPTION REGULATIONS***Article 29***Withdrawal in individual cases**

1. Where the Commission, empowered by a Council Regulation, such as Regulations 19/65/EEC, (EEC) No 2821/71, (EEC) No 3976/87, (EEC) No 1534/91 or (EEC) No 479/92, to apply Article 81 (3) of the Treaty by regulation, has declared Article 81(1) of the Treaty inapplicable to certain categories of agreements, decisions by associations of undertakings or concerted practices, it may, acting on its own initiative or on a complaint, withdraw the benefit of such an exemption Regulation when it finds that in any particular case an agreement, decision or concerted practice to which the exemption Regulation applies has certain effects which are incompatible with Article 81 (3) of the Treaty.

2. Where, in any particular case, agreements, decisions by associations of undertakings or concerted practices to which a Commission Regulation referred to in paragraph 1 applies have effects which are incompatible with Article 81(3) of the Treaty in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct geographic market, the competition authority of that Member State may withdraw the benefit of the Regulation in question in respect of that territory.

## CHAPTER X

**GENERAL PROVISIONS***Article 30***Publication of decisions**

1. The Commission shall publish the decisions, which it takes pursuant to Articles 7 to 10, 23 and 24.

2. The publication shall state the names of the parties and the main content of the decision, including any penalties imposed. It shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

*Article 31***Review by the Court of Justice**

The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.

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**▼B***Article 33***Implementing provisions**

1. The Commission shall be authorised to take such measures as may be appropriate in order to apply this Regulation. The measures may concern, *inter alia*:
  - (a) the form, content and other details of complaints lodged pursuant to Article 7 and the procedure for rejecting complaints;
  - (b) the practical arrangements for the exchange of information and consultations provided for in Article 11;
  - (c) the practical arrangements for the hearings provided for in Article 27.
2. Before the adoption of any measures pursuant to paragraph 1, the Commission shall publish a draft thereof and invite all interested parties to submit their comments within the time-limit it lays down, which may not be less than one month. Before publishing a draft measure and before adopting it, the Commission shall consult the Advisory Committee on Restrictive Practices and Dominant Positions.

**CHAPTER XI****TRANSITIONAL, AMENDING AND FINAL PROVISIONS***Article 34***Transitional provisions**

1. Applications made to the Commission under Article 2 of Regulation No 17, notifications made under Articles 4 and 5 of that Regulation and the corresponding applications and notifications made under Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 shall lapse as from the date of application of this Regulation.
2. Procedural steps taken under Regulation No 17 and Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 shall continue to have effect for the purposes of applying this Regulation.

*Article 35***Designation of competition authorities of Member States**

1. The Member States shall designate the competition authority or authorities responsible for the application of Articles 81 and 82 of the Treaty in such a way that the provisions of this regulation are effectively complied with. The measures necessary to empower those authorities to apply those Articles shall be taken before 1 May 2004. The authorities designated may include courts.
2. When enforcement of Community competition law is entrusted to national administrative and judicial authorities, the Member States may allocate different powers and functions to those different national authorities, whether administrative or judicial.
3. The effects of Article 11(6) apply to the authorities designated by the Member States including courts that exercise functions regarding the preparation and the adoption of the types of decisions foreseen in Article 5. The effects of Article 11(6) do not extend to courts insofar as they act as review courts in respect of the types of decisions foreseen in Article 5.
4. Notwithstanding paragraph 3, in the Member States where, for the adoption of certain types of decisions foreseen in Article 5, an authority brings an action before a judicial authority that is separate and different

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from the prosecuting authority and provided that the terms of this paragraph are complied with, the effects of Article 11(6) shall be limited to the authority prosecuting the case which shall withdraw its claim before the judicial authority when the Commission opens proceedings and this withdrawal shall bring the national proceedings effectively to an end.

*Article 36***Amendment of Regulation (EEC) No 1017/68**

Regulation (EEC) No 1017/68 is amended as follows:

1. Article 2 is repealed;
2. in Article 3(1), the words 'The prohibition laid down in Article 2' are replaced by the words 'The prohibition in Article 81(1) of the Treaty';
3. Article 4 is amended as follows:
  - (a) In paragraph 1, the words 'The agreements, decisions and concerted practices referred to in Article 2' are replaced by the words 'Agreements, decisions and concerted practices pursuant to Article 81(1) of the Treaty';
  - (b) Paragraph 2 is replaced by the following:
 

'2. If the implementation of any agreement, decision or concerted practice covered by paragraph 1 has, in a given case, effects which are incompatible with the requirements of Article 81(3) of the Treaty, undertakings or associations of undertakings may be required to make such effects cease.'
4. Articles 5 to 29 are repealed with the exception of Article 13(3) which continues to apply to decisions adopted pursuant to Article 5 of Regulation (EEC) No 1017/68 prior to the date of application of this Regulation until the date of expiration of those decisions;
5. in Article 30, paragraphs 2, 3 and 4 are deleted.

*Article 37***Amendment of Regulation (EEC) No 2988/74**

In Regulation (EEC) No 2988/74, the following Article is inserted:

*'Article 7a***Exclusion**

This Regulation shall not apply to measures taken under Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (\*)

(\*) OJ L 1, 4.1.2003, p. 1.'

*Article 38***Amendment of Regulation (EEC) No 4056/86**

Regulation (EEC) No 4056/86 is amended as follows:

1. Article 7 is amended as follows:
  - (a) Paragraph 1 is replaced by the following:

**▼B****‘1. Breach of an obligation**

Where the persons concerned are in breach of an obligation which, pursuant to Article 5, attaches to the exemption provided for in Article 3, the Commission may, in order to put an end to such breach and under the conditions laid down in Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (\*) adopt a decision that either prohibits them from carrying out or requires them to perform certain specific acts, or withdraws the benefit of the block exemption which they enjoyed.

(\*) OJ L 1, 4.1.2003, p. 1.’

**(b) Paragraph 2 is amended as follows:**

- (i) In point (a), the words ‘under the conditions laid down in Section II’ are replaced by the words ‘under the conditions laid down in Regulation (EC) No 1/2003’;
- (ii) The second sentence of the second subparagraph of point (c) (i) is replaced by the following:

‘At the same time it shall decide, in accordance with Article 9 of Regulation (EC) No 1/2003, whether to accept commitments offered by the undertakings concerned with a view, *inter alia*, to obtaining access to the market for non-conference lines.’

**2. Article 8 is amended as follows:**

- (a) Paragraph 1 is deleted.
- (b) In paragraph 2 the words ‘pursuant to Article 10’ are replaced by the words ‘pursuant to Regulation (EC) No 1/2003’.
- (c) Paragraph 3 is deleted;

**3. Article 9 is amended as follows:**

- (a) In paragraph 1, the words ‘Advisory Committee referred to in Article 15’ are replaced by the words ‘Advisory Committee referred to in Article 14 of Regulation (EC) No 1/2003’;
- (b) In paragraph 2, the words ‘Advisory Committee as referred to in Article 15’ are replaced by the words ‘Advisory Committee referred to in Article 14 of Regulation (EC) No 1/2003’;

**4. Articles 10 to 25 are repealed with the exception of Article 13(3) which continues to apply to decisions adopted pursuant to Article 81 (3) of the Treaty prior to the date of application of this Regulation until the date of expiration of those decisions;****5. in Article 26, the words ‘the form, content and other details of complaints pursuant to Article 10, applications pursuant to Article 12 and the hearings provided for in Article 23(1) and (2)’ are deleted.***Article 39***Amendment of Regulation (EEC) No 3975/87**

Articles 3 to 19 of Regulation (EEC) No 3975/87 are repealed with the exception of Article 6(3) which continues to apply to decisions adopted pursuant to Article 81(3) of the Treaty prior to the date of application of this Regulation until the date of expiration of those decisions.

**▼B***Article 40***Amendment of Regulations No 19/65/EEC, (EEC) No 2821/71 and (EEC) No 1534/91**

Article 7 of Regulation No 19/65/EEC, Article 7 of Regulation (EEC) No 2821/71 and Article 7 of Regulation (EEC) No 1534/91 are repealed.

*Article 41***Amendment of Regulation (EEC) No 3976/87**

Regulation (EEC) No 3976/87 is amended as follows:

1. Article 6 is replaced by the following:

*‘Article 6*

The Commission shall consult the Advisory Committee referred to in Article 14 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (\*) before publishing a draft Regulation and before adopting a Regulation.

(\*) OJ L 1, 4.1.2003, p. 1.’

2. Article 7 is repealed.

*Article 42***Amendment of Regulation (EEC) No 479/92**

Regulation (EEC) No 479/92 is amended as follows:

1. Article 5 is replaced by the following:

*‘Article 5*

Before publishing the draft Regulation and before adopting the Regulation, the Commission shall consult the Advisory Committee referred to in Article 14 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (\*)

(\*) OJ L 1, 4.1.2003, p. 1.’

2. Article 6 is repealed.

*Article 43***Repeal of Regulations No 17 and No 141**

1. Regulation No 17 is repealed with the exception of Article 8(3) which continues to apply to decisions adopted pursuant to Article 81(3) of the Treaty prior to the date of application of this Regulation until the date of expiration of those decisions.
2. Regulation No 141 is repealed.
3. References to the repealed Regulations shall be construed as references to this Regulation.

**▼B***Article 44***Report on the application of the present Regulation**

Five years from the date of application of this Regulation, the Commission shall report to the European Parliament and the Council on the functioning of this Regulation, in particular on the application of Article 11(6) and Article 17.

On the basis of this report, the Commission shall assess whether it is appropriate to propose to the Council a revision of this Regulation.

*Article 45***Entry into force**

This Regulation shall enter into force on the 20th day following that of its publication in the *Official Journal of the European Communities*.

It shall apply from 1 May 2004.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

This document is meant purely as a documentation tool and the institutions do not assume any liability for its contents

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**COMMISSION REGULATION (EC) No 773/2004**

**of 7 April 2004**

**relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty**

**(Text with EEA relevance)**

(OJ L 123, 27.4.2004, p. 18)

Amended by:

Official Journal

		No	page	date
► <b><u>M1</u></b>	Commission Regulation (EC) No 1792/2006 of 23 October 2006	L 362	1	20.12.2006
► <b><u>M2</u></b>	Commission Regulation (EC) No 622/2008 of 30 June 2008	L 171	3	1.7.2008



# COMMISSION REGULATION (EC) No 773/2004

of 7 April 2004

relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty <sup>(1)</sup>, and in particular Article 33 thereof,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

- (1) Regulation (EC) No 1/2003 empowers the Commission to regulate certain aspects of proceedings for the application of Articles 81 and 82 of the Treaty. It is necessary to lay down rules concerning the initiation of proceedings by the Commission as well as the handling of complaints and the hearing of the parties concerned.
- (2) According to Regulation (EC) No 1/2003, national courts are under an obligation to avoid taking decisions which could run counter to decisions envisaged by the Commission in the same case. According to Article 11(6) of that Regulation, national competition authorities are relieved from their competence once the Commission has initiated proceedings for the adoption of a decision under Chapter III of Regulation (EC) No 1/2003. In this context, it is important that courts and competition authorities of the Member States are aware of the initiation of proceedings by the Commission. The Commission should therefore be able to make public its decisions to initiate proceedings.
- (3) Before taking oral statements from natural or legal persons who consent to be interviewed, the Commission should inform those persons of the legal basis of the interview and its voluntary nature. The persons interviewed should also be informed of the purpose of the interview and of any record which may be made. In order to enhance the accuracy of the statements, the persons interviewed should also be given an opportunity to correct the statements recorded. Where information gathered from oral statements is exchanged pursuant to Article 12 of Regulation (EC) No 1/2003, that information should only be used in evidence to impose sanctions on natural persons where the conditions set out in that Article are fulfilled.
- (4) Pursuant to Article 23(1)(d) of Regulation (EC) No 1/2003 fines may be imposed on undertakings and associations of undertakings where they fail to rectify within the time limit fixed by the Commission an incorrect, incomplete or misleading answer given by a member of their staff to questions in the course of inspections. It is therefore necessary to provide the undertaking concerned with a record of any explanations given and to

<sup>(1)</sup> OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).



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establish a procedure enabling it to add any rectification, amendment or supplement to the explanations given by the member of staff who is not or was not authorised to provide explanations on behalf of the undertaking. The explanations given by a member of staff should remain in the Commission file as recorded during the inspection.

- (5) Complaints are an essential source of information for detecting infringements of competition rules. It is important to define clear and efficient procedures for handling complaints lodged with the Commission.
- (6) In order to be admissible for the purposes of Article 7 of Regulation (EC) No 1/2003, a complaint must contain certain specified information.
- (7) In order to assist complainants in submitting the necessary facts to the Commission, a form should be drawn up. The submission of the information listed in that form should be a condition for a complaint to be treated as a complaint as referred to in Article 7 of Regulation (EC) No 1/2003.
- (8) Natural or legal persons having chosen to lodge a complaint should be given the possibility to be associated closely with the proceedings initiated by the Commission with a view to finding an infringement. However, they should not have access to business secrets or other confidential information belonging to other parties involved in the proceedings.
- (9) Complainants should be granted the opportunity of expressing their views if the Commission considers that there are insufficient grounds for acting on the complaint. Where the Commission rejects a complaint on the grounds that a competition authority of a Member State is dealing with it or has already done so, it should inform the complainant of the identity of that authority.
- (10) In order to respect the rights of defence of undertakings, the Commission should give the parties concerned the right to be heard before it takes a decision.
- (11) Provision should also be made for the hearing of persons who have not submitted a complaint as referred to in Article 7 of Regulation (EC) No 1/2003 and who are not parties to whom a statement of objections has been addressed but who can nevertheless show a sufficient interest. Consumer associations that apply to be heard should generally be regarded as having a sufficient interest, where the proceedings concern products or services used by the end-consumer or products or services that constitute a direct input into such products or services. Where it considers this to be useful for the proceedings, the Commission should also be able to invite other persons to express their views in writing and to attend the oral hearing of the parties to whom a statement of objections has been addressed. Where appropriate, it should also be able to invite such persons to express their views at that oral hearing.
- (12) To improve the effectiveness of oral hearings, the Hearing Officer should have the power to allow the parties concerned, complainants, other persons invited to the hearing, the Commission services and the authorities of the Member States to ask questions during the hearing.
- (13) When granting access to the file, the Commission should ensure the protection of business secrets and other confidential information. The category of 'other confidential information' includes information other than business secrets, which may be considered as confidential, insofar as its disclosure would significantly harm an undertaking or person. The Commission should be able to request undertakings or associations of undertakings

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that submit or have submitted documents or statements to identify confidential information.

- (14) Where business secrets or other confidential information are necessary to prove an infringement, the Commission should assess for each individual document whether the need to disclose is greater than the harm which might result from disclosure.
- (15) In the interest of legal certainty, a minimum time-limit for the various submissions provided for in this Regulation should be laid down.
- (16) This Regulation replaces Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty <sup>(1)</sup>, which should therefore be repealed.
- (17) This Regulation aligns the procedural rules in the transport sector with the general rules of procedure in all sectors. Commission Regulation (EC) No 2843/98 of 22 December 1998 on the form, content and other details of applications and notifications provided for in Council Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 applying the rules on competition to the transport sector <sup>(2)</sup> should therefore be repealed.
- (18) Regulation (EC) No 1/2003 abolishes the notification and authorisation system. Commission Regulation (EC) No 3385/94 of 21 December 1994 on the form, content and other details of applications and notifications provided for in Council Regulation No 17 <sup>(3)</sup> should therefore be repealed,

HAS ADOPTED THIS REGULATION:

## CHAPTER I

### SCOPE

#### *Article 1*

#### **Subject-matter and scope**

This regulation applies to proceedings conducted by the Commission for the application of Articles 81 and 82 of the Treaty.

## CHAPTER II

### INITIATION OF PROCEEDINGS

#### *Article 2*

#### **Initiation of proceedings**

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1. The Commission may decide to initiate proceedings with a view to adopting a decision pursuant to Chapter III of Regulation (EC) No 1/2003 at any point in time, but no later than the date on which it issues a preliminary assessment as referred to in Article 9(1) of that Regulation, a statement of objections or a request for the parties to express their interest in engaging in settlement discussions, or the date on which a notice pursuant to Article 27(4) of that Regulation is published, whichever is the earlier.

<sup>(1)</sup> OJ L 354, 30.12.1998, p. 18.

<sup>(2)</sup> OJ L 354, 30.12.1998, p. 22.

<sup>(3)</sup> OJ L 377, 31.12.1994, p. 28.

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2. The Commission may make public the initiation of proceedings, in any appropriate way. Before doing so, it shall inform the parties concerned.
3. The Commission may exercise its powers of investigation pursuant to Chapter V of Regulation (EC) No 1/2003 before initiating proceedings.
4. The Commission may reject a complaint pursuant to Article 7 of Regulation (EC) No 1/2003 without initiating proceedings.

## CHAPTER III

## INVESTIGATIONS BY THE COMMISSION

*Article 3***Power to take statements**

1. Where the Commission interviews a person with his consent in accordance with Article 19 of Regulation (EC) No 1/2003, it shall, at the beginning of the interview, state the legal basis and the purpose of the interview, and recall its voluntary nature. It shall also inform the person interviewed of its intention to make a record of the interview.
2. The interview may be conducted by any means including by telephone or electronic means.
3. The Commission may record the statements made by the persons interviewed in any form. A copy of any recording shall be made available to the person interviewed for approval. Where necessary, the Commission shall set a time-limit within which the person interviewed may communicate to it any correction to be made to the statement.

*Article 4***Oral questions during inspections**

1. When, pursuant to Article 20(2)(e) of Regulation (EC) No 1/2003, officials or other accompanying persons authorised by the Commission ask representatives or members of staff of an undertaking or of an association of undertakings for explanations, the explanations given may be recorded in any form.
2. A copy of any recording made pursuant to paragraph 1 shall be made available to the undertaking or association of undertakings concerned after the inspection.
3. In cases where a member of staff of an undertaking or of an association of undertakings who is not or was not authorised by the undertaking or by the association of undertakings to provide explanations on behalf of the undertaking or association of undertakings has been asked for explanations, the Commission shall set a time-limit within which the undertaking or the association of undertakings may communicate to the Commission any rectification, amendment or supplement to the explanations given by such member of staff. The rectification, amendment or supplement shall be added to the explanations as recorded pursuant to paragraph 1.

## CHAPTER IV

## HANDLING OF COMPLAINTS

**▼B***Article 5***Admissibility of complaints**

1. Natural and legal persons shall show a legitimate interest in order to be entitled to lodge a complaint for the purposes of Article 7 of Regulation (EC) No 1/2003.

Such complaints shall contain the information required by Form C, as set out in the Annex. The Commission may dispense with this obligation as regards part of the information, including documents, required by Form C.

2. Three paper copies as well as, if possible, an electronic copy of the complaint shall be submitted to the Commission. The complainant shall also submit a non-confidential version of the complaint, if confidentiality is claimed for any part of the complaint.

3. Complaints shall be submitted in one of the official languages of the Community.

*Article 6***Participation of complainants in proceedings****▼M2**

1. Where the Commission issues a statement of objections relating to a matter in respect of which it has received a complaint, it shall provide the complainant with a copy of the non-confidential version of the statement of objections, except in cases where the settlement procedure applies, where it shall inform the complainant in writing of the nature and subject matter of the procedure. The Commission shall also set a time limit within which the complainant may make known its views in writing.

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2. The Commission may, where appropriate, afford complainants the opportunity of expressing their views at the oral hearing of the parties to which a statement of objections has been issued, if complainants so request in their written comments.

*Article 7***Rejection of complaints**

1. Where the Commission considers that on the basis of the information in its possession there are insufficient grounds for acting on a complaint, it shall inform the complainant of its reasons and set a time-limit within which the complainant may make known its views in writing. The Commission shall not be obliged to take into account any further written submission received after the expiry of that time-limit.

2. If the complainant makes known its views within the time-limit set by the Commission and the written submissions made by the complainant do not lead to a different assessment of the complaint, the Commission shall reject the complaint by decision.

3. If the complainant fails to make known its views within the time-limit set by the Commission, the complaint shall be deemed to have been withdrawn.

**▼B***Article 8***Access to information**

1. Where the Commission has informed the complainant of its intention to reject a complaint pursuant to Article 7(1) the complainant may request access to the documents on which the Commission bases its provisional assessment. For this purpose, the complainant may however not have access to business secrets and other confidential information belonging to other parties involved in the proceedings.
2. The documents to which the complainant has had access in the context of proceedings conducted by the Commission under Articles 81 and 82 of the Treaty may only be used by the complainant for the purposes of judicial or administrative proceedings for the application of those Treaty provisions.

*Article 9***Rejections of complaints pursuant to Article 13 of Regulation (EC) No 1/2003**

Where the Commission rejects a complaint pursuant to Article 13 of Regulation (EC) No 1/2003, it shall inform the complainant without delay of the national competition authority which is dealing or has already dealt with the case.

## CHAPTER V

**EXERCISE OF THE RIGHT TO BE HEARD***Article 10***Statement of objections and reply****▼M2**

1. The Commission shall inform the parties concerned of the objections raised against them. The statement of objections shall be notified in writing to each of the parties against whom objections are raised.

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2. The Commission shall, when notifying the statement of objections to the parties concerned, set a time-limit within which these parties may inform it in writing of their views. The Commission shall not be obliged to take into account written submissions received after the expiry of that time-limit.
3. The parties may, in their written submissions, set out all facts known to them which are relevant to their defence against the objections raised by the Commission. They shall attach any relevant documents as proof of the facts set out. They shall provide a paper original as well as an electronic copy or, where they do not provide an electronic copy, ►M1 30 ◄ paper copies of their submission and of the documents attached to it. They may propose that the Commission hear persons who may corroborate the facts set out in their submission.

**▼M2***Article 10a***Settlement procedure in cartel cases**

1. After the initiation of proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003, the Commission may set a time limit within which the parties may indicate in writing that they are prepared to engage in settlement discussions with a view to possibly

**▼M2**

introducing settlement submissions. The Commission shall not be obliged to take into account replies received after the expiry of that time limit.

If two or more parties within the same undertaking indicate their willingness to engage in settlement discussions pursuant to the first subparagraph, they shall appoint a joint representation to engage in discussions with the Commission on their behalf. When setting the time limit referred to in the first subparagraph, the Commission shall indicate to the relevant parties that they are identified within the same undertaking, for the sole purpose of enabling them to comply with this provision.

2. Parties taking part in settlement discussions may be informed by the Commission of:

- (a) the objections it envisages to raise against them;
- (b) the evidence used to determine the envisaged objections;
- (c) non-confidential versions of any specified accessible document listed in the case file at that point in time, in so far as a request by the party is justified for the purpose of enabling the party to ascertain its position regarding a time period or any other particular aspect of the cartel; and
- (d) the range of potential fines.

This information shall be confidential vis-à-vis third parties, save where the Commission has given a prior explicit authorisation for disclosure.

Should settlement discussions progress, the Commission may set a time limit within which the parties may commit to follow the settlement procedure by introducing settlement submissions reflecting the results of the settlement discussions and acknowledging their participation in an infringement of Article 81 of the Treaty as well as their liability. Before the Commission sets a time limit to introduce their settlement submissions, the parties concerned shall be entitled to have the information specified in Article 10a(2), first subparagraph disclosed to them, upon request, in a timely manner. The Commission shall not be obliged to take into account settlement submissions received after the expiry of that time limit.

3. When the statement of objections notified to the parties reflects the contents of their settlement submissions, the written reply to the statement of objections by the parties concerned shall, within a time limit set by the Commission, confirm that the statement of objections addressed to them reflects the contents of their settlement submissions. The Commission may then proceed to the adoption of a Decision pursuant to Article 7 and Article 23 of Regulation (EC) No 1/2003 after consultation of the Advisory Committee on Restrictive Practices and Dominant Positions pursuant to Article 14 of Regulation (EC) No 1/2003.

4. The Commission may decide at any time during the procedure to discontinue settlement discussions altogether in a specific case or with respect to one or more of the parties involved, if it considers that procedural efficiencies are not likely to be achieved.

**▼B***Article 11***Right to be heard****▼M2**

1. The Commission shall give the parties to whom it addresses a statement of objections the opportunity to be heard before consulting the Advisory Committee referred to in Article 14(1) of Regulation (EC) No 1/2003.

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2. The Commission shall, in its decisions, deal only with objections in respect of which the parties referred to in paragraph 1 have been able to comment.

**▼M2***Article 12*

1. The Commission shall give the parties to whom it addresses a statement of objections the opportunity to develop their arguments at an oral hearing, if they so request in their written submissions.
2. However, when introducing their settlement submissions the parties shall confirm to the Commission that they would only require having the opportunity to develop their arguments at an oral hearing, if the statement of objections does not reflect the contents of their settlement submissions.

**▼B***Article 13***Hearing of other persons**

1. If natural or legal persons other than those referred to in Articles 5 and 11 apply to be heard and show a sufficient interest, the Commission shall inform them in writing of the nature and subject matter of the procedure and shall set a time-limit within which they may make known their views in writing.
2. The Commission may, where appropriate, invite persons referred to in paragraph 1 to develop their arguments at the oral hearing of the parties to whom a statement of objections has been addressed, if the persons referred to in paragraph 1 so request in their written comments.
3. The Commission may invite any other person to express its views in writing and to attend the oral hearing of the parties to whom a statement of objections has been addressed. The Commission may also invite such persons to express their views at that oral hearing.

*Article 14***Conduct of oral hearings**

1. Hearings shall be conducted by a Hearing Officer in full independence.
2. The Commission shall invite the persons to be heard to attend the oral hearing on such date as it shall determine.
3. The Commission shall invite the competition authorities of the Member States to take part in the oral hearing. It may likewise invite officials and civil servants of other authorities of the Member States.
4. Persons invited to attend shall either appear in person or be represented by legal representatives or by representatives authorised by their constitution as appropriate. Undertakings and associations of undertakings may also be represented by a duly authorised agent appointed from among their permanent staff.
5. Persons heard by the Commission may be assisted by their lawyers or other qualified persons admitted by the Hearing Officer.
6. Oral hearings shall not be public. Each person may be heard separately or in the presence of other persons invited to attend, having regard to the legitimate interest of the undertakings in the protection of their business secrets and other confidential information.
7. The Hearing Officer may allow the parties to whom a statement of objections has been addressed, the complainants, other persons invited



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to the hearing, the Commission services and the authorities of the Member States to ask questions during the hearing.

8. The statements made by each person heard shall be recorded. Upon request, the recording of the hearing shall be made available to the persons who attended the hearing. Regard shall be had to the legitimate interest of the parties in the protection of their business secrets and other confidential information.

## CHAPTER VI

**ACCESS TO THE FILE AND TREATMENT OF CONFIDENTIAL INFORMATION***Article 15***Access to the file and use of documents**

1. If so requested, the Commission shall grant access to the file to the parties to whom it has addressed a statement of objections. Access shall be granted after the notification of the statement of objections.

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1a. After the initiation of proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003 and in order to enable the parties willing to introduce settlement submissions to do so, the Commission shall disclose to them the evidence and documents described in Article 10a(2) upon request and subject to the conditions established in the relevant subparagraphs. In view thereof, when introducing their settlement submissions, the parties shall confirm to the Commission that they will only require access to the file after the receipt of the statement of objections, if the statement of objections does not reflect the contents of their settlement submissions.

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2. The right of access to the file shall not extend to business secrets, other confidential information and internal documents of the Commission or of the competition authorities of the Member States. The right of access to the file shall also not extend to correspondence between the Commission and the competition authorities of the Member States or between the latter where such correspondence is contained in the file of the Commission.

3. Nothing in this Regulation prevents the Commission from disclosing and using information necessary to prove an infringement of Articles 81 or 82 of the Treaty.

4. Documents obtained through access to the file pursuant to this Article shall only be used for the purposes of judicial or administrative proceedings for the application of Articles 81 and 82 of the Treaty.

*Article 16***Identification and protection of confidential information**

1. Information, including documents, shall not be communicated or made accessible by the Commission in so far as it contains business secrets or other confidential information of any person.

2. Any person which makes known its views pursuant to Article 6(1), Article 7(1), Article 10(2) and Article 13(1) and (3) or subsequently submits further information to the Commission in the course of the same procedure, shall clearly identify any material which it considers to be confidential, giving reasons, and provide a separate non-confidential version by the date set by the Commission for making its views known.



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3. Without prejudice to paragraph 2 of this Article, the Commission may require undertakings and associations of undertakings which produce documents or statements pursuant to Regulation (EC) No 1/2003 to identify the documents or parts of documents which they consider to contain business secrets or other confidential information belonging to them and to identify the undertakings with regard to which such documents are to be considered confidential. The Commission may likewise require undertakings or associations of undertakings to identify any part of a statement of objections, a case summary drawn up pursuant to Article 27(4) of Regulation (EC) No 1/2003 or a decision adopted by the Commission which in their view contains business secrets.

The Commission may set a time-limit within which the undertakings and associations of undertakings are to:

- (a) substantiate their claim for confidentiality with regard to each individual document or part of document, statement or part of statement;
- (b) provide the Commission with a non-confidential version of the documents or statements, in which the confidential passages are deleted;
- (c) provide a concise description of each piece of deleted information.

4. If undertakings or associations of undertakings fail to comply with paragraphs 2 and 3, the Commission may assume that the documents or statements concerned do not contain confidential information.

## CHAPTER VII

## GENERAL AND FINAL PROVISIONS

*Article 17***Time-limits****▼M2**

1. In setting the time limits provided for in Article 3(3), Article 4(3), Article 6(1), Article 7(1), Article 10(2), Article 10a(1), Article 10a(2), Article 10a(3) and Article 16(3), the Commission shall have regard both to the time required for preparation of the submission and to the urgency of the case.

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2. The time-limits referred to in Article 6(1), Article 7(1) and Article 10(2) shall be at least four weeks. However, for proceedings initiated with a view to adopting interim measures pursuant to Article 8 of Regulation (EC) No 1/2003, the time-limit may be shortened to one week.

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3. The time limits referred to in Article 4(3), Article 10a(1), Article 10a(2) and Article 16(3) shall be at least two weeks. The time limit referred to in Article 3(3) shall be at least two weeks, except for settlement submissions, for which corrections shall be made within one week. The time limit referred to in Article 10a(3) shall be at least two weeks.

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4. Where appropriate and upon reasoned request made before the expiry of the original time-limit, time-limits may be extended.

**▼B***Article 18***Repeals**

Regulations (EC) No 2842/98, (EC) No 2843/98 and (EC) No 3385/94 are repealed.

References to the repealed regulations shall be construed as references to this regulation.

*Article 19***Transitional provisions**

Procedural steps taken under Regulations (EC) No 2842/98 and (EC) No 2843/98 shall continue to have effect for the purpose of applying this Regulation.

*Article 20***Entry into force**

This Regulation shall enter into force on 1 May 2004.

This Regulation shall be binding in its entirety and directly applicable in all Member States.



## ANNEX

**FORM C****COMPLAINT PURSUANT TO ARTICLE 7 OF REGULATION (EC) No 1/2003****I. Information regarding the complainant and the undertaking(s) or association of undertakings giving rise to the complaint**

1. Give full details on the identity of the legal or natural person submitting the complaint. Where the complainant is an undertaking, identify the corporate group to which it belongs and provide a concise overview of the nature and scope of its business activities. Provide a contact person (with telephone number, postal and e mail address) from which supplementary explanations can be obtained.
2. Identify the undertaking(s) or association of undertakings whose conduct the complaint relates to, including, where applicable, all available information on the corporate group to which the undertaking(s) complained of belong and the nature and scope of the business activities pursued by them. Indicate the position of the complainant vis à vis the undertaking(s) or association of undertakings complained of (e.g. customer, competitor).

**II. Details of the alleged infringement and evidence**

3. Set out in detail the facts from which, in your opinion, it appears that there exists an infringement of Article 81 or 82 of the Treaty and/or Article 53 or 54 of the EEA agreement. Indicate in particular the nature of the products (goods or services) affected by the alleged infringements and explain, where necessary, the commercial relationships concerning these products. Provide all available details on the agreements or practices of the undertakings or associations of undertakings to which this complaint relates. Indicate, to the extent possible, the relative market positions of the undertakings concerned by the complaint.
4. Submit all documentation in your possession relating to or directly connected with the facts set out in the complaint (for example, texts of agreements, minutes of negotiations or meetings, terms of transactions, business documents, circulars, correspondence, notes of telephone conversations...). State the names and address of the persons able to testify to the facts set out in the complaint, and in particular of persons affected by the alleged infringement. Submit statistics or other data in your possession which relate to the facts set out, in particular where they show developments in the marketplace (for example information relating to prices and price trends, barriers to entry to the market for new suppliers etc.).
5. Set out your view about the geographical scope of the alleged infringement and explain, where that is not obvious, to what extent trade between Member States or between the Community and one or more EFTA States that are contracting parties of the EEA Agreement may be affected by the conduct complained of.

**III. Finding sought from the Commission and legitimate interest**

6. Explain what finding or action you are seeking as a result of proceedings brought by the Commission.
7. Set out the grounds on which you claim a legitimate interest as complainant pursuant to Article 7 of Regulation (EC) No 1/2003. State in particular how the conduct complained of affects you and explain how, in your view, intervention by the Commission would be liable to remedy the alleged grievance.

**IV. Proceedings before national competition authorities or national courts**

8. Provide full information about whether you have approached, concerning the same or closely related subject matters, any other competition authority and/or whether a lawsuit has been brought before a national court. If so, provide full details about the administrative or judicial authority contacted and your submissions to such authority.

Declaration that the information given in this form and in the Annexes thereto is given entirely in good faith.

Date and signature.

## REGULATION (EEC, EURATOM) No 1182/71 OF THE COUNCIL

of 3 June 1971

determining the rules applicable to periods, dates and time limits

## THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 235 thereof;

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 203 thereof;

Having regard to the proposal from the Commission;

Having regard to the Opinion of the European Parliament<sup>1</sup>;

Whereas numerous acts of the Council and of the Commission determine periods, dates or time limits and employ the terms 'working days' or 'public holidays';

Whereas it is necessary to establish uniform general rules on the subject;

Whereas it may, in exceptional cases, be necessary for certain acts of the Council or Commission to derogate from these general rules;

Whereas, to attain the objectives of the Communities, it is necessary to ensure the uniform application of Community law and consequently to determine the general rules applicable to periods, dates and time limits;

Whereas no authority to establish such rules is provided for in the Treaties;

HAS ADOPTED THIS REGULATION:

*Article 1*

Save as otherwise provided, this Regulation shall apply to acts of the Council or Commission which have been or will be passed pursuant to the Treaty establishing the European Economic Community or the Treaty establishing the European Atomic Energy Community.

## CHAPTER I

## Periods

*Article 2*

1. For the purposes of this Regulation, 'public holidays' means all days designated as such in the Member State or in the Community institution in which action is to be taken.

To this end, each Member State shall transmit to the Commission the list of days designated as public holidays in its laws. The Commission shall publish in the *Official Journal of the European Communities* the lists transmitted by the Member States, to which shall be added the days designated as public holidays in the Community institutions.

2. For the purposes of this Regulation, 'working days' means all days other than public holidays, Sundays and Saturdays.

*Article 3*

1. Where a period expressed in hours is to be calculated from the moment at which an event occurs or an action takes place, the hour during which that event occurs or that action takes place shall not be considered as falling within the period in question.

Where a period expressed in days, weeks, months or years is to be calculated from the moment at which an event occurs or an action takes place, the day during which that event occurs or that action takes place shall not be considered as falling within the period in question.

2. Subject to the provisions of paragraphs 1 and 4:

- (a) a period expressed in hours shall start at the beginning of the first hour and shall end with the expiry of the last hour of the period;
- (b) a period expressed in days shall start at the beginning of the first hour of the first day and shall end with the expiry of the last hour of the last day of the period;

<sup>1</sup> OJ No C 51, 29.4.1970, p. 25.

(c) a period expressed in weeks, months or years shall start at the beginning of the first hour of the first day of the period, and shall end with the expiry of the last hour of whichever day in the last week, month or year is the same day of the week, or falls on the same date, as the day from which the period runs. If, in a period expressed in months or in years, the day on which it should expire does not occur in the last month, the period shall end with the expiry of the last hour of the last day of that month;

(d) if a period includes parts of months, the month shall, for the purpose of calculating such parts, be considered as having thirty days.

3. The periods concerned shall include public holidays, Sundays and Saturdays, save where these are expressly excepted or where the periods are expressed in working days.

4. Where the last day of a period expressed otherwise than in hours is a public holiday, Sunday or Saturday, the period shall end with the expiry of the last hour of the following working day.

This provision shall not apply to periods calculated retroactively from a given date or event.

5. Any period of two days or more shall include at least two working days.

## CHAPTER II

### Dates and time limits

#### Article 4

1. Subject to the provisions of this Article, the provisions of Article 3 shall, with the exception of paragraphs 4 and 5, apply to the times and periods of entry into force, taking effect, application, expiry of validity, termination of effect or cessation of application of acts of the Council or Commission or of any provisions of such acts.

2. Entry into force, taking effect or application of acts of the Council or Commission—or of

provisions of such acts—fixed at a given date shall occur at the beginning of the first hour of the day falling on that date.

This provision shall also apply when entry into force, taking effect or application of the afore-mentioned acts or provisions is to occur within a given number of days following the moment when an event occurs or an action takes place.

3. Expiry of validity, the termination of effect or the cessation of application of acts of the Council or Commission—or of any provisions of such acts—fixed at a given date shall occur on the expiry of the last hour of the day falling on that date.

This provision shall also apply when expiry of validity, termination of effect or cessation of application of the afore-mentioned acts or provisions is to occur within a given number of days following the moment when an event occurs or an action takes place.

#### Article 5

1. Subject to the provisions of this Article, the provisions of Article 3 shall, with the exception of paragraphs 4 and 5, apply when an action may or must be effected in implementation of an act of the Council or Commission at a specified moment.

2. Where an action may or must be effected in implementation of an act of the Council or Commission at a specified date, it may or must be effected between the beginning of the first hour and the expiry of the last hour of the day falling on that date.

This provision shall also apply where an action may or must be effected in implementation of an act of the Council or Commission within a given number of days following the moment when an event occurs or another action takes place.

#### Article 6

This Regulation shall enter into force on 1 July 1971.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Luxembourg, 3 June 1971.

*For the Council*

*The President*

R. PLEVEN

This document is meant purely as a documentation tool and the institutions do not assume any liability for its contents

► **B****REGULATION No 1**

**determining the languages to be used by the European Economic Community**

(OJ L 17, 6.10.1958, p. 385)

Amended by:

		Official Journal		
		No	page	date
► <b><u>M1</u></b>	Council Regulation (EC) No 920/2005 of 13 June 2005	L 156	3	18.6.2005
► <b><u>M2</u></b>	Council Regulation (EC) No 1791/2006 of 20 November 2006	L 363	1	20.12.2006

Amended by:

► <b><u>A1</u></b>	Act of Accession of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (adapted by Council Decision of 1 January 1973)	L 73 L 2	14 1	27.3.1972 1.1.1973
► <b><u>A2</u></b>	Act of Accession of Greece	L 291	17	19.11.1979
► <b><u>A3</u></b>	Act of Accession of Spain and Portugal	L 302	23	15.11.1985
► <b><u>A4</u></b>	Act of Accession of Austria, Sweden and Finland (adapted by Council Decision 95/1/EC, Euratom, ECSC)	C 241 L 1	21 1	29.8.1994 1.1.1995
► <b><u>A5</u></b>	Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded	L 236	33	23.9.2003

**▼B****REGULATION No 1****determining the languages to be used by the European Economic Community**

THE COUNCIL OF THE EUROPEAN ECONOMIC COMMUNITY,

Having regard to Article 217 of the Treaty which provides that the rules governing the languages of the institutions of the Community shall, without prejudice to the provisions contained in the rules of procedure of the Court of Justice, be determined by the Council, acting unanimously;

Whereas each of the four languages in which the Treaty is drafted is recognised as an official language in one or more of the Member States of the Community;

HAS ADOPTED THIS REGULATION:

**▼M2***Article 1*

The official languages and the working languages of the institutions of the Union shall be Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish.

**▼B***Article 2*

Documents which a Member State or a person subject to the jurisdiction of a Member State sends to institutions of the Community may be drafted in any one of the official languages selected by the sender. The reply shall be drafted in the same language.

*Article 3*

Documents which an institution of the Community sends to a Member State or to a person subject to the jurisdiction of a Member State shall be drafted in the language of such State.

**▼M2***Article 4*

Regulations and other documents of general application shall be drafted in the official languages.

*Article 5*

The *Official Journal of the European Union* shall be published in the official languages.

**▼B***Article 6*

The institutions of the Community may stipulate in their rules of procedure which of the languages are to be used in specific cases.

**▼B***Article 7*

The languages to be used in the proceedings of the Court of Justice shall be laid down in its rules of procedure.

*Article 8*

If a Member State has more than one official language, the language to be used shall, at the request of such State, be governed by the general rules of its law.

This Regulation shall be binding in its entirety and directly applicable in all Member States.



## **D. NOTICES AND GUIDELINES**



## Commission Notice on cooperation within the Network of Competition Authorities

(2004/C 101/03)

(Text with EEA relevance)

### 1. INTRODUCTION

1. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty <sup>(1)</sup> (hereafter the 'Council Regulation') creates a system of parallel competences in which the Commission and the Member States' competition authorities (hereafter the 'NCAs') <sup>(2)</sup> can apply Article 81 and Article 82 of the EC Treaty (hereafter the 'Treaty'). Together the NCAs and the Commission form a network of public authorities: they act in the public interest and cooperate closely in order to protect competition. The network is a forum for discussion and cooperation in the application and enforcement of EC competition policy. It provides a framework for the cooperation of European competition authorities in cases where Articles 81 and 82 of the Treaty are applied and is the basis for the creation and maintenance of a common competition culture in Europe. The network is called 'European Competition Network' (ECN).
2. The structure of the NCAs varies between Member States. In some Member States, one body investigates cases and takes all types of decisions. In other Member States, the functions are divided between two bodies, one which is in charge of the investigation of the case and another, often a college, which is responsible for deciding the case. Finally, in certain Member States, prohibition decisions and/or decisions imposing a fine can only be taken by a court: another competition authority acts as a prosecutor bringing the case before that court. Subject to the general principle of effectiveness, Article 35 of the Council Regulation allows Member States to choose the body or bodies which will be designated as national competition authorities and to allocate functions between them. Under general principles of Community law, Member States are under an obligation to set up a sanctioning system providing for sanctions which are effective, proportionate and dissuasive for infringements of EC law <sup>(3)</sup>. The enforcement systems of the Member States differ but they have recognised the standards of each other's systems as a basis for cooperation <sup>(4)</sup>.
3. The network formed by the competition authorities should ensure both an efficient division of work and an effective and consistent application of EC competition rules. The Council Regulation together with the joint statement of the Council and the Commission on the functioning of the European Competition Network sets out the main principles of the functioning of the network. This notice presents the details of the system.
4. Consultations and exchanges within the network are matters between public enforcers and do not alter any

rights or obligations arising from Community or national law for companies. Each competition authority remains fully responsible for ensuring due process in the cases it deals with.

### 2. DIVISION OF WORK

#### 2.1. Principles of allocation

5. The Council Regulation is based on a system of parallel competences in which all competition authorities have the power to apply Articles 81 or 82 of the Treaty and are responsible for an efficient division of work with respect to those cases where an investigation is deemed to be necessary. At the same time each network member retains full discretion in deciding whether or not to investigate a case. Under this system of parallel competences, cases will be dealt with by:
  - a single NCA, possibly with the assistance of NCAs of other Member States; or
  - several NCAs acting in parallel; or
  - the Commission.
6. In most instances the authority that receives a complaint or starts an ex-officio procedure <sup>(5)</sup> will remain in charge of the case. Re-allocation of a case would only be envisaged at the outset of a procedure (see paragraph 18 below) where either that authority considered that it was not well placed to act or where other authorities also considered themselves well placed to act (see paragraphs 8 to 15 below).
7. Where re-allocation is found to be necessary for an effective protection of competition and of the Community interest, network members will endeavour to re-allocate cases to a single well placed competition authority as often as possible <sup>(6)</sup>. In any event, re-allocation should be a quick and efficient process and not hold up ongoing investigations.

8. An authority can be considered to be well placed to deal with a case if the following three cumulative conditions are met:
1. the agreement or practice has substantial direct actual or foreseeable effects on competition within its territory, is implemented within or originates from its territory;
  2. the authority is able to effectively bring to an end the entire infringement, i.e. it can adopt a cease-and-desist order the effect of which will be sufficient to bring an end to the infringement and it can, where appropriate, sanction the infringement adequately;
  3. it can gather, possibly with the assistance of other authorities, the evidence required to prove the infringement.
9. The above criteria indicate that a material link between the infringement and the territory of a Member State must exist in order for that Member State's competition authority to be considered well placed. It can be expected that in most cases the authorities of those Member States where competition is substantially affected by an infringement will be well placed provided they are capable of effectively bringing the infringement to an end through either single or parallel action unless the Commission is better placed to act (see below paragraphs 14 and 15).
10. It follows that a single NCA is usually well placed to deal with agreements or practices that substantially affect competition mainly within its territory.
- Example 1: Undertakings situated in Member State A are involved in a price fixing cartel on products that are mainly sold in Member State A.

The NCA in A is well placed to deal with the case.
11. Furthermore single action of an NCA might also be appropriate where, although more than one NCA can be regarded as well placed, the action of a single NCA is sufficient to bring the entire infringement to an end.
- Example 2: Two undertakings have set up a joint venture in Member State A. The joint venture provides services in Member States A and B and gives rise to a competition problem. A cease-and-desist order is considered to be sufficient to deal with the case effectively because it can bring an end to the entire infringement. Evidence is located mainly at the offices of the joint venture in Member State A.
- The NCAs in A and B are both well placed to deal with the case but single action by the NCA in A would be sufficient and more efficient than single action by NCA in B or parallel action by both NCAs.*
12. Parallel action by two or three NCAs may be appropriate where an agreement or practice has substantial effects on competition mainly in their respective territories and the action of only one NCA would not be sufficient to bring the entire infringement to an end and/or to sanction it adequately.
- Example 3: Two undertakings agree on a market sharing agreement, restricting the activity of the company located in Member State A to Member State A and the activity of the company located in Member State B to Member State B.

The NCAs in A and B are well placed to deal with the case in parallel, each one for its respective territory.
13. The authorities dealing with a case in parallel action will endeavour to coordinate their action to the extent possible. To that effect, they may find it useful to designate one of them as a lead authority and to delegate tasks to the lead authority such as for example the coordination of investigative measures, while each authority remains responsible for conducting its own proceedings.
14. The Commission is particularly well placed if one or several agreement(s) or practice(s), including networks of similar agreements or practices, have effects on competition in more than three Member States (cross-border markets covering more than three Member States or several national markets).
- Example 4: Two undertakings agree to share markets or fix prices for the whole territory of the Community. The Commission is well placed to deal with the case.

Example 5: An undertaking, dominant in four different national markets, abuses its position by imposing fidelity rebates on its distributors in all these markets. The Commission is well placed to deal with the case. It could also deal with one national market so as to create a 'leading' case and other national markets could be dealt with by NCAs, particularly if each national market requires a separate assessment.

15. Moreover, the Commission is particularly well placed to deal with a case if it is closely linked to other Community provisions which may be exclusively or more effectively applied by the Commission, if the Community interest requires the adoption of a Commission decision to develop Community competition policy when a new competition issue arises or to ensure effective enforcement.

## 2.2. Mechanisms of cooperation for the purpose of case allocation and assistance

### 2.2.1. Information at the beginning of the procedure (Article 11 of the Council Regulation)

16. In order to detect multiple procedures and to ensure that cases are dealt with by a well placed competition authority, the members of the network have to be informed at an early stage of the cases pending before the various competition authorities (7). If a case is to be re-allocated, it is indeed in the best interest both of the network and of the undertakings concerned that the re-allocation takes place quickly.

17. The Council Regulation creates a mechanism for the competition authorities to inform each other in order to ensure an efficient and quick re-allocation of cases. Article 11(3) of the Council Regulation lays down an obligation for NCAs to inform the Commission when acting under Article 81 or 82 of the Treaty before or without delay after commencing the first formal investigative measure. It also states that the information may be made available to other NCAs (8). The rationale of Article 11(3) of the Council Regulation is to allow the network to detect multiple procedures and address possible case re-allocation issues as soon as an authority starts investigating a case. Information should therefore be provided to NCAs and the Commission before or just after any step similar to the measures of investigation that can be undertaken by the Commission under Articles 18 to 21 of the Council Regulation. The Commission has accepted an equivalent obligation to inform NCAs under Article 11(2) of the Council Regulation. Network members will inform each other of pending cases by means of a standard form containing limited details of the case, such as the authority dealing with the case, the product, territories and parties concerned, the alleged infringement, the suspected duration of the infringement and the origin of the case. They will also provide each other with updates when a relevant change occurs.

18. Where case re-allocation issues arise, they should be resolved swiftly, normally within a period of two

months, starting from the date of the first information sent to the network pursuant to Article 11 of the Council Regulation. During this period, competition authorities will endeavour to reach an agreement on a possible re-allocation and, where relevant, on the modalities for parallel action.

19. In general, the competition authority or authorities that is/are dealing with a case at the end of the re-allocation period should continue to deal with the case until the completion of the proceedings. Re-allocation of a case after the initial allocation period of two months should only occur where the facts known about the case change materially during the course of the proceedings.

### 2.2.2. Suspension or termination of proceedings (Article 13 of the Council Regulation)

20. If the same agreement or practice is brought before several competition authorities, be it because they have received a complaint or have opened a procedure on their own initiative, Article 13 of the Council Regulation provides a legal basis for suspending proceedings or rejecting a complaint on the grounds that another authority is dealing with the case or has dealt with the case. In Article 13 of the Council Regulation, 'dealing with the case' does not merely mean that a complaint has been lodged with another authority. It means that the other authority is investigating or has investigated the case on its own behalf.

21. Article 13 of the Council Regulation applies when another authority has dealt or is dealing with the competition issue raised by the complainant, even if the authority in question has acted or acts on the basis of a complaint lodged by a different complainant or as a result of an *ex-officio* procedure. This implies that Article 13 of the Council Regulation can be invoked when the agreement or practice involves the same infringement(s) on the same relevant geographic and product markets.

22. An NCA may suspend or close its proceedings but it has no obligation to do so. Article 13 of the Council Regulation leaves scope for appreciation of the peculiarities of each individual case. This flexibility is important: if a complaint was rejected by an authority following an investigation of the substance of the case, another authority may not want to re-examine the case. On the other hand, if a complaint was rejected for other reasons (e.g. the authority was unable to collect the evidence necessary

to prove the infringement), another authority may wish to carry out its own investigation and deal with the case. This flexibility is also reflected, for pending cases, in the choice open to each NCA as to whether it closes or suspends its proceedings. An authority may be unwilling to close a case before the outcome of another authority's proceedings is clear. The ability to suspend its proceedings allows the authority to retain its ability to decide at a later point whether or not to terminate its proceedings. Such flexibility also facilitates consistent application of the rules.

23. Where an authority closes or suspends proceedings because another authority is dealing with the case, it may transfer — in accordance with Article 12 of the Council Regulation — the information provided by the complainant to the authority which is to deal with the case.

24. Article 13 of the Council Regulation can also be applied to part of a complaint or to part of the proceedings in a case. It may be that only part of a complaint or of an ex-officio procedure overlaps with a case already dealt or being dealt with by another competition authority. In that case, the competition authority to which the complaint is brought is entitled to reject part of the complaint on the basis of Article 13 of the Council Regulation and to deal with the rest of the complaint in an appropriate manner. The same principle applies to the termination of proceedings.

25. Article 13 of the Council Regulation is not the only legal basis for suspending or closing ex-officio proceedings or rejecting complaints. NCAs may also be able to do so according to their national procedural law. The Commission may also reject a complaint for lack of Community interest or other reasons pertaining to the nature of the complaint <sup>(9)</sup>.

#### 2.2.3. *Exchange and use of confidential information (Article 12 of the Council Regulation)*

26. A key element of the functioning of the network is the power of all the competition authorities to exchange and use information (including documents, statements and digital information) which has been collected by them for the purpose of applying Article 81 or Article 82 of the Treaty. This power is a precondition for efficient and effective allocation and handling of cases.

27. Article 12 of the Council Regulation states that for the purpose of applying Articles 81 and 82 of the Treaty, the Commission and the competition authorities of the Member States shall have the power to provide one

another with and use in evidence any matter of fact or of law, including confidential information. This means that exchanges of information may not only take place between an NCA and the Commission but also between and amongst NCAs. Article 12 of the Council Regulation takes precedence over any contrary law of a Member State. The question whether information was gathered in a legal manner by the transmitting authority is governed on the basis of the law applicable to this authority. When transmitting information the transmitting authority may inform the receiving authority whether the gathering of the information was contested or could still be contested.

28. The exchange and use of information contains in particular the following safeguards for undertakings and individuals.

(a) First, Article 28 of the Council Regulation states that 'the Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities (. . .) shall not disclose information acquired or exchanged by them pursuant to the' Council Regulation which is 'of the kind covered by the obligation of professional secrecy'. However, the legitimate interest of undertakings in the protection of their business secrets may not prejudice the disclosure of information necessary to prove an infringement of Articles 81 and 82 of the Treaty. The term 'professional secrecy' used in Article 28 of the Council Regulation is a Community law concept and includes in particular business secrets and other confidential information. This will create a common minimum level of protection throughout the Community.

(b) The second safeguard given to undertakings relates to the use of information which has been exchanged within the network. Under Article 12(2) of the Council Regulation, information so exchanged can only be used in evidence for the application of Articles 81 and 82 of the Treaty and for the subject matter for which it was collected <sup>(10)</sup>. According to Article 12(2) of the Council Regulation, the information exchanged may also be used for the purpose of applying national competition law in parallel in the same case. This is, however, only possible if the application of national law does not lead to an outcome as regards the finding of an infringement different from that under Articles 81 and 82 of the Treaty.

(c) The third safeguard given by the Council Regulation relates to sanctions on individuals on the basis of information exchanged pursuant to Article 12(1). The Council Regulation only provides for sanctions on undertakings for violations of Articles 81 and 82 of

the Treaty. Some national laws also provide for sanctions on individuals in connection with violations of Articles 81 and 82 of the Treaty. Individuals normally enjoy more extensive rights of defence (e.g. a right to remain silent compared to undertakings which may only refuse to answer questions which would lead them to admit that they have committed an infringement<sup>(11)</sup>). Article 12(3) of the Council Regulation ensures that information collected from undertakings cannot be used in a way which would circumvent the higher protection of individuals. This provision precludes sanctions being imposed on individuals on the basis of information exchanged pursuant to the Council Regulation if the laws of the transmitting and the receiving authorities do not provide for sanctions of a similar kind in respect of individuals, unless the rights of the individual concerned as regards the collection of evidence have been respected by the transmitting authority to the same standard as they are guaranteed by the receiving authority. The qualification of the sanctions by national law ('administrative' or 'criminal') is not relevant for the purpose of applying Article 12(3) of the Council Regulation. The Council Regulation intends to create a distinction between sanctions which result in custody and other types of sanctions such as fines on individuals and other personal sanctions. If both the legal system of the transmitting and that of the receiving authority provide for sanctions of a similar kind (e.g. in both Member States, fines can be imposed on a member of the staff of an undertaking who has been involved in the violation of Article 81 or 82 of the Treaty), information exchanged pursuant to Article 12 of the Council Regulation can be used by the receiving authority. In that case, procedural safeguards in both systems are considered to be equivalent. If on the other hand, both legal systems do not provide for sanctions of a similar kind, the information can only be used if the same level of protection of the rights of the individual has been respected in the case at hand (see Article 12(3) of the Council Regulation). In that latter case however, custodial sanctions can only be imposed where both the transmitting and the receiving authority have the power to impose such a sanction.

#### 2.2.4. Investigations (Article 22 of the Council Regulation)

29. The Council Regulation provides that an NCA may ask another NCA for assistance in order to collect information on its behalf. An NCA can ask another NCA to carry out fact-finding measures on its behalf. Article 12 of the Council Regulation empowers the assisting NCA to transmit the information it has collected to the requesting NCA. Any exchange between or amongst NCAs and use in evidence by the requesting NCA of such information shall be carried out in accordance with Article 12 of the Council Regulation. Where an NCA acts on behalf of another NCA, it acts pursuant to its own rules of procedure, and under its own powers of investigation.

30. Under Article 22(2) of the Council Regulation, the Commission can ask an NCA to carry out an inspection on its behalf. The Commission can either adopt a decision pursuant to Article 20(4) of the Council Regulation or simply issue a request to the NCA. The NCA officials will exercise their powers in accordance with their national law. The agents of the Commission may assist the NCA during the inspection.

### 2.3. Position of undertakings

#### 2.3.1. General

31. All network members will endeavour to make the allocation of cases a quick and efficient process. Given the fact that the Council Regulation has created a system of parallel competences, the allocation of cases between members of the network constitutes a mere division of labour where some authorities abstain from acting. The allocation of cases therefore does not create individual rights for the companies involved in or affected by an infringement to have the case dealt with by a particular authority.
32. If a case is re-allocated to a given competition authority, it is because the application of the allocation criteria set out above led to the conclusion that this authority is well placed to deal with the case by single or parallel action. The competition authority to which the case is re-allocated would have been in a position, in any event, to commence an *ex-officio* procedure against the infringement.
33. Furthermore, all competition authorities apply Community competition law and the Council Regulation sets out mechanisms to ensure that the rules are applied in a consistent way.
34. If a case is re-allocated within the network, the undertakings concerned and the complainant(s) are informed as soon as possible by the competition authorities involved.

### 2.3.2. Position of complainants

35. If a complaint is lodged with the Commission pursuant to Article 7 of the Council Regulation and if the Commission does not investigate the complaint or prohibit the agreement or practice complained of, the complainant has a right to obtain a decision rejecting his complaint. This is without prejudice to Article 7(3) of the Commission implementing regulation<sup>(12)</sup>. The rights of complainants who lodge a complaint with an NCA are governed by the applicable national law.
36. In addition, Article 13 of the Council Regulation gives all NCAs the possibility of suspending or rejecting a complaint on the ground that another competition authority is dealing or has dealt with the same case. That provision also allows the Commission to reject a complaint on the ground that a competition authority of a Member State is dealing or has dealt with the case. Article 12 of the Council Regulation allows the transfer of information between competition authorities within the network subject to the safeguards provided in that Article (see paragraph 28 above).

### 2.3.3. Position of applicants claiming the benefit of a leniency programme

37. The Commission considers<sup>(13)</sup> that it is in the Community interest to grant favourable treatment to undertakings which co-operate with it in the investigation of cartel infringements. A number of Member States have also adopted leniency programmes<sup>(14)</sup> relating to cartel investigations. The aim of these leniency programmes is to facilitate the detection by competition authorities of cartel activity and also thereby to act as a deterrent to participation in unlawful cartels.
38. In the absence of a European Union-wide system of fully harmonised leniency programmes, an application for leniency to a given authority is not to be considered as an application for leniency to any other authority. It is therefore in the interest of the applicant to apply for leniency to all competition authorities which have competence to apply Article 81 of the Treaty in the territory which is affected by the infringement and which may be considered well placed to act against the infringement in question<sup>(15)</sup>. In view of the importance of timing in most existing leniency programmes, applicants will also need to consider whether it would be appropriate to file leniency applications with the relevant authorities simultaneously. It is for the applicant to take the steps which it considers appropriate to protect its position with respect to possible proceedings by these authorities.
39. As for all cases where Articles 81 and 82 of the Treaty are applied, where an NCA deals with a case which has been

initiated as a result of a leniency application, it must inform the Commission and may make the information available to other members of the network pursuant to Article 11(3) of the Council Regulation (cf. paragraphs 16 *et seq.*). The Commission has accepted an equivalent obligation to inform NCAs under Article 11(2) of the Council Regulation. In such cases, however, information submitted to the network pursuant to Article 11 will not be used by other members of the network as the basis for starting an investigation on their own behalf whether under the competition rules of the Treaty or, in the case of NCAs, under their national competition law or other laws<sup>(16)</sup>. This is without prejudice to any power of the authority to open an investigation on the basis of information received from other sources or, subject to paragraphs 40 and 41 below, to request, be provided with and use information pursuant to Article 12 from any member of the network, including the network member to whom the leniency application was submitted.

40. Save as provided under paragraph 41, information voluntarily submitted by a leniency applicant will only be transmitted to another member of the network pursuant to Article 12 of the Council Regulation with the consent of the applicant. Similarly other information that has been obtained during or following an inspection or by means of or following any other fact-finding measures which, in each case, could not have been carried out except as a result of the leniency application will only be transmitted to another authority pursuant to Article 12 of the Council Regulation if the applicant has consented to the transmission to that authority of information it has voluntarily submitted in its application for leniency. The network members will encourage leniency applicants to give such consent, in particular as regards disclosure to authorities in respect of which it would be open to the applicant to obtain lenient treatment. Once the leniency applicant has given consent to the transmission of information to another authority, that consent may not be withdrawn. This paragraph is without prejudice, however, to the responsibility of each applicant to file leniency applications to whichever authorities it may consider appropriate.
41. Notwithstanding the above, the consent of the applicant for the transmission of information to another authority pursuant to Article 12 of the Council Regulation is not required in any of the following circumstances:
1. No consent is required where the receiving authority has also received a leniency application relating to the same infringement from the same applicant as the transmitting authority, provided that at the time the information is transmitted it is not open to the applicant to withdraw the information which it has submitted to that receiving authority.



2. No consent is required where the receiving authority has provided a written commitment that neither the information transmitted to it nor any other information it may obtain following the date and time of transmission as noted by the transmitting authority, will be used by it or by any other authority to which the information is subsequently transmitted to impose sanctions:

- (a) on the leniency applicant;
- (b) on any other legal or natural person covered by the favourable treatment offered by the transmitting authority as a result of the application made by the applicant under its leniency programme;
- (c) on any employee or former employee of any of the persons covered by (a) or (b).

A copy of the receiving authority's written commitment will be provided to the applicant.

3. In the case of information collected by a network member under Article 22(1) of the Council Regulation on behalf of and for the account of the network member to whom the leniency application was made, no consent is required for the transmission of such information to, and its use by, the network member to whom the application was made.

42. Information relating to cases initiated as a result of a leniency application and which has been submitted to the Commission under Article 11(3) of the Council Regulation <sup>(17)</sup> will only be made available to those NCAs that have committed themselves to respecting the principles set out above (see paragraph 72). The same principle applies where a case has been initiated by the Commission as a result of a leniency application made to the Commission. This does not affect the power of any authority to be provided with information under Article 12 of the Council Regulation, provided however that the provisions of paragraphs 40 and 41 are respected.

### 3. CONSISTENT APPLICATION OF EC COMPETITION RULES <sup>(18)</sup>

#### 3.1. Mechanism of cooperation (Article 11(4) and 11(5) of the Council Regulation)

43. The Council Regulation pursues the objective that Articles 81 and 82 of the Treaty are applied in a consistent manner throughout the Community. In this respect NCAs will respect the convergence rule contained in Article 3(2) of the Council Regulation. In line with

Article 16(2) they cannot — when ruling on agreements, decisions and practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision — take decisions, which would run counter to the decisions adopted by the Commission. Within the network of competition authorities the Commission, as the guardian of the Treaty, has the ultimate but not the sole responsibility for developing policy and safeguarding consistency when it comes to the application of EC competition law.

44. According to Article 11(4) of the Council Regulation, no later than 30 days before the adoption of a decision applying Articles 81 or 82 of the Treaty and requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block-exemption regulation, NCAs shall inform the Commission. They have to send to the Commission, at the latest 30 days before the adoption of the decision, a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action.

45. As under Article 11(3) of the Council Regulation, the obligation is to inform the Commission, but the information may be shared by the NCA informing the Commission with the other members of the network.

46. Where an NCA has informed the Commission pursuant to Article 11(4) of the Council Regulation and the 30 days deadline has expired, the decision can be adopted as long as the Commission has not initiated proceedings. The Commission may make written observations on the case before the adoption of the decision by the NCA. The NCA and the Commission will make the appropriate efforts to ensure the consistent application of Community law (cf. paragraph 3 above).

47. If special circumstances require that a national decision is taken in less than 30 days following the transmission of information pursuant to Article 11(4) of the Council Regulation, the NCA concerned may ask the Commission for a swifter reaction. The Commission will endeavour to react as quickly as possible.

48. Other types of decisions, i.e. decisions rejecting complaints, decisions closing an *ex-officio* procedure or decisions ordering interim measures, can also be important from a competition policy point of view, and the network members may have an interest in informing each other about them and possibly discussing them. NCAs can therefore on the basis of Article 11(5) of the Council Regulation inform the Commission and thereby inform the network of any other case in which EC competition law is applied.

49. All members of the network should inform each other about the closure of their procedures which have been notified to the network pursuant to Article 11(2) and (3) of the Council Regulation <sup>(19)</sup>.

### 3.2. The initiation of proceedings by the Commission under Article 11(6) of the Council Regulation

50. According to the case law of the Court of Justice, the Commission, entrusted by Article 85(1) of the Treaty with the task of ensuring the application of the principles laid down in Articles 81 and 82 of the Treaty, is responsible for defining and implementing the orientation of Community competition policy <sup>(20)</sup>. It can adopt individual decisions under Articles 81 and 82 of the Treaty at any time.

51. Article 11(6) of the Council Regulation states that the initiation by the Commission of proceedings for the adoption of a decision under the Council Regulation shall relieve all NCAs of their competence to apply Articles 81 and 82 of the Treaty. This means that once the Commission has opened proceedings, NCAs cannot act under the same legal basis against the same agreement(s) or practice(s) by the same undertaking(s) on the same relevant geographic and product market.

52. The initiation of proceedings by the Commission is a formal act <sup>(21)</sup> by which the Commission indicates its intention to adopt a decision under Chapter III of the Council Regulation. It can occur at any stage of the investigation of the case by the Commission. The mere fact that the Commission has received a complaint is not in itself sufficient to relieve NCAs of their competence.

53. Two situations can arise. First, where the Commission is the first competition authority to initiate proceedings in a case for the adoption of a decision under the Council Regulation, national competition authorities may no longer deal with the case. Article 11(6) of the Council Regulation provides that once the Commission has initiated proceedings, the NCAs can no longer start their own procedure with a view to applying Articles 81 and 82 of the Treaty to the same agreement(s) or practice(s) by the same undertaking(s) on the same relevant geographic and product market.

54. The second situation is where one or more NCAs have informed the network pursuant to Article 11(3) of the Council Regulation that they are acting on a given case.

During the initial allocation period (indicative time period of two months, see paragraph 18 above), the Commission can initiate proceedings with the effects of Article 11(6) of the Council Regulation after having consulted the authorities concerned. After the allocation phase, the Commission will in principle only apply Article 11(6) of the Council Regulation if one of the following situations arises:

- (a) Network members envisage conflicting decisions in the same case.
  - (b) Network members envisage a decision which is obviously in conflict with consolidated case law; the standards defined in the judgements of the Community courts and in previous decisions and regulations of the Commission should serve as a yardstick; concerning the assessment of the facts (e.g. market definition), only a significant divergence will trigger an intervention of the Commission;
  - (c) Network member(s) is (are) unduly drawing out proceedings in the case;
  - (d) There is a need to adopt a Commission decision to develop Community competition policy in particular when a similar competition issue arises in several Member States or to ensure effective enforcement;
  - (e) The NCA(s) concerned do not object.
55. If an NCA is already acting on a case, the Commission will explain the reasons for the application of Article 11(6) of the Council Regulation in writing to the NCA concerned and to the other members of the Network <sup>(22)</sup>.
56. The Commission will announce to the network its intention of applying Article 11(6) of the Council Regulation in due time, so that Network members will have the possibility of asking for a meeting of the Advisory Committee on the matter before the Commission initiates proceedings.
57. The Commission will normally not — and to the extent that Community interest is not at stake — adopt a decision which is in conflict with a decision of an NCA after proper information pursuant to both Article 11(3) and (4) of the Council Regulation has taken place and the Commission has not made use of Article 11(6) of the Council Regulation.

#### 4. THE ROLE AND THE FUNCTIONING OF THE ADVISORY COMMITTEE IN THE NEW SYSTEM

58. The Advisory Committee is the forum where experts from the various competition authorities discuss individual cases and general issues of Community competition law <sup>(23)</sup>.

##### 4.1. Scope of the consultation

###### 4.1.1. Decisions of the Commission

59. The Advisory Committee is consulted prior to the Commission taking any decision pursuant to Articles 7, 8, 9, 10, 23, 24(2) or 29(1) of the Council Regulation. The Commission must take the utmost account of the opinion of the Advisory Committee and inform the Committee of the manner in which its opinion has been taken into account.

60. For decisions adopting interim measures, the Advisory Committee is consulted following a swifter and lighter procedure, on the basis of a short explanatory note and the operative part of the decision.

###### 4.1.2. Decisions of NCAs

61. It is in the interest of the network that important cases dealt with by NCAs under Articles 81 and 82 of the Treaty can be discussed in the Advisory Committee. The Council Regulation enables the Commission to put a given case being dealt with by an NCA on the agenda of the Advisory Committee. Discussion can be requested by the Commission or by any Member State. In either case, the Commission will put the case on the agenda after having informed the NCA(s) concerned. This discussion in the Advisory Committee will not lead to a formal opinion.

62. In important cases, the Advisory Committee could also serve as a forum for the discussion of case allocation. In particular, where the Commission intends to apply Article 11(6) of the Council Regulation after the initial allocation period, the case can be discussed in the Advisory Committee before the Commission initiates proceedings. The Advisory Committee may issue an informal statement on the matter.

###### 4.1.3. Implementing measures, block-exemption regulations, guidelines and other notices (Article 33 of the Council Regulation)

63. The Advisory Committee will be consulted on draft Commission regulations as provided for in the relevant Council Regulations.

64. Beside regulations, the Commission may also adopt notices and guidelines. These more flexible tools are very useful for explaining and announcing the Commission's policy, and for explaining its interpretation of the competition rules. The Advisory Committee will also be consulted on these notices and guidelines.

#### 4.2. Procedure

##### 4.2.1. Normal procedure

65. For consultation on Commission draft decisions, the meeting of the Advisory Committee takes place at the earliest 14 days after the invitation to the meeting is sent by the Commission. The Commission attaches to the invitation a summary of the case, a list of the most important documents, i.e. the documents needed to assess the case, and a draft decision. The Advisory Committee gives an opinion on the Commission draft decision. At the request of one or several members, the opinion shall be reasoned.

66. The Council Regulation allows for the possibility of the Member States agreeing upon a shorter period of time between the sending of the invitation and the meeting.

##### 4.2.2. Written procedure

67. The Council Regulation provides for the possibility of a written consultation procedure. If no Member State objects, the Commission can consult the Member States by sending the documents to them and setting a deadline within which they can comment on the draft. This deadline would not normally be shorter than 14 days, except for decisions on interim measures pursuant to Article 8 of the Council Regulation. Where a Member State requests that a meeting takes place, the Commission will arrange for such a meeting.

#### 4.3. Publication of the opinion of the Advisory Committee

68. The Advisory Committee can recommend the publication of its opinion. In that event, the Commission will carry out such publication simultaneously with the decision, taking into account the legitimate interest of undertakings in the protection of their business secrets.

#### 5. FINAL REMARKS

69. This Notice is without prejudice to any interpretation of the applicable Treaty and regulatory provisions by the Court of First Instance and the Court of Justice.

70. This Notice will be the subject of periodic review carried out jointly by the NCAs and the Commission. On the basis of the experience acquired, it will be reviewed no later than at the end of the third year after its adoption.

71. This notice replaces the Commission notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 81 and 82 of the Treaty published in 1997 <sup>(24)</sup>.

## 6. STATEMENT BY OTHER NETWORK MEMBERS

72. The principles set out in this notice will also be abided by those Member States' competition authorities which have signed a statement in the form of the Annex to this

Notice. In this statement they acknowledge the principles of this notice, including the principles relating to the protection of applicants claiming the benefit of a leniency programme <sup>(25)</sup> and declare that they will abide by them. A list of these authorities is published on the website of the European Commission. It will be updated if appropriate.

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<sup>(1)</sup> OJ L 1, 4.1.2003, p. 1.

<sup>(2)</sup> In this notice, the European Commission and the NCAs are collectively referred to as 'the competition authorities'.

<sup>(3)</sup> Cf. ECJ case 68/88 — Commission v. Greece [1989] ECR 2965 (recitals 23 to 25)

<sup>(4)</sup> See paragraph 8 of the Joint Statement of the Council and the Commission on the functioning of the network available from the Council register at <http://register.consilium.eu.int> (document No 15435/02 ADD 1).

<sup>(5)</sup> In this Notice the term 'procedure' is used for investigations and/or formal proceedings for the adoption of a decision pursuant to the Council Regulation conducted by an NCA or the Commission, as the case may be.

<sup>(6)</sup> See Recital 18 of the Council Regulation.

<sup>(7)</sup> For cases initiated following a leniency application see paragraphs 37 *et seq.*

<sup>(8)</sup> The intention of making any information exchanged pursuant to Article 11 available and easily accessible to all network members is however expressed in the Joint Statement on the functioning of the network mentioned above in footnote 4.

<sup>(9)</sup> See Commission notice on complaints.

<sup>(10)</sup> See ECJ case 85/87 — Dow Benelux, [1989] ECR 3137 (recitals 17-20).

<sup>(11)</sup> See ECJ case 374/87 — Orkem [1989] ECR 3283 and CFI, case T-112/98 — Mannesmannröhren-Werke AG, [2001] ECR II-729.

<sup>(12)</sup> Commission Regulation (EC) No 773/2004, OJ L 123, 27.4.2004.

<sup>(13)</sup> OJ C 45, 19.2.2002, p. 3 at paragraph 3.

<sup>(14)</sup> In this Notice, the term 'leniency programme' is used to describe all programmes (including the Commission's programme) which offer either full immunity or a significant reduction in the penalties which would otherwise have been imposed on a participant in a cartel, in exchange for the freely volunteered disclosure of information on the cartel which satisfies specific criteria prior to or during the investigative stage of the case. The term does not cover reductions in the penalty granted for other reasons. The Commission will publish on its website a list of those authorities that operate a leniency programme.

<sup>(15)</sup> See paragraphs 8 to 15 above.

<sup>(16)</sup> Similarly, information transmitted with a view to obtaining assistance from the receiving authority under Articles 20 or 21 of the Council Regulation or of carrying out an investigation or other fact-finding measure under Article 22 of the Council Regulation may only be used for the purpose of the application of the said Articles.

<sup>(17)</sup> See paragraph 17.

<sup>(18)</sup> Article 15 of the Council Regulation empowers NCAs and the Commission to submit written and, with the permission of the Court, oral submissions in court proceedings for the application of Articles 81 and 82 of the Treaty. This is a very important tool for ensuring consistent application of Community rules. In exercising this power NCAs and the Commission will cooperate closely.

<sup>(19)</sup> See paragraph 24 of the Joint Statement on the functioning of the network mentioned above in footnote 4.

<sup>(20)</sup> See ECJ case C-344/98 — Masterfoods Ltd, [2000] ECR I-11369.

<sup>(21)</sup> The ECJ has defined that concept in the case 48/72 — SA Brasserie de Haecht, [1973] ECR 77: 'the initiation of a procedure within the meaning of Article 9 of Regulation No 17 implies an authoritative act of the Commission, evidencing its intention of taking a decision.'

<sup>(22)</sup> See paragraph 22 of the Joint Statement mentioned above in footnote 4.

<sup>(23)</sup> In accordance with Article 14(2) of the Council Regulation, where horizontal issues such as block-exemption regulations and guidelines are being discussed, Member States can appoint an additional representative competent in competition matters and who does not necessarily belong to the competition authority.

<sup>(24)</sup> OJ C 313, 15.10.1997, p. 3.

<sup>(25)</sup> See paragraphs 37 *et seq.*

## ANNEX

**STATEMENT REGARDING THE COMMISSION NOTICE ON COOPERATION WITHIN THE NETWORK OF COMPETITION AUTHORITIES**

In order to cooperate closely with a view to protecting competition within the European Union in the interest of consumers, the undersigned competition authority:

1. Acknowledges the principles set out in the Commission Notice on Cooperation within the Network of Competition Authorities; and
2. Declares that it will abide by those principles, which include principles relating to the protection of applicants claiming the benefit of a leniency programme, in any case in which it is acting or may act and to which those principles apply.

.....

(place)

.....

(date)

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**Commission Notice on the co-operation between the Commission and the courts of the EU  
Member States in the application of Articles 81 and 82 EC**

(2004/C 101/04)

(Text with EEA relevance)

**I. THE SCOPE OF THE NOTICE**

1. The present notice addresses the co-operation between the Commission and the courts of the EU Member States, when the latter apply Articles 81 and 82 EC. For the purpose of this notice, the 'courts of the EU Member States' (hereinafter 'national courts') are those courts and tribunals within an EU Member State that can apply Articles 81 and 82 EC and that are authorised to ask a preliminary question to the Court of Justice of the European Communities pursuant to Article 234 EC <sup>(1)</sup>.

2. The national courts may be called upon to apply Articles 81 or 82 EC in lawsuits between private parties, such as actions relating to contracts or actions for damages. They may also act as public enforcer or as review court. A national court may indeed be designated as a competition authority of a Member State (hereinafter 'the national competition authority') pursuant to Article 35(1) of Regulation (EC) No 1/2003 (hereinafter 'the regulation') <sup>(2)</sup>. In that case, the co-operation between the national courts and the Commission is not only covered by the present notice, but also by the notice on the co-operation within the network of competition authorities <sup>(3)</sup>.

apply the EC competition rules, even when the party with an interest in application of those provisions has not relied on them, where domestic law allows such application by the national court. However, Community law does not require national courts to raise of their own motion an issue concerning the breach of provisions of Community law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim <sup>(7)</sup>.

4. Depending on the functions attributed to them under national law, national courts may be called upon to apply Articles 81 and 82 EC in administrative, civil or criminal proceedings <sup>(8)</sup>. In particular, where a natural or legal person asks the national court to safeguard his individual rights, national courts play a specific role in the enforcement of Articles 81 and 82 EC, which is different from the enforcement in the public interest by the Commission or by national competition authorities <sup>(9)</sup>. Indeed, national courts can give effect to Articles 81 and 82 EC by finding contracts to be void or by awards of damages.

**II. THE APPLICATION OF EC COMPETITION RULES BY NATIONAL COURTS**

**A. THE COMPETENCE OF NATIONAL COURTS TO APPLY EC COMPETITION RULES**

3. To the extent that national courts have jurisdiction to deal with a case <sup>(4)</sup>, they have the power to apply Articles 81 and 82 EC <sup>(5)</sup>. Moreover, it should be remembered that Articles 81 and 82 EC are a matter of public policy and are essential to the accomplishment of the tasks entrusted to the Community, and, in particular, for the functioning of the internal market <sup>(6)</sup>. According to the Court of Justice, where, by virtue of domestic law, national courts must raise of their own motion points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists where binding Community rules, such as the EC competition rules, are concerned. The position is the same if domestic law confers on national courts a discretion to apply of their own motion binding rules of law: national courts must

5. National courts can apply Articles 81 and 82 EC, without it being necessary to apply national competition law in parallel. However, where a national court applies national competition law to agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States within the meaning of Article 81(1) EC <sup>(10)</sup> or to any abuse prohibited by Article 82 EC, they also have to apply EC competition rules to those agreements, decisions or practices <sup>(11)</sup>.

6. The regulation does not only empower the national courts to apply EC competition law. The parallel application of national competition law to agreements, decisions of associations of undertakings and concerted practices which affect trade between Member States may not lead to a different outcome from that of EC competition law. Article 3(2) of the regulation provides that agreements, decisions or concerted practices which do not infringe

Article 81(1) EC or which fulfil the conditions of Article 81(3) EC cannot be prohibited either under national competition law<sup>(12)</sup>. On the other hand, the Court of Justice has ruled that agreements, decisions or concerted practices that violate Article 81(1) and do not fulfil the conditions of Article 81(3) EC cannot be upheld under national law<sup>(13)</sup>. As to the parallel application of national competition law and Article 82 EC in the case of unilateral conduct, Article 3 of the regulation does not provide for a similar convergence obligation. However, in case of conflicting provisions, the general principle of primacy of Community law requires national courts to disapply any provision of national law which contravenes a Community rule, regardless of whether that national law provision was adopted before or after the Community rule<sup>(14)</sup>.

7. Apart from the application of Articles 81 and 82 EC, national courts are also competent to apply acts adopted by EU institutions in accordance with the EC Treaty or in accordance with the measures adopted to give the Treaty effect, to the extent that these acts have direct effect. National courts may thus have to enforce Commission decisions<sup>(15)</sup> or regulations applying Article 81(3) EC to certain categories of agreements, decisions or concerted practices. When applying these EC competition rules, national courts act within the framework of Community law and are consequently bound to observe the general principles of Community law<sup>(16)</sup>.

8. The application of Articles 81 and 82 EC by national courts often depends on complex economic and legal assessments<sup>(17)</sup>. When applying EC competition rules, national courts are bound by the case law of the Community courts as well as by Commission regulations applying Article 81(3) EC to certain categories of agreements, decisions or concerted practices<sup>(18)</sup>. Furthermore, the application of Articles 81 and 82 EC by the Commission in a specific case binds the national courts when they apply EC competition rules in the same case in parallel with or subsequent to the Commission<sup>(19)</sup>. Finally, and without prejudice to the ultimate interpretation of the EC Treaty by the Court of Justice, national courts may find guidance in Commission regulations and decisions which present elements of analogy with the case they are dealing with, as well as in Commission notices and guidelines relating to the application of Articles 81 and 82 EC<sup>(20)</sup> and in the annual report on competition policy<sup>(21)</sup>.

#### B. PROCEDURAL ASPECTS OF THE APPLICATION OF EC COMPETITION RULES BY NATIONAL COURTS

9. The procedural conditions for the enforcement of EC competition rules by national courts and the sanctions they can impose in case of an infringement of those rules, are largely covered by national law. However, to some extent, Community law also determines the conditions in which EC competition rules are enforced. Those Community law provisions may provide for the faculty of national courts to avail themselves of certain instruments, e.g. to ask for the Commission's opinion on questions concerning the application of EC competition rules<sup>(22)</sup> or they may create rules that have an obligatory impact on proceedings before them, e.g. allowing the Commission and national competition authorities to submit written observations<sup>(23)</sup>. These Community law provisions prevail over national rules. Therefore, national courts have to set aside national rules which, if applied, would conflict with these Community law provisions. Where such Community law provisions are directly applicable, they are a direct source of rights and duties for all those affected, and must be fully and uniformly applied in all the Member States from the date of their entry into force<sup>(24)</sup>.

10. In the absence of Community law provisions on procedures and sanctions related to the enforcement of EC competition rules by national courts, the latter apply national procedural law and — to the extent that they are competent to do so — impose sanctions provided for under national law. However, the application of these national provisions must be compatible with the general principles of Community law. In this regard, it is useful to recall the case law of the Court of Justice, according to which:

- (a) where there is an infringement of Community law, national law must provide for sanctions which are effective, proportionate and dissuasive<sup>(25)</sup>;
- (b) where the infringement of Community law causes harm to an individual, the latter should under certain conditions be able to ask the national court for damages<sup>(26)</sup>;

- (c) the rules on procedures and sanctions which national courts apply to enforce Community law

— must not make such enforcement excessively difficult or practically impossible (the principle of effectiveness) <sup>(27)</sup> and they

— must not be less favourable than the rules applicable to the enforcement of equivalent national law (the principle of equivalence) <sup>(28)</sup>.

On the basis of the principle of primacy of Community law, a national court may not apply national rules that are incompatible with these principles.

#### C. PARALLEL OR CONSECUTIVE APPLICATION OF EC COMPETITION RULES BY THE COMMISSION AND BY NATIONAL COURTS

11. A national court may be applying EC competition law to an agreement, decision, concerted practice or unilateral behaviour affecting trade between Member States at the same time as the Commission or subsequent to the Commission <sup>(29)</sup>. The following points outline some of the obligations national courts have to respect in those circumstances.

12. Where a national court comes to a decision before the Commission does, it must avoid adopting a decision that would conflict with a decision contemplated by the Commission <sup>(30)</sup>. To that effect, the national court may ask the Commission whether it has initiated proceedings regarding the same agreements, decisions or practices <sup>(31)</sup> and if so, about the progress of proceedings and the likelihood of a decision in that case <sup>(32)</sup>. The national court may, for reasons of legal certainty, also consider staying its proceedings until the Commission has reached a decision <sup>(33)</sup>. The Commission, for its part, will endeavour to give priority to cases for which it has decided to initiate proceedings within the meaning of Article 2(1) of Commission Regulation (EC) No 773/2004 and that are the subject of national proceedings stayed in this way, in particular when the outcome of a civil dispute depends on them. However, where the national court cannot reasonably doubt the Commission's contemplated decision or where the Commission has already decided on a similar case, the national court may decide on the case pending before it in accordance with that contemplated or earlier decision without it being necessary to ask the

Commission for the information mentioned above or to await the Commission's decision.

13. Where the Commission reaches a decision in a particular case before the national court, the latter cannot take a decision running counter to that of the Commission. The binding effect of the Commission's decision is of course without prejudice to the interpretation of Community law by the Court of Justice. Therefore, if the national court doubts the legality of the Commission's decision, it cannot avoid the binding effects of that decision without a ruling to the contrary by the Court of Justice <sup>(34)</sup>. Consequently, if a national court intends to take a decision that runs counter to that of the Commission, it must refer a question to the Court of Justice for a preliminary ruling (Article 234 EC). The latter will then decide on the compatibility of the Commission's decision with Community law. However, if the Commission's decision is challenged before the Community courts pursuant to Article 230 EC and the outcome of the dispute before the national court depends on the validity of the Commission's decision, the national court should stay its proceedings pending final judgment in the action for annulment by the Community courts unless it considers that, in the circumstances of the case, a reference to the Court of Justice for a preliminary ruling on the validity of the Commission decision is warranted <sup>(35)</sup>.

14. When a national court stays proceedings, e.g. awaiting the Commission's decision (situation described in point 12 of this notice) or pending final judgement by the Community courts in an action for annulment or in a preliminary ruling procedure (situation described in point 13), it is incumbent on it to examine whether it is necessary to order interim measures in order to safeguard the interests of the parties <sup>(36)</sup>.

#### III. THE CO-OPERATION BETWEEN THE COMMISSION AND NATIONAL COURTS

15. Other than the co-operation mechanism between the national courts and the Court of Justice under Article 234 EC, the EC Treaty does not explicitly provide for co-operation between the national courts and the Commission. However, in its interpretation of Article 10 EC, which obliges the Member States to facilitate the achievement of the Community's tasks, the Community courts found that this Treaty provision imposes on the European institutions and the Member States mutual duties of loyal co-operation with a view to attaining the objectives of the EC Treaty. Article 10 EC thus implies that the Commission must assist national courts when they apply Community law <sup>(37)</sup>. Equally, national courts may be obliged to assist the Commission in the fulfilment of its tasks <sup>(38)</sup>.



16. It is also appropriate to recall the co-operation between national courts and national authorities, in particular national competition authorities, for the application of Articles 81 and 82 EC. While the co-operation between these national authorities is primarily governed by national rules, Article 15(3) of the regulation provides for the possibility for national competition authorities to submit observations before the national courts of their Member State. Points 31 and 33 to 35 of this notice are *mutatis mutandis* applicable to those submissions.

#### A. THE COMMISSION AS AMICUS CURIAE

17. In order to assist national courts in the application of EC competition rules, the Commission is committed to help national courts where the latter find such help necessary to be able to decide on a case. Article 15 of the regulation refers to the most frequent types of such assistance: the transmission of information (points 21 to 26) and the Commission's opinions (points 27 to 30), both at the request of a national court and the possibility for the Commission to submit observations (points 31 to 35). Since the regulation provides for these types of assistance, it cannot be limited by any Member States' rule. However, in the absence of Community procedural rules to this effect and to the extent that they are necessary to facilitate these forms of assistance, Member States must adopt the appropriate procedural rules to allow both the national courts and the Commission to make full use of the possibilities the regulation offers <sup>(39)</sup>.

18. The national court may send its request for assistance in writing to

European Commission  
Directorate General for Competition  
B-1049 Brussels  
Belgium

or send it electronically to [comp-amicus@cec.eu.int](mailto:comp-amicus@cec.eu.int)

19. It should be recalled that whatever form the co-operation with national courts takes, the Commission will respect the independence of national courts. As a consequence, the assistance offered by the Commission does not bind the national court. The Commission has also to make sure that

it respects its duty of professional secrecy and that it safeguards its own functioning and independence <sup>(40)</sup>. In fulfilling its duty under Article 10 EC, of assisting national courts in the application of EC competition rules, the Commission is committed to remaining neutral and objective in its assistance. Indeed, the Commission's assistance to national courts is part of its duty to defend the public interest. It has therefore no intention to serve the private interests of the parties involved in the case pending before the national court. As a consequence, the Commission will not hear any of the parties about its assistance to the national court. In case the Commission has been contacted by any of the parties in the case pending before the court on issues which are raised before the national court, it will inform the national court thereof, independent of whether these contacts took place before or after the national court's request for co-operation.

20. The Commission will publish a summary concerning its co-operation with national courts pursuant to this notice in its annual Report on Competition Policy. It may also make its opinions and observations available on its website.

#### 1. The Commission's duty to transmit information to national courts

21. The duty for the Commission to assist national courts in the application of EC competition law is mainly reflected in the obligation for the Commission to transmit information it holds to national courts. A national court may, e.g., ask the Commission for documents in its possession or for information of a procedural nature to enable it to discover whether a certain case is pending before the Commission, whether the Commission has initiated a procedure or whether it has already taken a position. A national court may also ask the Commission when a decision is likely to be taken, so as to be able to determine the conditions for any decision to stay proceedings or whether interim measures need to be adopted <sup>(41)</sup>.

22. In order to ensure the efficiency of the co-operation with national courts, the Commission will endeavour to provide the national court with the requested information within one month from the date it receives the request. Where the Commission has to ask the national court for further clarification of its request or where the Commission has to consult those who are directly affected by the transmission of the information, that period starts to run from the moment that it receives the required information.

23. In transmitting information to national courts, the Commission has to uphold the guarantees given to natural and legal persons by Article 287 EC<sup>(42)</sup>. Article 287 EC prevents members, officials and other servants of the Commission from disclosing information covered by the obligation of professional secrecy. The information covered by professional secrecy may be both confidential information and business secrets. Business secrets are information of which not only disclosure to the public but also mere transmission to a person other than the one that provided the information might seriously harm the latter's interests<sup>(43)</sup>.
24. The combined reading of Articles 10 and 287 EC does not lead to an absolute prohibition for the Commission to transmit information which is covered by the obligation of professional secrecy to national courts. The case law of the Community courts confirms that the duty of loyal co-operation requires the Commission to provide the national court with whatever information the latter asks for, even information covered by professional secrecy. However, in offering its co-operation to the national courts, the Commission may not in any circumstances undermine the guarantees laid down in Article 287 EC.
25. Consequently, before transmitting information covered by professional secrecy to a national court, the Commission will remind the court of its obligation under Community law to uphold the rights which Article 287 EC confers on natural and legal persons and it will ask the court whether it can and will guarantee protection of confidential information and business secrets. If the national court cannot offer such guarantee, the Commission shall not transmit the information covered by professional secrecy to the national court<sup>(44)</sup>. Only when the national court has offered a guarantee that it will protect the confidential information and business secrets, will the Commission transmit the information requested, indicating those parts which are covered by professional secrecy and which parts are not and can therefore be disclosed.
26. There are further exceptions to the disclosure of information by the Commission to national courts. Particularly, the Commission may refuse to transmit information to national courts for overriding reasons relating to the need to safeguard the interests of the Community or to avoid any interference with its functioning and independence, in particular by jeopardising the accomplishment of the tasks entrusted to it<sup>(45)</sup>. Therefore, the Commission will not transmit to national courts information voluntarily submitted by a leniency applicant without the consent of that applicant.
- 2. Request for an opinion on questions concerning the application of EC competition rules**
27. When called upon to apply EC competition rules to a case pending before it, a national court may first seek guidance in the case law of the Community courts or in Commission regulations, decisions, notices and guidelines applying Articles 81 and 82 EC<sup>(46)</sup>. Where these tools do not offer sufficient guidance, the national court may ask the Commission for its opinion on questions concerning the application of EC competition rules. The national court may ask the Commission for its opinion on economic, factual and legal matters<sup>(47)</sup>. The latter is of course without prejudice to the possibility or the obligation for the national court to ask the Court of Justice for a preliminary ruling regarding the interpretation or the validity of Community law in accordance with Article 234 EC.
28. In order to enable the Commission to provide the national court with a useful opinion, it may request the national court for further information<sup>(48)</sup>. In order to ensure the efficiency of the co-operation with national courts, the Commission will endeavour to provide the national court with the requested opinion within four months from the date it receives the request. Where the Commission has requested the national court for further information in order to enable it to formulate its opinion, that period starts to run from the moment that it receives the additional information.
29. When giving its opinion, the Commission will limit itself to providing the national court with the factual information or the economic or legal clarification asked for, without considering the merits of the case pending before the national court. Moreover, unlike the authoritative interpretation of Community law by the Community courts, the opinion of the Commission does not legally bind the national court.
30. In line with what has been said in point 19 of this notice, the Commission will not hear the parties before formulating its opinion to the national court. The latter will have to deal with the Commission's opinion in accordance with the relevant national procedural rules, which have to respect the general principles of Community law.

### 3. The Commission's submission of observations to the national court

31. According to Article 15(3) of the regulation, the national competition authorities and the Commission may submit observations on issues relating to the application of Articles 81 or 82 EC to a national court which is called upon to apply those provisions. The regulation distinguishes between written observations, which the national competition authorities and the Commission may submit on their own initiative, and oral observations, which can only be submitted with the permission of the national court <sup>(49)</sup>.

32. The regulation specifies that the Commission will only submit observations when the coherent application of Articles 81 or 82 EC so requires. That being the objective of its submission, the Commission will limit its observations to an economic and legal analysis of the facts underlying the case pending before the national court.

33. In order to enable the Commission to submit useful observations, national courts may be asked to transmit or ensure the transmission to the Commission of a copy of all documents that are necessary for the assessment of the case. In line with Article 15(3), second subparagraph, of the regulation, the Commission will only use those documents for the preparation of its observations <sup>(50)</sup>.

34. Since the regulation does not provide for a procedural framework within which the observations are to be submitted, Member States' procedural rules and practices determine the relevant procedural framework. Where a Member State has not yet established the relevant procedural framework, the national court has to determine which procedural rules are appropriate for the submission of observations in the case pending before it.

35. The procedural framework should respect the principles set out in point 10 of this notice. That implies amongst others that the procedural framework for the submission of observations on issues relating to the application of Articles 81 or 82 EC

- (a) has to be compatible with the general principles of Community law, in particular the fundamental rights of the parties involved in the case;

(b) cannot make the submission of such observations excessively difficult or practically impossible (the principle of effectiveness) <sup>(51)</sup>; and

(c) cannot make the submission of such observations more difficult than the submission of observations in court proceedings where equivalent national law is applied (the principle of equivalence).

### B. THE NATIONAL COURTS FACILITATING THE ROLE OF THE COMMISSION IN THE ENFORCEMENT OF EC COMPETITION RULES

36. Since the duty of loyal co-operation also implies that Member States' authorities assist the European institutions with a view to attaining the objectives of the EC Treaty <sup>(52)</sup>, the regulation provides for three examples of such assistance: (1) the transmission of documents necessary for the assessment of a case in which the Commission would like to submit observations (see point 33), (2) the transmission of judgements applying Articles 81 or 82 EC; and (3) the role of national courts in the context of a Commission inspection.

#### 1. The transmission of judgements of national courts applying Articles 81 or 82 EC

37. According to Article 15(2) of the regulation, Member States shall send to the Commission a copy of any written judgement of national courts applying Articles 81 or 82 EC without delay after the full written judgement is notified to the parties. The transmission of national judgements on the application of Articles 81 or 82 EC and the resulting information on proceedings before national courts primarily enable the Commission to become aware in a timely fashion of cases for which it might be appropriate to submit observations where one of the parties lodges an appeal against the judgement.

#### 2. The role of national courts in the context of a Commission inspection

38. Finally, national courts may play a role in the context of a Commission inspection of undertakings and associations of undertakings. The role of the national courts depends on whether the inspections are conducted in business premises or in non-business premises.

39. With regard to the inspection of business premises, national legislation may require authorisation from a national court to allow a national enforcement authority to assist the Commission in case of opposition of the undertaking concerned. Such authorisation may also be sought as a precautionary measure. When dealing with the request, the national court has the power to control that the Commission's inspection decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national court may ask the Commission, directly or through the national competition authority, for detailed explanations in particular on the grounds the Commission has for suspecting infringement of Articles 81 and 82 EC, as well as on the seriousness of the suspected infringement and on the nature of the involvement of the undertaking concerned <sup>(53)</sup>.
40. With regard to the inspection of non-business premises, the regulation requires the authorisation from a national court before a Commission decision ordering such an inspection can be executed. In that case, the national court may control that the Commission's inspection decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard in particular to the seriousness of the suspected infringement, to the importance of the evidence sought, to the involvement of the undertaking concerned and to the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in

the premises for which the authorisation is requested. The national court may ask the Commission, directly or through the national competition authority, for detailed explanations on those elements that are necessary to allow its control of the proportionality of the coercive measures envisaged <sup>(54)</sup>.

41. In both cases referred to in points 39 and 40, the national court may not call into question the lawfulness of the Commission's decision or the necessity for the inspection nor can it demand that it be provided with information in the Commission's file <sup>(55)</sup>. Furthermore, the duty of loyal co-operation requires the national court to take its decision within an appropriate timeframe that allows the Commission to effectively conduct its inspection <sup>(56)</sup>.

#### IV. FINAL PROVISIONS

42. This notice is issued in order to assist national courts in the application of Articles 81 and 82 EC. It does not bind the national courts, nor does it affect the rights and obligations of the EU Member States and natural or legal persons under Community law.
43. This notice replaces the 1993 notice on co-operation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty <sup>(57)</sup>.

<sup>(1)</sup> For the criteria to determine which entities can be regarded as courts or tribunals within the meaning of Article 234 EC, see e.g. case C-516/99 Schmid [2002] ECR I-4573, 34: 'The Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent'.

<sup>(2)</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).

<sup>(3)</sup> Notice on the co-operation within the network of competition authorities (OJ C 101, 27.4.2004, p. 43). For the purpose of this notice, a 'national competition authority' is the authority designated by a Member State in accordance with Article 35(1) of the regulation.

<sup>(4)</sup> The jurisdiction of a national court depends on national, European and international rules of jurisdiction. In this context, it may be recalled that Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (OJ L 12, 16.1.2001, p. 1) is applicable to all competition cases of a civil or commercial nature.

<sup>(5)</sup> See Article 6 of the regulation.

<sup>(6)</sup> See Articles 2 and 3 EC, case C-126/97 Eco Swiss [1999] ECR I-3055, 36; case T-34/92 Fiatagri UK and New Holland Ford [1994] ECR II-905, 39 and case T-128/98 Aéroports de Paris [2000] ECR II-3929, 241.

<sup>(7)</sup> Joined cases C-430/93 and C-431/93 van Schijndel [1995] ECR I-4705, 13 to 15 and 22.

<sup>(8)</sup> According to the last sentence of recital 8 of Regulation (EC) No 1/2003, the regulation does not apply to national laws which impose criminal sanctions on natural persons except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced.

- <sup>(9)</sup> Case T-24/90 Automec [1992] ECR II-2223, 85.
- <sup>(10)</sup> For further clarification of the effect on trade concept, see the notice on this issue (OJ L 101, 27.4.2004, p. 81).
- <sup>(11)</sup> Article 3(1) of the regulation.
- <sup>(12)</sup> See also the notice on the application of Article 81(3) EC (OJ L 101, 27.4.2004, p. 2).
- <sup>(13)</sup> Case 14/68 Walt Wilhelm [1969] ECR 1 and joined cases 253/78 and 1 to 3/79 Giry and Guerlain [1980] ECR 2327, 15 to 17.
- <sup>(14)</sup> Case 106/77 Simmenthal [1978] ECR 629, 21 and case C-198/01, Consorzio Industrie Fiammiferi (CIF) [2003] 49.
- <sup>(15)</sup> E.g. a national court may be asked to enforce a Commission decision taken pursuant to Articles 7 to 10, 23 and 24 of the regulation.
- <sup>(16)</sup> See e.g. case 5/88 Wachauf [1989] ECR 2609, 19.
- <sup>(17)</sup> Joined cases C-215/96 and C-216/96 Bagnasco [1999] ECR I-135, 50.
- <sup>(18)</sup> Case 63/75 Fonderies Roubaix [1976] ECR 111, 9 to 11 and case C-234/89 Delimitis [1991] ECR I-935, 46.
- <sup>(19)</sup> On the parallel or consecutive application of EC competition rules by national courts and the Commission, see also points 11 to 14.
- <sup>(20)</sup> Case 66/86 Ahmed Saeed Flugreisen [1989] ECR 803, 27 and case C-234/89 Delimitis [1991] ECR I-935, 50. A list of Commission guidelines, notices and regulations in the field of competition policy, in particular the regulations applying Article 81(3) EC to certain categories of agreements, decisions or concerted practices, are annexed to this notice. For the decisions of the Commission applying Articles 81 and 82 EC (since 1964), see <http://www.europa.eu.int/comm/competition/antitrust/cases/>.
- <sup>(21)</sup> Joined cases C-319/93, C-40/94 and C-224/94 Dijkstra [1995] ECR I-4471, 32.
- <sup>(22)</sup> On the possibility for national courts to ask the Commission for an opinion, see further in points 27 to 30.
- <sup>(23)</sup> On the submission of observations, see further in points 31 to 35.
- <sup>(24)</sup> Case 106/77 Simmenthal [1978] ECR 629, 14 and 15.
- <sup>(25)</sup> Case 68/88 Commission v Greece [1989] ECR 2965, 23 to 25.
- <sup>(26)</sup> On damages in case of an infringement by an undertaking, see case C-453/99 Courage and Crehan [2001] ECR 6297, 26 and 27. On damages in case of an infringement by a Member State or by an authority which is an emanation of the State and on the conditions of such state liability, see e.g. joined cases C-6/90 and C-9/90 Francovich [1991] ECR I-5357, 33 to 36; case C-271/91 Marshall v Southampton and South West Hampshire Area Health Authority [1993] ECR I-4367, 30 and 34 to 35; joined cases C-46/93 and C-48/93 Brasserie du Pêcheur and Factortame [1996] ECR I-1029; case C-392/93 British Telecommunications [1996] ECR I-1631, 39 to 46 and joined cases C-178/94, C-179/94 and C-188/94 to 190/94 Dillenkofer [1996] ECR I-4845, 22 to 26 and 72.
- <sup>(27)</sup> See e.g. case 33/76 Rewe [1976] ECR 1989, 5; case 45/76 Comet [1976] ECR 2043, 12 and case 79/83 Harz [1984] ECR 1921, 18 and 23.
- <sup>(28)</sup> See e.g. case 33/76 Rewe [1976] ECR 1989, 5; case 158/80 Rewe [1981] ECR 1805, 44; case 199/82 San Giorgio [1983] ECR 3595, 12 and case C-231/96 Edis [1998] ECR I-4951, 36 and 37.
- <sup>(29)</sup> Article 11(6), juncto Article 35(3) and (4) of the regulation prevents a parallel application of Articles 81 or 82 EC by the Commission and a national court only when the latter has been designated as a national competition authority.
- <sup>(30)</sup> Article 16(1) of the regulation.
- <sup>(31)</sup> The Commission makes the initiation of its proceedings with a view to adopting a decision pursuant to Article 7 to 10 of the regulation public (see Article 2(2) of Commission Regulation (EC) No 773/2004 of 7 April relating to proceedings pursuant to Articles 81 and 82 of the EC Treaty (OJ C 101, 27.4.2004). According to the Court of Justice, the initiation of proceedings implies an authoritative act of the Commission, evidencing its intention of taking a decision (case 48/72 Brasserie de Haecht [1973] ECR 77, 16).
- <sup>(32)</sup> Case C-234/89 Delimitis [1991] ECR I-935, 53, and joined cases C-319/93, C-40/94 and C-224/94 Dijkstra [1995] ECR I-4471, 34. See further on this issue point 21 of this notice.
- <sup>(33)</sup> See Article 16(1) of the regulation and case C-234/89 Delimitis [1991] ECR I-935, 47 and case C-344/98 Masterfoods [2000] ECR I-11369, 51.

- (<sup>34</sup>) Case 314/85 Foto-Frost [1987] ECR 4199, 12 to 20.
- (<sup>35</sup>) See Article 16(1) of the regulation and case C-344/98 Masterfoods [2000] ECR I-11369, 52 to 59.
- (<sup>36</sup>) Case C-344/98 Masterfoods [2000] ECR, I-11369, 58.
- (<sup>37</sup>) Case C-2/88 Imm Zwartveld [1990] ECR I-3365, 16 to 22 and case C-234/89 Delimitis [1991] I-935, 53.
- (<sup>38</sup>) C-94/00 Roquette Frères [2002] ECR 9011, 31.
- (<sup>39</sup>) On the compatibility of such national procedural rules with the general principles of Community law, see points 9 and 10 of this notice.
- (<sup>40</sup>) On these duties, see e.g. points 23 to 26 of this notice.
- (<sup>41</sup>) Case C-234/89 Delimitis [1991] ECR I-935, 53, and joined cases C-319/93, C-40/94 and C-224/94 Dijkstra [1995] ECR I-4471, 34.
- (<sup>42</sup>) Case C-234/89 Delimitis [1991] I-935, 53.
- (<sup>43</sup>) Case T-353/94 Postbank [1996] ECR II-921, 86 and 87 and case 145/83 Adams [1985] ECR 3539, 34.
- (<sup>44</sup>) Case C-2/88 Zwartveld [1990] ECR I-4405, 10 and 11 and case T-353/94 Postbank [1996] ECR II-921, 93.
- (<sup>45</sup>) Case C-2/88 Zwartveld [1990] ECR I-4405, 10 and 11; case C-275/00 First and Franex [2002] ECR I-10943, 49 and case T-353/94 Postbank [1996] ECR II-921, 93.
- (<sup>46</sup>) See point 8 of this notice.
- (<sup>47</sup>) Case C-234/89 Delimitis [1991] ECR I-935, 53, and joined cases C-319/93, C-40/94 and C-224/94 Dijkstra [1995] ECR I-4471, 34.
- (<sup>48</sup>) Compare with case 96/81 Commission v the Netherlands [1982] ECR 1791, 7 and case 272/86 Commission v Greece [1988] ECR 4875, 30.
- (<sup>49</sup>) According to Article 15(4) of the regulation, this is without prejudice to wider powers to make observations before courts conferred on national competition authorities under national law.
- (<sup>50</sup>) See also Article 28(2) of the regulation, which prevents the Commission from disclosing the information it has acquired and which is covered by the obligation of professional secrecy.
- (<sup>51</sup>) Joined cases 46/87 and 227/88 Hoechst [1989] ECR, 2859, 33. See also Article 15(3) of the regulation.
- (<sup>52</sup>) Case C-69/90 Commission v Italy [1991] ECR 6011, 15.
- (<sup>53</sup>) Article 20(6) to (8) of the regulation and case C-94/00 Roquette Frères [2002] ECR 9011.
- (<sup>54</sup>) Article 21(3) of the regulation.
- (<sup>55</sup>) Case C-94/00 Roquette Frères [2002] ECR 9011, 39 and 62 to 66.
- (<sup>56</sup>) See also *ibidem*, 91 and 92.
- (<sup>57</sup>) OJ C 39, 13.2.93, p. 6.
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## ANNEX

**COMMISSION BLOCK EXEMPTION REGULATIONS, NOTICES AND GUIDELINES**

This list is also available and updated on the website of the Directorate General for Competition of the European Commission:

<http://europa.eu.int/comm/competition/antitrust/legislation/>

**A. Non-sector specific rules****1. Notices of a general nature**

- Notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5)
- Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) (OJ C 368, 22.12.2001, p. 13)
- Notice on the effect on trade concept contained in Articles 81 and 82 of the Treaty (OJ C 101, 27.4.2004, p. 81)
- Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004, p. 2)

**2. Vertical agreements**

- 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, p. 21)
- Guidelines on Vertical Restraints (OJ C 291, 13.10.2000, p. 1)

**3. Horizontal co-operation agreements**

- 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, 5.12.2000, p. 3)
- 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, 5.12.2000, p. 7)
- Guidelines on the applicability of Article 81 to horizontal co-operation agreements (OJ C 3, 6.1.2001, p. 2)

**4. Licensing agreements for the transfer of technology**

- Regulation (EC) No 773/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements (OJ L 123, 27.4.2004)
- Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements (OJ C 101, 27.4.2004, p. 2)

**B. Sector specific rules****1. Insurance**

- Regulation (EC) No 358/2003 of 27 February 2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector (OJ L 53, 28.2.2003, p. 8)

**2. Motor vehicles**

- Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector (OJ L 203, 1.8.2002, p. 30)

### 3. *Telecommunications and postal services*

- Guidelines on the application of EEC competition rules in the telecommunications sector (OJ C 233, 6.9.1991, p. 2)
- Notice on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services (OJ C 39, 6.2.1998, p. 2)
- Notice on the application of the competition rules to access agreements in the telecommunications sector — Framework, relevant markets and principles (OJ C 265, 22.8.1998, p. 2)
- Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (OJ C 165, 11.7.2002, p. 6)

### 4. *Transport*

- Regulation (EEC) No 1617/93 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices concerning joint planning and co-ordination of schedules, joint operations, consultations on passenger and cargo tariffs on scheduled air services and slot allocation at airports (OJ L 155, 26.6.1993, p. 18)
  - Communication on clarification of the Commission recommendations on the application of the competition rules to new transport infrastructure projects (OJ C 298, 30.9.1997, p. 5)
  - Regulation (EC) No 823/2000 of 19 April 2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) (OJ L 100, 20.4.2000, p. 24)
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## COMMISSION NOTICE

## on the definition of relevant market for the purposes of Community competition law

(97/C 372/03)

(Text with EEA relevance)

## I. INTRODUCTION

1. The purpose of this notice is to provide guidance as to how the Commission applies the concept of relevant product and geographic market in its ongoing enforcement of Community competition law, in particular the application of Council Regulation No 17 and (EEC) No 4064/89, their equivalents in other sectoral applications such as transport, coal and steel, and agriculture, and the relevant provisions of the EEA Agreement<sup>(1)</sup>. Throughout this notice, references to Articles 85 and 86 of the Treaty and to merger control are to be understood as referring to the equivalent provisions in the EEA Agreement and the ECSC Treaty.
2. Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved<sup>(2)</sup> face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure. It is from this perspective that the market definition makes it possible *inter alia* to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance or for the purposes of applying Article 85.
3. It follows from point 2 that the concept of 'relevant market' is different from other definitions of market often used in other contexts. For instance, companies often use the term 'market' to refer to the area where it sells its products or to refer broadly to the industry or sector where it belongs.
4. The definition of the relevant market in both its product and its geographic dimensions often has a decisive influence on the assessment of a competition case. By rendering public the procedures which the Commission follows when considering market definition and by indicating the criteria and evidence on which it relies to reach a decision, the Commission expects to increase the transparency of its policy and decision-making in the area of competition policy.
5. Increased transparency will also result in companies and their advisers being able to better anticipate the possibility that the Commission may raise competition concerns in an individual case. Companies could, therefore, take such a possibility into account in their own internal decision-making when contemplating, for instance, acquisitions, the creation of joint ventures, or the establishment of certain agreements. It is also intended that companies should be in a better position to understand what sort of information the Commission considers relevant for the purposes of market definition.
6. The Commission's interpretation of 'relevant market' is without prejudice to the interpretation which may be given by the Court of Justice or the Court of First Instance of the European Communities.

## II. DEFINITION OF RELEVANT MARKET

**Definition of relevant product market and relevant geographic market**

- (1) The focus of assessment in State aid cases is the aid recipient and the industry/sector concerned rather than identification of competitive constraints faced by the aid recipient. When consideration of market power and therefore of the relevant market are raised in any particular case, elements of the approach outlined here might serve as a basis for the assessment of State aid cases.
- (2) For the purposes of this notice, the undertakings involved will be, in the case of a concentration, the parties to the concentration; in investigations within the meaning of Article 86 of the Treaty, the undertaking being investigated or the complainants; for investigations within the meaning of Article 85, the parties to the Agreement.

7. The Regulations based on Article 85 and 86 of the Treaty, in particular in section 6 of Form A/B with respect to Regulation No 17, as well as in section 6 of Form CO with respect to Regulation (EEC) No 4064/89 on the control of concentrations having a Community dimension have laid down the following definitions, 'Relevant product markets' are defined as follows:

'A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'.

8. 'Relevant geographic markets' are defined as follows:

'The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area'.

9. The relevant market within which to assess a given competition issue is therefore established by the combination of the product and geographic markets. The Commission interprets the definitions in paragraphs 7 and 8 (which reflect the case-law of the Court of Justice and the Court of First Instance as well as its own decision-making practice) according to the orientations defined in this notice.

#### **Concept of relevant market and objectives of Community competition policy**

10. The concept of relevant market is closely related to the objectives pursued under Community competition policy. For example, under the Community's merger control, the objective in controlling structural changes in the supply of a product/service is to prevent the creation or reinforcement of a dominant position as a result of which effective competition would be significantly impeded in a substantial part of the common market. Under the Community's competition rules, a dominant position is such that a firm or group of firms would be in a position to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers<sup>(\*)</sup>. Such a position would usually arise when a firm or group of firms accounted for a large share of the supply in any given market, provided that other factors analysed in the assessment (such as entry barriers, customers' capacity to react, etc.) point in the same direction.

(\*) Definition given by the Court of Justice in its judgment of 13 February 1979 in Case 85/76, *Hoffmann-La Roche* [1979] ECR 461, and confirmed in subsequent judgments.

11. The same approach is followed by the Commission in its application of Article 86 of the Treaty to firms that enjoy a single or collective dominant position. Within the meaning of Regulation No 17, the Commission has the power to investigate and bring to an end abuses of such a dominant position, which must also be defined by reference to the relevant market. Markets may also need to be defined in the application of Article 85 of the Treaty, in particular, in determining whether an appreciable restriction of competition exists or in establishing if the condition pursuant to Article 85 (3) (b) for an exemption from the application of Article 85 (1) is met.

12. The criteria for defining the relevant market are applied generally for the analysis of certain types of behaviour in the market and for the analysis of structural changes in the supply of products. This methodology, though, might lead to different results depending on the nature of the competition issue being examined. For instance, the scope of the geographic market might be different when analysing a concentration, where the analysis is essentially prospective, from an analysis of past behaviour. The different time horizon considered in each case might lead to the result that different geographic markets are defined for the same products depending on whether the Commission is examining a change in the structure of supply, such as a concentration or a cooperative joint venture, or examining issues relating to certain past behaviour.

#### **Basic principles for market definition**

##### *Competitive constraints*

13. Firms are subject to three main sources or competitive constraints: demand substitutability, supply substitutability and potential competition. From an economic point of view, for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions. A firm or a group of firms cannot have a significant impact on the prevailing conditions of sale, such as prices, if its customers are in a position to switch easily to available substitute products or to suppliers located elsewhere. Basically, the exercise of market definition consists in identifying the effective alternative sources of supply for the customers of the undertakings involved, in terms both of products/services and of geographic location of suppliers.

14. The competitive constraints arising from supply side substitutability other than those described in paragraphs 20 to 23 and from potential competition are in general less immediate and in any case require an analysis of additional factors. As a result such constraints are taken into account at the assessment stage of competition analysis.

#### *Demand substitution*

15. The assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer. One way of making this determination can be viewed as a speculative experiment, postulating a hypothetical small, lasting change in relative prices and evaluating the likely reactions of customers to that increase. The exercise of market definition focuses on prices for operational and practical purposes, and more precisely on demand substitution arising from small, permanent changes in relative prices. This concept can provide clear indications as to the evidence that is relevant in defining markets.

16. Conceptually, this approach means that, starting from the type of products that the undertakings involved sell and the area in which they sell them, additional products and areas will be included in, or excluded from, the market definition depending on whether competition from these other products and areas affect or restrain sufficiently the pricing of the parties' products in the short term.

17. The question to be answered is whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range 5 % to 10 %) but permanent relative price increase in the products and areas being considered. If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market. This would be done until the set of products and geographical areas is such that small, permanent increases in relative prices would be profitable. The equivalent analysis is applicable in cases concerning the concentration of buying power, where the starting point would then be the supplier and the price test serves to identify the alternative distribution channels or outlets for the supplier's products. In the application of these principles, careful account should be taken of certain particular situations as described within paragraphs 56 and 58.

18. A practical example of this test can be provided by its application to a merger of, for instance, soft-drink bottlers. An issue to examine in such a case would be to decide whether different flavours of soft drinks belong to the same market. In practice, the question to address would be whether consumers of flavour A would switch to other flavours when confronted with a permanent price increase of 5 % to 10 % for flavour A. If a sufficient number of consumers would switch to, say, flavour B, to such an extent that the price increase for flavour A would not be profitable owing to the resulting loss of sales, then the market would comprise at least flavours A and B. The process would have to be extended in addition to other available flavours until a set of products is identified for which a price rise would not induce a sufficient substitution in demand.

19. Generally, and in particular for the analysis of merger cases, the price to take into account will be the prevailing market price. This may not be the case where the prevailing price has been determined in the absence of sufficient competition. In particular for the investigation of abuses of dominant positions, the fact that the prevailing price might already have been substantially increased will be taken into account.

#### *Supply substitution*

20. Supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. This means that suppliers are able to switch production to the relevant products and market them in the short term<sup>(\*)</sup> without incurring significant additional costs or risks in response to small and permanent changes in relative prices. When these conditions are met, the additional production that is put on the market will have a disciplinary effect on the competitive behaviour of the companies involved. Such an impact in terms of effectiveness and immediacy is equivalent to the demand substitution effect.

21. These situations typically arise when companies market a wide range of qualities or grades of one product; even if, for a given final customer or group of consumers, the different qualities are not substitutable, the different qualities will be grouped

<sup>(\*)</sup> That is such a period that does not entail a significant adjustment of existing tangible and intangible assets (see paragraph 23).

into one product market, provided that most of the suppliers are able to offer and sell the various qualities immediately and without the significant increases in costs described above. In such cases, the relevant product market will encompass all products that are substitutable in demand and supply, and the current sales of those products will be aggregated so as to give the total value or volume of the market. The same reasoning may lead to group different geographic areas.

22. A practical example of the approach to supply-side substitutability when defining product markets is to be found in the case of paper. Paper is usually supplied in a range of different qualities, from standard writing paper to high quality papers to be used, for instance, to publish art books. From a demand point of view, different qualities of paper cannot be used for any given use, i.e. an art book or a high quality publication cannot be based on lower quality papers. However, paper plants are prepared to manufacture the different qualities, and production can be adjusted with negligible costs and in a short time-frame. In the absence of particular difficulties in distribution, paper manufacturers are able therefore, to compete for orders of the various qualities, in particular if orders are placed with sufficient lead time to allow for modification of production plans. Under such circumstances, the Commission would not define a separate market for each quality of paper and its respective use. The various qualities of paper are included in the relevant market, and their sales added up to estimate total market value and volume.

23. When supply-side substitutability would entail the need to adjust significantly existing tangible and intangible assets, additional investments, strategic decisions or time delays, it will not be considered at the stage of market definition. Examples where supply-side substitution did not induce the Commission to enlarge the market are offered in the area of consumer products, in particular for branded beverages. Although bottling plants may in principle bottle different beverages, there are costs and lead times involved (in terms of advertising, product testing and distribution) before the products can actually be sold. In these cases, the effects of supply-side substitutability and other forms of potential competition would then be examined at a later stage.

### *Potential competition*

24. The third source of competitive constraint, potential competition, is not taken into account when defining markets, since the conditions under which potential competition will actually represent an effective competitive constraint depend on the analysis of specific factors and circumstances related to the conditions of entry. If required, this analysis is only carried out at a subsequent stage, in general once the position of the companies involved in the relevant market has already been ascertained, and when such position gives rise to concerns from a competition point of view.

## III. EVIDENCE RELIED ON TO DEFINE RELEVANT MARKETS

### **The process of defining the relevant market in practice**

#### *Product dimension*

25. There is a range of evidence permitting an assessment of the extent to which substitution would take place. In individual cases, certain types of evidence will be determinant, depending very much on the characteristics and specificity of the industry and products or services that are being examined. The same type of evidence may be of no importance in other cases. In most cases, a decision will have to be based on the consideration of a number of criteria and different items of evidence. The Commission follows an open approach to empirical evidence, aimed at making an effective use of all available information which may be relevant in individual cases. The Commission does not follow a rigid hierarchy of different sources of information or types of evidence.
26. The process of defining relevant markets may be summarized as follows: on the basis of the preliminary information available or information submitted by the undertakings involved, the Commission will usually be in a position to broadly establish the possible relevant markets within which, for instance, a concentration or a restriction of competition has to be assessed. In general, and for all practical purposes when handling individual cases, the question will usually be to decide on a few alternative possible relevant markets. For instance, with respect to the product market, the issue will often be to establish whether product A and product B belong or do not belong to the same product market. It is often the case that the inclusion of product B would be enough to remove any competition concerns.

27. In such situations it is not necessary to consider whether the market includes additional products, or to reach a definitive conclusion on the precise product market. If under the conceivable alternative market definitions the operation in question does not raise competition concerns, the question of market definition will be left open, reducing thereby the burden on companies to supply information.

#### *Geographic dimension*

28. The Commission's approach to geographic market definition might be summarized as follows: it will take a preliminary view of the scope of the geographic market on the basis of broad indications as to the distribution of market shares between the parties and their competitors, as well as a preliminary analysis of pricing and price differences at national and Community or EEA level. This initial view is used basically as a working hypothesis to focus the Commission's enquiries for the purposes of arriving at a precise geographic market definition.

29. The reasons behind any particular configuration of prices and market shares need to be explored. Companies might enjoy high market shares in their domestic markets just because of the weight of the past, and conversely, a homogeneous presence of companies throughout the EEA might be consistent with national or regional geographic markets. The initial working hypothesis will therefore be checked against an analysis of demand characteristics (importance of national or local preferences, current patterns of purchases of customers, product differentiation/brands, other) in order to establish whether companies in different areas do indeed constitute a real alternative source of supply for consumers. The theoretical experiment is again based on substitution arising from changes in relative prices, and the question to answer is again whether the customers of the parties would switch their orders to companies located elsewhere in the short term and at a negligible cost.

30. If necessary, a further check on supply factors will be carried out to ensure that those companies located in differing areas do not face impediments in developing their sales on competitive terms throughout the whole geographic market. This analysis will include an examination of requirements for a local presence in order to sell in that area the conditions of access to distribution channels, costs

associated with setting up a distribution network, and the presence or absence of regulatory barriers arising from public procurement, price regulations, quotas and tariffs limiting trade or production, technical standards, monopolies, freedom of establishment, requirements for administrative authorizations, packaging regulations, etc. In short, the Commission will identify possible obstacles and barriers isolating companies located in a given area from the competitive pressure of companies located outside that area, so as to determine the precise degree of market interpenetration at national, European or global level.

31. The actual pattern and evolution of trade flows offers useful supplementary indications as to the economic importance of each demand or supply factor mentioned above, and the extent to which they may or may not constitute actual barriers creating different geographic markets. The analysis of trade flows will generally address the question of transport costs and the extent to which these may hinder trade between different areas, having regard to plant location, costs of production and relative price levels.

#### *Market integration in the Community*

32. Finally, the Commission also takes into account the continuing process of market integration, in particular in the Community, when defining geographic markets, especially in the area of concentrations and structural joint ventures. The measures adopted and implemented in the internal market programme to remove barriers to trade and further integrate the Community markets cannot be ignored when assessing the effects on competition of a concentration or a structural joint venture. A situation where national markets have been artificially isolated from each other because of the existence of legislative barriers that have now been removed will generally lead to a cautious assessment of past evidence regarding prices, market shares or trade patterns. A process of market integration that would, in the short term, lead to wider geographic markets may therefore be taken into consideration when defining the geographic market for the purposes of assessing concentrations and joint ventures.

### *The process of gathering evidence*

33. When a precise market definition is deemed necessary, the Commission will often contact the main customers and the main companies in the industry to enquire into their views about the boundaries of product and geographic markets and to obtain the necessary factual evidence to reach a conclusion. The Commission might also contact the relevant professional associations, and companies active in upstream markets, so as to be able to define, in so far as necessary, separate product and geographic markets, for different levels of production or distribution of the products/services in question. It might also request additional information to the undertakings involved.
34. Where appropriate, the Commission will address written requests for information to the market players mentioned above. These requests will usually include questions relating to the perceptions of companies about reactions to hypothetical price increases and their views of the boundaries of the relevant market. They will also ask for provision of the factual information the Commission deems necessary to reach a conclusion on the extent of the relevant market. The Commission might also discuss with marketing directors or other officers of those companies to gain a better understanding on how negotiations between suppliers and customers take place and better understand issues relating to the definition of the relevant market. Where appropriate, they might also carry out visits or inspections to the premises of the parties, their customers and/or their competitors, in order to better understand how products are manufactured and sold.
35. The type of evidence relevant to reach a conclusion as to the product market can be categorized as follows:
  37. The type of evidence the Commission considers relevant to assess whether two products are demand substitutes can be categorized as follows:
  38. *Evidence of substitution in the recent past.* In certain cases, it is possible to analyse evidence relating to recent past events or shocks in the market that offer actual examples of substitution between two products. When available, this sort of information will normally be fundamental for market definition. If there have been changes in relative prices in the past (all else being equal), the reactions in terms of quantities demanded will be determinant in establishing substitutability. Launches of new products in the past can also offer useful information, when it is possible to precisely analyse which products have lost sales to the new product.
  39. There are a number of *quantitative tests* that have specifically been designed for the purpose of delineating markets. These tests consist of various econometric and statistical approaches estimates of elasticities and cross-price elasticities<sup>(\*)</sup> for the demand of a product, tests based on similarity of price movements over time, the analysis of causality between price series and similarity of price levels and/or their convergence. The Commission takes into account the available quantitative evidence capable of withstanding rigorous scrutiny for the purposes of establishing patterns of substitution in the past.

### **Evidence to define markets — product dimension**

36. An analysis of the product characteristics and its intended use allows the Commission, as a first step, to limit the field of investigation of possible substitutes. However, product characteristics and intended use are insufficient to show whether two products are demand substitutes. Functional interchangeability or similarity in characteristics may not, in themselves, provide sufficient criteria, because the responsiveness of customers to relative price changes may be determined by other considerations as well. For example, there may be different competitive constraints in the original equipment market for car components and in spare parts, thereby leading to a separate delineation of two relevant markets. Conversely, differences in product characteristics are not in themselves sufficient to exclude demand substitutability, since this will depend to a large extent on how customers value different characteristics.
40. *Views of customers and competitors.* The Commission often contacts the main customers and competitors of the companies involved in its enquiries, to gather their views on the boundaries of the product market as well as most of the factual information it

<sup>(\*)</sup> Own-price elasticity of demand for product X is a measure of the responsiveness of demand for X to percentage change in its own price. Cross-price elasticity between products X and Y is the responsiveness of demand for product X to percentage change in the price of product Y.

requires to reach a conclusion on the scope of the market. Reasoned answers of customers and competitors as to what would happen if relative prices for the candidate products were to increase in the candidate geographic area by a small amount (for instance of 5 % to 10 %) are taken into account when they are sufficiently backed by factual evidence.

41. *Consumer preferences.* In the case of consumer goods, it may be difficult for the Commission to gather the direct views of end consumers about substitute products. *Marketing studies* that companies have commissioned in the past and that are used by companies in their own decision-making as to pricing of their products and/or marketing actions may provide useful information for the Commission's delineation of the relevant market. Consumer surveys on usage patterns and attitudes, data from consumer's purchasing patterns, the views expressed by retailers and more generally, market research studies submitted by the parties and their competitors are taken into account to establish whether an economically significant proportion of consumers consider two products as substitutable, also taking into account the importance of brands for the products in question. The methodology followed in consumer surveys carried out *ad hoc* by the undertakings involved or their competitors for the purposes of a merger procedure or a procedure pursuant to Regulation No 17 will usually be scrutinized with utmost care. Unlike pre-existing studies, they have not been prepared in the normal course of business for the adoption of business decisions.

42. *Barriers and costs associated with switching demand to potential substitutes.* There are a number of barriers and costs that might prevent the Commission from considering two *prima facie* demand substitutes as belonging to one single product market. It is not possible to provide an exhaustive list of all the possible barriers to substitution and of switching costs. These barriers or obstacles might have a wide range of origins, and in its decisions, the Commission has been confronted with regulatory barriers or other forms of State intervention, constraints arising in downstream markets, need to incur specific capital investment or loss in current output in order to switch to alternative inputs, the location of customers, specific investment in production process, learning and human capital investment, retooling costs or other investments, uncertainty about quality and reputation of unknown suppliers, and others.

43. *Different categories of customers and price discrimination.* The extent of the product market might be narrowed in the presence of distinct groups of customers. A distinct group of customers for the relevant product may constitute a narrower, distinct market when such a group could be subject to price discrimination. This will usually be the case when two conditions are met: (a) it is possible to identify clearly which group an individual customer belongs to at the moment of selling the relevant products to him, and (b) trade among customers or arbitrage by third parties should not be feasible.

#### Evidence for defining markets — geographic dimension

44. The type of evidence the Commission considers relevant to reach a conclusion as to the geographic market can be categorized as follows:

45. *Past evidence of diversion of orders to other areas.* In certain cases, evidence on changes in prices between different areas and consequent reactions by customers might be available. Generally, the same quantitative tests used for product market definition might as well be used in geographic market definition, bearing in mind that international comparisons of prices might be more complex due to a number of factors such as exchange rate movements, taxation and product differentiation.

46. *Basic demand characteristics.* The nature of demand for the relevant product may in itself determine the scope of the geographical market. Factors such as national preferences or preferences for national brands, language, culture and life style, and the need for a local presence have a strong potential to limit the geographic scope of competition.

47. *Views of customers and competitors.* Where appropriate, the Commission will contact the main customers and competitors of the parties in its enquiries, to gather their views on the boundaries of the geographic market as well as most of the factual information it requires to reach a conclusion on the scope of the market when they are sufficiently backed by factual evidence.

48. *Current geographic pattern of purchases.* An examination of the customers' current geographic pattern of purchases provides useful evidence as to the possible scope of the geographic market. When customers purchase from companies located anywhere in the Community or the EEA on similar terms, or they procure their supplies through effective tendering procedures in which companies from anywhere in the Community or the EEA submit bids, usually the geographic market will be considered to be Community-wide.
49. *Trade flows/pattern of shipments.* When the number of customers is so large that it is not possible to obtain through them a clear picture of geographic purchasing patterns, information on trade flows might be used alternatively, provided that the trade statistics are available with a sufficient degree of detail for the relevant products. Trade flows, and above all, the rationale behind trade flows provide useful insights and information for the purpose of establishing the scope of the geographic market but are not in themselves conclusive.
50. *Barriers and switching costs associated to divert orders to companies located in other areas.* The absence of trans-border purchases or trade flows, for instance, does not necessarily mean that the market is at most national in scope. Still, barriers isolating the national market have to be identified before it is concluded that the relevant geographic market in such a case is national. Perhaps the clearest obstacle for a customer to divert its orders to other areas is the impact of transport costs and transport restrictions arising from legislation or from the nature of the relevant products. The impact of transport costs will usually limit the scope of the geographic market for bulky, low-value products, bearing in mind that a transport disadvantage might also be compensated by a comparative advantage in other costs (labour costs or raw materials). Access to distribution in a given area, regulatory barriers still existing in certain sectors, quotas and custom tariffs might also constitute barriers isolating a geographic area from the competitive pressure of companies located outside that area. Significant switching costs in procuring supplies from companies located in other countries constitute additional sources of such barriers.
51. On the basis of the evidence gathered, the Commission will then define a geographic market that could range from a local dimension to a global one, and there are examples of both local and global markets in past decisions of the Commission.
52. The paragraphs above describe the different factors which might be relevant to define markets. This does not imply that in each individual case it will be necessary to obtain evidence and assess each of these factors. Often in practice the evidence provided by a subset of these factors will be sufficient to reach a conclusion, as shown in the past decisional practice of the Commission.
- #### IV. CALCULATION OF MARKET SHARE
53. The definition of the relevant market in both its product and geographic dimensions allows the identification of the suppliers and the customers/consumers active on that market. On that basis, a total market size and market shares for each supplier can be calculated on the basis of their sales of the relevant products in the relevant area. In practice, the total market size and market shares are often available from market sources, i.e. companies' estimates, studies commissioned from industry consultants and/or trade associations. When this is not the case, or when available estimates are not reliable, the Commission will usually ask each supplier in the relevant market to provide its own sales in order to calculate total market size and market shares.
54. If sales are usually the reference to calculate market shares, there are nevertheless other indications that, depending on the specific products or industry in question, can offer useful information such as, in particular, capacity, the number of players in bidding markets, units of fleet as in aerospace, or the reserves held in the case of sectors such as mining.
55. As a rule of thumb, both volume sales and value sales provide useful information. In cases of differentiated products, sales in value and their associated market share will usually be considered to better reflect the relative position and strength of each supplier.
- #### V. ADDITIONAL CONSIDERATIONS
56. There are certain areas where the application of the principles above has to be undertaken with care. This is the case when considering primary and secondary markets, in particular, when the behaviour of undertakings at a point in time has to be analysed pursuant to Article 86. The method of defining markets in these cases is the same, i.e. assessing the responses of customers based on their purchasing decisions to relative price changes, but taking into account as well, constraints on substitution imposed



by conditions in the connected markets. A narrow definition of market for secondary products, for instance, spare parts, may result when compatibility with the primary product is important. Problems of finding compatible secondary products together with the existence of high prices and a long lifetime of the primary products may render relative price increases of secondary products profitable. A different market definition may result if significant substitution between secondary products is possible or if the characteristics of the primary products make quick and direct consumer responses to relative price increases of the secondary products feasible.

57. In certain cases, the existence of chains of substitution might lead to the definition of a relevant market where products or areas at the extreme of the market are not directly substitutable. An example might be provided by the geographic dimension of a product with significant transport costs. In such cases, deliveries from a given plant are limited to a certain area around each plant by the impact of

transport costs. In principle, such an area could constitute the relevant geographic market. However, if the distribution of plants is such that there are considerable overlaps between the areas around different plants, it is possible that the pricing of those products will be constrained by a chain substitution effect, and lead to the definition of a broader geographic market. The same reasoning may apply if product B is a demand substitute for products A and C. Even if products A and C are not direct demand substitutes, they might be found to be in the same relevant product market since their respective pricing might be constrained by substitution to B.

58. From a practical perspective, the concept of chains of substitution has to be corroborated by actual evidence, for instance related to price interdependence at the extremes of the chains of substitution, in order to lead to an extension of the relevant market in an individual case. Price levels at the extremes of the chains would have to be of the same magnitude as well.

**Notice on agreements of minor importance which do not fall within the meaning of  
Article 85 (1) of the Treaty establishing the European Community**

(97/C 372/04)

(Text with EEA relevance)

I.

1. The Commission considers it important to facilitate cooperation between undertakings where such cooperation is economically desirable without presenting difficulties from the point of view of competition policy. To this end, it published the notice concerning agreements, decisions and concerted practices in the field of cooperation between enterprises<sup>(1)</sup> listing a number of agreements that by their nature cannot be regarded as being in restraint of competition. Furthermore, in the notice concerning its assessment of certain subcontracting agreements<sup>(2)</sup> the Commission considered that that type of contract, which offers all undertakings opportunities for development, does not automatically fall within the scope of Article 85 (1). The notice concerning the assessment of cooperative joint ventures pursuant to Article 85 of the EC Treaty<sup>(3)</sup> describes in detail the conditions

under which the agreements in question do not fall under the prohibition of restrictive agreements. By issuing this notice which replaces the Commission notice of 3 September 1986<sup>(4)</sup>, the Commission is taking a further step towards defining the scope of Article 85 (1), in order to facilitate cooperation between undertakings.

2. Article 85 (1) prohibits agreements which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. The Court of Justice of the European Communities has clarified that this provision is not applicable where the impact of the agreement on intra-Community trade or on competition is not appreciable. Agreements which are not capable of significantly affecting trade between Member States are not caught by Article 85. They should therefore be examined on the basis, and within the framework, of national legislation alone. This is also the case for

<sup>(1)</sup> OJ C 75, 29. 7. 1968. p. 3, as corrected in OJ C 84, 28. 8. 1968, p. 14.

<sup>(2)</sup> OJ C 1, 3. 1. 1979, p. 2.

<sup>(3)</sup> OJ C 43, 16. 2. 1993, p. 2.

<sup>(4)</sup> OJ C 231, 12. 9. 1986, p. 2.

**Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*)<sup>(1)</sup>**

(2001/C 368/07)

(Text with EEA relevance)

**I**

1. Article 81(1) prohibits agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. The Court of Justice of the European Communities has clarified that this provision is not applicable where the impact of the agreement on intra Community trade or on competition is not appreciable.
2. In this notice the Commission quantifies, with the help of market share thresholds, what is not an appreciable restriction of competition under Article 81 of the EC Treaty. This negative definition of appreciability does not imply that agreements between undertakings which exceed the thresholds set out in this notice appreciably restrict competition. Such agreements may still have only a negligible effect on competition and may therefore not be prohibited by Article 81(1)<sup>(2)</sup>.
3. Agreements may in addition not fall under Article 81(1) because they are not capable of appreciably affecting trade between Member States. This notice does not deal with this issue. It does not quantify what does not constitute an appreciable effect on trade. It is however acknowledged that agreements between small and medium sized undertakings, as defined in the Annex to Commission Recommendation 96/280/EC<sup>(3)</sup>, are rarely capable of appreciably affecting trade between Member States. Small and medium sized undertakings are currently defined in that recommendation as undertakings which have fewer than 250 employees and have either an annual turnover not exceeding EUR 40 million or an annual balance sheet total not exceeding EUR 27 million.
4. In cases covered by this notice the Commission will not institute proceedings either upon application or on its own initiative. Where undertakings assume in good faith that an

agreement is covered by this notice, the Commission will not impose fines. Although not binding on them, this notice also intends to give guidance to the courts and authorities of the Member States in their application of Article 81.

5. This notice also applies to decisions by associations of undertakings and to concerted practices.
6. This notice is without prejudice to any interpretation of Article 81 which may be given by the Court of Justice or the Court of First Instance of the European Communities.

**II**

7. The Commission holds the view that agreements between undertakings which affect trade between Member States do not appreciably restrict competition within the meaning of Article 81(1):
  - (a) if the aggregate market share held by the parties to the agreement does not exceed 10 % on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are actual or potential competitors on any of these markets (agreements between competitors)<sup>(4)</sup>; or
  - (b) if the market share held by each of the parties to the agreement does not exceed 15 % on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are not actual or potential competitors on any of these markets (agreements between non competitors).

In cases where it is difficult to classify the agreement as either an agreement between competitors or an agreement between non competitors the 10 % threshold is applicable.

<sup>(1)</sup> This notice replaces the notice on agreements of minor importance published in OJ C 372, 9.12.1997.

<sup>(2)</sup> See, for instance, the judgment of the Court of Justice in Joined Cases C 215/96 and C 216/96 *Bagnasco (Carlos) v Banca Popolare di Novara and Casa di Risparmio di Genova e Imperia* (1999) ECR I 135, points 34-35. This notice is also without prejudice to the principles for assessment under Article 81(1) as expressed in the Commission notice 'Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements', OJ C 3, 6.1.2001, in particular points 17-31 inclusive, and in the Commission notice 'Guidelines on vertical restraints', OJ C 291, 13.10.2000, in particular points 5-20 inclusive.

<sup>(3)</sup> OJ L 107, 30.4.1996, p. 4. This recommendation will be revised. It is envisaged to increase the annual turnover threshold from EUR 40 million to EUR 50 million and the annual balance sheet total threshold from EUR 27 million to EUR 43 million.

<sup>(4)</sup> On what are actual or potential competitors, see the Commission notice 'Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements', OJ C 3, 6.1.2001, paragraph 9. A firm is treated as an actual competitor if it is either active on the same relevant market or if, in the absence of the agreement, it is able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to a small and permanent increase in relative prices (immediate supply side substitutability). A firm is treated as a potential competitor if there is evidence that, absent the agreement, this firm could and would be likely to undertake the necessary additional investments or other necessary switching costs so that it could enter the relevant market in response to a small and permanent increase in relative prices.

8. Where in a relevant market competition is restricted by the cumulative effect of agreements for the sale of goods or services entered into by different suppliers or distributors (cumulative foreclosure effect of parallel networks of agreements having similar effects on the market), the market share thresholds under point 7 are reduced to 5 %, both for agreements between competitors and for agreements between non competitors. Individual suppliers or distributors with a market share not exceeding 5 % are in general not considered to contribute significantly to a cumulative foreclosure effect <sup>(1)</sup>. A cumulative foreclosure effect is unlikely to exist if less than 30 % of the relevant market is covered by parallel (networks of) agreements having similar effects.
9. The Commission also holds the view that agreements are not restrictive of competition if the market shares do not exceed the thresholds of respectively 10 %, 15 % and 5 % set out in point 7 and 8 during two successive calendar years by more than 2 percentage points.
10. In order to calculate the market share, it is necessary to determine the relevant market. This consists of the relevant product market and the relevant geographic market. When defining the relevant market, reference should be had to the notice on the definition of the relevant market for the purposes of Community competition law <sup>(2)</sup>. The market shares are to be calculated on the basis of sales value data or, where appropriate, purchase value data. If value data are not available, estimates based on other reliable market information, including volume data, may be used.
11. Points 7, 8 and 9 do not apply to agreements containing any of the following hardcore restrictions:
- (1) as regards agreements between competitors as defined in point 7, restrictions which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object <sup>(3)</sup>:
    - (a) the fixing of prices when selling the products to third parties;
    - (b) the limitation of output or sales;
    - (c) the allocation of markets or customers;
  - (2) as regards agreements between non competitors as defined in point 7, restrictions which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:
    - (a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier imposing a maximum sale price or recommending a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;
    - (b) the restriction of the territory into which, or of the customers to whom, the buyer may sell the contract goods or services, except the following restrictions which are not hardcore:
      - the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer,
      - the restriction of sales to end users by a buyer operating at the wholesale level of trade,
      - the restriction of sales to unauthorised distributors by the members of a selective distribution system, and
      - the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;
    - (c) the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment;
    - (d) the restriction of cross supplies between distributors within a selective distribution system, including between distributors operating at different levels of trade;

<sup>(1)</sup> See also the Commission notice 'Guidelines on vertical restraints', OJ C 291, 13.10.2000, in particular paragraphs 73, 142, 143 and 189. While in the guidelines on vertical restraints in relation to certain restrictions reference is made not only to the total but also to the tied market share of a particular supplier or buyer, in this notice all market share thresholds refer to total market shares.

<sup>(2)</sup> OJ C 372, 9.12.1997, p. 5.

<sup>(3)</sup> Without prejudice to situations of joint production with or without joint distribution as defined in Article 5, paragraph 2, of Commission Regulation (EC) No 2658/2000 and Article 5, paragraph 2, of Commission Regulation (EC) No 2659/2000, OJ L 304, 5.12.2000, pp. 3 and 7 respectively.

- (e) the restriction agreed between a supplier of components and a buyer who incorporates those components, which limits the supplier's ability to sell the components as spare parts to end users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods;
- (3) as regards agreements between competitors as defined in point 7, where the competitors operate, for the purposes of the agreement, at a different level of the production or distribution chain, any of the hardcore restrictions listed in paragraph (1) and (2) above.
12. (1) For the purposes of this notice, the terms 'undertaking', 'party to the agreement', 'distributor', 'supplier' and 'buyer' shall include their respective connected undertakings.
- (2) 'Connected undertakings' are:
- (a) undertakings in which a party to the agreement, directly or indirectly:
- has the power to exercise more than half the voting rights, or
  - has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or
  - has the right to manage the undertaking's affairs;
- (b) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in (a);
- (c) undertakings in which an undertaking referred to in (b) has, directly or indirectly, the rights or powers listed in (a);
- (d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in (a);
- (e) undertakings in which the rights or the powers listed in (a) are jointly held by:
- parties to the agreement or their respective connected undertakings referred to in (a) to (d), or
  - one or more of the parties to the agreement or one or more of their connected undertakings referred to in (a) to (d) and one or more third parties.
- (3) For the purposes of paragraph 2(e), the market share held by these jointly held undertakings shall be apportioned equally to each undertaking having the rights or the powers listed in paragraph 2(a).
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## COMMISSION NOTICE

## Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty

(2004/C 101/07)

(Text with EEA relevance)

## 1. INTRODUCTION

1. Articles 81 and 82 of the Treaty are applicable to horizontal and vertical agreements and practices on the part of undertakings which 'may affect trade between Member States'.
2. In their interpretation of Articles 81 and 82, the Community Courts have already substantially clarified the content and scope of the concept of effect on trade between Member States.
3. The present guidelines set out the principles developed by the Community Courts in relation to the interpretation of the effect on trade concept of Articles 81 and 82. They further spell out a rule indicating when agreements are in general unlikely to be capable of appreciably affecting trade between Member States (the non-appreciable affectation of trade rule or NAAT-rule). The guidelines are not intended to be exhaustive. The aim is to set out the methodology for the application of the effect on trade concept and to provide guidance on its application in frequently occurring situations. Although not binding on them, these guidelines also intend to give guidance to the courts and authorities of the Member States in their application of the effect on trade concept contained in Articles 81 and 82.
4. The present guidelines do not address the issue of what constitutes an appreciable restriction of competition under Article 81(1). This issue, which is distinct from the ability of agreements to appreciably affect trade between Member States, is dealt with in the Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty<sup>(1)</sup> (the *de minimis* rule). The guidelines are also not intended to provide guidance on the effect on trade concept contained in Article 87(1) of the Treaty on State aid.
5. These guidelines, including the NAAT-rule, are without prejudice to the interpretation of Articles 81 and 82 which may be given by the Court of Justice and the Court of First Instance.

## 2. THE EFFECT ON TRADE CRITERION

## 2.1. General principles

6. Article 81(1) provides that 'the following shall be prohibited as incompatible with the common market:

all agreements between undertakings, decisions of associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market'. For the sake of simplicity the terms 'agreements, decisions of associations of undertakings and concerted practices' are collectively referred to as 'agreements'.

7. Article 82 on its part stipulates that 'any abuse by one or more undertakings of a dominant position within the common market or in a substantial part thereof shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.' In what follows the term 'practices' refers to the conduct of dominant undertakings.
8. The effect on trade criterion also determines the scope of application of Article 3 of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty<sup>(2)</sup>.
9. According to Article 3(1) of that Regulation the competition authorities and courts of the Member States must apply Article 81 to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, when they apply national competition law to such agreements, decisions or concerted practices. Similarly, when the competition authorities and courts of the Member States apply national competition law to any abuse prohibited by Article 82 of the Treaty, they must also apply Article 82 of the Treaty. Article 3(1) thus obliges the competition authorities and courts of the Member States to also apply Articles 81 and 82 when they apply national competition law to agreements and abusive practices which may affect trade between Member States. On the other hand, Article 3(1) does not oblige national competition authorities and courts to apply national competition law when they apply Articles 81 and 82 to agreements, decisions and concerted practices and to abuses which may affect trade between Member States. They may in such cases apply the Community competition rules on a stand alone basis.

10. It follows from Article 3(2) that the application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty. Member States, however, are not under Regulation 1/2003 precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.
11. Finally it should be mentioned that Article 3(3) stipulates that without prejudice to general principles and other provisions of Community law, Article 3(1) and (2) do not apply when the competition authorities and the courts of the Member States apply national merger control laws, nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty.
12. The effect on trade criterion is an autonomous Community law criterion, which must be assessed separately in each case. It is a jurisdictional criterion, which defines the scope of application of Community competition law <sup>(3)</sup>. Community competition law is not applicable to agreements and practices that are not capable of appreciably affecting trade between Member States.
13. The effect on trade criterion confines the scope of application of Articles 81 and 82 to agreements and practices that are capable of having a minimum level of cross-border effects within the Community. In the words of the Court of Justice, the ability of the agreement or practice to affect trade between Member States must be 'appreciable' <sup>(4)</sup>.
14. In the case of Article 81 of the Treaty, it is the agreement that must be capable of affecting trade between Member States. It is not required that each individual part of the agreement, including any restriction of competition which may flow from the agreement, is capable of doing so <sup>(5)</sup>. If the agreement as a whole is capable of affecting trade between Member States, there is Community law jurisdiction in respect of the entire agreement, including any parts of the agreement that individually do not affect trade between Member States. In cases where the contractual relations between the same parties cover several activities, these activities must, in order to form part of the same agreement, be directly linked and form an integral part of the same overall business arrangement <sup>(6)</sup>. If not, each activity constitutes a separate agreement.
15. It is also immaterial whether or not the participation of a particular undertaking in the agreement has an appreciable effect on trade between Member States <sup>(7)</sup>. An undertaking cannot escape Community law jurisdiction merely because of the fact that its own contribution to an agreement, which itself is capable of affecting trade between Member States, is insignificant.
16. It is not necessary, for the purposes of establishing Community law jurisdiction, to establish a link between the alleged restriction of competition and the capacity of the agreement to affect trade between Member States. Non-restrictive agreements may also affect trade between Member States. For example, selective distribution agreements based on purely qualitative selection criteria justified by the nature of the products, which are not restrictive of competition within the meaning of Article 81(1), may nevertheless affect trade between Member States. However, the alleged restrictions arising from an agreement may provide a clear indication as to the capacity of the agreement to affect trade between Member States. For instance, a distribution agreement prohibiting exports is by its very nature capable of affecting trade between Member States, although not necessarily to an appreciable extent <sup>(8)</sup>.
17. In the case of Article 82 it is the abuse that must affect trade between Member States. This does not imply, however, that each element of the behaviour must be assessed in isolation. Conduct that forms part of an overall strategy pursued by the dominant undertaking must be assessed in terms of its overall impact. Where a dominant undertaking adopts various practices in pursuit of the same aim, for instance practices that aim at eliminating or foreclosing competitors, in order for Article 82 to be applicable to all the practices forming part of this overall strategy, it is sufficient that at least one of these practices is capable of affecting trade between Member States <sup>(9)</sup>.
18. It follows from the wording of Articles 81 and 82 and the case law of the Community Courts that in the application of the effect on trade criterion three elements in particular must be addressed:
  - (a) The concept of 'trade between Member States',
  - (b) The notion of 'may affect', and
  - (c) The concept of 'appreciability'.

## 2.2. The concept of 'trade between Member States'

19. The concept of 'trade' is not limited to traditional exchanges of goods and services across borders<sup>(10)</sup>. It is a wider concept, covering all cross-border economic activity including establishment<sup>(11)</sup>. This interpretation is consistent with the fundamental objective of the Treaty to promote free movement of goods, services, persons and capital.
20. According to settled case law the concept of 'trade' also encompasses cases where agreements or practices affect the competitive structure of the market. Agreements and practices that affect the competitive structure inside the Community by eliminating or threatening to eliminate a competitor operating within the Community may be subject to the Community competition rules<sup>(12)</sup>. When an undertaking is or risks being eliminated the competitive structure within the Community is affected and so are the economic activities in which the undertaking is engaged.
21. The requirement that there must be an effect on trade 'between Member States' implies that there must be an impact on cross-border economic activity involving at least two Member States. It is not required that the agreement or practice affect trade between the whole of one Member State and the whole of another Member State. Articles 81 and 82 may be applicable also in cases involving part of a Member State, provided that the effect on trade is appreciable<sup>(13)</sup>.
22. The application of the effect on trade criterion is independent of the definition of relevant geographic markets. Trade between Member States may be affected also in cases where the relevant market is national or sub-national<sup>(14)</sup>.

## 2.3. The notion 'may affect'

23. The function of the notion 'may affect' is to define the nature of the required impact on trade between Member States. According to the standard test developed by the Court of Justice, the notion 'may affect' implies that it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement or practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States<sup>(15)</sup><sup>(16)</sup>. As mentioned in paragraph 20 above the Court of Justice has in addition developed a test based on whether or not the agreement or practice affects the competitive structure. In cases where the agreement or practice is liable to affect the competitive structure inside the Community, Community law jurisdiction is established.

24. The 'pattern of trade'-test developed by the Court of Justice contains the following main elements, which are dealt with in the following sections:

- (a) 'A sufficient degree of probability on the basis of a set of objective factors of law or fact',
- (b) An influence on the 'pattern of trade between Member States',
- (c) 'A direct or indirect, actual or potential influence' on the pattern of trade.

### 2.3.1. A sufficient degree of probability on the basis of a set of objective factors of law or fact

25. The assessment of effect on trade is based on objective factors. Subjective intent on the part of the undertakings concerned is not required. If, however, there is evidence that undertakings have intended to affect trade between Member States, for example because they have sought to hinder exports to or imports from other Member States, this is a relevant factor to be taken into account.
26. The words 'may affect' and the reference by the Court of Justice to 'a sufficient degree of probability' imply that, in order for Community law jurisdiction to be established, it is not required that the agreement or practice will actually have or has had an effect on trade between Member States. It is sufficient that the agreement or practice is 'capable' of having such an effect<sup>(17)</sup>.
27. There is no obligation or need to calculate the actual volume of trade between Member States affected by the agreement or practice. For example, in the case of agreements prohibiting exports to other Member States there is no need to estimate what would have been the level of parallel trade between the Member States concerned, in the absence of the agreement. This interpretation is consistent with the jurisdictional nature of the effect on trade criterion. Community law jurisdiction extends to categories of agreements and practices that are capable of having cross-border effects, irrespective of whether a particular agreement or practice actually has such effects.
28. The assessment under the effect on trade criterion depends on a number of factors that individually may not be decisive<sup>(18)</sup>. The relevant factors include the nature of the agreement and practice, the nature of the products covered by the agreement or practice and the position and importance of the undertakings concerned<sup>(19)</sup>.

29. The nature of the agreement and practice provides an indication from a qualitative point of view of the ability of the agreement or practice to affect trade between Member States. Some agreements and practices are by their very nature capable of affecting trade between Member States, whereas others require more detailed analysis in this respect. Cross-border cartels are an example of the former, whereas joint ventures confined to the territory of a single Member State are an example of the latter. This aspect is further examined in section 3 below, which deals with various categories of agreements and practices.
30. The nature of the products covered by the agreements or practices also provides an indication of whether trade between Member States is capable of being affected. When by their nature products are easily traded across borders or are important for undertakings that want to enter or expand their activities in other Member States, Community jurisdiction is more readily established than in cases where due to their nature there is limited demand for products offered by suppliers from other Member States or where the products are of limited interest from the point of view of cross-border establishment or the expansion of the economic activity carried out from such place of establishment<sup>(20)</sup>. Establishment includes the setting-up by undertakings in one Member State of agencies, branches or subsidiaries in another Member State.
31. The market position of the undertakings concerned and their sales volumes are indicative from a quantitative point of view of the ability of the agreement or practice concerned to affect trade between Member States. This aspect, which forms an integral part of the assessment of appreciability, is addressed in section 2.4 below.
32. In addition to the factors already mentioned, it is necessary to take account of the legal and factual environment in which the agreement or practice operates. The relevant economic and legal context provides insight into the potential for an effect on trade between Member States. If there are absolute barriers to cross-border trade between Member States, which are external to the agreement or practice, trade is only capable of being affected if those barriers are likely to disappear in the foreseeable future. In cases where the barriers are not absolute but merely render cross-border activities more difficult, it is of the utmost importance to ensure that agreements and practices do not further hinder such activities. Agreements and practices that do so are capable of affecting trade between Member States.
- 2.3.2. *An influence on the 'pattern of trade between Member States'*
33. For Articles 81 and 82 to be applicable there must be an influence on the 'pattern of trade between Member States'.
34. The term 'pattern of trade' is neutral. It is not a condition that trade be restricted or reduced<sup>(21)</sup>. Patterns of trade can also be affected when an agreement or practice causes an increase in trade. Indeed, Community law jurisdiction is established if trade between Member States is likely to develop differently with the agreement or practice compared to the way in which it would probably have developed in the absence of the agreement or practice<sup>(22)</sup>.
35. This interpretation reflects the fact that the effect on trade criterion is a jurisdictional one, which serves to distinguish those agreements and practices which are capable of having cross-border effects, so as to warrant an examination under the Community competition rules, from those agreements and practices which do not.
- 2.3.3. *A 'direct or indirect, actual or potential influence' on the pattern of trade*
36. The influence of agreements and practices on patterns of trade between Member States can be 'direct or indirect, actual or potential'.
37. Direct effects on trade between Member States normally occur in relation to the products covered by an agreement or practice. When, for example, producers of a particular product in different Member States agree to share markets, direct effects are produced on trade between Member States on the market for the products in question. Another example of direct effects being produced is when a supplier limits distributor rebates to products sold within the Member State in which the distributors are established. Such practices increase the relative price of products destined for exports, rendering export sales less attractive and less competitive.
38. Indirect effects often occur in relation to products that are related to those covered by an agreement or practice. Indirect effects may, for example, occur where an agreement or practice has an impact on cross-border economic activities of undertakings that use or otherwise rely on the products covered by the agreement or practice<sup>(23)</sup>. Such effects can, for instance, arise where the agreement or practice relates to an intermediate product, which is not traded, but



which is used in the supply of a final product, which is traded. The Court of Justice has held that trade between Member States was capable of being affected in the case of an agreement involving the fixing of prices of spirits used in the production of cognac <sup>(24)</sup>. Whereas the raw material was not exported, the final product — cognac — was exported. In such cases Community competition law is thus applicable, if trade in the final product is capable of being appreciably affected.

39. Indirect effects on trade between Member States may also occur in relation to the products covered by the agreement or practice. For instance, agreements whereby a manufacturer limits warranties to products sold by distributors within their Member State of establishment create disincentives for consumers from other Member States to buy the products because they would not be able to invoke the warranty <sup>(25)</sup>. Export by official distributors and parallel traders is made more difficult because in the eyes of consumers the products are less attractive without the manufacturer's warranty <sup>(26)</sup>.

40. Actual effects on trade between Member States are those that are produced by the agreement or practice once it is implemented. An agreement between a supplier and a distributor within the same Member State, for instance one that prohibits exports to other Member States, is likely to produce actual effects on trade between Member States. Without the agreement the distributor would have been free to engage in export sales. It should be recalled, however, that it is not required that actual effects are demonstrated. It is sufficient that the agreement or practice be capable of having such effects.

41. Potential effects are those that may occur in the future with a sufficient degree of probability. In other words, foreseeable market developments must be taken into account <sup>(27)</sup>. Even if trade is not capable of being affected at the time the agreement is concluded or the practice is implemented, Articles 81 and 82 remain applicable if the factors which led to that conclusion are likely to change in the foreseeable future. In this respect it is relevant to consider the impact of liberalisation measures adopted by the Community or by the Member State in question and other foreseeable measures aiming at eliminating legal barriers to trade.

42. Moreover, even if at a given point in time market conditions are unfavourable to cross-border trade, for example because prices are similar in the Member States in question, trade may still be capable of being

affected if the situation may change as a result of changing market conditions <sup>(28)</sup>. What matters is the ability of the agreement or practice to affect trade between Member States and not whether at any given point in time it actually does so.

43. The inclusion of indirect or potential effects in the analysis of effects on trade between Member States does not mean that the analysis can be based on remote or hypothetical effects. The likelihood of a particular agreement to produce indirect or potential effects must be explained by the authority or party claiming that trade between Member States is capable of being appreciably affected. Hypothetical or speculative effects are not sufficient for establishing Community law jurisdiction. For instance, an agreement that raises the price of a product which is not tradable reduces the disposable income of consumers. As consumers have less money to spend they may purchase fewer products imported from other Member States. However, the link between such income effects and trade between Member States is generally in itself too remote to establish Community law jurisdiction.

## 2.4. The concept of appreciability

### 2.4.1. General principle

44. The effect on trade criterion incorporates a quantitative element, limiting Community law jurisdiction to agreements and practices that are capable of having effects of a certain magnitude. Agreements and practices fall outside the scope of application of Articles 81 and 82 when they affect the market only insignificantly having regard to the weak position of the undertakings concerned on the market for the products in question <sup>(29)</sup>. Appreciability can be appraised in particular by reference to the position and the importance of the relevant undertakings on the market for the products concerned <sup>(30)</sup>.

45. The assessment of appreciability depends on the circumstances of each individual case, in particular the nature of the agreement and practice, the nature of the products covered and the market position of the undertakings concerned. When by its very nature the agreement or practice is capable of affecting trade between Member States, the appreciability threshold is lower than in the case of agreements and practices that are not by their very nature capable of affecting trade between Member States. The stronger the market position of the undertakings concerned, the more likely it is that an agreement or practice capable of affecting trade between Member States can be held to do so appreciably <sup>(31)</sup>.

46. In a number of cases concerning imports and exports the Court of Justice has considered that the appreciability requirement was fulfilled when the sales of the undertakings concerned accounted for about 5 % of the market <sup>(32)</sup>. Market share alone, however, has not always been considered the decisive factor. In particular, it is necessary also to take account of the turnover of the undertakings in the products concerned <sup>(33)</sup>.
47. Appreciability can thus be measured both in absolute terms (turnover) and in relative terms, comparing the position of the undertaking(s) concerned to that of other players on the market (market share). This focus on the position and importance of the undertakings concerned is consistent with the concept 'may affect', which implies that the assessment is based on the ability of the agreement or practice to affect trade between Member States rather than on the impact on actual flows of goods and services across borders. The market position of the undertakings concerned and their turnover in the products concerned are indicative of the ability of an agreement or practice to affect trade between Member States. These two elements are reflected in the presumptions set out in paragraphs and 53 below.
48. The application of the appreciability test does not necessarily require that relevant markets be defined and market shares calculated <sup>(34)</sup>. The sales of an undertaking in absolute terms may be sufficient to support a finding that the impact on trade is appreciable. This is particularly so in the case of agreements and practices that by their very nature are liable to affect trade between Member States, for example because they concern imports or exports or because they cover several Member States. The fact that in such circumstances turnover in the products covered by the agreement may be sufficient for a finding of an appreciable effect on trade between Member States is reflected in the positive presumption set out in paragraph below.
49. Agreements and practices must always be considered in the economic and legal context in which they occur. In the case of vertical agreements it may be necessary to have regard to any cumulative effects of parallel networks of similar agreements <sup>(35)</sup>. Even if a single agreement or network of agreements is not capable of appreciably affecting trade between Member States, the effect of parallel networks of agreements, taken as a whole, may be capable of doing so. For that to be the case, however, it is necessary that the individual agreement or network of agreements makes a significant contribution to the overall effect on trade <sup>(36)</sup>.
- 2.4.2. Quantification of appreciability
50. It is not possible to establish general quantitative rules covering all categories of agreements indicating when trade between Member States is capable of being appreciably affected. It is possible, however, to indicate when trade is normally not capable of being appreciably affected. Firstly, in its notice on agreements of minor importance which do not appreciably restrict competition in the meaning of Article 81(1) of the Treaty (the *de minimis* rule) <sup>(37)</sup> the Commission has stated that agreements between small and medium-sized undertakings (SMEs) as defined in the Annex to Commission Recommendation 96/280/EC <sup>(38)</sup> are normally not capable of affecting trade between Member States. The reason for this presumption is the fact that the activities of SMEs are normally local or at most regional in nature. However, SMEs may be subject to Community law jurisdiction in particular where they engage in cross-border economic activity. Secondly, the Commission considers it appropriate to set out general principles indicating when trade is normally not capable of being appreciably affected, i.e. a standard defining the absence of an appreciable effect on trade between Member States (the NAAT-rule). When applying Article 81, the Commission will consider this standard as a negative rebuttable presumption applying to all agreements within the meaning of Article 81(1) irrespective of the nature of the restrictions contained in the agreement, including restrictions that have been identified as hardcore restrictions in Commission block exemption regulations and guidelines. In cases where this presumption applies the Commission will normally not institute proceedings either upon application or on its own initiative. Where the undertakings assume in good faith that an agreement is covered by this negative presumption, the Commission will not impose fines.
51. Without prejudice to paragraph below, this negative definition of appreciability does not imply that agreements, which do not fall within the criteria set out below, are automatically capable of appreciably affecting trade between Member States. A case by case analysis is necessary.
52. The Commission holds the view that in principle agreements are not capable of appreciably affecting trade between Member States when the following cumulative conditions are met:
- (a) The aggregate market share of the parties on any relevant market within the Community affected by the agreement does not exceed 5 %, and
  - (b) In the case of horizontal agreements, the aggregate annual Community turnover of the undertakings concerned <sup>(39)</sup> in the products covered by the agreement does not exceed 40 million euro. In the case of agreements concerning the joint buying of products the relevant turnover shall be the parties' combined purchases of the products covered by the agreement.

In the case of vertical agreements, the aggregate annual Community turnover of the supplier in the products covered by the agreement does not exceed 40 million euro. In the case of licence agreements the relevant turnover shall be the aggregate turnover of the licensees in the products incorporating the licensed technology and the licensor's own turnover in such products. In cases involving agreements concluded between a buyer and several suppliers the relevant turnover shall be the buyer's combined purchases of the products covered by the agreements.

The Commission will apply the same presumption where during two successive calendar years the above turnover threshold is not exceeded by more than 10 % and the above market threshold is not exceeded by more than 2 percentage points. In cases where the agreement concerns an emerging not yet existing market and where as a consequence the parties neither generate relevant turnover nor accumulate any relevant market share, the Commission will not apply this presumption. In such cases appreciability may have to be assessed on the basis of the position of the parties on related product markets or their strength in technologies relating to the agreement.

53. The Commission will also hold the view that where an agreement by its very nature is capable of affecting trade between Member States, for example, because it concerns imports and exports or covers several Member States, there is a rebuttable positive presumption that such effects on trade are appreciable when the turnover of the parties in the products covered by the agreement calculated as indicated in paragraphs 52 and 54 exceeds 40 million euro. In the case of agreements that by their very nature are capable of affecting trade between Member States it can also often be presumed that such effects are appreciable when the market share of the parties exceeds the 5 % threshold set out in the previous paragraph. However, this presumption does not apply where the agreement covers only part of a Member State (see paragraph 90 below).

54. With regard to the threshold of 40 million euro (cf. paragraph 52 above), the turnover is calculated on the basis of total Community sales excluding tax during the previous financial year by the undertakings concerned, of the products covered by the agreement (the contract products). Sales between entities that form part of the same undertaking are excluded <sup>(40)</sup>.

55. In order to apply the market share threshold, it is necessary to determine the relevant market <sup>(41)</sup>. This

consists of the relevant product market and the relevant geographic market. The market shares are to be calculated on the basis of sales value data or, where appropriate, purchase value data. If value data are not available, estimates based on other reliable market information, including volume data, may be used.

56. In the case of networks of agreements entered into by the same supplier with different distributors, sales made through the entire network are taken into account.

57. Contracts that form part of the same overall business arrangement constitute a single agreement for the purposes of the NAAT-rule <sup>(42)</sup>. Undertakings cannot bring themselves inside these thresholds by dividing up an agreement that forms a whole from an economic perspective.

### 3. THE APPLICATION OF THE ABOVE PRINCIPLES TO COMMON TYPES OF AGREEMENTS AND ABUSES

58. The Commission will apply the negative presumption set out in the preceding section to all agreements, including agreements that by their very nature are capable of affecting trade between Member States as well as agreements that involve trade with undertakings located in third countries (cf. section 3.3 below).

59. Outside the scope of negative presumption, the Commission will take account of qualitative elements relating to the nature of the agreement or practice and the nature of the products that they concern (see paragraphs and above). The relevance of the nature of the agreement is also reflected in the positive presumption set out in paragraph 53 above relating to appreciability in the case of agreements that by their very nature are capable of affecting trade between Member States. With a view to providing additional guidance on the application of the effect on trade concept it is therefore useful to consider various common types of agreements and practices.

60. In the following sections a primary distinction is drawn between agreements and practices that cover several Member States and agreements and practices that are confined to a single Member State or to part of a single Member State. These two main categories are broken down into further subcategories based on the nature of the agreement or practice involved. Agreements and practices involving third countries are also dealt with.

### 3.1. Agreements and abuse covering or implemented in several Member States

61. Agreements and practices covering or implemented in several Member States are in almost all cases by their very nature capable of affecting trade between Member States. When the relevant turnover exceeds the threshold set out in paragraph above it will therefore in most cases not be necessary to conduct a detailed analysis of whether trade between Member States is capable of being affected. However, in order to provide guidance also in these cases and to illustrate the principles developed in section 2 above, it is useful to explain what are the factors that are normally used to support a finding of Community law jurisdiction.

#### 3.1.1. Agreements concerning imports and exports

62. Agreements between undertakings in two or more Member States that concern imports and exports are by their very nature capable of affecting trade between Member States. Such agreements, irrespective of whether they are restrictive of competition or not, have a direct impact on patterns of trade between Member States. In *Kerpen & Kerpen*, for example, which concerned an agreement between a French producer and a German distributor covering more than 10 % of exports of cement from France to Germany, amounting in total to 350 000 tonnes per year, the Court of Justice held that it was impossible to take the view that such an agreement was not capable of (appreciably) affecting trade between Member States <sup>(43)</sup>.

63. This category includes agreements that impose restrictions on imports and exports, including restrictions on active and passive sales and resale by buyers to customers in other Member States <sup>(44)</sup>. In these cases there is an inherent link between the alleged restriction of competition and the effect on trade, since the very purpose of the restriction is to prevent flows of goods and services between Member States, which would otherwise be possible. It is immaterial whether the parties to the agreement are located in the same Member State or in different Member States.

#### 3.1.2. Cartels covering several Member States

64. Cartel agreements such as those involving price fixing and market sharing covering several Member States are by their very nature capable of affecting trade between Member States. Cross-border cartels harmonise the conditions of competition and affect the interpenetration of trade by cementing traditional patterns of trade <sup>(45)</sup>.

When undertakings agree to allocate geographic territories, sales from other areas into the allocated territories are capable of being eliminated or reduced. When undertakings agree to fix prices, they eliminate competition and any resulting price differentials that would entice both competitors and customers to engage in cross-border trade. When undertakings agree on sales quotas traditional patterns of trade are preserved. The undertakings concerned abstain from expanding output and thereby from serving potential customers in other Member States.

65. The effect on trade produced by cross-border cartels is generally also by its very nature appreciable due to the market position of the parties to the cartel. Cartels are normally only formed when the participating undertakings together hold a large share of the market, as this allows them to raise price or reduce output.

#### 3.1.3. Horizontal cooperation agreements covering several Member States

66. This section covers various types of horizontal cooperation agreements. Horizontal cooperation agreements may for instance take the form of agreements whereby two or more undertakings cooperate in the performance of a particular economic activity such as production and distribution <sup>(46)</sup>. Often such agreements are referred to as joint ventures. However, joint ventures that perform on a lasting basis all the functions of an autonomous economic entity are covered by the Merger Regulation <sup>(47)</sup>. At the level of the Community such full function joint ventures are not dealt with under Articles 81 and 82 except in cases where Article 2(4) of the Merger Regulation is applicable <sup>(48)</sup>. This section therefore does not deal with full-function joint ventures. In the case of non-full function joint ventures the joint entity does not operate as an autonomous supplier (or buyer) on any market. It merely serves the parents, who themselves operate on the market <sup>(49)</sup>.

67. Joint ventures which engage in activities in two or more Member States or which produce an output that is sold by the parents in two or more Member States affect the commercial activities of the parties in those areas of the Community. Such agreements are therefore normally by their very nature capable of affecting trade between Member States compared to the situation without the agreement <sup>(50)</sup>. Patterns of trade are affected when undertakings switch their activities to the joint venture or use it for the purpose of establishing a new source of supply in the Community.

68. Trade may also be capable of being affected where a joint venture produces an input for the parent companies, which is subsequently further processed or incorporated into a product by the parent undertakings. This is likely to be the case where the input in question was previously sourced from suppliers in other Member States, where the parents previously produced the input in other Member States or where the final product is traded in more than one Member State.
69. In the assessment of appreciability it is important to take account of the parents' sales of products related to the agreement and not only those of the joint entity created by the agreement, given that the joint venture does not operate as an autonomous entity on any market.
- 3.1.4. Vertical agreements implemented in several Member States*
70. Vertical agreements and networks of similar vertical agreements implemented in several Member States are normally capable of affecting trade between Member States if they cause trade to be channelled in a particular way. Networks of selective distribution agreements implemented in two or more Member States for example, channel trade in a particular way because they limit trade to members of the network, thereby affecting patterns of trade compared to the situation without the agreement <sup>(51)</sup>.
71. Trade between Member States is also capable of being affected by vertical agreements that have foreclosure effects. This may for instance be the case of agreements whereby distributors in several Member States agree to buy only from a particular supplier or to sell only its products. Such agreements may limit trade between the Member States in which the agreements are implemented, or trade from Member States not covered by the agreements. Foreclosure may result from individual agreements or from networks of agreements. When an agreement or networks of agreements that cover several Member States have foreclosure effects, the ability of the agreement or agreements to affect trade between Member States is normally by its very nature appreciable.
72. Agreements between suppliers and distributors which provide for resale price maintenance (RPM) and which cover two or more Member States are normally also by their very nature capable of affecting trade between Member States <sup>(52)</sup>. Such agreements alter the price levels that would have been likely to exist in the absence of the agreements and thereby affect patterns of trade.
- 3.1.5. Abuses of dominant positions covering several Member States*
73. In the case of abuse of a dominant position it is useful to distinguish between abuses that raise barriers to entry or eliminate competitors (exclusionary abuses) and abuses whereby the dominant undertaking exploits its economic power for instance by charging excessive or discriminatory prices (exploitative abuses). Both kinds of abuse may be carried out either through agreements, which are equally subject to Article 81(1), or through unilateral conduct, which as far as Community competition law is concerned is subject only to Article 82.
74. In the case of exploitative abuses such as discriminatory rebates, the impact is on downstream trading partners, which either benefit or suffer, altering their competitive position and affecting patterns of trade between Member States.
75. When a dominant undertaking engages in exclusionary conduct in more than one Member State, such abuse is normally by its very nature capable of affecting trade between Member States. Such conduct has a negative impact on competition in an area extending beyond a single Member State, being likely to divert trade from the course it would have followed in the absence of the abuse. For example, patterns of trade are capable of being affected where the dominant undertaking grants loyalty rebates. Customers covered by the exclusionary rebate system are likely to purchase less from competitors of the dominant firm than they would otherwise have done. Exclusionary conduct that aims directly at eliminating a competitor such as predatory pricing is also capable of affecting trade between Member States because of its impact on the competitive market structure inside the Community <sup>(53)</sup>. When a dominant firm engages in behaviour with a view to eliminating a competitor operating in more than one Member State, trade is capable of being affected in several ways. First, there is a risk that the affected competitor will cease to be a source of supply inside the Community. Even if the targeted undertaking is not eliminated, its future competitive conduct is likely to be affected, which may also have an impact on trade between Member States. Secondly, the abuse may have an impact on other competitors. Through its abusive behaviour the dominant undertaking can signal to its competitors that it will discipline attempts to engage in real competition. Thirdly, the very fact of eliminating a competitor may be sufficient for trade between Member States to be capable of being affected. This may be the case even where the undertaking that risks being eliminated mainly engages in exports to third countries <sup>(54)</sup>. Once the effective competitive market structure inside the Community risks being further impaired, there is Community law jurisdiction.

76. Where a dominant undertaking engages in exploitative or exclusionary abuse in more than one Member State, the capacity of the abuse to affect trade between Member States will normally also by its very nature be appreciable. Given the market position of the dominant undertaking concerned, and the fact that the abuse is implemented in several Member States, the scale of the abuse and its likely impact on patterns of trade is normally such that trade between Member States is capable of being appreciably affected. In the case of an exploitative abuse such as price discrimination, the abuse alters the competitive position of trading partners in several Member States. In the case of exclusionary abuses, including abuses that aim at eliminating a competitor, the economic activity engaged in by competitors in several Member States is affected. The very existence of a dominant position in several Member States implies that competition in a substantial part of the common market is already weakened<sup>(55)</sup>. When a dominant undertaking further weakens competition through recourse to abusive conduct, for example by eliminating a competitor, the ability of the abuse to affect trade between Member States is normally appreciable.

### 3.2. Agreements and abuses covering a single, or only part of a, Member State

77. When agreements or abusive practices cover the territory of a single Member State, it may be necessary to proceed with a more detailed inquiry into the ability of the agreements or abusive practices to affect trade between Member States. It should be recalled that for there to be an effect on trade between Member States it is not required that trade is reduced. It is sufficient that an appreciable change is capable of being caused in the pattern of trade between Member States. Nevertheless, in many cases involving a single Member State the nature of the alleged infringement, and in particular, its propensity to foreclose the national market, provides a good indication of the capacity of the agreement or practice to affect trade between Member States. The examples mentioned hereafter are not exhaustive. They merely provide examples of cases where agreements confined to the territory of a single Member State can be considered capable of affecting trade between Member States.

#### 3.2.1. Cartels covering a single Member State

78. Horizontal cartels covering the whole of a Member State are normally capable of affecting trade between Member States. The Community Courts have held in a number of cases that agreements extending over the whole territory of a Member State by their very nature have the effect of reinforcing the partitioning of markets on a national basis by hindering the economic penetration which the Treaty is designed to bring about<sup>(56)</sup>.

79. The capacity of such agreements to partition the internal market follows from the fact that undertakings partici-

pating in cartels in only one Member State, normally need to take action to exclude competitors from other Member States<sup>(57)</sup>. If they do not, and the product covered by the agreement is tradable<sup>(58)</sup>, the cartel risks being undermined by competition from undertakings from other Member States. Such agreements are normally also by their very nature capable of having an appreciable effect on trade between Member States, given the market coverage required for such cartels to be effective.

80. Given the fact that the effect on trade concept encompasses potential effects, it is not decisive whether such action against competitors from other Member States is in fact adopted at any given point in time. If the cartel price is similar to the price prevailing in other Member States, there may be no immediate need for the members of the cartel to take action against competitors from other Member States. What matters is whether or not they are likely to do so, if market conditions change. The likelihood of that depends on the existence or otherwise of natural barriers to trade in the market, including in particular whether or not the product in question is tradable. In a case involving certain retail banking services<sup>(59)</sup> the Court of Justice has, for example, held that trade was not capable of being appreciably affected because the potential for trade in the specific products concerned was very limited and because they were not an important factor in the choice made by undertakings from other Member States regarding whether or not to establish themselves in the Member State in question<sup>(60)</sup>.

81. The extent to which the members of a cartel monitor prices and competitors from other Member States can provide an indication of the extent to which the products covered by the cartel are tradable. Monitoring suggests that competition and competitors from other Member States are perceived as a potential threat to the cartel. Moreover, if there is evidence that the members of the cartel have deliberately fixed the price level in the light of the price level prevailing in other Member States (limit pricing), it is an indication that the products in question are tradable and that trade between Member States is capable of being affected.

82. Trade is normally also capable of being affected when the members of a national cartel temper the competitive constraint imposed by competitors from other Member States by inducing them to join the restrictive agreement, or if their exclusion from the agreement places the competitors at a competitive disadvantage<sup>(61)</sup>. In such cases the agreement either prevents these competitors from exploiting any competitive advantage that they have, or raises their costs, thereby having a negative impact on their competitiveness and their sales. In both

cases the agreement hampers the operations of competitors from other Member States on the national market in question. The same is true when a cartel agreement confined to a single Member State is concluded between undertakings that resell products imported from other Member States <sup>(62)</sup>.

### 3.2.2. *Horizontal cooperation agreements covering a single Member State*

83. Horizontal cooperation agreements and in particular non-full function joint ventures (cf. paragraph 66 above), which are confined to a single Member State and which do not directly relate to imports and exports, do not belong to the category of agreements that by their very nature are capable of affecting trade between Member States. A careful examination of the capacity of the individual agreement to affect trade between Member States may therefore be required.

84. Horizontal cooperation agreements may, in particular, be capable of affecting trade between Member States where they have foreclosure effects. This may be the case with agreements that establish sector-wide standardisation and certification regimes, which either exclude undertakings from other Member States or which are more easily fulfilled by undertakings from the Member State in question due to the fact that they are based on national rules and traditions. In such circumstances the agreements make it more difficult for undertakings from other Member States to penetrate the national market.

85. Trade may also be affected where a joint venture results in undertakings from other Member States being cut off from an important channel of distribution or source of demand. If, for example, two or more distributors established within the same Member State, and which account for a substantial share of imports of the products in question, establish a purchasing joint venture combining their purchases of that product, the resulting reduction in the number of distribution channels limits the possibility for suppliers from other Member States of gaining access to the national market in question. Trade is therefore capable of being affected <sup>(63)</sup>. Trade may also be affected where undertakings which previously imported a particular product form a joint venture which is entrusted with the production of that same product. In this case the agreement causes a change in the patterns of trade between Member States compared to the situation before the agreement.

### 3.2.3. *Vertical agreements covering a single Member State*

86. Vertical agreements covering the whole of a Member State may, in particular, be capable of affecting patterns of trade between Member States when they make it more difficult for undertakings from other Member States to penetrate the national market in question, either by

means of exports or by means of establishment (foreclosure effect). When vertical agreements give rise to such foreclosure effects, they contribute to the partitioning of markets on a national basis, thereby hindering the economic interpenetration which the Treaty is designed to bring about <sup>(64)</sup>.

87. Foreclosure may, for example, occur when suppliers impose exclusive purchasing obligations on buyers <sup>(65)</sup>. In *Delimitis* <sup>(66)</sup>, which concerned agreements between a brewer and owners of premises where beer was consumed whereby the latter undertook to buy beer exclusively from the brewer, the Court of Justice defined foreclosure as the absence, due to the agreements, of real and concrete possibilities of gaining access to the market. Agreements normally only create significant barriers to entry when they cover a significant proportion of the market. Market share and market coverage can be used as an indicator in this respect. In making the assessment account must be taken not only of the particular agreement or network of agreements in question, but also of other parallel networks of agreements having similar effects <sup>(67)</sup>.

88. Vertical agreements which cover the whole of a Member State and which relate to tradable products may also be capable of affecting trade between Member States, even if they do not create direct obstacles to trade. Agreements whereby undertakings engage in resale price maintenance (RPM) may have direct effects on trade between Member States by increasing imports from other Member States and by decreasing exports from the Member State in question <sup>(68)</sup>. Agreements involving RPM may also affect patterns of trade in much the same way as horizontal cartels. To the extent that the price resulting from RPM is higher than that prevailing in other Member States this price level is only sustainable if imports from other Member States can be controlled.

### 3.2.4. *Agreements covering only part of a Member State*

89. In qualitative terms the assessment of agreements covering only part of a Member State is approached in the same way as in the case of agreements covering the whole of a Member State. This means that the analysis in section 2 applies. In the assessment of appreciability, however, the two categories must be distinguished, as it must be taken into account that only part of a Member State is covered by the agreement. It must also be taken into account what proportion of the national territory is susceptible to trade. If, for example, transport costs or the operating radius of equipment render it economically unviable for undertakings from other Member States to serve the entire territory of another Member State, trade is capable of being affected if the agreement forecloses access to the part of the territory of a Member State that is susceptible to trade, provided that this part is not insignificant <sup>(69)</sup>.

90. Where an agreement forecloses access to a regional market, then for trade to be appreciably affected, the volume of sales affected must be significant in proportion to the overall volume of sales of the products concerned inside the Member State in question. This assessment cannot be based merely on geographic coverage. The market share of the parties to the agreement must also be given fairly limited weight. Even if the parties have a high market share in a properly defined regional market, the size of that market in terms of volume may still be insignificant when compared to total sales of the products concerned within the Member State in question. In general, the best indicator of the capacity of the agreement to (appreciably) affect trade between Member States is therefore considered to be the share of the national market in terms of volume that is being foreclosed. Agreements covering areas with a high concentration of demand will thus weigh more heavily than those covering areas where demand is less concentrated. For Community jurisdiction to be established the share of the national market that is being foreclosed must be significant.
91. Agreements that are local in nature are in themselves not capable of appreciably affecting trade between Member States. This is the case even if the local market is located in a border region. Conversely, if the foreclosed share of the national market is significant, trade is capable of being affected even where the market in question is not located in a border region.
92. In cases in this category some guidance may be derived from the case law concerning the concept in Article 82 of a substantial part of the common market<sup>(70)</sup>. Agreements that, for example, have the effect of hindering competitors from other Member States from gaining access to part of a Member State, which constitutes a substantial part of the common market, should be considered to have an appreciable effect on trade between Member States.
- 3.2.5. Abuses of dominant positions covering a single Member State**
93. Where an undertaking, which holds a dominant position covering the whole of a Member State, engages in exclusionary abuses, trade between Member States is normally capable of being affected. Such abusive conduct will generally make it more difficult for competitors from other Member States to penetrate the market, in which case patterns of trade are capable of being affected<sup>(71)</sup>. In *Michelin*<sup>(72)</sup>, for example, the Court of Justice held that a system of loyalty rebates foreclosed competitors from other Member States and therefore affected trade within the meaning of Article 82. In *Rennet*<sup>(73)</sup> the Court similarly held that an abuse in the form of an exclusive purchasing obligation on customers foreclosed products from other Member States.
94. Exclusionary abuses that affect the competitive market structure inside a Member State, for instance by eliminating or threatening to eliminate a competitor, may also be capable of affecting trade between Member States. Where the undertaking that risks being eliminated only operates in a single Member State, the abuse will normally not affect trade between Member States. However, trade between Member States is capable of being affected where the targeted undertaking exports to or imports from other Member States<sup>(74)</sup> and where it also operates in other Member States<sup>(75)</sup>. An effect on trade may arise from the dissuasive impact of the abuse on other competitors. If through repeated conduct the dominant undertaking has acquired a reputation for adopting exclusionary practices towards competitors that attempt to engage in direct competition, competitors from other Member States are likely to compete less aggressively, in which case trade may be affected, even if the victim in the case at hand is not from another Member State.
95. In the case of exploitative abuses such as price discrimination and excessive pricing, the situation may be more complex. Price discrimination between domestic customers will normally not affect trade between Member States. However, it may do so if the buyers are engaged in export activities and are disadvantaged by the discriminatory pricing or if this practice is used to prevent imports<sup>(76)</sup>. Practices consisting of offering lower prices to customers that are the most likely to import products from other Member States may make it more difficult for competitors from other Member States to enter the market. In such cases trade between Member States is capable of being affected.
96. As long as an undertaking has a dominant position which covers the whole of a Member State it is normally immaterial whether the specific abuse engaged in by the dominant undertaking only covers part of its territory or affects certain buyers within the national territory. A dominant firm can significantly impede trade by engaging in abusive conduct in the areas or vis-à-vis the customers that are the most likely to be targeted by competitors from other Member States. For example, it may be the case that a particular channel of distribution constitutes a particularly important means of gaining access to broad categories of consumers. Hindering access to such channels can have a substantial impact on trade between Member States. In the assessment of appreciability it must also be taken into account that the very presence of the dominant undertaking covering the whole of a Member State is likely to make market penetration more difficult. Any abuse which makes it more difficult to enter the national market should therefore be considered to appreciably affect trade. The combination of the market position of the dominant undertaking and the anti-competitive nature of its conduct implies that such abuses have normally by their very nature an appreciable effect on trade. However, if the abuse is purely local in nature or



involves only an insignificant share of the sales of the dominant undertaking within the Member State in question, trade may not be capable of being appreciably affected.

### 3.2.6. *Abuse of a dominant position covering only part of a Member State*

97. Where a dominant position covers only part of a Member State some guidance may, as in the case of agreements, be derived from the condition in Article 82 that the dominant position must cover a substantial part of the common market. If the dominant position covers part of a Member State that constitutes a substantial part of the common market and the abuse makes it more difficult for competitors from other Member States to gain access to the market where the undertaking is dominant, trade between Member States must normally be considered capable of being appreciably affected.

98. In the application of this criterion regard must be had in particular to the size of the market in question in terms of volume. Regions and even a port or an airport situated in a Member State may, depending on their importance, constitute a substantial part of the common market<sup>(77)</sup>. In the latter cases it must be taken into account whether the infrastructure in question is used to provide cross-border services and, if so, to what extent. When infrastructures such as airports and ports are important in providing cross-border services, trade between Member States is capable of being affected.

99. As in the case of dominant positions covering the whole of a Member State (cf. paragraph 95 above), trade may not be capable of being appreciably affected if the abuse is purely local in nature or involves only an insignificant share of the sales of the dominant undertaking.

### 3.3. **Agreements and abuses involving imports and exports with undertakings located in third countries, and agreements and practices involving undertakings located in third countries**

#### 3.3.1. *General remarks*

100. Articles 81 and 82 apply to agreements and practices that are capable of affecting trade between Member States even if one or more of the parties are located outside the Community<sup>(78)</sup>. Articles 81 and 82 apply irrespective of where the undertakings are located or where the agreement has been concluded, provided that the agreement or practice is either implemented inside the Community<sup>(79)</sup>, or produce effects inside the Community<sup>(80)</sup>. Articles 81 and 82 may also apply to agreements and practices that cover third countries, provided that they are capable of affecting trade between Member States. The general principle set out in section 2 above according to which the agreement or practice must be capable of having an appreciable

influence, direct or indirect, actual or potential, on the pattern of trade between Member States, also applies in the case of agreements and abuses which involve undertakings located in third countries or which relate to imports or exports with third countries.

101. For the purposes of establishing Community law jurisdiction it is sufficient that an agreement or practice involving third countries or undertakings located in third countries is capable of affecting cross-border economic activity inside the Community. Import into one Member State may be sufficient to trigger effects of this nature. Imports can affect the conditions of competition in the importing Member State, which in turn can have an impact on exports and imports of competing products to and from other Member States. In other words, imports from third countries resulting from the agreement or practice may cause a diversion of trade between Member States, thus affecting patterns of trade.

102. In the application of the effect on trade criterion to the above mentioned agreements and practices it is relevant to examine, inter alia, what is the object of the agreement or practice as indicated by its content or the underlying intent of the undertakings involved<sup>(81)</sup>.

103. Where the object of the agreement is to restrict competition inside the Community the requisite effect on trade between Member States is more readily established than where the object is predominantly to regulate competition outside the Community. Indeed in the former case the agreement or practice has a direct impact on competition inside the Community and trade between Member States. Such agreements and practices, which may concern both imports and exports, are normally by their very nature capable of affecting trade between Member States.

#### 3.3.2. *Arrangements that have as their object the restriction of competition inside the Community*

104. In the case of imports, this category includes agreements that bring about an isolation of the internal market<sup>(82)</sup>. This is, for instance, the case of agreements whereby competitors in the Community and in third countries share markets, e.g. by agreeing not to sell in each other's home markets or by concluding reciprocal (exclusive) distribution agreements<sup>(83)</sup>.

105. In the case of exports, this category includes cases where undertakings that compete in two or more Member States agree to export certain (surplus) quantities to third countries with a view to co-ordinating their market conduct inside the Community. Such export agreements serve to reduce price competition by limiting output inside the Community, thereby affecting trade between Member States. Without the export agreement these quantities might have been sold inside the Community<sup>(84)</sup>.

### 3.3.3. Other arrangements

106. In the case of agreements and practices whose object is not to restrict competition inside the Community, it is normally necessary to proceed with a more detailed analysis of whether or not cross-border economic activity inside the Community, and thus patterns of trade between Member States, are capable of being affected.
107. In this regard it is relevant to examine the effects of the agreement or practice on customers and other operators inside the Community that rely on the products of the undertakings that are parties to the agreement or practice<sup>(85)</sup>. In *Compagnie maritime belge*<sup>(86)</sup>, which concerned agreements between shipping companies operating between Community ports and West African ports, the agreements were held to be capable of indirectly affecting trade between Member States because they altered the catchment areas of the Community ports covered by the agreements and because they affected the activities of other undertakings inside those areas. More specifically, the agreements affected the activities of undertakings that relied on the parties for transportation services, either as a means of transporting goods purchased in third countries or sold there, or as an important input into the services that the ports themselves offered.
108. Trade may also be capable of being affected when the agreement prevents re-imports into the Community. This may, for example, be the case with vertical agreements between Community suppliers and third country distributors, imposing restrictions on resale outside an allocated territory, including the Community. If in the absence of the agreement resale to the Community would be possible and likely, such imports may be capable of affecting patterns of trade inside the Community<sup>(87)</sup>.
109. However, for such effects to be likely, there must be an appreciable difference between the prices of the products charged in the Community and those charged outside the Community, and this price difference must not be eroded by customs duties and transport costs. In addition, the product volumes exported compared to the total market for those products in the territory of the common market must not be insignificant<sup>(88)</sup>. If these product volumes are insignificant compared to those sold inside the Community, the impact of any re-importation on trade between Member States is considered not to be appreciable. In making this assessment, regard must be had not only to the individual agreement concluded between the parties, but also to any cumulative effect of similar agreements concluded by the same and competing suppliers. It may be, for example, that the product volumes covered by a single agreement are quite small, but that the product volumes covered by several such agreements are significant. In that case the agreements taken as a whole may be capable of appreciably affecting trade between Member States. It should be recalled, however (cf. paragraph 49 above), that the individual agreement or network of agreements must make a significant contribution to the overall effect on trade.

<sup>(1)</sup> OJ C 368, 22.12.2001, p. 13.

<sup>(2)</sup> OJ L 1, 4.1.2003, p. 1.

<sup>(3)</sup> See e.g. Joined Cases 56/64 and 58/64, *Consten and Grundig*, [1966] ECR p. 429, and Joined Cases 6/73 and 7/73, *Commercial Solvents*, [1974] ECR p. 223.

<sup>(4)</sup> See in this respect Case 22/71, *Béguélin*, [1971] ECR p. 949, paragraph 16.

<sup>(5)</sup> See Case 193/83, *Windsurfing*, [1986] ECR p. 611, paragraph 96, and Case T-77/94, *Vereniging van Groothandelaren in Bloemkwekerijprodukten*, [1997] ECR II-759, paragraph 126.

<sup>(6)</sup> See paragraphs 142 to 144 of the judgment in *Vereniging van Groothandelaren in Bloemkwekerijprodukteten* cited in the previous footnote.

<sup>(7)</sup> See e.g. Case T-2/89, *Petrofina*, [1991] ECR II-1087, paragraph 226.

<sup>(8)</sup> The concept of appreciability is dealt with in section 2.4 below.

<sup>(9)</sup> See in this respect Case 85/76, *Hoffmann-La Roche*, [1979] ECR p. 461, paragraph 126.

<sup>(10)</sup> Throughout these guidelines the term 'products' covers both goods and services.

<sup>(11)</sup> See Case 172/80, *Züchner*, [1981] ECR p. 2021, paragraph 18. See also Case C-309/99, *Wouters*, [2002] ECR I-1577, paragraph 95, Case C-475/99, *Ambulanz Glöckner*, [2001] ECR I-8089, paragraph 49, Joined Cases C-215/96 and 216/96, *Bagnasco*, [1999] ECR I-135, paragraph 51, Case C-55/96, *Job Centre*, [1997] ECR I-7119, paragraph 37, and Case C-41/90, *Höfner and Elser*, [1991] ECR I-1979, paragraph 33.

<sup>(12)</sup> See e.g. Joined Cases T-24/93 and others, *Compagnie maritime belge*, [1996] ECR II-1201, paragraph 203, and paragraph 23 of the judgment in *Commercial Solvents* cited in footnote.

<sup>(13)</sup> See e.g. Joined Cases T-213/95 and T-18/96, *SCK and FNK*, [1997] ECR II-1739, and sections 3.2.4 and 3.2.6 below.

<sup>(14)</sup> See section 3.2 below.

<sup>(15)</sup> See e.g. the judgment in *Züchner* cited in footnote 11 and Case 319/82, *Kerpen & Kerpen*, [1983] ECR 4173, Joined Cases 240/82 and others, *Stichting Sigarettenindustrie*, [1985] ECR 3831, paragraph 48, and Joined Cases T-25/95 and others, *Cimenteries CBR*, [2000] ECR II-491, paragraph 3930.

- <sup>(16)</sup> In some judgments mainly relating to vertical agreements the Court of Justice has added wording to the effect that the agreement was capable of hindering the attainment of the objectives of a single market between Member States, see e.g. Case T-62/98, Volkswagen, [2000] ECR II-2707, paragraph 179, and paragraph 47 of the Bagnasco judgment cited in footnote 11, and Case 56/65, Société Technique Minière, [1966] ECR 337. The impact of an agreement on the single market objective is thus a factor which can be taken into account.
- <sup>(17)</sup> See e.g. Case T-228/97, Irish Sugar, [1999] ECR II-2969, paragraph 170, and Case 19/77, Miller, [1978] ECR 131, paragraph 15.
- <sup>(18)</sup> See e.g. Case C-250/92, Gøttrup-Klim [1994] ECR II-5641, paragraph 54.
- <sup>(19)</sup> See e.g. Case C-306/96, Javico, [1998] ECR I-1983, paragraph 17, and paragraph 18 of the judgment in Béguelin cited in footnote 4.
- <sup>(20)</sup> Compare in this respect the judgments in Bagnasco and Wouters cited in footnote 11.
- <sup>(21)</sup> See e.g. Case T-141/89, Tréfileurope, [1995] ECR II-791, Case T-29/92, Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid (SPO), [1995] ECR II-289, as far as exports were concerned, and Commission Decision in Volkswagen (II) (OJ L 264, 2.10.2001, p. 14).
- <sup>(22)</sup> See in this respect Case 71/74, Frubo, [1975] ECR 563, paragraph 38, Joined Cases 209/78 and others, Van Landewyck, [1980] ECR 3125, paragraph 172, Case T-61/89, Dansk Pelsdyravler Forening, [1992] ECR II-1931, paragraph 143, and Case T-65/89, BPB Industries and British Gypsum, [1993] ECR II-389, paragraph 135.
- <sup>(23)</sup> See in this respect Case T-86/95, Compagnie Générale Maritime and others, [2002] ECR II-1011, paragraph 148, and paragraph 202 of the judgment in Compagnie maritime belge cited in footnote 12.
- <sup>(24)</sup> See Case 123/83, BNIC v Clair, [1985] ECR 391, paragraph 29.
- <sup>(25)</sup> See Commission Decision in Zanussi, OJ L 322, 16.11.1978, p. 36, paragraph 11.
- <sup>(26)</sup> See in this respect Case 31/85, ETA Fabrique d'Ébauches, [1985] ECR 3933, paragraphs 12 and 13.
- <sup>(27)</sup> See Joined Cases C-241/91 P and C-242/91 P, RTE (Magill), [1995] ECR I-743, paragraph 70, and Case 107/82, AEG, [1983] ECR 3151, paragraph 60.
- <sup>(28)</sup> See paragraph 60 of the AEG judgment cited in the previous footnote.
- <sup>(29)</sup> See Case 5/69, Völk, [1969] ECR 295, paragraph 7.
- <sup>(30)</sup> See e.g. paragraph 17 of the judgment in Javico cited in footnote 19, and paragraph 138 of the judgment in BPB Industries and British Gypsum cited in footnote 22.
- <sup>(31)</sup> See paragraph 138 of the judgment in BPB Industries and British Gypsum cited in footnote 22.
- <sup>(32)</sup> See e.g. paragraphs 9 and 10 of the Miller judgment cited in footnote 17, and paragraph 58 of the AEG judgment cited in footnote 27.
- <sup>(33)</sup> See Joined Cases 100/80 and others, Musique Diffusion Française, [1983] ECR 1825, paragraph 86. In that case the products in question accounted for just above 3 % of sales on the national markets concerned. The Court held that the agreements, which hindered parallel trade, were capable of appreciably affecting trade between Member States due to the high turnover of the parties and the relative market position of the products, compared to those of products produced by competing suppliers.
- <sup>(34)</sup> See in this respect paragraphs 179 and 231 of the Volkswagen judgment cited in footnote 16, and Case T-213/00, CMA CGM and others, [2003] ECR I-, paragraphs 219 and 220.
- <sup>(35)</sup> See e.g. Case T-7/93, Langnese-Iglo, [1995] ECR II-1533, paragraph 120.
- <sup>(36)</sup> See paragraphs 140 and 141 of the judgment in Vereniging van Groothandelaren in Bloemkweekerijprodukten cited in footnote 5.
- <sup>(37)</sup> See Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty (OJ C 368, 22.12.2001, p. 13, paragraph 3).
- <sup>(38)</sup> OJ L 107, 30.4.1996, p. 4. With effect from 1.1.2005 this recommendation will be replaced by Commission Recommendation 2003/361/EC concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).
- <sup>(39)</sup> The term 'undertakings concerned' shall include connected undertakings as defined in paragraph 12.2 of the Commission's Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (OJ C 368, 22.12.2001, p. 13).
- <sup>(40)</sup> See the previous footnote.
- <sup>(41)</sup> When defining the relevant market, reference should be made to the notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).
- <sup>(42)</sup> See also paragraph 14 above.
- <sup>(43)</sup> See paragraph 8 of the judgment in Kerpen & Kerpen cited in footnote 15. It should be noted that the Court does not refer to market share but to the share of French exports and to the product volumes involved.
- <sup>(44)</sup> See e.g. the judgment in Volkswagen cited in footnote 16 and Case T-175/95, BASF Coatings, [1999] ECR II-1581. For a horizontal agreement to prevent parallel trade see Joined Cases 96/82 and others, IAZ International, [1983] ECR 3369, paragraph 27.
- <sup>(45)</sup> See e.g. Case T-142/89, Usines Gustave Boël, [1995] ECR II-867, paragraph 102.
- <sup>(46)</sup> Horizontal cooperation agreements are dealt with in the Commission Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (OJ C 3, 6.1.2001, p. 2). Those guidelines deal with the substantive competition assessment of various types of agreements but do not deal with the effect on trade issue.
- <sup>(47)</sup> See Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p. 1).
- <sup>(48)</sup> The Commission Notice on the concept of full-function joint ventures under the Merger Regulation (OJ C 66, 2.3.1998, p. 1) gives guidance on the scope of this concept.

- (<sup>49</sup>) See e.g. the Commission Decision in Ford/Volkswagen (OJ L 20, 28.1.1993, p. 14).
- (<sup>50</sup>) See in this respect paragraph 146 of the *Compagnie Générale Maritime* judgment cited in footnote 23 above.
- (<sup>51</sup>) See in this respect Joined Cases 43/82 and 63/82, *VBVB and VBBB*, [1984] ECR 19, paragraph 9.
- (<sup>52</sup>) See in this respect Case T-66/89, *Publishers Association*, [1992] ECR II-1995.
- (<sup>53</sup>) See in this respect the judgment in *Commercial Solvents* cited in footnote 3, in the judgment in *Hoffmann-La Roche*, cited in footnote, paragraph 125, and in *RTE and ITP* cited in footnote, as well as Case 6/72, *Continental Can*, [1973] ECR 215, paragraph 16, and Case 27/76, *United Brands*, [1978] ECR 207, paragraphs 197 to 203.
- (<sup>54</sup>) See paragraphs 32 and 33 of the judgment in *Commercial Solvents* cited in footnote 3.
- (<sup>55</sup>) According to settled case law dominance is a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to act to an appreciable extent independently of its competitors, its customers and ultimately of the consumers, see e.g. paragraph 38 of the judgment in *Hoffmann-La Roche* cited in footnote 9.
- (<sup>56</sup>) See for a recent example paragraph 95 of the *Wouters* judgment cited in footnote 11.
- (<sup>57</sup>) See e.g. Case 246/86, *Belasco*, [1989] ECR 2117, paragraph 32-38.
- (<sup>58</sup>) See paragraph 34 of the *Belasco* judgment cited in the previous footnote and more recently Joined Cases T-202/98 a.o., *British Sugar*, [2001] ECR II-2035, paragraph 79. On the other hand this is not so when the market is not susceptible to imports, see paragraph 51 of the *Bagnasco* judgment cited in footnote 11.
- (<sup>59</sup>) Guarantees for current account credit facilities.
- (<sup>60</sup>) See paragraph 51 of the *Bagnasco* judgment cited in footnote 11.
- (<sup>61</sup>) See in this respect Case 45/85, *Verband der Sachversicherer*, [1987] ECR 405, paragraph 50, and Case C-7/95 P, *John Deere*, [1998] ECR I-3111. See also paragraph 172 of the judgment in *Van Landewyck* cited in footnote 22, where the Court stressed that the agreement in question reduced appreciably the incentive to sell imported products.
- (<sup>62</sup>) See e.g. the judgment in *Stichting Sigarettenindustrie*, cited in footnote 15, paragraphs 49 and 50.
- (<sup>63</sup>) See in this respect Case T-22/97, *Kesko*, [1999] ECR II-3775, paragraph 109.
- (<sup>64</sup>) See e.g. Case T-65/98, *Van den Bergh Foods*, [2003] ECR II-..., and the judgment in *Langnese-Iglo*, cited in footnote 35 paragraph 120.
- (<sup>65</sup>) See e.g. judgment of 7.12.2000, Case C-214/99, *Neste*, ECR I-11121.
- (<sup>66</sup>) See judgment of 28.2.1991, Case C-234/89, *Delimitis*, ECR I-935.
- (<sup>67</sup>) See paragraph 120 of the *Langnese-Iglo* judgment cited in footnote 35.
- (<sup>68</sup>) See e.g. Commission Decision in *Volkswagen (II)*, cited in footnote 21, paragraphs 81 *et seq.*
- (<sup>69</sup>) See in this respect paragraphs 177 to 181 of the judgment in *SCK and FNK* cited in footnote 13.
- (<sup>70</sup>) See as to this notion the judgment in *Ambulanz Glöckner*, cited in footnote 11, paragraph 38, and Case C-179/90, *Merci convenzionali porto di Genova*, [1991] ECR I-5889, and Case C-242/95, *GT-Link*, [1997] ECR I-4449.
- (<sup>71</sup>) See e.g. paragraph 135 of the judgment in *BPB Industries and British Gypsum* cited in footnote.
- (<sup>72</sup>) See Case 322/81, *Nederlandse Banden Industrie Michelin*, [1983] ECR 3461
- (<sup>73</sup>) See Case 61/80, *Coöperative Stremsel- en Kleursel-fabriek*, [1981] ECR 851, paragraph 15.
- (<sup>74</sup>) See in this respect judgment in *Irish Sugar*, cited in footnote 17 paragraph 169.
- (<sup>75</sup>) See paragraph 70 of the judgment in *RTE (Magill)* cited in footnote 27.
- (<sup>76</sup>) See the judgment in *Irish Sugar* cited in footnote 17.
- (<sup>77</sup>) See e.g. the case law cited in footnote 70.
- (<sup>78</sup>) See in this respect Case 28/77, *Tepea*, [1978] ECR 1391, paragraph 48, and paragraph 16 of the judgment in *Continental Can* cited in footnote 53.
- (<sup>79</sup>) See Joined Cases C-89/85 and others, *Ahlström Osakeyhtiö (Woodpulp)*, [1988] ECR 651, paragraph 16.
- (<sup>80</sup>) See in this respect Case T-102/96, *Gencor*, [1999] ECR II-753, which applies the effects test in the field of mergers.
- (<sup>81</sup>) See to that effect paragraph 19 of the judgment in *Javico* cited in footnote 19.
- (<sup>82</sup>) See in this respect Case 51/75, *EMI v CBS*, [1976] ECR 811, paragraphs 28 and 29.
- (<sup>83</sup>) See Commission Decision in *Siemens/Fanuc* (OJ L 376, 31.12.1985, p. 29).
- (<sup>84</sup>) See in this respect Joined Cases 29/83 and 30/83, *CRAM and Rheinzinc*, [1984] ECR 1679, and Joined Cases 40/73 and others, *Suiker Unie*, [1975] ECR 1663, paragraphs 564 and 580.
- (<sup>85</sup>) See paragraph 22 of the judgment in *Javico* cited in footnote 19.
- (<sup>86</sup>) See paragraph 203 of the judgment in *Compagnie maritime belge* cited in footnote 12.
- (<sup>87</sup>) See in this respect the judgment in *Javico* cited in footnote 19.
- (<sup>88</sup>) See in this respect paragraphs 24 to 26 of the *Javico* judgment cited in footnote 19.

## COMMUNICATION FROM THE COMMISSION

### Notice

### Guidelines on the application of Article 81(3) of the Treaty

(2004/C 101/08)

(Text with EEA relevance)

#### 1. INTRODUCTION

1. Article 81(3) of the Treaty sets out an exception rule, which provides a defence to undertakings against a finding of an infringement of Article 81(1) of the Treaty. Agreements, decisions of associations of undertakings and concerted practices<sup>(1)</sup> caught by Article 81(1) which satisfy the conditions of Article 81(3) are valid and enforceable, no prior decision to that effect being required.
2. Article 81(3) can be applied in individual cases or to categories of agreements and concerted practices by way of block exemption regulation. Regulation 1/2003 on the implementation of the competition rules laid down in Articles 81 and 82<sup>(2)</sup> does not affect the validity and legal nature of block exemption regulations. All existing block exemption regulations remain in force and agreements covered by block exemption regulations are legally valid and enforceable even if they are restrictive of competition within the meaning of Article 81(1)<sup>(3)</sup>. Such agreements can only be prohibited for the future and only upon formal withdrawal of the block exemption by the Commission or a national competition authority<sup>(4)</sup>. Block exempted agreements cannot be held invalid by national courts in the context of private litigation.
3. The existing guidelines on vertical restraints, horizontal cooperation agreements and technology transfer agreements<sup>(5)</sup> deal with the application of Article 81 to various types of agreements and concerted practices. The purpose of those guidelines is to set out the Commission's view of the substantive assessment criteria applied to the various types of agreements and practices.
4. The present guidelines set out the Commission's interpretation of the conditions for exception contained in Article 81(3). It thereby provides guidance on how it will apply Article 81 in individual cases. Although not binding on them, these guidelines also intend to give guidance to the courts and authorities of the Member States in their application of Article 81(1) and (3) of the Treaty.
5. The guidelines establish an analytical framework for the application of Article 81(3). The purpose is to develop a methodology for the application of this Treaty provision. This methodology is based on the economic approach already introduced and developed in the guidelines on

vertical restraints, horizontal co-operation agreements and technology transfer agreements. The Commission will follow the present guidelines, which provide more detailed guidance on the application of the four conditions of Article 81(3) than the guidelines on vertical restraints, horizontal co-operation agreements and technology transfer agreements, also with regard to agreements covered by those guidelines.

6. The standards set forth in the present guidelines must be applied in light of the circumstances specific to each case. This excludes a mechanical application. Each case must be assessed on its own facts and the guidelines must be applied reasonably and flexibly.
7. With regard to a number of issues, the present guidelines outline the current state of the case law of the Court of Justice. However, the Commission also intends to explain its policy with regard to issues that have not been dealt with in the case law, or that are subject to interpretation. The Commission's position, however, is without prejudice to the case law of the Court of Justice and the Court of First Instance concerning the interpretation of Article 81(1) and (3), and to the interpretation that the Community Courts may give to those provisions in the future.

#### 2. THE GENERAL FRAMEWORK OF ARTICLE 81 EC

##### 2.1. The Treaty provisions

8. Article 81(1) prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States<sup>(6)</sup> and which have as their object or effect the prevention, restriction or distortion of competition<sup>(7)</sup>.
9. As an exception to this rule Article 81(3) provides that the prohibition contained in Article 81(1) may be declared inapplicable in case of agreements which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, and which do not impose restrictions which are not indispensable to the attainment of these objectives, and do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products concerned.

10. According to Article 1(1) of Regulation 1/2003 agreements which are caught by Article 81(1) and which do not satisfy the conditions of Article 81(3) are prohibited, no prior decision to that effect being required<sup>(8)</sup>. According to Article 1(2) of the same Regulation agreements which are caught by Article 81(1) but which satisfy the conditions of Article 81(3) are not prohibited, no prior decision to that effect being required. Such agreements are valid and enforceable from the moment that the conditions of Article 81(3) are satisfied and for as long as that remains the case.
11. The assessment under Article 81 thus consists of two parts. The first step is to assess whether an agreement between undertakings, which is capable of affecting trade between Member States, has an anti-competitive object or actual or potential<sup>(9)</sup> anti-competitive effects. The second step, which only becomes relevant when an agreement is found to be restrictive of competition, is to determine the pro-competitive benefits produced by that agreement and to assess whether these pro-competitive effects outweigh the anti-competitive effects. The balancing of anti-competitive and pro-competitive effects is conducted exclusively within the framework laid down by Article 81(3)<sup>(10)</sup>.
12. The assessment of any countervailing benefits under Article 81(3) necessarily requires prior determination of the restrictive nature and impact of the agreement. To place Article 81(3) in its proper context it is appropriate to briefly outline the objective and principal content of the prohibition rule of Article 81(1). The Commission guidelines on vertical restraints, horizontal co-operation agreements and technology transfer agreements<sup>(11)</sup> contain substantial guidance on the application of Article 81(1) to various types of agreements. The present guidelines are therefore limited to recalling the basic analytical framework for applying Article 81(1).
13. The objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers.
14. The prohibition rule of Article 81(1) applies to restrictive agreements and concerted practices between undertakings and decisions by associations of undertakings in so far as they are capable of affecting trade between Member States. A general principle underlying Article 81(1) which is expressed in the case law of the Community Courts is that each economic operator must determine independently the policy, which he intends to adopt on the market<sup>(12)</sup>. In view of this the Community Courts have defined 'agreements', 'decisions' and 'concerted practices' as Community law concepts which allow a distinction to be made between the unilateral conduct of an undertaking and co-ordination of behaviour or collusion between undertakings<sup>(13)</sup>. Unilateral conduct is subject only to Article 82 of the Treaty as far as Community competition law is concerned. Moreover, the convergence rule set out in Article 3(2) of Regulation 1/2003 does not apply to unilateral conduct. This provision applies only to agreements, decisions and concerted practices, which are capable of affecting trade between Member States. Article 3(2) provides that when such agreements, decisions and concerted practices are not prohibited by Article 81, they cannot be prohibited by national competition law. Article 3 is without prejudice to the fundamental principle of primacy of Community law, which entails in particular that agreements and abusive practices that are prohibited by Articles 81 and 82 cannot be upheld by national law<sup>(14)</sup>.
15. The type of co-ordination of behaviour or collusion between undertakings falling within the scope of Article 81(1) is that where at least one undertaking vis-à-vis another undertaking undertakes to adopt a certain conduct on the market or that as a result of contacts between them uncertainty as to their conduct on the market is eliminated or at least substantially reduced<sup>(15)</sup>. It follows that co-ordination can take the form of obligations that regulate the market conduct of at least one of the parties as well as of arrangements that influence the market conduct of at least one of the parties by causing a change in its incentives. It is not required that co-ordination is in the interest of all the undertakings concerned<sup>(16)</sup>. Co-ordination must also not necessarily be express. It can also be tacit. For an agreement to be capable of being regarded as having been concluded by tacit acceptance there must be an invitation from an undertaking to another undertaking, whether express or implied, to fulfil a goal jointly<sup>(17)</sup>. In certain circumstances an agreement may be inferred from and imputed to an ongoing commercial relationship between the parties<sup>(18)</sup>. However, the mere fact that a measure adopted by an undertaking falls within the context of on-going business relations is not sufficient<sup>(19)</sup>.

## 2.2. The prohibition rule of Article 81(1)

### 2.2.1. General remarks

13. The objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of an open single

16. Agreements between undertakings are caught by the prohibition rule of Article 81(1) when they are likely to have an appreciable adverse impact on the parameters of competition on the market, such as price, output, product quality, product variety and innovation. Agreements can have this effect by appreciably reducing rivalry between the parties to the agreement or between them and third parties.

#### 2.2.2. *The basic principles for assessing agreements under Article 81(1)*

17. The assessment of whether an agreement is restrictive of competition must be made within the actual context in which competition would occur in the absence of the agreement with its alleged restrictions <sup>(20)</sup>. In making this assessment it is necessary to take account of the likely impact of the agreement on inter-brand competition (i.e. competition between suppliers of competing brands) and on intra-brand competition (i.e. competition between distributors of the same brand). Article 81(1) prohibits restrictions of both inter-brand competition and intra-brand competition <sup>(21)</sup>.

18. For the purpose of assessing whether an agreement or its individual parts may restrict inter-brand competition and/or intra-brand competition it needs to be considered how and to what extent the agreement affects or is likely to affect competition on the market. The following two questions provide a useful framework for making this assessment. The first question relates to the impact of the agreement on inter-brand competition while the second question relates to the impact of the agreement on intra-brand competition. As restraints may be capable of affecting both inter-brand competition and intra-brand competition at the same time, it may be necessary to analyse a restraint in light of both questions before it can be concluded whether or not competition is restricted within the meaning of Article 81(1):

- (1) Does the agreement restrict actual or potential competition that would have existed without the agreement? If so, the agreement may be caught by Article 81(1). In making this assessment it is necessary to take into account competition between the parties and competition from third parties. For instance, where two undertakings established in different Member States undertake not to sell products in each other's home markets, (potential) competition that existed prior to the agreement is restricted. Similarly, where a supplier imposes obligations on his distributors not to sell competing products and these obligations foreclose third party access to the market, actual or potential competition that would have existed in the absence of the agreement is restricted. In assessing whether the

parties to an agreement are actual or potential competitors the economic and legal context must be taken into account. For instance, if due to the financial risks involved and the technical capabilities of the parties it is unlikely on the basis of objective factors that each party would be able to carry out on its own the activities covered by the agreement the parties are deemed to be non-competitors in respect of that activity <sup>(22)</sup>. It is for the parties to bring forward evidence to that effect.

- (2) Does the agreement restrict actual or potential competition that would have existed in the absence of the contractual restraint(s)? If so, the agreement may be caught by Article 81(1). For instance, where a supplier restricts its distributors from competing with each other, (potential) competition that could have existed between the distributors absent the restraints is restricted. Such restrictions include resale price maintenance and territorial or customer sales restrictions between distributors. However, certain restraints may in certain cases not be caught by Article 81(1) when the restraint is objectively necessary for the existence of an agreement of that type or that nature <sup>(23)</sup>. Such exclusion of the application of Article 81(1) can only be made on the basis of objective factors external to the parties themselves and not the subjective views and characteristics of the parties. The question is not whether the parties in their particular situation would not have accepted to conclude a less restrictive agreement, but whether given the nature of the agreement and the characteristics of the market a less restrictive agreement would not have been concluded by undertakings in a similar setting. For instance, territorial restraints in an agreement between a supplier and a distributor may for a certain period of time fall outside Article 81(1), if the restraints are objectively necessary in order for the distributor to penetrate a new market <sup>(24)</sup>. Similarly, a prohibition imposed on all distributors not to sell to certain categories of end users may not be restrictive of competition if such restraint is objectively necessary for reasons of safety or health related to the dangerous nature of the product in question. Claims that in the absence of a restraint the supplier would have resorted to vertical integration are not sufficient. Decisions on whether or not to vertically integrate depend on a broad range of complex economic factors, a number of which are internal to the undertaking concerned.

19. In the application of the analytical framework set out in the previous paragraph it must be taken into account that Article 81(1) distinguishes between those agreements that have a restriction of competition as their object and those agreements that have a restriction of competition as their effect. An agreement or contractual restraint is only prohibited by Article 81(1) if its object or effect is to restrict inter-brand competition and/or intra-brand competition.

20. The distinction between restrictions by object and restrictions by effect is important. Once it has been established that an agreement has as its object the restriction of competition, there is no need to take account of its concrete effects <sup>(25)</sup>. In other words, for the purpose of applying Article 81(1) no actual anti-competitive effects need to be demonstrated where the agreement has a restriction of competition as its object. Article 81(3), on the other hand, does not distinguish between agreements that restrict competition by object and agreements that restrict competition by effect. Article 81(3) applies to all agreements that fulfil the four conditions contained therein <sup>(26)</sup>.
21. Restrictions of competition by *object* are those that by their very nature have the potential of restricting competition. These are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article 81(1) to demonstrate any actual effects on the market. This presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market and to jeopardise the objectives pursued by the Community competition rules. Restrictions by object such as price fixing and market sharing reduce output and raise prices, leading to a misallocation of resources, because goods and services demanded by customers are not produced. They also lead to a reduction in consumer welfare, because consumers have to pay higher prices for the goods and services in question.
22. The assessment of whether or not an agreement has as its object the restriction of competition is based on a number of factors. These factors include, in particular, the content of the agreement and the objective aims pursued by it. It may also be necessary to consider the context in which it is (to be) applied and the actual conduct and behaviour of the parties on the market <sup>(27)</sup>. In other words, an examination of the facts underlying the agreement and the specific circumstances in which it operates may be required before it can be concluded whether a particular restriction constitutes a restriction of competition by object. The way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement does not contain an express provision to that effect. Evidence of subjective intent on the part of the parties to restrict competition is a relevant factor but not a necessary condition.
23. Non-exhaustive guidance on what constitutes restrictions by object can be found in Commission block exemption regulations, guidelines and notices. Restrictions that are black-listed in block exemptions or identified as hardcore restrictions in guidelines and notices are generally considered by the Commission to constitute restrictions by object. In the case of horizontal agreements restrictions of competition by object include price fixing, output limitation and sharing of markets and customers <sup>(28)</sup>. As regards vertical agreements the category of restrictions by object includes, in particular, fixed and minimum resale price maintenance and restrictions providing absolute territorial protection, including restrictions on passive sales <sup>(29)</sup>.
24. If an agreement is not restrictive of competition by object it must be examined whether it has restrictive effects on competition. Account must be taken of both actual and potential effects <sup>(30)</sup>. In other words the agreement must have likely anti-competitive effects. In the case of restrictions of competition by effect there is no presumption of anti-competitive effects. For an agreement to be restrictive by effect it must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability <sup>(31)</sup>. Such negative effects must be appreciable. The prohibition rule of Article 81(1) does not apply when the identified anti-competitive effects are insignificant <sup>(32)</sup>. This test reflects the economic approach which the Commission is applying. The prohibition of Article 81(1) only applies where on the basis of proper market analysis it can be concluded that the agreement has likely anti-competitive effects on the market <sup>(33)</sup>. It is insufficient for such a finding that the market shares of the parties exceed the thresholds set out in the Commission's *de minimis* notice <sup>(34)</sup>. Agreements falling within safe harbours of block exemption regulations may be caught by Article 81(1) but this is not necessarily so. Moreover, the fact that due to the market shares of the parties, an agreement falls outside the safe harbour of a block exemption is in itself an insufficient basis for finding that the agreement is caught by Article 81(1) or that it does not fulfil the conditions of Article 81(3). Individual assessment of the likely effects produced by the agreement is required.
25. Negative effects on competition within the relevant market are likely to occur when the parties individually or jointly have or obtain some degree of market power and the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power. Market



power is the ability to maintain prices above competitive levels for a significant period of time or to maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a significant period of time. In markets with high fixed costs undertakings must price significantly above their marginal costs of production in order to ensure a competitive return on their investment. The fact that undertakings price above their marginal costs is therefore not in itself a sign that competition in the market is not functioning well and that undertakings have market power that allows them to price above the competitive level. It is when competitive constraints are insufficient to maintain prices and output at competitive levels that undertakings have market power within the meaning of Article 81(1).

26. The creation, maintenance or strengthening of market power can result from a restriction of competition between the parties to the agreement. It can also result from a restriction of competition between any one of the parties and third parties, e.g. because the agreement leads to foreclosure of competitors or because it raises competitors' costs, limiting their capacity to compete effectively with the contracting parties. Market power is a question of degree. The degree of market power normally required for the finding of an infringement under Article 81(1) in the case of agreements that are restrictive of competition by effect is less than the degree of market power required for a finding of dominance under Article 82.
27. For the purposes of analysing the restrictive effects of an agreement it is normally necessary to define the relevant market <sup>(35)</sup>. It is normally also necessary to examine and assess, *inter alia*, the nature of the products, the market position of the parties, the market position of competitors, the market position of buyers, the existence of potential competitors and the level of entry barriers. In some cases, however, it may be possible to show anti-competitive effects directly by analysing the conduct of the parties to the agreement on the market. It may for example be possible to ascertain that an agreement has led to price increases. The guidelines on horizontal cooperation agreements and on vertical restraints set out a detailed framework for analysing the competitive impact of various types of horizontal and vertical agreements under Article 81(1) <sup>(36)</sup>.

### 2.2.3. Ancillary restraints

28. Paragraph 18 above sets out a framework for analysing the impact of an agreement and its individual restrictions on inter-brand competition and intra-brand competition. If on the basis of those principles it is concluded that the main transaction covered by the agreement is not

restrictive of competition, it becomes relevant to examine whether individual restraints contained in the agreement are also compatible with Article 81(1) because they are ancillary to the main non-restrictive transaction.

29. In Community competition law the concept of ancillary restraints covers any alleged restriction of competition which is directly related and necessary to the implementation of a main non-restrictive transaction and proportionate to it <sup>(37)</sup>. If an agreement in its main parts, for instance a distribution agreement or a joint venture, does not have as its object or effect the restriction of competition, then restrictions, which are directly related to and necessary for the implementation of that transaction, also fall outside Article 81(1) <sup>(38)</sup>. These related restrictions are called ancillary restraints. A restriction is directly related to the main transaction if it is subordinate to the implementation of that transaction and is inseparably linked to it. The test of necessity implies that the restriction must be objectively necessary for the implementation of the main transaction and be proportionate to it. It follows that the ancillary restraints test is similar to the test set out in paragraph 18(2) above. However, the ancillary restraints test applies in all cases where the main transaction is not restrictive of competition <sup>(39)</sup>. It is not limited to determining the impact of the agreement on intra-brand competition.
30. The application of the ancillary restraint concept must be distinguished from the application of the defence under Article 81(3) which relates to certain economic benefits produced by restrictive agreements and which are balanced against the restrictive effects of the agreements. The application of the ancillary restraint concept does not involve any weighing of pro-competitive and anti-competitive effects. Such balancing is reserved for Article 81(3) <sup>(40)</sup>.
31. The assessment of ancillary restraints is limited to determining whether, in the specific context of the main non-restrictive transaction or activity, a particular restriction is necessary for the implementation of that transaction or activity and proportionate to it. If on the basis of objective factors it can be concluded that without the restriction the main non-restrictive transaction would be difficult or impossible to implement, the restriction may be regarded as objectively necessary for its implementation and proportionate to it <sup>(41)</sup>. If, for example, the main object of a franchise agreement does not restrict competition, then restrictions, which are necessary for the proper functioning of the agreement, such as obligations aimed at protecting the uniformity and reputation of the franchise system, also fall outside Article 81(1) <sup>(42)</sup>. Similarly, if a joint venture is not in itself restrictive of competition, then restrictions that are necessary for the functioning of the agreement are

deemed to be ancillary to the main transaction and are therefore not caught by Article 81(1). For instance in *TPS* <sup>(43)</sup> the Commission concluded that an obligation on the parties not to be involved in companies engaged in distribution and marketing of television programmes by satellite was ancillary to the creation of the joint venture during the initial phase. The restriction was therefore deemed to fall outside Article 81(1) for a period of three years. In arriving at this conclusion the Commission took account of the heavy investments and commercial risks involved in entering the market for pay-television.

### 2.3. The exception rule of Article 81(3)

32. The assessment of restrictions by object and effect under Article 81(1) is only one side of the analysis. The other side, which is reflected in Article 81(3), is the assessment of the positive economic effects of restrictive agreements.

33. The aim of the Community competition rules is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Agreements that restrict competition may at the same time have pro-competitive effects by way of efficiency gains <sup>(44)</sup>. Efficiencies may create additional value by lowering the cost of producing an output, improving the quality of the product or creating a new product. When the pro-competitive effects of an agreement outweigh its anti-competitive effects the agreement is on balance pro-competitive and compatible with the objectives of the Community competition rules. The net effect of such agreements is to promote the very essence of the competitive process, namely to win customers by offering better products or better prices than those offered by rivals. This analytical framework is reflected in Article 81(1) and Article 81(3). The latter provision expressly acknowledges that restrictive agreements may generate objective economic benefits so as to outweigh the negative effects of the restriction of competition <sup>(45)</sup>.

34. The application of the exception rule of Article 81(3) is subject to four cumulative conditions, two positive and two negative:

(a) The agreement must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress,

(b) Consumers must receive a fair share of the resulting benefits,

(c) The restrictions must be indispensable to the attainment of these objectives, and finally

(d) The agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

When these four conditions are fulfilled the agreement enhances competition within the relevant market, because it leads the undertakings concerned to offer cheaper or better products to consumers, compensating the latter for the adverse effects of the restrictions of competition.

35. Article 81(3) can be applied either to individual agreements or to categories of agreements by way of a block exemption regulation. When an agreement is covered by a block exemption the parties to the restrictive agreement are relieved of their burden under Article 2 of Regulation 1/2003 of showing that their individual agreement satisfies each of the conditions of Article 81(3). They only have to prove that the restrictive agreement benefits from a block exemption. The application of Article 81(3) to categories of agreements by way of block exemption regulation is based on the presumption that restrictive agreements that fall within their scope <sup>(46)</sup> fulfil each of the four conditions laid down in Article 81(3).

36. If in an individual case the agreement is caught by Article 81(1) and the conditions of Article 81(3) are not fulfilled the block exemption may be withdrawn. According to Article 29(1) of Regulation 1/2003 the Commission is empowered to withdraw the benefit of a block exemption when it finds that in a particular case an agreement covered by a block exemption regulation has certain effects which are incompatible with Article 81(3) of the Treaty. Pursuant to Article 29(2) of Regulation 1/2003 a competition authority of a Member State may also withdraw the benefit of a Commission block exemption regulation in respect of its territory (or part of its territory), if this territory has all the characteristics of a distinct geographic market. In the case of withdrawal it is for the competition authorities concerned to demonstrate that the agreement infringes Article 81(1) and that it does not fulfil the conditions of Article 81(3).

37. The courts of the Member States have no power to withdraw the benefit of block exemption regulations. Moreover, in their application of block exemption regulations Member State courts may not modify their scope by extending their sphere of application to agreements not covered by the block exemption regulation in question <sup>(47)</sup>. Outside the scope of block exemption regulations Member State courts have the power to apply Article 81 in full (cf. Article 6 of Regulation 1/2003).

### 3. THE APPLICATION OF THE FOUR CONDITIONS OF ARTICLE 81(3)

38. The remainder of these guidelines will consider each of the four conditions of Article 81(3) <sup>(48)</sup>. Given that these four conditions are cumulative <sup>(49)</sup> it is unnecessary to examine any remaining conditions once it is found that one of the conditions of Article 81(3) is not fulfilled. In individual cases it may therefore be appropriate to consider the four conditions in a different order.

39. For the purposes of these guidelines it is considered appropriate to invert the order of the second and the third condition and thus deal with the issue of indispensability before the issue of pass-on to consumers. The analysis of pass-on requires a balancing of the negative and positive effects of an agreement on consumers. This analysis should not include the effects of any restrictions, which already fail the indispensability test and which for that reason are prohibited by Article 81.

#### 3.1. General principles

40. Article 81(3) of the Treaty only becomes relevant when an agreement between undertakings restricts competition within the meaning of Article 81(1). In the case of non-restrictive agreements there is no need to examine any benefits generated by the agreement.

41. Where in an individual case a restriction of competition within the meaning of Article 81(1) has been proven, Article 81(3) can be invoked as a defence. According to Article 2 of Regulation 1/2003 the burden of proof under Article 81(3) rests on the undertaking(s) invoking the benefit of the exception rule. Where the conditions of Article 81(3) are not satisfied the agreement is null and void, cf. Article 81(2). However, such automatic nullity only applies to those parts of the agreement that are incompatible with Article 81, provided that such parts are severable from the agreement as a whole <sup>(50)</sup>. If only part of the agreement is null and void, it is for the

applicable national law to determine the consequences thereof for the remaining part of the agreement <sup>(51)</sup>.

42. According to settled case law the four conditions of Article 81(3) are cumulative <sup>(52)</sup>, i.e. they must all be fulfilled for the exception rule to be applicable. If they are not, the application of the exception rule of Article 81(3) must be refused <sup>(53)</sup>. The four conditions of Article 81(3) are also exhaustive. When they are met the exception is applicable and may not be made dependant on any other condition. Goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article 81(3) <sup>(54)</sup>.

43. The assessment under Article 81(3) of benefits flowing from restrictive agreements is in principle made within the confines of each relevant market to which the agreement relates. The Community competition rules have as their objective the protection of competition on the market and cannot be detached from this objective. Moreover, the condition that consumers <sup>(55)</sup> must receive a fair share of the benefits implies in general that efficiencies generated by the restrictive agreement within a relevant market must be sufficient to outweigh the anti-competitive effects produced by the agreement within that same relevant market <sup>(56)</sup>. Negative effects on consumers in one geographic market or product market cannot normally be balanced against and compensated by positive effects for consumers in another unrelated geographic market or product market. However, where two markets are related, efficiencies achieved on separate markets can be taken into account provided that the group of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same <sup>(57)</sup>. Indeed, in some cases only consumers in a downstream market are affected by the agreement in which case the impact of the agreement on such consumers must be assessed. This is for instance so in the case of purchasing agreements <sup>(58)</sup>.

44. The assessment of restrictive agreements under Article 81(3) is made within the actual context in which they occur <sup>(59)</sup> and on the basis of the facts existing at any given point in time. The assessment is sensitive to material changes in the facts. The exception rule of Article 81(3) applies as long as the four conditions are fulfilled and ceases to apply when that is no longer the case <sup>(60)</sup>. When applying Article 81(3) in accordance with these principles it is necessary to take into account the initial sunk investments made by any of the parties and the time needed and the restraints required to commit and recoup an efficiency enhancing investment. Article 81 cannot be applied without taking due account of such *ex ante* investment. The risk facing the parties and the sunk investment that must be committed to implement

the agreement can thus lead to the agreement falling outside Article 81(1) or fulfilling the conditions of Article 81(3), as the case may be, for the period of time required to recoup the investment.

45. In some cases the restrictive agreement is an irreversible event. Once the restrictive agreement has been implemented the *ex ante* situation cannot be re-established. In such cases the assessment must be made exclusively on the basis of the facts pertaining at the time of implementation. For instance, in the case of a research and development agreement whereby each party agrees to abandon its respective research project and pool its capabilities with those of another party, it may from an objective point of view be technically and economically impossible to revive a project once it has been abandoned. The assessment of the anti-competitive and pro-competitive effects of the agreement to abandon the individual research projects must therefore be made as of the time of the completion of its implementation. If at that point in time the agreement is compatible with Article 81, for instance because a sufficient number of third parties have competing research and development projects, the parties' agreement to abandon their individual projects remains compatible with Article 81, even if at a later point in time the third party projects fail. However, the prohibition of Article 81 may apply to other parts of the agreement in respect of which the issue of irreversibility does not arise. If for example in addition to joint research and development, the agreement provides for joint exploitation, Article 81 may apply to this part of the agreement if due to subsequent market developments the agreement becomes restrictive of competition and does not (any longer) satisfy the conditions of Article 81(3) taking due account of *ex ante* sunk investments, cf. the previous paragraph.

46. Article 81(3) does not exclude *a priori* certain types of agreements from its scope. As a matter of principle all restrictive agreements that fulfil the four conditions of Article 81(3) are covered by the exception rule<sup>(61)</sup>. However, severe restrictions of competition are unlikely to fulfil the conditions of Article 81(3). Such restrictions are usually black-listed in block exemption regulations or identified as hardcore restrictions in Commission guidelines and notices. Agreements of this nature generally fail (at least) the two first conditions of Article 81(3). They neither create objective economic benefits<sup>(62)</sup> nor do they benefit consumers<sup>(63)</sup>. For example, a horizontal agreement to fix prices limits output leading to misallocation of resources. It also transfers value from consumers to producers, since it leads to higher prices without producing any countervailing value to consumers within the relevant market. Moreover, these types of agreements generally also fail the indispensability test under the third condition<sup>(64)</sup>.

47. Any claim that restrictive agreements are justified because they aim at ensuring fair conditions of competition on the market is by nature unfounded and must be discarded<sup>(65)</sup>. The purpose of Article 81 is to protect effective competition by ensuring that markets remain open and competitive. The protection of fair conditions of competition is a task for the legislator in compliance with Community law obligations<sup>(66)</sup> and not for undertakings to regulate themselves.

### 3.2. First condition of Article 81(3): Efficiency gains

#### 3.2.1. General remarks

48. According to the first condition of Article 81(3) the restrictive agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress. The provision refers expressly only to goods, but applies by analogy to services.

49. It follows from the case law of the Court of Justice that only objective benefits can be taken into account<sup>(67)</sup>. This means that efficiencies are not assessed from the subjective point of view of the parties<sup>(68)</sup>. Cost savings that arise from the mere exercise of market power by the parties cannot be taken into account. For instance, when companies agree to fix prices or share markets they reduce output and thereby production costs. Reduced competition may also lead to lower sales and marketing expenditures. Such cost reductions are a direct consequence of a reduction in output and value. The cost reductions in question do not produce any pro-competitive effects on the market. In particular, they do not lead to the creation of value through an integration of assets and activities. They merely allow the undertakings concerned to increase their profits and are therefore irrelevant from the point of view of Article 81(3).

50. The purpose of the first condition of Article 81(3) is to define the types of efficiency gains that can be taken into account and be subject to the further tests of the second and third conditions of Article 81(3). The aim of the analysis is to ascertain what are the objective benefits created by the agreement and what is the economic importance of such efficiencies. Given that for Article 81(3) to apply the pro-competitive effects flowing from the agreement must outweigh its anti-competitive effects, it is necessary to verify what is the link between the agreement and the claimed efficiencies and what is the value of these efficiencies.

51. All efficiency claims must therefore be substantiated so that the following can be verified:

- (a) The *nature* of the claimed efficiencies;
- (b) The *link* between the agreement and the efficiencies;
- (c) The *likelihood* and *magnitude* of each claimed efficiency; and
- (d) *How* and *when* each claimed efficiency would be achieved.

52. Letter (a) allows the decision-maker to verify whether the claimed efficiencies are objective in nature, cf. paragraph 49 above.

53. Letter (b) allows the decision-maker to verify whether there is a sufficient causal link between the restrictive agreement and the claimed efficiencies. This condition normally requires that the efficiencies result from the economic activity that forms the object of the agreement. Such activities may, for example, take the form of distribution, licensing of technology, joint production or joint research and development. To the extent, however, that an agreement has wider efficiency enhancing effects within the relevant market, for example because it leads to a reduction in industry wide costs, these additional benefits are also taken into account.

54. The causal link between the agreement and the claimed efficiencies must normally also be direct<sup>(69)</sup>. Claims based on indirect effects are as a general rule too uncertain and too remote to be taken into account. A direct causal link exists for instance where a technology transfer agreement allows the licensees to produce new or improved products or a distribution agreement allows products to be distributed at lower cost or valuable services to be produced. An example of indirect effect would be a case where it is claimed that a restrictive agreement allows the undertakings concerned to increase their profits, enabling them to invest more in research and development to the ultimate benefit of consumers. While there may be a link between profitability and research and development, this link is generally not sufficiently direct to be taken into account in the context of Article 81(3).

55. Letters (c) and (d) allow the decision-maker to verify the value of the claimed efficiencies, which in the context of

the third condition of Article 81(3) must be balanced against the anti-competitive effects of the agreement, see paragraph 101 below. Given that Article 81(1) only applies in cases where the agreement has likely negative effects on competition and consumers (in the case of hardcore restrictions such effects are presumed) efficiency claims must be substantiated so that they can be verified. Unsubstantiated claims are rejected.

56. In the case of claimed cost efficiencies the undertakings invoking the benefit of Article 81(3) must as accurately as reasonably possible calculate or estimate the value of the efficiencies and describe in detail how the amount has been computed. They must also describe the method(s) by which the efficiencies have been or will be achieved. The data submitted must be verifiable so that there can be a sufficient degree of certainty that the efficiencies have materialised or are likely to materialise.

57. In the case of claimed efficiencies in the form of new or improved products and other non-cost based efficiencies, the undertakings claiming the benefit of Article 81(3) must describe and explain in detail what is the nature of the efficiencies and how and why they constitute an objective economic benefit.

58. In cases where the agreement has yet to be fully implemented the parties must substantiate any projections as to the date from which the efficiencies will become operational so as to have a significant positive impact in the market.

### 3.2.2. The different categories of efficiencies

59. The types of efficiencies listed in Article 81(3) are broad categories which are intended to cover all objective economic efficiencies. There is considerable overlap between the various categories mentioned in Article 81(3) and the same agreement may give rise to several kinds of efficiencies. It is therefore not appropriate to draw clear and firm distinctions between the various categories. For the purpose of these guidelines, a distinction is made between cost efficiencies and efficiencies of a qualitative nature whereby value is created in the form of new or improved products, greater product variety etc.

60. In general, efficiencies stem from an integration of economic activities whereby undertakings combine their assets to achieve what they could not achieve as efficiently on their own or whereby they entrust another undertaking with tasks that can be performed more efficiently by that other undertaking.

61. The research and development, production and distribution process may be viewed as a value chain that can be divided into a number of stages. At each stage of this chain an undertaking must make a choice between performing the activity itself, performing it together with (an)other undertaking(s) or outsourcing the activity entirely to (an)other undertaking(s).
62. In each case where the choice made involves cooperation on the market with another undertaking, an agreement within the meaning of Article 81(1) normally needs to be concluded. These agreements can be vertical, as is the case where the parties operate at different levels of the value chain or horizontal, as is the case where the firms operate at the same level of the value chain. Both categories of agreements may create efficiencies by allowing the undertakings in question to perform a particular task at lower cost or with higher added value for consumers. Such agreements may also contain or lead to restrictions of competition in which case the prohibition rule of Article 81(1) and the exception rule of Article 81(3) may become relevant.
63. The types of efficiencies mentioned in the following are only examples and are not intended to be exhaustive.

#### 3.2.2.1. Cost efficiencies

64. Cost efficiencies flowing from agreements between undertakings can originate from a number of different sources. One very important source of cost savings is the development of new production technologies and methods. In general, it is when technological leaps are made that the greatest potential for cost savings is achieved. For instance, the introduction of the assembly line led to a very substantial reduction in the cost of producing motor vehicles.
65. Another very important source of efficiency is synergies resulting from an integration of existing assets. When the parties to an agreement combine their respective assets they may be able to attain a cost/output configuration that would not otherwise be possible. The combination of two existing technologies that have complementary strengths may reduce production costs or lead to the production of a higher quality product. For instance, it may be that the production assets of firm A generate a high output per hour but require a relatively high input of raw materials per unit of output, whereas the production assets of firm B generate lower output per hour but require a relatively lower input of raw

materials per unit of output. Synergies are created if by establishing a production joint venture combining the production assets of A and B the parties can attain a high(er) level of output per hour with a low(er) input of raw materials per unit of output. Similarly, if one undertaking has optimised one part of the value chain and another undertaking has optimised another part of the value chain, the combination of their operations may lead to lower costs. Firm A may for instance have a highly automated production facility resulting in low production costs per unit whereas B has developed an efficient order processing system. The system allows production to be tailored to customer demand, ensuring timely delivery and reducing warehousing and obsolescence costs. By combining their assets A and B may be able to obtain cost reductions.

66. Cost efficiencies may also result from economies of scale, i.e. declining cost per unit of output as output increases. To give an example: investment in equipment and other assets often has to be made in indivisible blocks. If an undertaking cannot fully utilise a block, its average costs will be higher than if it could do so. For instance, the cost of operating a truck is virtually the same regardless of whether it is almost empty, half-full or full. Agreements whereby undertakings combine their logistics operations may allow them to increase the load factors and reduce the number of vehicles employed. Larger scale may also allow for better division of labour leading to lower unit costs. Firms may achieve economies of scale in respect of all parts of the value chain, including research and development, production, distribution and marketing. Learning economies constitute a related type of efficiency. As experience is gained in using a particular production process or in performing particular tasks, productivity may increase because the process is made to run more efficiently or because the task is performed more quickly.
67. Economies of scope are another source of cost efficiency, which occur when firms achieve cost savings by producing different products on the basis of the same input. Such efficiencies may arise from the fact that it is possible to use the same components and the same facilities and personnel to produce a variety of products. Similarly, economies of scope may arise in distribution when several types of goods are distributed in the same vehicles. For instance, a producer of frozen pizzas and a producer of frozen vegetables may obtain economies of scope by jointly distributing their products. Both groups of products must be distributed in refrigerated vehicles and it is likely that there are significant overlaps in terms of customers. By combining their operations the two producers may obtain lower distribution costs per distributed unit.

68. Efficiencies in the form of cost reductions can also follow from agreements that allow for better planning of production, reducing the need to hold expensive inventory and allowing for better capacity utilisation. Efficiencies of this nature may for example stem from the use of 'just in time' purchasing, i.e. an obligation on a supplier of components to continuously supply the buyer according to its needs thereby avoiding the need for the buyer to maintain a significant stock of components which risks becoming obsolete. Cost savings may also result from agreements that allow the parties to rationalise production across their facilities.

### 3.2.2.2. Qualitative efficiencies

69. Agreements between undertakings may generate various efficiencies of a qualitative nature which are relevant to the application of Article 81(3). In a number of cases the main efficiency enhancing potential of the agreement is not cost reduction; it is quality improvements and other efficiencies of a qualitative nature. Depending on the individual case such efficiencies may therefore be of equal or greater importance than cost efficiencies.

70. Technical and technological advances form an essential and dynamic part of the economy, generating significant benefits in the form of new or improved goods and services. By cooperating undertakings may be able to create efficiencies that would not have been possible without the restrictive agreement or would have been possible only with substantial delay or at higher cost. Such efficiencies constitute an important source of economic benefits covered by the first condition of Article 81(3). Agreements capable of producing efficiencies of this nature include, in particular, research and development agreements. An example would be A and B creating a joint venture for the development and, if successful, joint production of a cell-based tyre. The puncture of one cell does not affect other cells, which means that there is no risk of collapse of the tyre in the event of a puncture. The tyre is thus safer than traditional tyres. It also means that there is no immediate need to change the tyre and thus to carry a spare. Both types of efficiencies constitute objective benefits within the meaning of the first condition of Article 81(3).

71. In the same way that the combination of complementary assets can give rise to cost savings, combinations of assets may also create synergies that create efficiencies of a qualitative nature. The combination of production assets may for instance lead to the production of higher quality

products or products with novel features. This may for instance be the case for licence agreements, and agreements providing for joint production of new or improved goods or services. Licence agreements may, in particular, ensure more rapid dissemination of new technology in the Community and enable the licensee(s) to make available new products or to employ new production techniques that lead to quality improvements. Joint production agreements may, in particular, allow new or improved products or services to be introduced on the market more quickly or at lower cost<sup>(70)</sup>. In the telecommunications sector, for example, cooperation agreements have been held to create efficiencies by making available more quickly new global services<sup>(71)</sup>. In the banking sector cooperation agreements that made available improved facilities for making cross-border payments have also been held to create efficiencies falling within the scope of the first condition of Article 81(3)<sup>(72)</sup>.

72. Distribution agreements may also give rise to qualitative efficiencies. Specialised distributors, for example, may be able to provide services that are better tailored to customer needs or to provide quicker delivery or better quality assurance throughout the distribution chain<sup>(73)</sup>.

### 3.3. Third condition of Article 81(3): Indispensability of the restrictions

73. According to the third condition of Article 81(3) the restrictive agreement must not impose restrictions, which are not indispensable to the attainment of the efficiencies created by the agreement in question. This condition implies a two-fold test. First, the restrictive agreement as such must be reasonably necessary in order to achieve the efficiencies. Secondly, the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of the efficiencies.

74. In the context of the third condition of Article 81(3) the decisive factor is whether or not the restrictive agreement and individual restrictions make it possible to perform the activity in question more efficiently than would likely have been the case in the absence of the agreement or the restriction concerned. The question is not whether in the absence of the restriction the agreement would not have been concluded, but whether more efficiencies are produced with the agreement or restriction than in the absence of the agreement or restriction<sup>(74)</sup>.

75. The first test contained in the third condition of Article 81(3) requires that the efficiencies be specific to the agreement in question in the sense that there are no other economically practicable and less restrictive means of achieving the efficiencies. In making this latter assessment the market conditions and business realities facing the parties to the agreement must be taken into account. Undertakings invoking the benefit of Article 81(3) are not required to consider hypothetical or theoretical alternatives. The Commission will not second guess the business judgment of the parties. It will only intervene where it is reasonably clear that there are realistic and attainable alternatives. The parties must only explain and demonstrate why such seemingly realistic and significantly less restrictive alternatives to the agreement would be significantly less efficient.
76. It is particularly relevant to examine whether, having due regard to the circumstances of the individual case, the parties could have achieved the efficiencies by means of another less restrictive type of agreement and, if so, when they would likely be able to obtain the efficiencies. It may also be necessary to examine whether the parties could have achieved the efficiencies on their own. For instance, where the claimed efficiencies take the form of cost reductions resulting from economies of scale or scope the undertakings concerned must explain and substantiate why the same efficiencies would not be likely to be attained through internal growth and price competition. In making this assessment it is relevant to consider, *inter alia*, what is the minimum efficient scale on the market concerned. The minimum efficient scale is the level of output required to minimise average cost and exhaust economies of scale <sup>(75)</sup>. The larger the minimum efficient scale compared to the current size of either of the parties to the agreement, the more likely it is that the efficiencies will be deemed to be specific to the agreement. In the case of agreements that produce substantial synergies through the combination of complementary assets and capabilities the very nature of the efficiencies give rise to a presumption that the agreement is necessary to attain them.
77. These principles can be illustrated by the following hypothetical example:
- A and B combine within a joint venture their respective production technologies to achieve higher output and lower raw material consumption. The joint venture is granted an exclusive licence to their respective production technologies. The parties transfer their existing production facilities to the joint venture. They also transfer key staff in order to ensure that existing learning economies can be exploited and further developed. It is estimated that these economies will reduce production costs by a further 5 %. The output of the joint venture is sold independently by A and B. In this case the indispensability condition necessitates an assessment of whether or not the benefits could be substantially achieved by means of a licence agreement, which would be likely to be less restrictive because A and B would continue to produce independently. In the circumstances described this is unlikely to be the case since under a licence agreement the parties would not be able to benefit in the same seamless and continued way from their respective experience in operating the two technologies, resulting in significant learning economies.
78. Once it is found that the agreement in question is necessary in order to produce the efficiencies, the indispensability of each restriction of competition flowing from the agreement must be assessed. In this context it must be assessed whether individual restrictions are reasonably necessary in order to produce the efficiencies. The parties to the agreement must substantiate their claim with regard to both the nature of the restriction and its intensity.
79. A restriction is indispensable if its absence would eliminate or significantly reduce the efficiencies that follow from the agreement or make it significantly less likely that they will materialise. The assessment of alternative solutions must take into account the actual and potential improvement in the field of competition by the elimination of a particular restriction or the application of a less restrictive alternative. The more restrictive the restraint the stricter the test under the third condition <sup>(76)</sup>. Restrictions that are black listed in block exemption regulations or identified as hardcore restrictions in Commission guidelines and notices are unlikely to be considered indispensable.
80. The assessment of indispensability is made within the actual context in which the agreement operates and must in particular take account of the structure of the market, the economic risks related to the agreement, and the incentives facing the parties. The more uncertain the success of the product covered by the agreement, the more a restriction may be required to ensure that the efficiencies will materialise. Restrictions may also be indispensable in order to align the incentives of the parties and ensure that they concentrate their efforts on the implementation of the agreement. A restriction may for instance be necessary in order to avoid hold-up problems once a substantial sunk investment has been made by one of the parties. Once for instance a supplier has made a substantial relationship-specific



investment with a view to supplying a customer with an input, the supplier is locked into the customer. In order to avoid that *ex post* the customer exploits this dependence to obtain more favourable terms, it may be necessary to impose an obligation not to purchase the component from third parties or to purchase minimum quantities of the component from the supplier <sup>(77)</sup>.

81. In some cases a restriction may be indispensable only for a certain period of time, in which case the exception of Article 81(3) only applies during that period. In making this assessment it is necessary to take due account of the period of time required for the parties to achieve the efficiencies justifying the application of the exception rule <sup>(78)</sup>. In cases where the benefits cannot be achieved without considerable investment, account must, in particular, be taken of the period of time required to ensure an adequate return on such investment, see also paragraph 44 above.

82. These principles can be illustrated by the following hypothetical examples:

P produces and distributes frozen pizzas, holding 15 % of the market in Member State X. Deliveries are made directly to retailers. Since most retailers have limited storage capacity, relatively frequent deliveries are required, leading to low capacity utilisation and use of relatively small vehicles. T is a wholesaler of frozen pizzas and other frozen products, delivering to most of the same customers as P. The pizza products distributed by T hold 30 % of the market. T has a fleet of larger vehicles and has excess capacity. P concludes an exclusive distribution agreement with T for Member State X and undertakes to ensure that distributors in other Member States will not sell into T's territory either actively or passively. T undertakes to advertise the products, survey consumer tastes and satisfaction rates and ensure delivery to retailers of all products within 24 hours. The agreement leads to a reduction in total distribution costs of 30 % as capacity is better utilised and duplication of routes is eliminated. The agreement also leads to the provision of additional services to consumers. Restrictions on passive sales are hardcore restrictions under the block exemption regulation on vertical restraints <sup>(79)</sup> and can only be considered indispensable in exceptional circumstances. The established market position of T and the nature of the obligations imposed on it indicate this is not an exceptional case. The ban on active selling, on the other hand, is likely to be indispensable. T is likely to have less incentive to sell and advertise the P brand, if distributors in other Member

States could sell actively in Member State X and thus get a free ride on the efforts of T. This is particularly so, as T also distributes competing brands and thus has the possibility of pushing more of the brands that are the least exposed to free riding.

S is a producer of carbonated soft drinks, holding 40 % of the market. The nearest competitor holds 20 %. S concludes supply agreements with customers accounting for 25 % of demand, whereby they undertake to purchase exclusively from S for 5 years. S concludes agreements with other customers accounting for 15 % of demand whereby they are granted quarterly target rebates, if their purchases exceed certain individually fixed targets. S claims that the agreements allow it to predict demand more accurately and thus to better plan production, reducing raw material storage and warehousing costs and avoiding supply shortages. Given the market position of S and the combined coverage of the restrictions, the restrictions are very unlikely to be considered indispensable. The exclusive purchasing obligation exceeds what is required to plan production and the same is true of the target rebate scheme. Predictability of demand can be achieved by less restrictive means. S could, for example, provide incentives for customers to order large quantities at a time by offering quantity rebates or by offering a rebate to customers that place firm orders in advance for delivery on specified dates.

### 3.4. Second condition of Article 81(3): Fair share for consumers

#### 3.4.1. General remarks

83. According to the second condition of Article 81(3) consumers must receive a fair share of the efficiencies generated by the restrictive agreement.

84. The concept of 'consumers' encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers, i.e. natural persons who are acting for purposes which can be regarded as outside their trade or profession. In other words, consumers within the meaning of Article 81(3) are the customers of the parties to the agreement and subsequent purchasers. These customers can be undertakings as in the case of buyers of industrial machinery or an input for further processing or final consumers as for instance in the case of buyers of impulse ice-cream or bicycles.

85. The concept of 'fair share' implies that the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under Article 81(1). In line with the overall objective of Article 81 to prevent anti-competitive agreements, the net effect of the agreement must at least be neutral from the point of view of those consumers directly or likely affected by the agreement<sup>(80)</sup>. If such consumers are worse off following the agreement, the second condition of Article 81(3) is not fulfilled. The positive effects of an agreement must be balanced against and compensate for its negative effects on consumers<sup>(81)</sup>. When that is the case consumers are not harmed by the agreement. Moreover, society as a whole benefits where the efficiencies lead either to fewer resources being used to produce the output consumed or to the production of more valuable products and thus to a more efficient allocation of resources.
86. It is not required that consumers receive a share of each and every efficiency gain identified under the first condition. It suffices that sufficient benefits are passed on to compensate for the negative effects of the restrictive agreement. In that case consumers obtain a fair share of the overall benefits<sup>(82)</sup>. If a restrictive agreement is likely to lead to higher prices, consumers must be fully compensated through increased quality or other benefits. If not, the second condition of Article 81(3) is not fulfilled.
87. The decisive factor is the overall impact on consumers of the products within the relevant market and not the impact on individual members of this group of consumers<sup>(83)</sup>. In some cases a certain period of time may be required before the efficiencies materialise. Until such time the agreement may have only negative effects. The fact that pass-on to the consumer occurs with a certain time lag does not in itself exclude the application of Article 81(3). However, the greater the time lag, the greater must be the efficiencies to compensate also for the loss to consumers during the period preceding the pass-on.
88. In making this assessment it must be taken into account that the value of a gain for consumers in the future is not the same as a present gain for consumers. The value of saving 100 euro today is greater than the value of saving the same amount a year later. A gain for consumers in the future therefore does not fully compensate for a present loss to consumers of equal nominal size. In order to allow for an appropriate comparison of a present loss to consumers with a future gain to consumers, the value of future gains must be discounted. The discount rate applied must reflect the rate of inflation, if any, and lost interest as an indication of the lower value of future gains.
89. In other cases the agreement may enable the parties to obtain the efficiencies earlier than would otherwise be possible. In such circumstances it is necessary to take account of the likely negative impact on consumers within the relevant market once this lead-time has lapsed. If through the restrictive agreement the parties obtain a strong position on the market, they may be able to charge a significantly higher price than would otherwise have been the case. For the second condition of Article 81(3) to be satisfied the benefit to consumers of having earlier access to the products must be equally significant. This may for instance be the case where an agreement allows two tyre manufacturers to bring to market three years earlier a new substantially safer tyre but at the same time, by increasing their market power, allows them to raise prices by 5 %. In such a case it is likely that having early access to a substantially improved product outweighs the price increase.
90. The second condition of Article 81(3) incorporates a sliding scale. The greater the restriction of competition found under Article 81(1) the greater must be the efficiencies and the pass-on to consumers. This sliding scale approach implies that if the restrictive effects of an agreement are relatively limited and the efficiencies are substantial it is likely that a fair share of the cost savings will be passed on to consumers. In such cases it is therefore normally not necessary to engage in a detailed analysis of the second condition of Article 81(3), provided that the three other conditions for the application of this provision are fulfilled.
91. If, on the other hand, the restrictive effects of the agreement are substantial and the cost savings are relatively insignificant, it is very unlikely that the second condition of Article 81(3) will be fulfilled. The impact of the restriction of competition depends on the intensity of the restriction and the degree of competition that remains following the agreement.

92. If the agreement has both substantial anti-competitive effects and substantial pro-competitive effects a careful analysis is required. In the application of the balancing test in such cases it must be taken into account that competition is an important long-term driver of efficiency and innovation. Undertakings that are not subject to effective competitive constraints – such as for instance dominant firms – have less incentive to maintain or build on the efficiencies. The more substantial the impact of the agreement on competition, the more likely it is that consumers will suffer in the long run.
93. The following two sections describe in more detail the analytical framework for assessing consumer pass-on of efficiency gains. The first section deals with cost efficiencies, whereas the section that follows covers other types of efficiencies such as new or improved products (qualitative efficiencies). The framework, which is developed in these two sections, is particularly important in cases where it is not immediately obvious that the competitive harms exceed the benefits to consumers or *vice versa* <sup>(84)</sup>.
94. In the application of the principles set out below the Commission will have regard to the fact that in many cases it is difficult to accurately calculate the consumer pass-on rate and other types of consumer pass-on. Undertakings are only required to substantiate their claims by providing estimates and other data to the extent reasonably possible, taking account of the circumstances of the individual case.
- 3.4.2. *Pass-on and balancing of cost efficiencies*
95. When markets, as is normally the case, are not perfectly competitive, undertakings are able to influence the market price to a greater or lesser extent by altering their output <sup>(85)</sup>. They may also be able to price discriminate amongst customers.
96. Cost efficiencies may in some circumstances lead to increased output and lower prices for the affected consumers. If due to cost efficiencies the undertakings in question can increase profits by expanding output, consumer pass-on may occur. In assessing the extent to which cost efficiencies are likely to be passed on to consumers and the outcome of the balancing test contained in Article 81(3) the following factors are in particular taken into account:
- (a) The characteristics and structure of the market,
  - (b) The nature and magnitude of the efficiency gains,
  - (c) The elasticity of demand, and
  - (d) The magnitude of the restriction of competition.
- All factors must normally be considered. Since Article 81(3) only applies in cases where competition on the market is being appreciably restricted, see paragraph 24 above, there can be no presumption that residual competition will ensure that consumers receive a fair share of the benefits. However, the degree of competition remaining on the market and the nature of this competition influences the likelihood of pass-on.
97. The greater the degree of residual competition the more likely it is that individual undertakings will try to increase their sales by passing on cost efficiencies. If undertakings compete mainly on price and are not subject to significant capacity constraints, pass-on may occur relatively quickly. If competition is mainly on capacity and capacity adaptations occur with a certain time lag, pass-on will be slower. Pass-on is also likely to be slower when the market structure is conducive to tacit collusion <sup>(86)</sup>. If competitors are likely to retaliate against an increase in output by one or more parties to the agreement, the incentive to increase output may be tempered, unless the competitive advantage conferred by the efficiencies is such that the undertakings concerned have an incentive to break away from the common policy adopted on the market by the members of the oligopoly. In other words, the efficiencies generated by the agreement may turn the undertakings concerned into so-called 'mavericks' <sup>(87)</sup>.

98. The nature of the efficiency gains also plays an important role. According to economic theory undertakings maximise their profits by selling units of output until marginal revenue equals marginal cost. Marginal revenue is the change in total revenue resulting from selling an additional unit of output and marginal cost is the change in total cost resulting from producing that additional unit of output. It follows from this principle that as a general rule output and pricing decisions of a profit maximising undertaking are not determined by its fixed costs (i.e. costs that do not vary with the rate of production) but by its variable costs (i.e. costs that vary with the rate of production). After fixed costs are incurred and capacity is set, pricing and output decisions are determined by variable cost and demand conditions. Take for instance a situation in which two companies each produce two products on two production lines operating only at half their capacities. A specialisation agreement may allow the two undertakings to specialise in producing one of the two products and scrap their second production line for the other product. At the same time the specialisation may allow the companies to reduce variable input and stocking costs. Only the latter savings will have a direct effect on the pricing and output decisions of the undertakings, as they will influence the marginal costs of production. The scrapping by each undertaking of one of their production lines will not reduce their variable costs and will not have an impact on their production costs. It follows that undertakings may have a direct incentive to pass on to consumers in the form of higher output and lower prices efficiencies that reduce marginal costs, whereas they have no such direct incentive with regard to efficiencies that reduce fixed costs. Consumers are therefore more likely to receive a fair share of the cost efficiencies in the case of reductions in variable costs than they are in the case of reductions in fixed costs.
99. The fact that undertakings may have an incentive to pass on certain types of cost efficiencies does not imply that the pass-on rate will necessarily be 100 %. The actual pass-on rate depends on the extent to which consumers respond to changes in price, i.e. the elasticity of demand. The greater the increase in demand caused by a decrease in price, the greater the pass-on rate. This follows from the fact that the greater the additional sales caused by a price reduction due to an increase in output the more likely it is that these sales will offset the loss of revenue caused by the lower price resulting from the increase in output. In the absence of price discrimination the lowering of prices affects all units sold by the undertaking, in which case marginal revenue is less than the price obtained for the marginal product. If the undertakings concerned are able to charge different prices to different customers, i.e. price discriminate, pass-on will normally only benefit price-sensitive consumers<sup>(88)</sup>.
100. It must also be taken into account that efficiency gains often do not affect the whole cost structure of the undertakings concerned. In such event the impact on the price to consumers is reduced. If for example an agreement allows the parties to reduce production costs by 6 %, but production costs only make up one third of the costs on the basis of which prices are determined, the impact on the product price is 2 %, assuming that the full amount is passed-on.
101. Finally, and very importantly, it is necessary to balance the two opposing forces resulting from the restriction of competition and the cost efficiencies. On the one hand, any increase in market power caused by the restrictive agreement gives the undertakings concerned the ability and incentive to raise price. On the other hand, the types of cost efficiencies that are taken into account may give the undertakings concerned an incentive to reduce price, see paragraph 98 above. The effects of these two opposing forces must be balanced against each other. It is recalled in this regard that the consumer pass-on condition incorporates a sliding scale. When the agreement causes a substantial reduction in the competitive constraint facing the parties, extraordinarily large cost efficiencies are normally required for sufficient pass-on to occur.
- 3.4.3. *Pass-on and balancing of other types of efficiencies*
102. Consumer pass-on can also take the form of qualitative efficiencies such as new and improved products, creating sufficient value for consumers to compensate for the anti-competitive effects of the agreement, including a price increase.
103. Any such assessment necessarily requires value judgment. It is difficult to assign precise values to dynamic efficiencies of this nature. However, the fundamental objective of the assessment remains the same, namely to ascertain the overall impact of the agreement on the consumers within the relevant market. Undertakings claiming the benefit of Article 81(3) must substantiate that consumers obtain countervailing benefits (see in this respect paragraphs 57 and 86 above).

104. The availability of new and improved products constitutes an important source of consumer welfare. As long as the increase in value stemming from such improvements exceeds any harm from a maintenance or an increase in price caused by the restrictive agreement, consumers are better off than without the agreement and the consumer pass-on requirement of Article 81(3) is normally fulfilled. In cases where the likely effect of the agreement is to increase prices for consumers within the relevant market it must be carefully assessed whether the claimed efficiencies create real value for consumers in that market so as to compensate for the adverse effects of the restriction of competition.

### 3.5. Fourth condition of Article 81(3): No elimination of competition

105. According to the fourth condition of Article 81(3) the agreement must not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products concerned. Ultimately the protection of rivalry and the competitive process is given priority over potentially pro-competitive efficiency gains which could result from restrictive agreements. The last condition of Article 81(3) recognises the fact that rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the shape of innovation. In other words, the ultimate aim of Article 81 is to protect the competitive process. When competition is eliminated the competitive process is brought to an end and short-term efficiency gains are outweighed by longer-term losses stemming *inter alia* from expenditures incurred by the incumbent to maintain its position (rent seeking), misallocation of resources, reduced innovation and higher prices.

106. The concept in Article 81(3) of elimination of competition in respect of a substantial part of the products concerned is an autonomous Community law concept specific to Article 81(3)<sup>(89)</sup>. However, in the application of this concept it is necessary to take account of the relationship between Article 81 and Article 82. According to settled case law the application of Article 81(3) cannot prevent the application of Article 82 of the Treaty<sup>(90)</sup>. Moreover, since Articles 81 and 82 both pursue the aim of maintaining effective competition on the market, consistency requires that Article 81(3) be interpreted as precluding any application of this provision to restrictive agreements that constitute an abuse of a dominant position<sup>(91)</sup><sup>(92)</sup>. However, not all restrictive agreements concluded by a dominant undertaking constitute an abuse of a dominant position. This is for instance the case where a dominant undertaking is party to a non-full function joint venture<sup>(93)</sup>, which is found to be restrictive of competition but at the same time involves a substantial integration of assets.

107. Whether competition is being eliminated within the meaning of the last condition of Article 81(3) depends on the degree of competition existing prior to the agreement and on the impact of the restrictive agreement on competition, i.e. the reduction in competition that the agreement brings about. The more competition is already weakened in the market concerned, the slighter the further reduction required for competition to be eliminated within the meaning of Article 81(3). Moreover, the greater the reduction of competition caused by the agreement, the greater the likelihood that competition in respect of a substantial part of the products concerned risks being eliminated.

108. The application of the last condition of Article 81(3) requires a realistic analysis of the various sources of competition in the market, the level of competitive constraint that they impose on the parties to the agreement and the impact of the agreement on this competitive constraint. Both actual and potential competition must be considered.

109. While market shares are relevant, the magnitude of remaining sources of actual competition cannot be assessed exclusively on the basis of market share. More extensive qualitative and quantitative analysis is normally called for. The capacity of actual competitors to compete and their incentive to do so must be examined. If, for example, competitors face capacity constraints or have relatively higher costs of production their competitive response will necessarily be limited.

110. In the assessment of the impact of the agreement on competition it is also relevant to examine its influence on the various parameters of competition. The last condition for exception under Article 81(3) is not fulfilled, if the agreement eliminates competition in one of its most important expressions. This is particularly the case when an agreement eliminates price competition<sup>(94)</sup> or competition in respect of innovation and development of new products.

111. The actual market conduct of the parties can provide insight into the impact of the agreement. If following the conclusion of the agreement the parties have implemented and maintained substantial price increases or engaged in other conduct indicative of the existence of a considerable degree of market power, it is an indication that the parties are not subject to any real competitive pressure and that competition has been eliminated with regard to a substantial part of the products concerned.

112. Past competitive interaction may also provide an indication of the impact of the agreement on future competitive interaction. An undertaking may be able to eliminate competition within the meaning of Article 81(3) by concluding an agreement with a competitor that in the past has been a 'maverick' <sup>(95)</sup>. Such an agreement may change the competitive incentives and capabilities of the competitor and thereby remove an important source of competition in the market.
113. In cases involving differentiated products, i.e. products that differ in the eyes of consumers, the impact of the agreement may depend on the competitive relationship between the products sold by the parties to the agreement. When undertakings offer differentiated products the competitive constraint that individual products impose on each other differs according to the degree of substitutability between them. It must therefore be considered what is the degree of substitutability between the products offered by the parties, i.e. what is the competitive constraint that they impose on each other. The more the products of the parties to the agreement are close substitutes the greater the likely restrictive effect of the agreement. In other words, the more substitutable the products the greater the likely change brought about by the agreement in terms of restriction of competition on the market and the more likely it is that competition in respect of a substantial part of the products concerned risks being eliminated.
114. While sources of actual competition are usually the most important, as they are most easily verified, sources of potential competition must also be taken into account. The assessment of potential competition requires an analysis of barriers to entry facing undertakings that are not already competing within the relevant market. Any assertions by the parties that there are low barriers to market entry must be supported by information identifying the sources of potential competition and the parties must also substantiate why these sources constitute a real competitive pressure on the parties.
115. In the assessment of entry barriers and the real possibility for new entry on a significant scale, it is relevant to examine, *inter alia*, the following:
- (i) The regulatory framework with a view to determining its impact on new entry.
  - (ii) The cost of entry including sunk costs. Sunk costs are those that cannot be recovered if the entrant subsequently exits the market. The higher the sunk costs the higher the commercial risk for potential entrants.
  - (iii) The minimum efficient scale within the industry, i.e. the rate of output where average costs are minimised. If the minimum efficient scale is large compared to the size of the market, efficient entry is likely to be more costly and risky.
  - (iv) The competitive strengths of potential entrants. Effective entry is particularly likely where potential entrants have access to at least as cost efficient technologies as the incumbents or other competitive advantages that allow them to compete effectively. When potential entrants are on the same or an inferior technological trajectory compared to the incumbents and possess no other significant competitive advantage entry is more risky and less effective.
  - (v) The position of buyers and their ability to bring onto the market new sources of competition. It is irrelevant that certain strong buyers may be able to extract more favourable conditions from the parties to the agreement than their weaker competitors <sup>(96)</sup>. The presence of strong buyers can only serve to counter a *prima facie* finding of elimination of competition if it is likely that the buyers in question will pave the way for effective new entry.
  - (vi) The likely response of incumbents to attempted new entry. Incumbents may for example through past conduct have acquired a reputation of aggressive behaviour, having an impact on future entry.
  - (vii) The economic outlook for the industry may be an indicator of its longer-term attractiveness. Industries that are stagnating or in decline are less attractive candidates for entry than industries characterised by growth.
  - (viii) Past entry on a significant scale or the absence thereof.
116. The above principles can be illustrated by the following hypothetical examples, which are not intended to establish thresholds:

Firm A is brewer, holding 70 % of the relevant market, comprising the sale of beer through cafés and other on-trade premises. Over the past 5 years A has increased its market share from 60 %. There are four other competitors in the market, B, C, D and E with market shares of 10 %, 10 %, 5 % and 5 %. No new entry has occurred in the recent past and price changes implemented by A have generally been followed by competitors. A concludes agreements with 20 % of the on-trade premises representing 40 % of sales volumes whereby the contracting parties undertake to purchase beer only from A for a period of 5 years. The agreements raise the costs and reduce the revenues of rivals, which are foreclosed from the most attractive outlets. Given the market position of A, which has been strengthened in recent years, the absence of new entry and the already weak position of competitors it is likely that competition in the market is eliminated within the meaning of Article 81(3).

Shipping firms A, B, C, and D, holding collectively more than 70 % of the relevant market, conclude an agreement whereby they agree to coordinate their schedules and their tariffs. Following the implementation of the agreement prices rise between 30 % and 100 %. There are four other suppliers, the largest holding about 14 % of the relevant market. There has been no new entry in recent years and the parties to the agreement did not lose significant market share following the price increases. The existing competitors brought no significant new

capacity to the market and no new entry occurred. In light of the market position of the parties and the absence of competitive response to their joint conduct it can reasonably be concluded that the parties to the agreement are not subject to real competitive pressures and that the agreement affords them the possibility of eliminating competition within the meaning of Article 81(3).

A is a producer of electric appliances for professional users with a market share of 65 % of a relevant national market. B is a competing manufacturer with 5 % market share which has developed a new type of motor that is more powerful while consuming less electricity. A and B conclude an agreement whereby they establish a production joint venture for the production of the new motor. B undertakes to grant an exclusive licence to the joint venture. The joint venture combines the new technology of B with the efficient manufacturing and quality control process of A. There is one other main competitor with 15 % of the market. Another competitor with 5 % market share has recently been acquired by C, a major international producer of competing electric appliances, which itself owns efficient technologies. C has thus far not been active on the market mainly due to the fact that local presence and servicing is desired by customers. Through the acquisition C gains access to the service organisation required to penetrate the market. The entry of C is likely to ensure that competition is not being eliminated.

<sup>(1)</sup> In the following the term 'agreement' includes concerted practices and decisions of associations of undertakings.

<sup>(2)</sup> OJ L 1, 4.1.2003, p. 1.

<sup>(3)</sup> All existing block exemption regulations and Commission notices are available on the DG Competition web-site: <http://www.europa.eu.int/comm/dgs/competition>

<sup>(4)</sup> See paragraph 36 below.

<sup>(5)</sup> See Commission Notice on Guidelines on vertical restraints (OJ C 291, 13.10.2000, p. 1), Commission Notice on Guidelines on the application of Article 81 of the Treaty to horizontal cooperation agreements (OJ C 3, 6.1.2001, p. 2), and Commission Notice on Guidelines on the application of Article 81 of the Treaty to technology transfer agreements, not yet published.

<sup>(6)</sup> The concept of effect on trade between Member States is dealt with in separate guidelines.

<sup>(7)</sup> In the following the term 'restriction' includes the prevention and distortion of competition.

<sup>(8)</sup> According to Article 81(2) such agreements are automatically void.

<sup>(9)</sup> Article 81(1) prohibits both actual and potential anti-competitive effects, see e.g. Case C-7/95 P, John Deere, [1998] ECR I-3111, paragraph 77.

<sup>(10)</sup> See Case T-65/98, Van den Bergh Foods, [2003] ECR II . . . , paragraph 107 and Case T-112/99, Métropole télévision (M6) and others, [2001] ECR II-2459, paragraph 74, where the Court of First Instance held that it is only in the precise framework of Article 81(3) that the pro- and anti-competitive aspects of a restriction may be weighed.

<sup>(11)</sup> See note above.

<sup>(12)</sup> See e.g. Case C-49/92 P, Anic Partecipazioni, [1999] ECR I-4125, paragraph 116; and Joined Cases 40/73 to 48/73 and others, Suiker Unie, [1975] ECR page 1663, paragraph 173.

<sup>(13)</sup> See in this respect paragraph 108 of the judgment in Anic Partecipazioni cited in the previous note and Case C-277/87, Sandoz Prodotti, [1990] ECR I-45.

- (<sup>14</sup>) See in this respect e.g. Case 14/68, *Walt Wilhelm*, [1969] ECR I, and more recently Case T-203/01, *Michelin (II)*, [2003] ECR II . . . , paragraph 112.
- (<sup>15</sup>) See *Joined Cases T-25/95 and others, Cimenteries CBR*, [2000] ECR II-491, paragraphs 1849 and 1852; and *Joined Cases T-202/98 and others, British Sugar*, [2001] ECR II-2035, paragraphs 58 to 60.
- (<sup>16</sup>) See to that effect Case C-453/99, *Courage v Crehan*, [2001] ECR I-6297, and paragraph 3444 of the judgment in *Cimenteries CBR* cited in the previous note.
- (<sup>17</sup>) See in this respect *Joined Cases C-2/01 P and C-3/01 P, Bundesverband der Arzneimittel-Importeure*, [2004] ECR I . . . , paragraph 102.
- (<sup>18</sup>) See e.g. *Joined Cases 25/84 and 26/84, Ford*, [1985] ECR 2725.
- (<sup>19</sup>) See in this respect paragraph 141 of the judgment in *Bundesverband der Arzneimittel-Importeure* cited in note.
- (<sup>20</sup>) See Case 56/65, *Société Technique Minière*, [1966] ECR 337, and paragraph 76 of the judgment in *John Deere*, cited in note 9.
- (<sup>21</sup>) See in this respect e.g. *Joined Cases 56/64 and 58/66, Consten and Grundig*, [1966] ECR 429.
- (<sup>22</sup>) See in this respect e.g. *Commission Decision in Elopak/Metal Box – Odin* (OJ 1990 L 209, p. 15) and in *TPS* (OJ 1999 L 90, p. 6).
- (<sup>23</sup>) See in this respect the judgment in *Société Technique Minière* cited in note 20 and Case 258/78, *Nungesser*, [1982] ECR 2015.
- (<sup>24</sup>) See rule 10 in paragraph 119 of the Guidelines on vertical restraints cited in note above, according to which inter alia passive sales restrictions — a hardcore restraint — are held to fall outside Article 81(1) for a period of 2 years when the restraint is linked to opening up new product or geographic markets.
- (<sup>25</sup>) See e.g. paragraph 99 of the judgment in *Anic Partecipazioni* cited in note 12.
- (<sup>26</sup>) See paragraph 46 below.
- (<sup>27</sup>) See *Joined Cases 29/83 and 30/83, Cram and Rheinzink*, [1984] ECR 1679, paragraph 26, and *Joined Cases 96/82 and others, ANSEAU-NAVEWA*, [1983] ECR 3369, paragraphs 23-25.
- (<sup>28</sup>) See the Guidelines on horizontal cooperation agreements, cited in note, paragraph 25, and Article 5 of Commission Regulation 2658/2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements (OJ L 304, 5.12.2000, p. 3).
- (<sup>29</sup>) See Article 4 Commission Regulation 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ L 336, 29.12.1999, p. 21) and the Guidelines on Vertical Restraints, cited in note, paragraph 46 et seq. See also Case 279/87, *Tipp-Ex*, [1990] ECR I-261, and Case T-62/98, *Volkswagen v Commission*, [2000] ECR II-2707, paragraph 178.
- (<sup>30</sup>) See paragraph 77 of the judgment in *John Deere* cited in note 9.
- (<sup>31</sup>) It is not sufficient in itself that the agreement restricts the freedom of action of one or more of the parties, see paragraphs 76 and 77 of the judgment in *Métropole television (M6)* cited in note 10. This is in line with the fact that the object of Article 81 is to protect competition on the market for the benefit of consumers.
- (<sup>32</sup>) See e.g. Case 5/69, *Völk*, [1969] ECR 295, paragraph 7. Guidance on the issue of appreciability can be found in the Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty (OJ C 368, 22.12.2001, p. 13). The notice defines appreciability in a negative way. Agreements, which fall outside the scope of the de minimis notice, do not necessarily have appreciable restrictive effects. An individual assessment is required.
- (<sup>33</sup>) See in this respect *Joined Cases T-374/94 and others, European Night Services*, [1998] ECR II-3141.
- (<sup>34</sup>) See note 32.
- (<sup>35</sup>) See in this respect Commission notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 1).
- (<sup>36</sup>) For the reference in the OJ see note 5.
- (<sup>37</sup>) See paragraph 104 of the judgment in *Métropole télévision (M6) and others*, cited in note 10.
- (<sup>38</sup>) See e.g. Case C-399/93, *Luttikhuis*, [1995] ECR I-4515, paragraphs 12 to 14.
- (<sup>39</sup>) See in this respect paragraphs 118 et seq. of the *Métropole television* judgment cited in note 10.
- (<sup>40</sup>) See paragraph 107 of the judgment in *Métropole télévision* judgement cited in note 10.
- (<sup>41</sup>) See e.g. *Commission Decision in Elopak/Metal Box – Odin* cited in note 22.
- (<sup>42</sup>) See Case 161/84, *Pronuptia*, [1986] ECR 353.
- (<sup>43</sup>) See note 22. The decision was upheld by the Court of First Instance in the judgment in *Métropole télévision (M6)* cited in note 10.
- (<sup>44</sup>) Cost savings and other gains to the parties that arise from the mere exercise of market power do not give rise to objective benefits and cannot be taken into account, cf. paragraph 49 below.



- (45) See the judgment in *Consten and Grundig*, cited in note 21.
- (46) The fact that an agreement is block exempted does not in itself indicate that the individual agreement is caught by Article 81(1).
- (47) See e.g. Case C-234/89, *Delimitis*, [1991] ECR I-935, paragraph 46.
- (48) Article 36(4) of Regulation 1/2003 has, inter alia, repealed Article 5 of Regulation 1017/68 applying rules of competition to transport by rail, road and inland waterway. However, the Commission's case practice adopted under Regulation 1017/68 remains relevant for the purposes of applying Article 81(3) in the inland transport sector.
- (49) See paragraph 42 below.
- (50) See the judgment in *Société Technique Minière* cited in note 20.
- (51) See in this respect Case 319/82, *Kerpen & Kerpen*, [1983] ECR 4 173, paragraphs 11 and 12.
- (52) See e.g. Case T-185/00 and others, *Métropole télévision SA (M6)*, [2002] ECR II-3805, paragraph 86, Case T-17/93, *Matra*, ECR [1994] II-595, paragraph 85; and Joined Cases 43/82 and 63/82, *VBVB and VBVB*, [1984] ECR 19, paragraph 61.
- (53) See Case T-213/00, *CMA CGM and others*, [2003] ECR II ..., paragraph 226.
- (54) See to that effect implicitly paragraph 139 of the *Matra* judgment cited in note 52 and Case 26/76, *Metro (I)*, [1977] ECR 1875, paragraph 43.
- (55) As to the concept of consumers see paragraph 84 below where it is stated that consumers are the customers of the parties and subsequent buyers. The parties themselves are not 'consumers' for the purposes of Article 81(3).
- (56) The test is market specific, see to that effect Case T-131/99, *Shaw*, [2002] ECR II-2023, paragraph 163, where the Court of First Instance held that the assessment under Article 81(3) had to be made within the same analytical framework as that used for assessing the restrictive effects, and Case C-360/92 P, *Publishers Association*, [1995] ECR I-23, paragraph 29, where in a case where the relevant market was wider than national the Court of Justice held that in the application of Article 81(3) it was not correct only to consider the effects on the national territory.
- (57) In Case T-86/95, *Compagnie Générale Maritime and others*, [2002] ECR II-1011, paragraphs 343 to 345, the Court of First Instance held that Article 81(3) does not require that the benefits are linked to a specific market and that in appropriate cases regard must be had to benefits 'for every other market on which the agreement in question might have beneficial effects, and even, in a more general sense, for any service the quality or efficiency of which might be improved by the existence of that agreement'. Importantly, however, in this case the affected group of consumers was the same. The case concerned intermodal transport services encompassing a bundle of, inter alia, inland and maritime transportation provided to shipping companies across the Community. The restrictions related to inland transport services, which were held to constitute a separate market, whereas the benefits were claimed to occur in relation to maritime transport services. Both services were demanded by shippers requiring intermodal transport services between northern Europe and South-East and East Asia. The judgment in *CMA CGM*, cited in note 53 above, also concerned a situation where the agreement, while covering several distinct services, affected the same group of consumers, namely shippers of containerised cargo between northern Europe and the Far East. Under the agreement the parties fixed charges and surcharges relating to inland transport services, port services and maritime transport services. The Court of First Instance held (cf. paragraphs 226 to 228) that in the circumstances of the case there was no need to define relevant markets for the purpose of applying Article 81(3). The agreement was restrictive of competition by its very object and there were no benefits for consumers.
- (58) See paragraphs 126 and 132 of the Guidelines on horizontal co-operation agreements cited in note 5 above.
- (59) See the *Ford* judgment cited in note 18.
- (60) See in this respect for example Commission Decision in *TPS* (OJ L 90, 2.4.1999, p. 6). Similarly, the prohibition of Article 81(1) also only applies as long as the agreement has a restrictive object or restrictive effects.
- (61) See paragraph 85 of the *Matra* judgment cited in note 52.
- (62) As to this requirement see paragraph 49 below.
- (63) See e.g. Case T-29/92, *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid (SPO)*, [1995] ECR II-289.
- (64) See e.g. Case 258/78, *Nungesser*, [1982] ECR 2015, paragraph 77, concerning absolute territorial protection.
- (65) See in this respect e.g. the judgment in *SPO* cited in note 63.
- (66) National measures must, inter alia, comply with the Treaty rules on free movement of goods, services, persons and capital.
- (67) See e.g. the judgment in *Consten and Grundig* cited in note 21.
- (68) See in this respect Commission Decision in *Van den Bergh Foods* (OJ 1998 L 246, p. 1).
- (69) See in this respect Commission Decision in *Glaxo Wellcome* (OJ 2001 L 302, p. 1).
- (70) See e.g. Commission Decision in *GEAE/P&W* (OJ 2000 L 58, p. 16); in *British Interactive Broadcasting/Open* (OJ 1999 L 312, p. 1) and in *Asahi/Saint Gobain* (OJ 1994 L 354, page 87).
- (71) See e.g. Commission Decision in *Atlas* (OJ 1996 L 239, p. 23), and in *Phoenix/Global One* (OJ 1996 L 239, p. 57).
- (72) See e.g. Commission Decision in *Uniform Eurocheques* (OJ 1985 L 35, p. 43).
- (73) See e.g. Commission Decision in *Cégétel + 4* (OJ 1999 L 88, p. 26).

- (<sup>74</sup>) As to the former question, which may be relevant in the context of Article 81(1), see paragraph 18 above.
- (<sup>75</sup>) Scale economies are normally exhausted at a certain point. Thereafter average costs will stabilise and eventually rise due to, for example, capacity constraints and bottlenecks.
- (<sup>76</sup>) See in this respect paragraphs 392 to 395 of the judgment in *Compagnie Générale Maritime* cited in note 57.
- (<sup>77</sup>) See for more detail paragraph 116 of the Guidelines on Vertical Restraints cited in note 5.
- (<sup>78</sup>) See Joined Cases T-374/94 and others, *European Night Services*, [1998] ECR II-3141, paragraph 230.
- (<sup>79</sup>) See Commission Regulation No 2790/1999 on the application of Article 81(3) of the Treaty on categories of vertical agreements and concerted practices (OJ 1999 L 336, page 21).
- (<sup>80</sup>) See in this respect the judgment in *Consten and Grundig* cited in note 21, where the Court of Justice held that the improvements within the meaning of the first condition of Article 81(3) must show appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition.
- (<sup>81</sup>) It is recalled that positive and negative effects on consumers are in principle balanced within each relevant market (cf. paragraph 43 above).
- (<sup>82</sup>) See in this respect paragraph 48 of the *Metro (I)* judgment cited in note 54.
- (<sup>83</sup>) See paragraph 163 of the judgment in *Shaw* cited in note 56.
- (<sup>84</sup>) In the following sections, for convenience the competitive harm is referred to in terms of higher prices; competitive harm could also mean lower quality, less variety or lower innovation than would otherwise have occurred.
- (<sup>85</sup>) In perfectly competitive markets individual undertakings are price-takers. They sell their products at the market price, which is determined by overall supply and demand. The output of the individual undertaking is so small that any individual undertaking's change in output does not affect the market price.
- (<sup>86</sup>) Undertakings collude tacitly when in an oligopolistic market they are able to coordinate their action on the market without resorting to an explicit cartel agreement.
- (<sup>87</sup>) This term refers to undertakings that constrain the pricing behaviour of other undertakings in the market who might otherwise have tacitly colluded.
- (<sup>88</sup>) The restrictive agreement may even allow the undertakings in question to charge a higher price to customers with a low elasticity of demand.
- (<sup>89</sup>) See Joined Cases T-191/98, T-212/98 and T-214/98, *Atlantic Container Line (TACA)*, [2003] ECR II-..., paragraph 939, and Case T-395/94, *Atlantic Container Line*, [2002] ECR II-875, paragraph 330.
- (<sup>90</sup>) See Joined Cases C-395/96 P and C-396/96 P, *Compagnie maritime belge*, [2000] ECR I-1365, paragraph 130. Similarly, the application of Article 81(3) does not prevent the application of the Treaty rules on the free movement of goods, services, persons and capital. These provisions are in certain circumstances applicable to agreements, decisions and concerted practices within the meaning of Article 81(1), see to that effect Case C-309/99, *Wouters*, [2002] ECR I-1577, paragraph 120.
- (<sup>91</sup>) See in this respect Case T-51/89, *Tetra Pak (I)*, [1990] ECR II-309, and Joined Cases T-191/98, T-212/98 and T-214/98, *Atlantic Container Line (TACA)*, [2003] ECR II-..., paragraph 1456.
- (<sup>92</sup>) This is how paragraph 135 of the Guidelines on vertical restraints and paragraphs 36, 71, 105, 134 and 155 of the Guidelines on horizontal cooperation agreements, cited in note 5, should be understood when they state that in principle restrictive agreements concluded by dominant undertakings cannot be exempted.
- (<sup>93</sup>) Full function joint ventures, i.e. joint ventures that perform on a lasting basis all the functions of an autonomous economic entity, are covered by Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ 1990 L 257, p 13).
- (<sup>94</sup>) See paragraph 21 of the judgment in *Metro (I)* cited in note 54.
- (<sup>95</sup>) See paragraph 97 above.
- (<sup>96</sup>) See in this respect Case T-228/97, *Irish Sugar*, [1999] ECR II-2969, paragraph 101.
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## II

(Information)

## INFORMATION FROM EUROPEAN UNION INSTITUTIONS AND BODIES

## COMMISSION

**Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings**

(Text with EEA relevance)

(2009/C 45/02)

## I. INTRODUCTION

1. Article 82 of the Treaty establishing the European Community ('Article 82') prohibits abuses of a dominant position. In accordance with the case law, it is not in itself illegal for an undertaking to be in a dominant position and such a dominant undertaking is entitled to compete on the merits. However, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market. Article 82 is the legal basis for a crucial component of competition policy and its effective enforcement helps markets to work better for the benefit of businesses and consumers. This is particularly important in the context of the wider objective of achieving an integrated internal market.

## II. PURPOSE OF THIS DOCUMENT

2. This document sets out the enforcement priorities that will guide the Commission's action in applying Article 82 to exclusionary conduct by dominant undertakings. Alongside the Commission's specific enforcement decisions, it is intended to provide greater clarity and predictability as regards the general framework of analysis which the Commission employs in determining whether it should pursue cases concerning various forms of exclusionary conduct and to help undertakings better assess whether certain behaviour is likely to result in intervention by the Commission under Article 82.
3. This document is not intended to constitute a statement of the law and is without prejudice to the interpretation of Article 82 by the Court of Justice or the Court of First Instance of the European Communities. In addition, the general framework set out in this document applies without

prejudice to the possibility for the Commission to reject a complaint when it considers that a case lacks priority on grounds of lack of Community interest.

4. Article 82 applies to undertakings which hold a dominant position on one or more relevant markets. Such a position may be held by one undertaking (single dominance) or by two or more undertakings (collective dominance). This document only relates to abuses committed by an undertaking holding a single dominant position.
5. In applying Article 82 to exclusionary conduct by dominant undertakings, the Commission will focus on those types of conduct that are most harmful to consumers. Consumers benefit from competition through lower prices, better quality and a wider choice of new or improved goods and services. The Commission, therefore, will direct its enforcement to ensuring that markets function properly and that consumers benefit from the efficiency and productivity which result from effective competition between undertakings.
6. The emphasis of the Commission's enforcement activity in relation to exclusionary conduct is on safeguarding the competitive process in the internal market and ensuring that undertakings which hold a dominant position do not exclude their competitors by other means than competing on the merits of the products or services they provide. In doing so the Commission is mindful that what really matters is protecting an effective competitive process and not simply protecting competitors. This may well mean that competitors who deliver less to consumers in terms of price, choice, quality and innovation will leave the market.

7. Conduct which is directly exploitative of consumers, for example charging excessively high prices or certain behaviour that undermines the efforts to achieve an integrated internal market, is also liable to infringe Article 82. The Commission may decide to intervene in relation to such conduct, in particular where the protection of consumers and the proper functioning of the internal market cannot otherwise be adequately ensured. For the purpose of providing guidance on its enforcement priorities the Commission at this stage limits itself to exclusionary conduct and in, particular, certain specific types of exclusionary conduct which, based on its experience, appear to be the most common.

8. In applying the general enforcement principles set out in this Communication, the Commission will take into account the specific facts and circumstances of each case. For example, in cases involving regulated markets, the Commission will take into account the specific regulatory environment in conducting its assessment <sup>(1)</sup>. The Commission may therefore adapt the approach set out in this Communication to the extent that this would appear to be reasonable and appropriate in a given case.

### III. GENERAL APPROACH TO EXCLUSIONARY CONDUCT

#### A. Market power

9. The assessment of whether an undertaking is in a dominant position and of the degree of market power it holds is a first step in the application of Article 82. According to the case law, holding a dominant position confers a special responsibility on the undertaking concerned, the scope of which must be considered in the light of the specific circumstances of each case <sup>(2)</sup>.

10. Dominance has been defined under Community law as a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers <sup>(3)</sup>. This notion of independence is related to the degree of competitive constraint exerted on the undertaking in question. Dominance entails that these competitive constraints are not sufficiently effective and hence that the undertaking in question enjoys substantial market power over a period of time. This means that the undertaking's decisions are

largely insensitive to the actions and reactions of competitors, customers and, ultimately, consumers. The Commission may consider that effective competitive constraints are absent even if some actual or potential competition remains <sup>(4)</sup>. In general, a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative <sup>(5)</sup>.

11. The Commission considers that an undertaking which is capable of profitably increasing prices above the competitive level for a significant period of time does not face sufficiently effective competitive constraints and can thus generally be regarded as dominant <sup>(6)</sup>. In this Communication, the expression 'increase prices' includes the power to maintain prices above the competitive level and is used as shorthand for the various ways in which the parameters of competition — such as prices, output, innovation, the variety or quality of goods or services — can be influenced to the advantage of the dominant undertaking and to the detriment of consumers <sup>(7)</sup>.

12. The assessment of dominance will take into account the competitive structure of the market, and in particular the following factors:

- constraints imposed by the existing supplies from, and the position on the market of, actual competitors (the market position of the dominant undertaking and its competitors),
- constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors (expansion and entry),
- constraints imposed by the bargaining strength of the undertaking's customers (countervailing buyer power).

(a) *Market position of the dominant undertaking and its competitors*

13. Market shares provide a useful first indication for the Commission of the market structure and of the relative importance of the various undertakings active on the market <sup>(8)</sup>. However, the Commission will interpret market shares in the light of the relevant market conditions, and

<sup>(1)</sup> See for instance paragraph 82.

<sup>(2)</sup> Case 322/81 *Nederlandsche Banden Industrie Michelin (Michelin I) v Commission* [1983] ECR 3461, paragraph 57; Case T 83/91 *Tetra Pak v Commission (Tetra Pak II)* [1993] ECR II 755, paragraph 114; Case T 111/96 *ITT Promedia v Commission* [1998] ECR II 2937, paragraph 139; Case T 228/97 *Irish Sugar v Commission* [1999] ECR II 2969, paragraph 112; and Case T 203/01 *Michelin v Commission (Michelin II)* [2003] ECR II 4071, paragraph 97.

<sup>(3)</sup> See Case 27/76 *United Brands Company and United Brands Continentaal v Commission* [1978] ECR 207, paragraph 65; Case 85/76 *Hoffmann La Roche & Co. v Commission* [1979] ECR 461, paragraph 38.

<sup>(4)</sup> See Case 27/76 *United Brands Company and United Brands Continentaal v Commission* [1978] ECR 207, paragraphs 113 to 121; Case T 395/94 *Atlantic Container Line and Others v Commission* [2002] ECR II 875, paragraph 330.

<sup>(5)</sup> Case 27/76 *United Brands and United Brands Continentaal v Commission* [1978] ECR 207, paragraphs 65 and 66; Case C 250/92 *Gøttrup Klim e.a. Grovwareforeninger v Dansk Landbrugs Grovareselskab* [1994] ECR I 5641, paragraph 47; Case T 30/89 *Hilti v Commission* [1991] ECR II 1439, paragraph 90.

<sup>(6)</sup> What is a significant period of time will depend on the product and on the circumstances of the market in question, but normally a period of two years will be sufficient.

<sup>(7)</sup> Accounting profitability may be a poor proxy for the exercise of market power. See to that effect Case 27/76 *United Brands Company and United Brands Continentaal v Commission* [1978] ECR 207, paragraph 126.

<sup>(8)</sup> Case 85/76 *Hoffmann La Roche & Co. v Commission* [1979] ECR 461, paragraph 39 41; Case C 62/86 *AKZO v Commission* [1991] ECR I 3359, paragraph 60; Case T 30/89 *Hilti v Commission* [1991] ECR II 1439, paragraphs 90, 91 and 92; Case T 340/03 *France Télécom v Commission* [2007] ECR II 107, paragraph 100.

in particular of the dynamics of the market and of the extent to which products are differentiated. The trend or development of market shares over time may also be taken into account in volatile or bidding markets.

14. The Commission considers that low market shares are generally a good proxy for the absence of substantial market power. The Commission's experience suggests that dominance is not likely if the undertaking's market share is below 40 % in the relevant market. However, there may be specific cases below that threshold where competitors are not in a position to constrain effectively the conduct of a dominant undertaking, for example where they face serious capacity limitations. Such cases may also deserve attention on the part of the Commission.

15. Experience suggests that the higher the market share and the longer the period of time over which it is held, the more likely it is that it constitutes an important preliminary indication of the existence of a dominant position and, in certain circumstances, of possible serious effects of abusive conduct, justifying an intervention by the Commission under Article 82 (<sup>(1)</sup>). However, as a general rule, the Commission will not come to a final conclusion as to whether or not a case should be pursued without examining all the factors which may be sufficient to constrain the behaviour of the undertaking.

(b) *Expansion or entry*

16. Competition is a dynamic process and an assessment of the competitive constraints on an undertaking cannot be based solely on the existing market situation. The potential impact of expansion by actual competitors or entry by potential competitors, including the threat of such expansion or entry, is also relevant. An undertaking can be deterred from increasing prices if expansion or entry is likely, timely and sufficient. For the Commission to consider expansion or entry likely it must be sufficiently profitable for the competitor or entrant, taking into account factors such as the barriers to expansion or entry, the likely reactions of the allegedly dominant undertaking and other competitors, and the risks and costs of failure. For expansion or entry to be considered timely, it must be sufficiently swift to deter or defeat the exercise of substantial market power. For expansion or entry to be considered sufficient, it cannot be simply small scale entry, for example into some market niche, but must be of such a magnitude as to be able to deter any attempt to increase prices by the putatively dominant undertaking in the relevant market.

(<sup>1</sup>) As to the relationship between the degree of dominance and the finding of abuse, see Joined Cases C 395/96 P and C 396/96 P *Compagnie Maritime Belge Transports, Compagnie Maritime Belge and Dafra Lines v Commission* [2000] ECR I 1365, paragraph 119; Case T 228/97 *Irish Sugar v Commission* [1999] ECR II 2969, paragraph 186.

17. Barriers to expansion or entry can take various forms. They may be legal barriers, such as tariffs or quotas, or they may take the form of advantages specifically enjoyed by the dominant undertaking, such as economies of scale and scope, privileged access to essential inputs or natural resources, important technologies (<sup>(2)</sup>) or an established distribution and sales network (<sup>(3)</sup>). They may also include costs and other impediments, for instance resulting from network effects, faced by customers in switching to a new supplier. The dominant undertaking's own conduct may also create barriers to entry, for example where it has made significant investments which entrants or competitors would have to match (<sup>(4)</sup>), or where it has concluded long term contracts with its customers that have appreciable foreclosing effects. Persistently high market shares may be indicative of the existence of barriers to entry and expansion.

(c) *Countervailing buyer power*

18. Competitive constraints may be exerted not only by actual or potential competitors but also by customers. Even an undertaking with a high market share may not be able to act to an appreciable extent independently of customers with sufficient bargaining strength (<sup>(5)</sup>). Such countervailing buying power may result from the customers' size or their commercial significance for the dominant undertaking, and their ability to switch quickly to competing suppliers, to promote new entry or to vertically integrate, and to credibly threaten to do so. If countervailing power is of a sufficient magnitude, it may deter or defeat an attempt by the undertaking to profitably increase prices. Buyer power may not, however, be considered a sufficiently effective constraint if it only ensures that a particular or limited segment of customers is shielded from the market power of the dominant undertaking.

**B. Foreclosure leading to consumer harm ('anti-competitive foreclosure')**

19. The aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti competitive way, thus having an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice. In this document the term

(<sup>2</sup>) Case T 30/89 *Hilti v Commission* [1991] ECR II 1439, paragraph 19.

(<sup>3</sup>) Case 85/76 *Hoffmann La Roche v Commission* [1979] ECR 461, paragraph 48.

(<sup>4</sup>) Case 27/76 *United Brands v Commission* [1978] ECR 207, paragraph 91.

(<sup>5</sup>) See Case T 228/97 *Irish Sugar v Commission* [1999] ECR II 2969, paragraphs 97 to 104, in which the Court of First Instance considered whether the alleged lack of independence of the undertaking vis à vis its customers should be seen as an exceptional circumstance preventing the finding of a dominant position in spite of the fact that the undertaking was responsible for a very large part of the sales recorded on the industrial sugar market in Ireland.

'anti competitive foreclosure' is used to describe a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices <sup>(1)</sup> to the detriment of consumers. The identification of likely consumer harm can rely on qualitative and, where possible and appropriate, quantitative evidence. The Commission will address such anti competitive foreclosure either at the intermediate level or at the level of final consumers, or at both levels <sup>(2)</sup>.

20. The Commission will normally intervene under Article 82 where, on the basis of cogent and convincing evidence, the allegedly abusive conduct is likely to lead to anti competitive foreclosure. The Commission considers the following factors to be generally relevant to such an assessment:

- *the position of the dominant undertaking*: in general, the stronger the dominant position, the higher the likelihood that conduct protecting that position leads to anti competitive foreclosure,
- *the conditions on the relevant market*: this includes the conditions of entry and expansion, such as the existence of economies of scale and/or scope and network effects. Economies of scale mean that competitors are less likely to enter or stay in the market if the dominant undertaking forecloses a significant part of the relevant market. Similarly, the conduct may allow the dominant undertaking to 'tip' a market characterised by network effects in its favour or to further entrench its position on such a market. Likewise, if entry barriers in the upstream and/or downstream market are significant, this means that it may be costly for competitors to overcome possible foreclosure through vertical integration,
- *the position of the dominant undertaking's competitors*: this includes the importance of competitors for the maintenance of effective competition. A specific competitor may play a significant competitive role even if it only holds a small market share compared to other competitors. It may, for example, be the closest competitor to the dominant undertaking, be a particularly innovative competitor, or have the reputation of systematically cutting prices. In its assessment, the Commission may also consider in appropriate cases, on the basis of

information available, whether there are realistic, effective and timely counterstrategies that competitors would be likely to deploy,

- *the position of the customers or input suppliers*: this may include consideration of the possible selectivity of the conduct in question. The dominant undertaking may apply the practice only to selected customers or input suppliers who may be of particular importance for the entry or expansion of competitors, thereby enhancing the likelihood of anti competitive foreclosure <sup>(3)</sup>. In the case of customers, they may, for example, be the ones most likely to respond to offers from alternative suppliers, they may represent a particular means of distributing the product that would be suitable for a new entrant, they may be situated in a geographic area well suited to new entry or they may be likely to influence the behaviour of other customers. In the case of input suppliers, those with whom the dominant undertaking has concluded exclusive supply arrangements may be the ones most likely to respond to requests by customers who are competitors of the dominant undertaking in a downstream market, or may produce a grade of the product — or produce at a location — particularly suitable for a new entrant. Any strategies at the disposal of the customers or input suppliers which could help to counter the conduct of the dominant undertaking will also be considered,
- *the extent of the allegedly abusive conduct*: in general, the higher the percentage of total sales in the relevant market affected by the conduct, the longer its duration, and the more regularly it has been applied, the greater is the likely foreclosure effect,
- *possible evidence of actual foreclosure*: if the conduct has been in place for a sufficient period of time, the market performance of the dominant undertaking and its competitors may provide direct evidence of anti competitive foreclosure. For reasons attributable to the allegedly abusive conduct, the market share of the dominant undertaking may have risen or a decline in market share may have been slowed. For similar reasons, actual competitors may have been marginalised or may have exited, or potential competitors may have tried to enter and failed,
- *direct evidence of any exclusionary strategy*: this includes internal documents which contain direct evidence of a strategy to exclude competitors, such as a detailed plan to engage in certain conduct in order to exclude a competitor, to prevent entry or to preempt the emergence of a market, or evidence of concrete threats of exclusionary action. Such direct evidence may be helpful in interpreting the dominant undertaking's conduct.

<sup>(1)</sup> For the meaning of the expression 'increase price' see paragraph 11.

<sup>(2)</sup> The concept of 'consumers' encompasses all direct or indirect users of the products affected by the conduct, including intermediate producers that use the products as an input, as well as distributors and final consumers both of the immediate product and of products provided by intermediate producers. Where intermediate users are actual or potential competitors of the dominant undertaking, the assessment focuses on the effects of the conduct on users further downstream.

<sup>(3)</sup> Case T 228/97 *Irish Sugar v Commission* [1999] ECR II 2969, paragraph 188.

21. When pursuing a case the Commission will develop the analysis of the general factors mentioned in paragraph 20, together with the more specific factors described in the sections dealing with certain types of exclusionary conduct, and any other factors which it may consider to be appropriate. This assessment will usually be made by comparing the actual or likely future situation in the relevant market (with the dominant undertaking's conduct in place) with an appropriate counterfactual, such as the simple absence of the conduct in question or with another realistic alternative scenario, having regard to established business practices.
22. There may be circumstances where it is not necessary for the Commission to carry out a detailed assessment before concluding that the conduct in question is likely to result in consumer harm. If it appears that the conduct can only raise obstacles to competition and that it creates no efficiencies, its anti competitive effect may be inferred. This could be the case, for instance, if the dominant undertaking prevents its customers from testing the products of competitors or provides financial incentives to its customers on condition that they do not test such products, or pays a distributor or a customer to delay the introduction of a competitor's product.
26. The cost benchmarks that the Commission is likely to use are average avoidable cost (AAC) and long run average incremental cost (LRAIC) <sup>(2)</sup>. Failure to cover AAC indicates that the dominant undertaking is sacrificing profits in the short term and that an equally efficient competitor cannot serve the targeted customers without incurring a loss. LRAIC is usually above AAC because, in contrast to AAC (which only includes fixed costs if incurred during the period under examination), LRAIC includes product specific fixed costs made before the period in which allegedly abusive conduct took place. Failure to cover LRAIC indicates that the dominant undertaking is not recovering all the (attributable) fixed costs of producing the good or service in question and that an equally efficient competitor could be foreclosed from the market <sup>(3)</sup>.

### C. Price-based exclusionary conduct

23. The considerations in paragraphs 23 to 27 apply to price based exclusionary conduct. Vigorous price competition is generally beneficial to consumers. With a view to preventing anti competitive foreclosure, the Commission will normally only intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking <sup>(1)</sup>.
24. However, the Commission recognises that in certain circumstances a less efficient competitor may also exert a constraint which should be taken into account when considering whether particular price based conduct leads to anti competitive foreclosure. The Commission will take a dynamic view of that constraint, given that in the absence of an abusive practice such a competitor may benefit from demand related advantages, such as network and learning effects, which will tend to enhance its efficiency.
25. In order to determine whether even a hypothetical competitor as efficient as the dominant undertaking would be
27. If the data clearly suggest that an equally efficient competitor can compete effectively with the pricing conduct of the dominant undertaking, the Commission will, in principle, infer that the dominant undertaking's pricing conduct is not likely to have an adverse impact on effective competition, and thus on consumers, and will therefore be unlikely to intervene. If, on the contrary, the data suggest that the price charged by the dominant undertaking has the potential to foreclose equally efficient competitors, then the Commission will integrate this in the general assessment of anti competitive foreclosure (see Section B above), taking into account other relevant quantitative and/or qualitative evidence.

<sup>(1)</sup> Case 62/86 *AKZO Chemie v Commission* [1991] ECR I 3359, paragraph 72: in relation to pricing below average total cost (ATC) the Court of Justice stated: 'Such prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them'. See also Judgment of 10 April 2008 in Case T 271/03 *Deutsche Telekom v Commission* not yet reported, paragraph 194.

<sup>(2)</sup> Average avoidable cost is the average of the costs that could have been avoided if the company had not produced a discrete amount of (extra) output, in this case the amount allegedly the subject of abusive conduct. In most cases, AAC and the average variable cost (AVC) will be the same, as it is often only variable costs that can be avoided. Long run average incremental cost is the average of all the (variable and fixed) costs that a company incurs to produce a particular product. LRAIC and average total cost (ATC) are good proxies for each other, and are the same in the case of single product undertakings. If multi product undertakings have economies of scope, LRAIC would be below ATC for each individual product, as true common costs are not taken into account in LRAIC. In the case of multiple products, any costs that could have been avoided by not producing a particular product or range are not considered to be common costs. In situations where common costs are significant, they may have to be taken into account when assessing the ability to foreclose equally efficient competitors.

<sup>(3)</sup> In order to apply these cost benchmarks it may also be necessary to look at revenues and costs of the dominant company and its competitors in a wider context. It may not be sufficient to only assess whether the price or revenue covers the costs for the product in question, but it may be necessary to look at incremental revenues in case the dominant company's conduct in question negatively affects its revenues in other markets or of other products. Similarly, in the case of two sided markets it may be necessary to look at revenues and costs of both sides at the same time.

#### D. Objective necessity and efficiencies

28. In the enforcement of Article 82, the Commission will also examine claims put forward by a dominant undertaking that its conduct is justified <sup>(1)</sup>. A dominant undertaking may do so either by demonstrating that its conduct is objectively necessary or by demonstrating that its conduct produces substantial efficiencies which outweigh any anti competitive effects on consumers. In this context, the Commission will assess whether the conduct in question is indispensable and proportionate to the goal allegedly pursued by the dominant undertaking.

29. The question of whether conduct is objectively necessary and proportionate must be determined on the basis of factors external to the dominant undertaking. Exclusionary conduct may, for example, be considered objectively necessary for health or safety reasons related to the nature of the product in question. However, proof of whether conduct of this kind is objectively necessary must take into account that it is normally the task of public authorities to set and enforce public health and safety standards. It is not the task of a dominant undertaking to take steps on its own initiative to exclude products which it regards, rightly or wrongly, as dangerous or inferior to its own product <sup>(2)</sup>.

30. The Commission considers that a dominant undertaking may also justify conduct leading to foreclosure of competitors on the ground of efficiencies that are sufficient to guarantee that no net harm to consumers is likely to arise. In this context, the dominant undertaking will generally be expected to demonstrate, with a sufficient degree of probability, and on the basis of verifiable evidence, that the following cumulative conditions are fulfilled <sup>(3)</sup>:

- the efficiencies have been, or are likely to be, realised as a result of the conduct. They may, for example, include technical improvements in the quality of goods, or a reduction in the cost of production or distribution,
- the conduct is indispensable to the realisation of those efficiencies; there must be no less anti competitive alternatives to the conduct that are capable of producing the same efficiencies,

<sup>(1)</sup> See Case 27/76 *United Brands v Commission* [1978] ECR 207, paragraph 184; Case 311/84 *Centre Belge d'études de marché — Télémarketing (CBEM) v Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicitè Benelux (IPB)* [1985] ECR 3261, paragraph 27; Case T 30/89 *Hilti v Commission* [1991] ECR II 1439, paragraphs 102 to 119; Case T 83/91 *Tetra Pak International v Commission (Tetra Pak II)* [1994] ECR II 755, paragraphs 136 and 207; Case C 95/04 P *British Airways v Commission* [2007] ECR I 2331, paragraphs 69 and 86.

<sup>(2)</sup> See, for instance, Case T 30/89 *Hilti v Commission* [1991] ECR II 1439, paragraph 118 119; Case T 83/91 *Tetra Pak International v Commission (Tetra Pak II)* [1994] ECR II 755, paragraphs 83 and 84 and 138.

<sup>(3)</sup> See, in the different context of Article 81, the Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004, p. 97).

— the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare in the affected markets,

— the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition. Rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the form of innovation. In its absence the dominant undertaking will lack adequate incentives to continue to create and pass on efficiency gains. Where there is no residual competition and no foreseeable threat of entry, the protection of rivalry and the competitive process outweighs possible efficiency gains. In the Commission's view, exclusionary conduct which maintains, creates or strengthens a market position approaching that of a monopoly can normally not be justified on the grounds that it also creates efficiency gains.

31. It is incumbent upon the dominant undertaking to provide all the evidence necessary to demonstrate that the conduct concerned is objectively justified. It then falls to the Commission to make the ultimate assessment of whether the conduct concerned is not objectively necessary and, based on a weighing up of any apparent anti competitive effects against any advanced and substantiated efficiencies, is likely to result in consumer harm.

#### IV. SPECIFIC FORMS OF ABUSE

##### A. Exclusive dealing

32. A dominant undertaking may try to foreclose its competitors by hindering them from selling to customers through use of exclusive purchasing obligations or rebates, together referred to as exclusive dealing <sup>(4)</sup>. This section sets out the circumstances which are most likely to prompt an intervention by the Commission in respect of exclusive dealing arrangements entered into by dominant undertakings.

##### (a) Exclusive purchasing

33. An exclusive purchasing obligation requires a customer on a particular market to purchase exclusively or to a large

<sup>(4)</sup> The notion of exclusive dealing also includes exclusive supply obligations or incentives with the same effect, whereby the dominant undertaking tries to foreclose its competitors by hindering them from purchasing from suppliers. The Commission considers that such input foreclosure is in principle liable to result in anti competitive foreclosure if the exclusive supply obligation or incentive ties most of the efficient input suppliers and customers competing with the dominant undertaking are unable to find alternative efficient sources of input supply.



extent only from the dominant undertaking. Certain other obligations, such as stocking requirements, which appear to fall short of requiring exclusive purchasing, may in practice lead to the same effect <sup>(1)</sup>.

34. In order to convince customers to accept exclusive purchasing, the dominant undertaking may have to compensate them, in whole or in part, for the loss in competition resulting from the exclusivity. Where such compensation is given, it may be in the individual interest of a customer to enter into an exclusive purchasing obligation with the dominant undertaking. But it would be wrong to conclude automatically from this that all exclusive purchasing obligations, taken together, are beneficial for customers overall, including those currently not purchasing from the dominant undertaking, and the final consumers. The Commission will focus its attention on those cases where it is likely that consumers as a whole will not benefit. This will, in particular, be the case if there are many customers and the exclusive purchasing obligations of the dominant undertaking, taken together, have the effect of preventing the entry or expansion of competing undertakings.

35. In addition to the factors mentioned in paragraph 20, the following factors will generally be of particular relevance in determining whether the Commission will intervene in respect of exclusive purchasing arrangements.

36. The capacity for exclusive purchasing obligations to result in anti competitive foreclosure arises in particular where, without the obligations, an important competitive constraint is exercised by competitors who either are not yet present in the market at the time the obligations are concluded, or who are not in a position to compete for the full supply of the customers. Competitors may not be able to compete for an individual customer's entire demand because the dominant undertaking is an unavoidable trading partner at least for part of the demand on the market, for instance because its brand is a 'must stock item' preferred by many final consumers or because the capacity constraints on the other suppliers are such that a part of demand can only be provided for by the dominant supplier <sup>(2)</sup>. If competitors can compete on equal terms for each individual customer's entire demand, exclusive purchasing obligations are generally unlikely to hamper effective competition unless the switching of supplier by customers is rendered difficult due to the duration of the exclusive purchasing obligation. In general, the longer the duration of the obligation, the greater the likely foreclosure effect. However, if the dominant undertaking is an unavoidable trading partner for all or most customers, even an exclusive purchasing obligation of short duration can lead to anti competitive foreclosure.

<sup>(1)</sup> Case T 65/98 *Van den Bergh Foods v Commission* [2003] ECR II 4653. In this case the obligation to use coolers exclusively for the products of the dominant undertaking was considered to lead to outlet exclusivity.

<sup>(2)</sup> Case T 65/98 *Van den Bergh Foods v Commission* [2003] ECR II 4653, paragraphs 104 and 156.

#### (b) *Conditional rebates*

37. Conditional rebates are rebates granted to customers to reward them for a particular form of purchasing behaviour. The usual nature of a conditional rebate is that the customer is given a rebate if its purchases over a defined reference period exceed a certain threshold, the rebate being granted either on all purchases (retroactive rebates) or only on those made in excess of those required to achieve the threshold (incremental rebates). Conditional rebates are not an uncommon practice. Undertakings may offer such rebates in order to attract more demand, and as such they may stimulate demand and benefit consumers. However, such rebates — when granted by a dominant undertaking — can also have actual or potential foreclosure effects similar to exclusive purchasing obligations. Conditional rebates can have such effects without necessarily entailing a sacrifice for the dominant undertaking <sup>(3)</sup>.

38. In addition to the factors already mentioned in paragraph 20, the following factors are of particular importance to the Commission in determining whether a given system of conditional rebates is liable to result in anti competitive foreclosure and, consequently, will be part of the Commission's enforcement priorities.

39. As with exclusive purchasing obligations, the likelihood of anti competitive foreclosure is higher where competitors are not able to compete on equal terms for the entire demand of each individual customer. A conditional rebate granted by a dominant undertaking may enable it to use the 'non contestable' portion of the demand of each customer (that is to say, the amount that would be purchased by the customer from the dominant undertaking in any event) as leverage to decrease the price to be paid for the 'contestable' portion of demand (that is to say, the amount for which the customer may prefer and be able to find substitutes) <sup>(4)</sup>.

40. In general terms, retroactive rebates may foreclose the market significantly, as they may make it less attractive for customers to switch small amounts of demand to an alternative supplier, if this would lead to loss of the retroactive rebates <sup>(5)</sup>. The potential foreclosing effect of retroactive rebates is in principle strongest on the last purchased unit of the product before the threshold is exceeded. However, what is in the Commission's view relevant for an assessment of the loyalty enhancing effect of a rebate is not simply the effect on competition to provide the last individual unit, but the foreclosing effect of the rebate system

<sup>(3)</sup> In this regard, the assessment of conditional rebates differs from that of predation, which always entails a sacrifice.

<sup>(4)</sup> See Case T 203/01 *Michelin v Commission (Michelin II)* [2003] ECR II 4071, paragraphs 162 and 163. See also Case T 219/99 *British Airways v Commission* [2003] ECR II 5917, paragraphs 277 and 278.

<sup>(5)</sup> Case 322/81 *Nederlandsche Banden Industrie Michelin v Commission (Michelin I)* [1983] ECR 3461, paragraphs 70 to 73.

on (actual or potential) competitors of the dominant supplier. The higher the rebate as a percentage of the total price and the higher the threshold, the greater the inducement below the threshold and, therefore, the stronger the likely foreclosure of actual or potential competitors.

41. When applying the methodology explained in paragraphs 23 to 27, the Commission intends to investigate, to the extent that the data are available and reliable, whether the rebate system is capable of hindering expansion or entry even by competitors that are equally efficient by making it more difficult for them to supply part of the requirements of individual customers. In this context the Commission will estimate what price a competitor would have to offer in order to compensate the customer for the loss of the conditional rebate if the latter would switch part of its demand ('the relevant range') away from the dominant undertaking. The effective price that the competitor will have to match is not the average price of the dominant undertaking, but the normal (list) price less the rebate the customer loses by switching, calculated over the relevant range of sales and in the relevant period of time. The Commission will take into account the margin of error that may be caused by the uncertainties inherent in this kind of analysis.

42. The relevant range over which to calculate the effective price in a particular case depends on the specific facts of each case and on whether the rebate is incremental or retroactive. For incremental rebates, the relevant range is normally the incremental purchases that are being considered. For retroactive rebates, it will generally be relevant to assess in the specific market context how much of a customer's purchase requirements can realistically be switched to a competitor (the 'contestable share' or 'contestable portion'). If it is likely that customers would be willing and able to switch large amounts of demand to a (potential) competitor relatively quickly, the relevant range is likely to be relatively large. If, on the other hand, it is likely that customers would only be willing or able to switch small amounts incrementally, then the relevant range will be relatively small. For existing competitors their capacity to expand sales to customers and the fluctuations in those sales over time may also provide an indication of the relevant range. For potential competitors, an assessment of the scale at which a new entrant would realistically be able to enter may be undertaken, where possible. It may be possible to take the historical growth pattern of new entrants in the same or in similar markets as an indication of a realistic market share of a new entrant <sup>(1)</sup>.

<sup>(1)</sup> The relevant range will be estimated on the basis of data which may have varying degrees of precision. The Commission will take this into account in drawing any conclusions regarding the dominant undertaking's ability to foreclose equally efficient competitors. It may also be useful to calculate how big a share of customers' requirements on average the entrant should capture as a minimum so that the effective price is at least as high as the LRAIC of the dominant company. In a number of cases the size of this share, when compared with the actual market shares of competitors and their shares of the customers' requirements, may make it clear whether the rebate scheme is capable of having an anti competitive foreclosure effect.

43. The lower the estimated effective price over the relevant range is compared to the average price of the dominant supplier, the stronger the loyalty enhancing effect. However, as long as the effective price remains consistently above the LRAIC of the dominant undertaking, this would normally allow an equally efficient competitor to compete profitably notwithstanding the rebate. In those circumstances the rebate is normally not capable of foreclosing in an anti competitive way.

44. Where the effective price is below AAC, as a general rule the rebate scheme is capable of foreclosing even equally efficient competitors. Where the effective price is between AAC and LRAIC, the Commission will investigate whether other factors point to the conclusion that entry or expansion even by equally efficient competitors is likely to be affected. In this context, the Commission will investigate whether and to what extent competitors have realistic and effective counterstrategies at their disposal, for instance their capacity to also use a 'non contestable' portion of their buyers' demand as leverage to decrease the price for the relevant range. Where competitors do not have such counterstrategies at their disposal, the Commission will consider that the rebate scheme is capable of foreclosing equally efficient competitors.

45. As indicated in paragraph 27, this analysis will be integrated in the general assessment, taking into account other relevant quantitative or qualitative evidence. It is normally important to consider whether the rebate system is applied with an individualised or a standardised threshold. An individualised threshold — one based on a percentage of the total requirements of the customer or an individualised volume target — allows the dominant supplier to set the threshold at such a level as to make it difficult for customers to switch suppliers, thereby creating a maximum loyalty enhancing effect <sup>(2)</sup>. By contrast, a standardised volume threshold — where the threshold is the same for all or a group of customers — may be too high for some smaller customers and/or too low for larger customers to have a loyalty enhancing effect. If, however, it can be established that a standardised volume threshold approximates the requirements of an appreciable proportion of customers, the Commission is likely to consider that such a standardised system of rebates may produce anti competitive foreclosure effects.

#### (c) *Efficiencies*

46. Provided that the conditions set out in Section III D are fulfilled, the Commission will consider claims by dominant undertakings that rebate systems achieve cost or other advantages which are passed on to customers <sup>(3)</sup>. Transaction related cost advantages are often more likely to be

<sup>(2)</sup> See Case 85/76 *Hoffmann La Roche & Co. v Commission* [1979] ECR 461, paragraphs 89 and 90; Case T 288/97 *Irish Sugar v Commission* [1999] ECR II 2969, paragraph 213; Case T 219/99 *British Airways v Commission* [2003] ECR II 5917, paragraphs 7 to 11 and 270 to 273.

<sup>(3)</sup> For instance, for rebates see Case C 95/04 P *British Airways v Commission* [2007] ECR I 2331, paragraph 86.

achieved with standardised volume targets than with individualised volume targets. Similarly, incremental rebate schemes are in general more likely to give resellers an incentive to produce and resell a higher volume than retroactive rebate schemes<sup>(1)</sup>. Under the same conditions, the Commission will consider evidence demonstrating that exclusive dealing arrangements result in advantages to particular customers if those arrangements are necessary for the dominant undertaking to make certain relationship specific investments in order to be able to supply those customers.

## B. Tying and bundling

47. A dominant undertaking may try to foreclose its competitors by tying or bundling. This section sets out the circumstances which are most likely to prompt an intervention by the Commission when assessing tying and bundling by dominant undertakings.

48. 'Tying' usually refers to situations where customers that purchase one product (the tying product) are required also to purchase another product from the dominant undertaking (the tied product). Tying can take place on a technical or contractual basis<sup>(2)</sup>. 'Bundling' usually refers to the way products are offered and priced by the dominant undertaking. In the case of pure bundling the products are only sold jointly in fixed proportions. In the case of mixed bundling, often referred to as a multi product rebate, the products are also made available separately, but the sum of the prices when sold separately is higher than the bundled price.

49. Tying and bundling are common practices intended to provide customers with better products or offerings in more cost effective ways. However, an undertaking which is dominant in one product market (or more) of a tie or bundle (referred to as the tying market) can harm consumers through tying or bundling by foreclosing the market for the other products that are part of the tie or bundle (referred to as the tied market) and, indirectly, the tying market.

50. The Commission will normally take action under Article 82 where an undertaking is dominant in the tying market<sup>(3)</sup> and where, in addition, the following conditions are fulfilled: (i) the tying and tied products are distinct products, and (ii) the tying practice is likely to lead to anti competitive foreclosure<sup>(4)</sup>.

<sup>(1)</sup> See, to that effect, Case T 203/01 *Michelin v Commission* (*Michelin II*) [2003] ECR II 4071, paragraphs 56 to 60, 74 and 75.

<sup>(2)</sup> Technical tying occurs when the tying product is designed in such a way that it only works properly with the tied product (and not with the alternatives offered by competitors). Contractual tying occurs when the customer who purchases the tying product undertakes also to purchase the tied product (and not the alternatives offered by competitors).

<sup>(3)</sup> The undertaking should be dominant in the tying market, though not necessarily in the tied market. In bundling cases, the undertaking needs to be dominant in one of the bundled markets. In the special case of tying in after markets, the condition is that the undertaking is dominant in the tying market and/or the tied after market.

<sup>(4)</sup> Case T 201/04 *Microsoft v Commission* [2007] ECR II 3601, in particular paragraphs 842, 859 to 862, 867 and 869.

### (a) Distinct products

51. Whether the products will be considered by the Commission to be distinct depends on customer demand. Two products are distinct if, in the absence of tying or bundling, a substantial number of customers would purchase or would have purchased the tying product without also buying the tied product from the same supplier, thereby allowing stand alone production for both the tying and the tied product<sup>(5)</sup>. Evidence that two products are distinct could include direct evidence that, when given a choice, customers purchase the tying and the tied products separately from different sources of supply, or indirect evidence, such as the presence on the market of undertakings specialised in the manufacture or sale of the tied product without the tying product<sup>(6)</sup> or of each of the products bundled by the dominant undertaking, or evidence indicating that undertakings with little market power, particularly in competitive markets, tend not to tie or not to bundle such products.

### (b) Anti competitive foreclosure in the tied and/or tying market

52. Tying or bundling may lead to anti competitive effects in the tied market, the tying market, or both at the same time. However, even when the aim of the tying or bundling is to protect the dominant undertaking's position in the tying market, this is done indirectly through foreclosing the tied market. In addition to the factors already mentioned in paragraph 20, the Commission considers that the following factors are generally of particular importance for identifying cases of likely or actual anti competitive foreclosure.

53. The risk of anti competitive foreclosure is expected to be greater where the dominant undertaking makes its tying or bundling strategy a lasting one, for example through technical tying which is costly to reverse. Technical tying also reduces the opportunities for resale of individual components.

54. In the case of bundling, the undertaking may have a dominant position for more than one of the products in the bundle. The greater the number of such products in the bundle, the stronger the likely anti competitive foreclosure. This is particularly true if the bundle is difficult for a competitor to replicate, either on its own or in combination with others.

55. The tying may lead to less competition for customers interested in buying the tied product, but not the tying product. If there is not a sufficient number of customers who will buy the tied product alone to sustain competitors of the dominant undertaking in the tied market, the tying can lead to those customers facing higher prices.

<sup>(5)</sup> Case T 201/04 *Microsoft v Commission* [2007] ECR II 3601, paragraphs 917, 921 and 922.

<sup>(6)</sup> Case T 30/89 *Hilti v Commission* [1991] ECR II 1439, paragraph 67.

56. If the tying and the tied product can be used in variable proportions as inputs to a production process, customers may react to an increase in price for the tying product by increasing their demand for the tied product while decreasing their demand for the tying product. By tying the two products the dominant undertaking may seek to avoid this substitution and as a result be able to raise its prices.
57. If the prices the dominant undertaking can charge in the tying market are regulated, tying may allow the dominant undertaking to raise prices in the tied market in order to compensate for the loss of revenue caused by the regulation in the tying market.
58. If the tied product is an important complementary product for customers of the tying product, a reduction of alternative suppliers of the tied product and hence a reduced availability of that product can make entry to the tying market alone more difficult.

(c) *Multi product rebates*

59. A multi product rebate may be anti competitive on the tied or the tying market if it is so large that equally efficient competitors offering only some of the components cannot compete against the discounted bundle.
60. In theory, it would be ideal if the effect of the rebate could be assessed by examining whether the incremental revenue covers the incremental costs for each product in the dominant undertaking's bundle. However, in practice assessing the incremental revenue is complex. Therefore, in its enforcement practice the Commission will in most situations use the incremental price as a good proxy. If the incremental price that customers pay for each of the dominant undertaking's products in the bundle remains above the LRAIC of the dominant undertaking from including that product in the bundle, the Commission will normally not intervene since an equally efficient competitor with only one product should in principle be able to compete profitably against the bundle. Enforcement action may, however, be warranted if the incremental price is below the LRAIC, because in such a case even an equally efficient competitor may be prevented from expanding or entering <sup>(1)</sup>.
61. If the evidence suggests that competitors of the dominant undertaking are selling identical bundles, or could do so in a timely way without being deterred by possible additional costs, the Commission will generally regard this as a bundle competing against a bundle, in which case the relevant question is not whether the incremental revenue covers the incremental costs for each product in the bundle, but rather whether the price of the bundle as a whole is predatory.

<sup>(1)</sup> In principle, the LRAIC cost benchmark is relevant here as long as competitors are not able to also sell bundles (see paragraphs 23 to 27 and paragraph 61).

(d) *Efficiencies*

62. Provided that the conditions set out in Section III D are fulfilled, the Commission will look into claims by dominant undertakings that their tying and bundling practices may lead to savings in production or distribution that would benefit customers. The Commission may also consider whether such practices reduce transaction costs for customers, who would otherwise be forced to buy the components separately, and enable substantial savings on packaging and distribution costs for suppliers. It may also examine whether combining two independent products into a new, single product might enhance the ability to bring such a product to the market to the benefit of consumers. The Commission may also consider whether tying and bundling practices allow the supplier to pass on efficiencies arising from its production or purchase of large quantities of the tied product.

### C. Predation

63. In line with its enforcement priorities, the Commission will generally intervene where there is evidence showing that a dominant undertaking engages in predatory conduct by deliberately incurring losses or foregoing profits in the short term (referred to hereafter as 'sacrifice'), so as to foreclose or be likely to foreclose one or more of its actual or potential competitors with a view to strengthening or maintaining its market power, thereby causing consumer harm <sup>(2)</sup>.

(a) *Sacrifice*

64. Conduct will be viewed by the Commission as entailing a sacrifice if, by charging a lower price for all or a particular part of its output over the relevant time period, or by expanding its output over the relevant time period, the dominant undertaking incurred or is incurring losses that could have been avoided. The Commission will take AAC as the appropriate starting point for assessing whether the dominant undertaking incurred or is incurring avoidable losses. If a dominant undertaking charges a price below AAC for all or part of its output, it is not recovering the costs that could have been avoided by not producing that output: it is incurring a loss that could have been avoided <sup>(3)</sup>. Pricing below AAC will thus in most cases be

<sup>(2)</sup> The Commission may also pursue predatory practices by dominant undertakings on secondary markets on which they are not yet dominant. In particular, the Commission will be more likely to find such an abuse in sectors where activities are protected by a legal monopoly. While the dominant undertaking does not need to engage in predatory conduct to protect its dominant position in the market protected by legal monopoly, it may use the profits gained in the monopoly market to cross subsidize its activities in another market and thereby threaten to eliminate effective competition in that other market.

<sup>(3)</sup> In most cases the average variable cost (AVC) and AAC will be the same, as often only variable costs can be avoided. However, in circumstances where AVC and AAC differ, the latter better reflects possible sacrifice: for example, if the dominant undertaking had to expand capacity in order to be able to predate, then the sunk costs of that extra capacity should be taken into account in looking at the dominant undertaking's losses. Those costs would be reflected in the AAC, but not the AVC.

viewed by the Commission as a clear indication of sacrifice <sup>(1)</sup>.

65. However, the concept of sacrifice does not only include pricing below AAC <sup>(2)</sup>. In order to show a predatory strategy, the Commission may also investigate whether the allegedly predatory conduct led in the short term to net revenues lower than could have been expected from a reasonable alternative conduct, that is to say, whether the dominant undertaking incurred a loss that it could have avoided <sup>(3)</sup>. The Commission will not compare the actual conduct with hypothetical or theoretical alternatives that might have been more profitable. Only economically rational and practicable alternatives will be considered which, taking into account the market conditions and business realities facing the dominant undertaking, can realistically be expected to be more profitable.
66. In some cases it will be possible to rely upon direct evidence consisting of documents from the dominant undertaking which clearly show a predatory strategy <sup>(4)</sup>, such as a detailed plan to sacrifice in order to exclude a competitor, to prevent entry or to pre-empt the emergence of a market, or evidence of concrete threats of predatory action <sup>(5)</sup>.

(b) *Anti competitive foreclosure*

67. If sufficient reliable data are available, the Commission will apply the equally efficient competitor analysis, described in paragraphs 25 to 27, to determine whether the conduct is capable of harming consumers. Normally only pricing below LRAIC is capable of foreclosing as efficient competitors from the market.
68. In addition to the factors already mentioned in paragraph 20, the Commission will generally investigate whether and how the suspected conduct reduces the likelihood that competitors will compete. For instance, if the dominant undertaking is better informed about cost or other market conditions, or can distort market signals

about profitability, it may engage in predatory conduct so as to influence the expectations of potential entrants and thereby deter entry. If the conduct and its likely effects are felt on multiple markets and/or in successive periods of possible entry, the dominant undertaking may be shown to be seeking a reputation for predatory conduct. If the targeted competitor is dependent on external financing, substantial price decreases or other predatory conduct by the dominant undertaking could adversely affect the competitor's performance so that its access to further financing may be seriously undermined.

69. The Commission does not consider that it is necessary to show that competitors have exited the market in order to show that there has been anti competitive foreclosure. The possibility cannot be excluded that the dominant undertaking may prefer to prevent the competitor from competing vigorously and have it follow the dominant undertaking's pricing, rather than eliminate it from the market altogether. Such disciplining avoids the risk inherent in eliminating competitors, in particular the risk that the assets of the competitor are sold at a low price and stay in the market, creating a new low cost entrant.
70. Generally speaking, consumers are likely to be harmed if the dominant undertaking can reasonably expect its market power after the predatory conduct comes to an end to be greater than it would have been had the undertaking not engaged in that conduct in the first place, that is to say, if the undertaking is likely to be in a position to benefit from the sacrifice.
71. This does not mean that the Commission will only intervene if the dominant undertaking would be likely to be able to increase its prices above the level persisting in the market before the conduct. It is sufficient, for instance, that the conduct would be likely to prevent or delay a decline in prices that would otherwise have occurred. Identifying consumer harm is not a mechanical calculation of profits and losses, and proof of overall profits is not required. Likely consumer harm may be demonstrated by assessing the likely foreclosure effect of the conduct, combined with consideration of other factors, such as entry barriers <sup>(6)</sup>. In this context, the Commission will also consider possibilities of re entry.
72. It may be easier for the dominant undertaking to engage in predatory conduct if it selectively targets specific customers with low prices, as this will limit the losses incurred by the dominant undertaking.

<sup>(1)</sup> In Case 62/86 *AKZO Chemie v Commission* [1991] ECR I 3359, paragraph 71, the Court held, in relation to pricing below average variable cost (AVC), that: 'A dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its price by taking advantage of its monopolistic position, since each sale generates a loss ...'.

<sup>(2)</sup> If the estimate of cost is based on the direct cost of production (as registered in the undertaking's accounts), it may not adequately capture whether or not there has been a sacrifice.

<sup>(3)</sup> However, undertakings should not be penalised for incurring *ex post* losses where the *ex ante* decision to engage in the conduct was taken in good faith, that is to say, if they can provide conclusive evidence that they could reasonably expect that the activity would be profitable.

<sup>(4)</sup> See Case T 83/91 *Tetra Pak International v Commission (Tetra Pak II)* [1994] ECR II 755, paragraphs 151 and 171, and Case T 340/03 *France Télécom v Commission* [2007] ECR II 107, paragraphs 198 to 215.

<sup>(5)</sup> In Case 62/86 *AKZO Chemie v Commission* [1991] ECR I 3359, the Court accepted that there was clear evidence of AKZO threatening ECS in two meetings with below cost pricing if it did not withdraw from the organic peroxides market. In addition there was a detailed plan, with figures, describing the measures that AKZO would put into effect if ECS would not withdraw from the market (see paragraphs 76 to 82, 115, and 131 to 140).

<sup>(6)</sup> This was confirmed in Case T 83/91 *Tetra Pak International v Commission (Tetra Pak II)* [1994] ECR II 755, upheld on appeal in Case C 333/94 *P Tetra Pak International v Commission* [1996] ECR I 5951, where the Court of First Instance stated that proof of actual recoupment was not required (paragraph 150 in fine). More in general, as predation may turn out to be more difficult than expected at the start of the conduct, the total costs to the dominant undertaking of predating could outweigh its later profits and thus make actual recoupment impossible while it may still be rational to decide to continue with the predatory strategy that it started some time ago. See also COMP/38.233 *Wanadoo Interactive*, Commission Decision of 16 July 2003, paragraphs 332 to 367.

73. It is less likely that the dominant undertaking engages in predatory conduct if the conduct concerns a low price applied generally for a long period of time.

#### (c) Efficiencies

74. In general it is considered unlikely that predatory conduct will create efficiencies. However, provided that the conditions set out in Section III D are fulfilled, the Commission will consider claims by a dominant undertaking that the low pricing enables it to achieve economies of scale or efficiencies related to expanding the market.

### D. Refusal to supply and margin squeeze

75. When setting its enforcement priorities, the Commission starts from the position that, generally speaking, any undertaking, whether dominant or not, should have the right to choose its trading partners and to dispose freely of its property. The Commission therefore considers that intervention on competition law grounds requires careful consideration where the application of Article 82 would lead to the imposition of an obligation to supply on the dominant undertaking<sup>(1)</sup>. The existence of such an obligation — even for a fair remuneration — may undermine undertakings' incentives to invest and innovate and, thereby, possibly harm consumers. The knowledge that they may have a duty to supply against their will may lead dominant undertakings — or undertakings who anticipate that they may become dominant — not to invest, or to invest less, in the activity in question. Also, competitors may be tempted to free ride on investments made by the dominant undertaking instead of investing themselves. Neither of these consequences would, in the long run, be in the interest of consumers.

76. Typically competition problems arise when the dominant undertaking competes on the 'downstream' market with the buyer whom it refuses to supply. The term 'downstream market' is used to refer to the market for which the refused input is needed in order to manufacture a product or provide a service. This section deals only with this type of refusal.

77. Other types of possibly unlawful refusal to supply, in which the supply is made conditional upon the purchaser accepting limitations on its conduct, are not dealt with in this section. For instance, halting supplies in order to punish customers for dealing with competitors or refusing to supply customers that do not agree to tying arrangements, will be examined by the Commission in line with the principles set out in the sections on exclusive dealing and tying and bundling. Similarly, refusals to supply aimed at preventing the purchaser from engaging in parallel

trade<sup>(2)</sup> or from lowering its resale price are also not dealt with in this section.

78. The concept of refusal to supply covers a broad range of practices, such as a refusal to supply products to existing or new customers<sup>(3)</sup>, refusal to license intellectual property rights<sup>(4)</sup>, including when the licence is necessary to provide interface information<sup>(5)</sup>, or refusal to grant access to an essential facility or a network<sup>(6)</sup>.

79. The Commission does not regard it as necessary for the refused product to have been already traded: it is sufficient that there is demand from potential purchasers and that a potential market for the input at stake can be identified<sup>(7)</sup>. Likewise, it is not necessary for there to be actual refusal on the part of a dominant undertaking; 'constructive refusal' is sufficient. Constructive refusal could, for example, take the form of unduly delaying or otherwise degrading the supply of the product or involve the imposition of unreasonable conditions in return for the supply.

80. Finally, instead of refusing to supply, a dominant undertaking may charge a price for the product on the upstream market which, compared to the price it charges on the downstream market<sup>(8)</sup>, does not allow even an equally efficient competitor to trade profitably in the downstream market on a lasting basis (a so called 'margin squeeze'). In margin squeeze cases the benchmark which the Commission will generally rely on to determine the costs of an equally efficient competitor are the LRAIC of the downstream division of the integrated dominant undertaking<sup>(9)</sup>.

81. The Commission will consider these practices as an enforcement priority if all the following circumstances are present:

— the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market,

<sup>(1)</sup> Joined Cases C 241/91 P and C 242/91 P *Radio Telefís Éireann (RTE) and Independent Television Publications (ITP) v Commission (Magill)* [1995] ECR I 743, paragraph 50; Case C 418/01 *IMS Health v NDC Health* [2004] ECR I 5039, paragraph 35; Case T 201/04 *Microsoft v Commission* [2007] ECR II 3601, paragraphs 319, 330, 331, 332 and 336.

<sup>(2)</sup> See Judgment of 16 September 2008 in Joined Cases C 468/06 to C 478/06 *Sot. Lélou kai Sia and Others v GlaxoSmithKline*, not yet reported.

<sup>(3)</sup> Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents v Commission* [1974] ECR 223.

<sup>(4)</sup> Joined Cases C 241/91 P and C 242/91 P *Radio Telefís Éireann (RTE) and Independent Television Publications Ltd (ITP) v Commission (Magill)* [1995] ECR I 743; Case C 418/01 *IMS Health v NDC Health* [2004] ECR I 5039. Those judgments show that in exceptional circumstances a refusal to license intellectual property rights is abusive.

<sup>(5)</sup> See Case T 201/04 *Microsoft v Commission* [2007] ECR II 3601.

<sup>(6)</sup> See Commission Decision 94/19/EC of 21 December 1993 in Case IV/34.689 *Sea Containers v Stena Sealink — Interim Measures* (OJ L 15, 18.1.1994, p. 8) and Commission Decision 92/213/EEC of 26 February 1992 in Case IV/33.544 *British Midland v Aer Lingus* — (OJ L 96, 10.4.1992, p. 34).

<sup>(7)</sup> Case C 418/01 *IMS Health v NDC Health* [2004] ECR I 5039, paragraph 44.

<sup>(8)</sup> Including a situation in which an integrated undertaking that sells a 'system' of complementary products refuses to sell one of the complementary products on an unbundled basis to a competitor that produces the other complementary product.

<sup>(9)</sup> In some cases, however, the LRAIC of a non integrated competitor downstream might be used as the benchmark, for example when it is not possible to clearly allocate the dominant undertaking's costs to downstream and upstream operations.

- the refusal is likely to lead to the elimination of effective competition on the downstream market, and
- the refusal is likely to lead to consumer harm.

82. In certain specific cases, it may be clear that imposing an obligation to supply is manifestly not capable of having negative effects on the input owner's and/or other operators' incentives to invest and innovate upstream, whether *ex ante* or *ex post*. The Commission considers that this is particularly likely to be the case where regulation compatible with Community law already imposes an obligation to supply on the dominant undertaking and it is clear, from the considerations underlying such regulation, that the necessary balancing of incentives has already been made by the public authority when imposing such an obligation to supply. This could also be the case where the upstream market position of the dominant undertaking has been developed under the protection of special or exclusive rights or has been financed by state resources. In such specific cases there is no reason for the Commission to deviate from its general enforcement standard of showing likely anti competitive foreclosure, without considering whether the three circumstances referred to in paragraph 81 are present.

(a) *Objective necessity of the input*

83. In examining whether a refusal to supply deserves its priority attention, the Commission will consider whether the supply of the refused input is objectively necessary for operators to be able to compete effectively on the market. This does not mean that, without the refused input, no competitor could ever enter or survive on the downstream market <sup>(1)</sup>. Rather, an input is indispensable where there is no actual or potential substitute on which competitors in the downstream market could rely so as to counter — at least in the long term — the negative consequences of the refusal <sup>(2)</sup>. In this regard, the Commission will normally make an assessment of whether competitors could effectively duplicate the input produced by the dominant undertaking in the foreseeable future <sup>(3)</sup>. The notion of duplication means the creation of an alternative source of efficient supply that is capable of allowing competitors to exert a competitive constraint on the dominant undertaking in the downstream market <sup>(4)</sup>.

<sup>(1)</sup> Case T 201/04 *Microsoft v Commission* [2007] ECR II 3601, paragraphs 428 and 560 to 563.

<sup>(2)</sup> Joined Cases C 241/91 P and C 242/91 *Radio Telefís Éireann (RTE) and Independent Television Publications LTD (ITP) v Commission (Magill)* [1995] ECR 743, paragraphs 52 and 53; Case 7/97 *Oscar Bronner v Mediaprint Zeitungs- und Zeitschriftenverlag, Mediaprint Zeitungsvertriebsgesellschaft and Mediaprint Anzeigengesellschaft* [1998] ECR I 7791, paragraphs 44 and 45; Case T 201/04 *Microsoft v Commission* [2007] ECR II 3601, paragraph 421.

<sup>(3)</sup> In general, an input is likely to be impossible to replicate when it involves a natural monopoly due to scale or scope economies, where there are strong network effects or when it concerns so called 'single source' information. However, in all cases account should be taken of the dynamic nature of the industry and, in particular whether or not market power can rapidly dissipate.

<sup>(4)</sup> Case 7/97 *Oscar Bronner v Mediaprint Zeitungs- und Zeitschriftenverlag, Mediaprint Zeitungsvertriebsgesellschaft and Mediaprint Anzeigengesellschaft* [1998] ECR I 7791, paragraph 46, Case C 418/01 *IMS Health v NDC Health* [2004] ECR I 5039, paragraph 29.

84. The criteria set out in paragraph 81 apply both to cases of disruption of previous supply, and to refusals to supply a good or service which the dominant company has not previously supplied to others (*de novo* refusals to supply). However, the termination of an existing supply arrangement is more likely to be found to be abusive than a *de novo* refusal to supply. For example, if the dominant undertaking had previously been supplying the requesting undertaking, and the latter had made relationship specific investments in order to use the subsequently refused input, the Commission may be more likely to regard the input in question as indispensable. Similarly, the fact that the owner of the essential input in the past has found it in its interest to supply is an indication that supplying the input does not imply any risk that the owner receives inadequate compensation for the original investment. It would therefore be up to the dominant company to demonstrate why circumstances have actually changed in such a way that the continuation of its existing supply relationship would put in danger its adequate compensation.

(b) *Elimination of effective competition*

85. If the requirements set out in paragraphs 83 and 84 are fulfilled, the Commission considers that a dominant undertaking's refusal to supply is generally liable to eliminate, immediately or over time, effective competition in the downstream market. The likelihood of effective competition being eliminated is generally greater the higher the market share of the dominant undertaking in the downstream market. The less capacity constrained the dominant undertaking is relative to competitors in the downstream market, the closer the substitutability between the dominant undertaking's output and that of its competitors in the downstream market, the greater the proportion of competitors in the downstream market that are affected, and the more likely it is that the demand that could be served by the foreclosed competitors would be diverted away from them to the advantage of the dominant undertaking.

(c) *Consumer harm*

86. In examining the likely impact of a refusal to supply on consumer welfare, the Commission will examine whether, for consumers, the likely negative consequences of the refusal to supply in the relevant market outweigh over time the negative consequences of imposing an obligation to supply. If they do, the Commission will normally pursue the case.

87. The Commission considers that consumer harm may, for instance, arise where the competitors that the dominant undertaking forecloses are, as a result of the refusal, prevented from bringing innovative goods or services to market and/or where follow on innovation is likely to be stifled <sup>(5)</sup>. This may be particularly the case if the undertaking which requests supply does not intend to limit itself essentially to duplicating the goods or services already

<sup>(5)</sup> Case T 201/04 *Microsoft v Commission* [2007] ECR II 3601, paragraphs 643, 647, 648, 649, 652, 653 and 656.

offered by the dominant undertaking on the downstream market, but intends to produce new or improved goods or services for which there is a potential consumer demand or is likely to contribute to technical development <sup>(1)</sup>.

88. The Commission also considers that a refusal to supply may lead to consumer harm where the price in the upstream input market is regulated, the price in the downstream market is not regulated and the dominant undertaking, by excluding competitors on the downstream market through a refusal to supply, is able to extract more profits in the unregulated downstream market than it would otherwise do.

(d) *Efficiencies*

89. The Commission will consider claims by the dominant undertaking that a refusal to supply is necessary to allow the dominant undertaking to realise an adequate return on

the investments required to develop its input business, thus generating incentives to continue to invest in the future, taking the risk of failed projects into account. The Commission will also consider claims by the dominant undertaking that its own innovation will be negatively affected by the obligation to supply, or by the structural changes in the market conditions that imposing such an obligation will bring about, including the development of follow on innovation by competitors.

90. However, when considering such claims, the Commission will ensure that the conditions set out in Section III D are fulfilled. In particular, it falls on the dominant undertaking to demonstrate any negative impact which an obligation to supply is likely to have on its own level of innovation <sup>(2)</sup>. If a dominant undertaking has previously supplied the input in question, this can be relevant for the assessment of any claim that the refusal to supply is justified on efficiency grounds.

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<sup>(1)</sup> Case C 418/01 *IMS Health v NDC Health* [2004] ECR I 5039, para graph 49; Case T 201/04 *Microsoft v Commission* [2007] ECR II 3601, paragraph 658.

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<sup>(2)</sup> Case T 201/04 *Microsoft v Commission* [2007] ECR II 3601, para graph 659.



## Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003

(2006/C 210/02)

(Text with EEA relevance)

### INTRODUCTION

1. Pursuant to Article 23(2)(a) of Regulation No 1/2003 <sup>(1)</sup>, the Commission may, by decision, impose fines on undertakings or associations of undertakings where, either intentionally or negligently, they infringe Article 81 or 82 of the Treaty.
2. In exercising its power to impose such fines, the Commission enjoys a wide margin of discretion <sup>(2)</sup> within the limits set by Regulation No 1/2003. First, the Commission must have regard both to the gravity and to the duration of the infringement. Second, the fine imposed may not exceed the limits specified in Article 23(2), second and third subparagraphs, of Regulation No 1/2003.
3. In order to ensure the transparency and impartiality of its decisions, the Commission published on 14 January 1998 guidelines on the method of setting fines <sup>(3)</sup>. After more than eight years of implementation, the Commission has acquired sufficient experience to develop further and refine its policy on fines.
4. The Commission's power to impose fines on undertakings or associations of undertakings which, intentionally or negligently, infringe Article 81 or 82 of the Treaty is one of the means conferred on it in order for it to carry out the task of supervision entrusted to it by the Treaty. That task not only includes the duty to investigate and sanction individual infringements, but it also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to steer the conduct of undertakings in the light of those principles <sup>(4)</sup>. For this purpose, the Commission must ensure that its action has the necessary deterrent effect <sup>(5)</sup>. Accordingly, when the Commission discovers that Article 81 or 82 of the Treaty has been infringed, it may be necessary to impose a fine on those who have acted in breach of the law. Fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles 81 and 82 of the EC Treaty (general deterrence).
5. In order to achieve these objectives, it is appropriate for the Commission to refer to the value of the sales of goods or services to which the infringement relates as a basis for setting the fine. The duration of the infringement should also play a significant role in the setting of the appropriate amount of the fine. It necessarily has an impact on the potential consequences of the infringement on the market. It is therefore considered important that the fine should also reflect the number of years during which an undertaking participated in the infringement.
6. The combination of the value of sales to which the infringement relates and of the duration of the infringement is regarded as providing an appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement. Reference to these factors provides a good indication of the order of magnitude of the fine and should not be regarded as the basis for an automatic and arithmetical calculation method.
7. It is also considered appropriate to include in the fine a specific amount irrespective of the duration of the infringement, in order to deter companies from even entering into illegal practices.
8. The sections below set out the principles which will guide the Commission when it sets fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003.

### METHOD FOR THE SETTING OF FINES

9. Without prejudice to point 37 below, the Commission will use the following two-step methodology when setting the fine to be imposed on undertakings or associations of undertakings.
  10. First, the Commission will determine a basic amount for each undertaking or association of undertakings (see Section 1 below).
  11. Second, it may adjust that basic amount upwards or downwards (see Section 2 below).
- 1. Basic amount of the fine**
12. The basic amount will be set by reference to the value of sales and applying the following methodology.

<sup>(1)</sup> Council Regulation (EC) No 1 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).

<sup>(2)</sup> See, for example, Case C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri A/S and others v Commission* [2005] ECR I-5425, paragraph 172.

<sup>(3)</sup> Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ C 9, 14.1.1998, p. 3).

<sup>(4)</sup> See, for example, *Dansk Rørindustri A/S and others v Commission*, cited above, paragraph 170.

<sup>(5)</sup> See Joined Cases 100/80 to 103/80 *Musique Diffusion française and others v Commission* [1983] ECR 1825, paragraph 106.

#### A. Calculation of the value of sales

13. In determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly <sup>(1)</sup> relates in the relevant geographic area within the EEA. It will normally take the sales made by the undertaking during the last full business year of its participation in the infringement (hereafter 'value of sales').
14. Where the infringement by an association of undertakings relates to the activities of its members, the value of sales will generally correspond to the sum of the value of sales by its members.
15. In determining the value of sales by an undertaking, the Commission will take that undertaking's best available figures.
16. Where the figures made available by an undertaking are incomplete or not reliable, the Commission may determine the value of its sales on the basis of the partial figures it has obtained and/or any other information which it regards as relevant and appropriate.
17. The value of sales will be determined before VAT and other taxes directly related to the sales.
18. Where the geographic scope of an infringement extends beyond the EEA (e.g. worldwide cartels), the relevant sales of the undertakings within the EEA may not properly reflect the weight of each undertaking in the infringement. This may be the case in particular with worldwide market-sharing arrangements.

In such circumstances, in order to reflect both the aggregate size of the relevant sales within the EEA and the relative weight of each undertaking in the infringement, the Commission may assess the total value of the sales of goods or services to which the infringement relates in the relevant geographic area (wider than the EEA), may determine the share of the sales of each undertaking party to the infringement on that market and may apply this share to the aggregate sales within the EEA of the undertakings concerned. The result will be taken as the value of sales for the purpose of setting the basic amount of the fine.

#### B. Determination of the basic amount of the fine

19. The basic amount of the fine will be related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement.
20. The assessment of gravity will be made on a case-by-case basis for all types of infringement, taking account of all the relevant circumstances of the case.

<sup>(1)</sup> Such will be the case for instance for horizontal price fixing arrangements on a given product, where the price of that product then serves as a basis for the price of lower or higher quality products.

21. As a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30 % of the value of sales.
22. In order to decide whether the proportion of the value of sales to be considered in a given case should be at the lower end or at the higher end of that scale, the Commission will have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.
23. Horizontal price-fixing, market-sharing and output-limitation agreements <sup>(2)</sup>, which are usually secret, are, by their very nature, among the most harmful restrictions of competition. As a matter of policy, they will be heavily fined. Therefore, the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale.
24. In order to take fully into account the duration of the participation of each undertaking in the infringement, the amount determined on the basis of the value of sales (see points 20 to 23 above) will be multiplied by the number of years of participation in the infringement. Periods of less than six months will be counted as half a year; periods longer than six months but shorter than one year will be counted as a full year.
25. In addition, irrespective of the duration of the undertaking's participation in the infringement, the Commission will include in the basic amount a sum of between 15 % and 25 % of the value of sales as defined in Section A above in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output-limitation agreements. The Commission may also apply such an additional amount in the case of other infringements. For the purpose of deciding the proportion of the value of sales to be considered in a given case, the Commission will have regard to a number of factors, in particular those referred in point 22.
26. Where the value of sales by undertakings participating in the infringement is similar but not identical, the Commission may set for each of them an identical basic amount. Moreover, in determining the basic amount of the fine, the Commission will use rounded figures.

#### 2. Adjustments to the basic amount

27. In setting the fine, the Commission may take into account circumstances that result in an increase or decrease in the basic amount as determined in Section 1 above. It will do so on the basis of an overall assessment which takes account of all the relevant circumstances.

<sup>(2)</sup> This includes agreements, concerted practices and decisions by associations of undertakings within the meaning of Article 81 of the Treaty.

*A. Aggravating circumstances*

28. The basic amount may be increased where the Commission finds that there are aggravating circumstances, such as:

- where an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed Article 81 or 82: the basic amount will be increased by up to 100 % for each such infringement established;
- refusal to cooperate with or obstruction of the Commission in carrying out its investigations;
- role of leader in, or instigator of, the infringement; the Commission will also pay particular attention to any steps taken to coerce other undertakings to participate in the infringement and/or any retaliatory measures taken against other undertakings with a view to enforcing the practices constituting the infringement.

*B. Mitigating circumstances*

29. The basic amount may be reduced where the Commission finds that mitigating circumstances exist, such as:

- where the undertaking concerned provides evidence that it terminated the infringement as soon as the Commission intervened: this will not apply to secret agreements or practices (in particular, cartels);
- where the undertaking provides evidence that the infringement has been committed as a result of negligence;
- where the undertaking provides evidence that its involvement in the infringement is substantially limited and thus demonstrates that, during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market: the mere fact that an undertaking participated in an infringement for a shorter duration than others will not be regarded as a mitigating circumstance since this will already be reflected in the basic amount;
- where the undertaking concerned has effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so;
- where the anti-competitive conduct of the undertaking has been authorized or encouraged by public authorities or by legislation. <sup>(1)</sup>

<sup>(1)</sup> This is without prejudice to any action that may be taken against the Member State concerned.

*C. Specific increase for deterrence*

30. The Commission will pay particular attention to the need to ensure that fines have a sufficiently deterrent effect; to that end, it may increase the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates.
31. The Commission will also take into account the need to increase the fine in order to exceed the amount of gains improperly made as a result of the infringement where it is possible to estimate that amount.

*D. Legal maximum*

32. The final amount of the fine shall not, in any event, exceed 10 % of the total turnover in the preceding business year of the undertaking or association of undertakings participating in the infringement, as laid down in Article 23(2) of Regulation No 1/2003.
33. Where an infringement by an association of undertakings relates to the activities of its members, the fine shall not exceed 10 % of the sum of the total turnover of each member active on the market affected by that infringement.

*E. Leniency Notice*

34. The Commission will apply the leniency rules in line with the conditions set out in the applicable notice.

*F. Ability to pay*

35. In exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.

**FINAL CONSIDERATIONS**

36. The Commission may, in certain cases, impose a symbolic fine. The justification for imposing such a fine should be given in its decision.

37. Although these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology or from the limits specified in point 21.

38. These Guidelines will be applied in all cases where a statement of objections is notified after their date of publication in the Official Journal, regardless of whether the fine is imposed pursuant to Article 23(2) of Regulation No 1/2003 or Article 15(2) of Regulation 17/62 <sup>(1)</sup>.

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<sup>(1)</sup> Article 15(2) of Regulation 17/62 of 6 February 1962: First Regulation implementing Articles 85 and 86 [now 81 and 82] of the Treaty (OJ 13, 21.2.1962, p. 204).

## Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty

(2004/C 101/05)

(Text with EEA relevance)

### I. INTRODUCTION AND SUBJECT-MATTER OF THE NOTICE

1. Regulation 1/2003 <sup>(1)</sup> establishes a system of parallel competence for the application of Articles 81 and 82 of the EC Treaty by the Commission and the Member States' competition authorities and courts. The Regulation recognises in particular the complementary functions of the Commission and Member States' competition authorities acting as public enforcers and the Member States' courts that rule on private lawsuits in order to safeguard the rights of individuals deriving from Articles 81 and 82 <sup>(2)</sup>.
2. Under Regulation 1/2003, the public enforcers may focus their action on the investigation of serious infringements of Articles 81 and 82 which are often difficult to detect. For their enforcement activity, they benefit from information supplied by undertakings and by consumers in the market.
3. The Commission therefore wishes to encourage citizens and undertakings to address themselves to the public enforcers to inform them about suspected infringements of the competition rules. At the level of the Commission, there are two ways to do this, one is by lodging a complaint pursuant to Article 7(2) of Regulation 1/2003. Under Articles 5 to 9 of Regulation 773/2004 <sup>(3)</sup>, such complaints must fulfil certain requirements.
4. The other way is the provision of market information that does not have to comply with the requirements for complaints pursuant to Article 7(2) of Regulation 1/2003. For this purpose, the Commission has created a special website to collect information from citizens and undertakings and their associations who wish to inform the Commission about suspected infringements of Articles 81 and 82. Such information can be the starting point for an investigation by the Commission <sup>(4)</sup>. Information about suspected infringements can be supplied to the following address:

<http://europa.eu.int/dgcomp/info-on-anti-competitive-practices>

or to:

Commission européenne/Europese Commissie  
Competition DG  
B-1049 Bruxelles/Brussel

5. Without prejudice to the interpretation of Regulation 1/2003 and of Commission Regulation 773/2004 by the

Community Courts, the present Notice intends to provide guidance to citizens and undertakings that are seeking relief from suspected infringements of the competition rules. The Notice contains two main parts:

- Part II gives indications about the choice between complaining to the Commission or bringing a lawsuit before a national court. Moreover, it recalls the principles related to the work-sharing between the Commission and the national competition authorities in the enforcement system established by Regulation 1/2003 that are explained in the Notice on cooperation within the network of competition authorities <sup>(5)</sup>.
- Part III explains the procedure for the treatment of complaints pursuant to Article 7(2) of Regulation 1/2003 by the Commission.

6. This Notice does not address the following situations:

- complaints lodged by Member States pursuant to Article 7(2) of Regulation 1/2003,
- complaints that ask the Commission to take action against a Member State pursuant to Article 86(3) in conjunction with Articles 81 or 82 of the Treaty,
- complaints relating to Article 87 of the Treaty on state aids,
- complaints relating to infringements by Member States that the Commission may pursue in the framework of Article 226 of the Treaty <sup>(6)</sup>.

### II. DIFFERENT POSSIBILITIES FOR LODGING COMPLAINTS ABOUT SUSPECTED INFRINGEMENTS OF ARTICLES 81 OR 82

#### A. COMPLAINTS IN THE NEW ENFORCEMENT SYSTEM ESTABLISHED BY REGULATION 1/2003

7. Depending on the nature of the complaint, a complainant may bring his complaint either to a national court or to a competition authority that acts as public enforcer. The present chapter of this Notice intends to help potential complainants to make an informed choice about whether to address themselves to the Commission, to one of the Member States' competition authorities or to a national court.

8. While national courts are called upon to safeguard the rights of individuals and are thus bound to rule on cases brought before them, public enforcers cannot investigate all complaints, but must set priorities in their treatment of cases. The Court of Justice has held that the Commission, entrusted by Article 85(1) of the EC Treaty with the task of ensuring application of the principles laid down in Articles 81 and 82 of the Treaty, is responsible for defining and implementing the orientation of Community competition policy and that, in order to perform that task effectively, it is entitled to give differing degrees of priority to the complaints brought before it <sup>(7)</sup>.
  9. Regulation 1/2003 empowers Member States' courts and Member States' competition authorities to apply Articles 81 and 82 in their entirety alongside the Commission. Regulation 1/2003 pursues as one principal objective that Member States' courts and competition authorities should participate effectively in the enforcement of Articles 81 and 82 <sup>(8)</sup>.
  10. Moreover, Article 3 of Regulation 1/2003 provides that Member States' courts and competition authorities have to apply Articles 81 and 82 to all cases of agreements or conduct that are capable of affecting trade between Member States to which they apply their national competition laws. In addition, Articles 11 and 15 of the Regulation create a range of mechanisms by which Member States' courts and competition authorities cooperate with the Commission in the enforcement of Articles 81 and 82.
  11. In this new legislative framework, the Commission intends to refocus its enforcement resources along the following lines:
    - enforce the EC competition rules in cases for which it is well placed to act <sup>(9)</sup>, concentrating its resources on the most serious infringements <sup>(10)</sup>;
    - handle cases in relation to which the Commission should act with a view to define Community competition policy and/or to ensure coherent application of Articles 81 or 82.
- B. THE COMPLEMENTARY ROLES OF PRIVATE AND PUBLIC ENFORCEMENT**
12. It has been consistently held by the Community Courts that national courts are called upon to safeguard the rights of individuals created by the direct effect of Articles 81(1) and 82 <sup>(11)</sup>.
  13. National courts can decide upon the nullity or validity of contracts and only national courts can grant damages to an individual in case of an infringement of Articles 81 and 82. Under the case law of the Court of Justice, any individual can claim damages for loss caused to him by a contract or by conduct which restricts or distorts competition, in order to ensure the full effectiveness of the Community competition rules. Such actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community as they discourage undertakings from concluding or applying restrictive agreements or practices <sup>(12)</sup>.
  14. Regulation 1/2003 takes express account of the fact that national courts have an essential part to play in applying the EC competition rules <sup>(13)</sup>. By extending the power to apply Article 81(3) to national courts it removes the possibility for undertakings to delay national court proceedings by a notification to the Commission and thus eliminates an obstacle for private litigation that existed under Regulation No 17 <sup>(14)</sup>.
  15. Without prejudice to the right or obligation of national courts to address a preliminary question to the Court of Justice in accordance with Article 234 EC, Article 15(1) of Regulation 1/2003 provides expressly that national courts may ask for opinions or information from the Commission. This provision aims at facilitating the application of Articles 81 and 82 by national courts <sup>(15)</sup>.
  16. Action before national courts has the following advantages for complainants:
    - National courts may award damages for loss suffered as a result of an infringement of Article 81 or 82.
    - National courts may rule on claims for payment or contractual obligations based on an agreement that they examine under Article 81.
    - It is for the national courts to apply the civil sanction of nullity of Article 81(2) in contractual relationships between individuals <sup>(16)</sup>. They can in particular assess, in the light of the applicable national law, the scope and consequences of the nullity of certain contractual provisions under Article 81(2), with particular regard to all the other matters covered by the agreement <sup>(17)</sup>.
    - National courts are usually better placed than the Commission to adopt interim measures <sup>(18)</sup>.

- Before national courts, it is possible to combine a claim under Community competition law with other claims under national law.
  - Courts normally have the power to award legal costs to the successful applicant. This is never possible in an administrative procedure before the Commission.
17. The fact that a complainant can secure the protection of his rights by an action before a national court, is an important element that the Commission may take into account in its examination of the Community interest for investigating a complaint <sup>(19)</sup>.
18. The Commission holds the view that the new enforcement system established by Regulation 1/2003 strengthens the possibilities for complainants to seek and obtain effective relief before national courts.
- C. WORK-SHARING BETWEEN THE PUBLIC ENFORCERS IN THE EUROPEAN COMMUNITY
19. Regulation 1/2003 creates a system of parallel competence for the application of Articles 81 and 82 by empowering Member States' competition authorities to apply Articles 81 and 82 in their entirety (Article 5). Decentralised enforcement by Member States' competition authorities is further encouraged by the possibility to exchange information (Article 12) and to provide each other assistance with investigations (Article 22).
20. The Regulation does not regulate the work-sharing between the Commission and the Member States' competition authorities but leaves the division of case work to the cooperation of the Commission and the Member States' competition authorities inside the European Competition Network (ECN). The Regulation pursues the objective of ensuring effective enforcement of Articles 81 and 82 through a flexible division of case work between the public enforcers in the Community.
21. Orientations for the work sharing between the Commission and the Member States' competition authorities are laid down in a separate Notice <sup>(20)</sup>. The guidance contained in that Notice, which concerns the relations between the public enforcers, will be of interest to complainants as it permits them to address a complaint to the authority most likely to be well placed to deal with their case.
22. The Notice on cooperation within the Network of Competition Authorities states in particular <sup>(21)</sup>:
- 'An authority can be considered to be well placed to deal with a case if the following three cumulative conditions are met:
- the agreement or practice has substantial direct actual or foreseeable effects on competition within its territory, is implemented within or originates from its territory;
  - the authority is able effectively to bring to an end the entire infringement, i.e. it can adopt a cease-and-desist order, the effect of which will be sufficient to bring an end to the infringement and it can, where appropriate, sanction the infringement adequately;
  - it can gather, possibly with the assistance of other authorities, the evidence required to prove the infringement.
- The above criteria indicate that a material link between the infringement and the territory of a Member State must exist in order for that Member State's competition authority to be considered well placed. It can be expected that in most cases the authorities of those Member States where competition is substantially affected by an infringement will be well placed provided they are capable of effectively bringing the infringement to an end through either single or parallel action unless the Commission is better placed to act (see below [. . .]).
- It follows that a single NCA is usually well placed to deal with agreements or practices that substantially affect competition mainly within its territory [. . .].
- Furthermore single action of an NCA might also be appropriate where, although more than one NCA can be regarded as well placed, the action of a single NCA is sufficient to bring the entire infringement to an end [. . .].
- Parallel action by two or three NCAs may be appropriate where an agreement or practice has substantial effects on competition mainly in their respective territories and the action of only one NCA would not be sufficient to bring the entire infringement to an end and/or to sanction it adequately [. . .].



The authorities dealing with a case in parallel action will endeavour to coordinate their action to the extent possible. To that effect, they may find it useful to designate one of them as a lead authority and to delegate tasks to the lead authority such as for example the coordination of investigative measures, while each authority remains responsible for conducting its own proceedings.

The Commission is particularly well placed if one or several agreement(s) or practice(s), including networks of similar agreements or practices, have effects on competition in more than three Member States (cross-border markets covering more than three Member States or several national markets) [...].

Moreover, the Commission is particularly well placed to deal with a case if it is closely linked to other Community provisions which may be exclusively or more effectively applied by the Commission, if the Community interest requires the adoption of a Commission decision to develop Community competition policy when a new competition issue arises or to ensure effective enforcement.<sup>1</sup>

23. Within the European Competition Network, information on cases that are being investigated following a complaint will be made available to the other members of the network before or without delay after commencing the first formal investigative measure<sup>(22)</sup>. Where the same complaint has been lodged with several authorities or where a case has not been lodged with an authority that is well placed, the members of the network will endeavour to determine within an indicative time-limit of two months which authority or authorities should be in charge of the case.
24. Complainants themselves have an important role to play in further reducing the potential need for reallocation of a case originating from their complaint by referring to the orientations on work sharing in the network set out in the present chapter when deciding on where to lodge their complaint. If nonetheless a case is reallocated within the network, the undertakings concerned and the complainant(s) are informed as soon as possible by the competition authorities involved<sup>(23)</sup>.
25. The Commission may reject a complaint in accordance with Article 13 of Regulation 1/2003, on the grounds that a Member State competition authority is dealing or has dealt with the case. When doing so, the Commission must, in accordance with Article 9 of Regulation

773/2004, inform the complainant without delay of the national competition authority which is dealing or has already dealt with the case.

### III. THE COMMISSION'S HANDLING OF COMPLAINTS PURSUANT TO ARTICLE 7(2) OF REGULATION 1/2003

#### A. GENERAL

26. According to Article 7(2) of Regulation 1/2003 natural or legal persons that can show a legitimate interest<sup>(24)</sup> are entitled to lodge a complaint to ask the Commission to find an infringement of Articles 81 and 82 EC and to require that the infringement be brought to an end in accordance with Article 7(1) of Regulation 1/2003. The present part of this Notice explains the requirements applicable to complaints based on Article 7(2) of Regulation 1/2003, their assessment and the procedure followed by the Commission.
27. The Commission, unlike civil courts, whose task is to safeguard the individual rights of private persons, is an administrative authority that must act in the public interest. It is an inherent feature of the Commission's task as public enforcer that it has a margin of discretion to set priorities in its enforcement activity<sup>(25)</sup>.
28. The Commission is entitled to give different degrees of priority to complaints made to it and may refer to the Community interest presented by a case as a criterion of priority<sup>(26)</sup>. The Commission may reject a complaint when it considers that the case does not display a sufficient Community interest to justify further investigation. Where the Commission rejects a complaint, the complainant is entitled to a decision of the Commission<sup>(27)</sup> without prejudice to Article 7(3) of Regulation 773/2004.

#### B. MAKING A COMPLAINT PURSUANT TO ARTICLE 7(2) OF REGULATION 1/2003

##### (a) Complaint form

29. A complaint pursuant to Article 7(2) of Regulation 1/2003 can only be made about an alleged infringement of Articles 81 or 82 with a view to the Commission taking action under Article 7(1) of Regulation 1/2003. A complaint under Article 7(2) of Regulation 1/2003 has to comply with Form C mentioned in Article 5(1) of Regulation 773/2004 and annexed to that Regulation.



30. Form C is available at <http://europa.eu.int/dgcomp/complaints-form> and is also annexed to this Notice. The complaint must be submitted in three paper copies as well as, if possible, an electronic copy. In addition, the complainant must provide a non-confidential version of the complaint (Article 5(2) of Regulation 773/2004). Electronic transmission to the Commission is possible via the website indicated, the paper copies should be sent to the following address:

Commission européenne/Europese Commissie  
Competition DG  
B-1049 Bruxelles/Brussel

31. Form C requires complainants to submit comprehensive information in relation to their complaint. They should also provide copies of relevant supporting documentation reasonably available to them and, to the extent possible, provide indications as to where relevant information and documents that are unavailable to them could be obtained by the Commission. In particular cases, the Commission may dispense with the obligation to provide information in relation to part of the information required by Form C (Article 5(1) of Regulation 773/2004). The Commission holds the view that this possibility can in particular play a role to facilitate complaints by consumer associations where they, in the context of an otherwise substantiated complaint, do not have access to specific pieces of information from the sphere of the undertakings complained of.

32. Correspondence to the Commission that does not comply with the requirements of Article 5 of Regulation 773/2004 and therefore does not constitute a complaint within the meaning of Article 7(2) of Regulation 1/2003 will be considered by the Commission as general information that, where it is useful, may lead to an own-initiative investigation (cf. point 4 above).

#### (b) Legitimate interest

33. The status of formal complainant under Article 7(2) of Regulation 1/2003 is reserved to legal and natural persons who can show a legitimate interest<sup>(28)</sup>. Member States are deemed to have a legitimate interest for all complaints they choose to lodge.

34. In the past practice of the Commission, the condition of legitimate interest was not often a matter of doubt as most complainants were in a position of being directly and adversely affected by the alleged infringement. However, there are situations where the condition of a 'legitimate interest' in Article 7(2) requires further analysis to conclude that it is fulfilled. Useful guidance can best be provided by a non-exhaustive set of examples.

35. The Court of First Instance has held that an association of undertakings may claim a legitimate interest in lodging a

complaint regarding conduct concerning its members, even if it is not directly concerned, as an undertaking operating in the relevant market, by the conduct complained of, provided that, first, it is entitled to represent the interests of its members and secondly, the conduct complained of is liable to adversely affect the interests of its members<sup>(29)</sup>. Conversely, the Commission has been found to be entitled not to pursue the complaint of an association of undertakings whose members were not involved in the type of business transactions complained of<sup>(30)</sup>.

36. From this case law, it can be inferred that undertakings (themselves or through associations that are entitled to represent their interests) can claim a legitimate interest where they are operating in the relevant market or where the conduct complained of is liable to directly and adversely affect their interests. This confirms the established practice of the Commission which has accepted that a legitimate interest can, for instance, be claimed by the parties to the agreement or practice which is the subject of the complaint, by competitors whose interests have allegedly been damaged by the behaviour complained of or by undertakings excluded from a distribution system.

37. Consumer associations can equally lodge complaints with the Commission<sup>(31)</sup>. The Commission moreover holds the view that individual consumers whose economic interests are directly and adversely affected insofar as they are the buyers of goods or services that are the object of an infringement can be in a position to show a legitimate interest<sup>(32)</sup>.

38. However, the Commission does not consider as a legitimate interest within the meaning of Article 7(2) the interest of persons or organisations that wish to come forward on general interest considerations without showing that they or their members are liable to be directly and adversely affected by the infringement (*pro bono publico*).

39. Local or regional public authorities may be able to show a legitimate interest in their capacity as buyers or users of goods or services affected by the conduct complained of. Conversely, they cannot be considered as showing a legitimate interest within the meaning of Article 7(2) of Regulation 1/2003 to the extent that they bring to the attention of the Commission alleged infringements *pro bono publico*.

40. Complainants have to demonstrate their legitimate interest. Where a natural or legal person lodging a complaint is unable to demonstrate a legitimate interest, the Commission is entitled, without prejudice to its right to initiate proceedings of its own initiative, not to pursue the complaint. The Commission may ascertain whether this condition is met at any stage of the investigation<sup>(33)</sup>.

## C. ASSESSMENT OF COMPLAINTS

## (a) Community interest

41. Under the settled case law of the Community Courts, the Commission is not required to conduct an investigation in each case <sup>(34)</sup> or, *a fortiori*, to take a decision within the meaning of Article 249 EC on the existence or non-existence of an infringement of Articles 81 or 82 <sup>(35)</sup>, but is entitled to give differing degrees of priority to the complaints brought before it and refer to the Community interest in order to determine the degree of priority to be applied to the various complaints it receives <sup>(36)</sup>. The position is different only if the complaint falls within the exclusive competence of the Commission <sup>(37)</sup>.
42. The Commission must however examine carefully the factual and legal elements brought to its attention by the complainant in order to assess the Community interest in further investigation of a case <sup>(38)</sup>.
43. The assessment of the Community interest raised by a complaint depends on the circumstances of each individual case. Accordingly, the number of criteria of assessment to which the Commission may refer is not limited, nor is the Commission required to have recourse exclusively to certain criteria. As the factual and legal circumstances may differ considerably from case to case, it is permissible to apply new criteria which had not before been considered <sup>(39)</sup>. Where appropriate, the Commission may give priority to a single criterion for assessing the Community interest <sup>(40)</sup>.
44. Among the criteria which have been held relevant in the case law for the assessment of the Community interest in the (further) investigation of a case are the following:

- The Commission can reject a complaint on the ground that the complainant can bring an action to assert its rights before national courts <sup>(41)</sup>.
- The Commission may not regard certain situations as excluded in principle from its purview under the task entrusted to it by the Treaty but is required to assess in each case how serious the alleged infringements are and how persistent their consequences are. This means in particular that it must take into account the duration and the extent of the infringements complained of and their effect on the competition situation in the Community <sup>(42)</sup>.
- The Commission may have to balance the significance of the alleged infringement as regards the functioning of the common market, the probability of establishing

the existence of the infringement and the scope of the investigation required in order to fulfil its task of ensuring that Articles 81 and 82 of the Treaty are complied with <sup>(43)</sup>.

- While the Commission's discretion does not depend on how advanced the investigation of a case is, the stage of the investigation forms part of the circumstances of the case which the Commission may have to take into consideration <sup>(44)</sup>.
  - The Commission may decide that it is not appropriate to investigate a complaint where the practices in question have ceased. However, for this purpose, the Commission will have to ascertain whether anti-competitive effects persist and if the seriousness of the infringements or the persistence of their effects does not give the complaint a Community interest <sup>(45)</sup>.
  - The Commission may also decide that it is not appropriate to investigate a complaint where the undertakings concerned agree to change their conduct in such a way that it can consider that there is no longer a sufficient Community interest to intervene <sup>(46)</sup>.
45. Where it forms the view that a case does not display sufficient Community interest to justify (further) investigation, the Commission may reject the complaint on that ground. Such a decision can be taken either before commencing an investigation or after taking investigative measures <sup>(47)</sup>. However, the Commission is not obliged to set aside a complaint for lack of Community interest <sup>(48)</sup>.

## (b) Assessment under Articles 81 and 82

46. The examination of a complaint under Articles 81 and 82 involves two aspects, one relating to the facts to be established to prove an infringement of Articles 81 or 82 and the other relating to the legal assessment of the conduct complained of.
47. Where the complaint, while complying with the requirements of Article 5 of Regulation 773/2004 and Form C, does not sufficiently substantiate the allegations put forward, it may be rejected on that ground <sup>(49)</sup>. In order to reject a complaint on the ground that the conduct complained of does not infringe the EC competition rules or does not fall within their scope of application, the Commission is not obliged to take into account circumstances that have not been brought to its attention by the complainant and that it could only have uncovered by the investigation of the case <sup>(50)</sup>.

48. The criteria for the legal assessment of agreements or practices under Articles 81 and 82 cannot be dealt with exhaustively in the present Notice. However, potential complainants should refer to the extensive guidance available from the Commission<sup>(51)</sup>, in addition to other sources and in particular the case law of the Community Courts and the case practice of the Commission. Four specific issues are mentioned in the following points with indications on where to find further guidance.
49. Agreements and practices fall within the scope of application of Articles 81 and 82 where they are capable of affecting trade between Member States. Where an agreement or practice does not fulfil this condition, national competition law may apply, but not EC competition law. Extensive guidance on this subject can be found in the Notice on the effect on trade concept<sup>(52)</sup>.
50. Agreements falling within the scope of Article 81 may be agreements of minor importance which are deemed not to restrict competition appreciably. Guidance on this issue can be found in the Commission's *de minimis* Notice<sup>(53)</sup>.
51. Agreements that fulfil the conditions of a block exemption regulation are deemed to satisfy the conditions of Article 81(3)<sup>(54)</sup>. For the Commission to withdraw the benefit of the block exemption pursuant to Article 29 of Regulation 1/2003, it must find that upon individual assessment an agreement to which the exemption regulation applies has certain effects which are incompatible with Article 81(3).
52. Agreements that restrict competition within the meaning of Article 81(1) EC may fulfil the conditions of Article 81(3) EC. Pursuant to Article 1(2) of Regulation 1/2003 and without a prior administrative decision being required, such agreements are not prohibited. Guidance on the conditions to be fulfilled by an agreement pursuant to Article 81(3) can be found in the Notice on Article 81(3)<sup>(55)</sup>.
53. As recalled above, the Commission is not obliged to carry out an investigation on the basis of every complaint submitted with a view to establishing whether an infringement has been committed. However, the Commission is under a duty to consider carefully the factual and legal issues brought to its attention by the complainant, in order to assess whether those issues indicate conduct which is liable to infringe Articles 81 and 82<sup>(56)</sup>.
54. In the Commission's procedure for dealing with complaints, different stages can be distinguished<sup>(57)</sup>.
55. During the first stage, following the submission of the complaint, the Commission examines the complaint and may collect further information in order to decide what action it will take on the complaint. That stage may include an informal exchange of views between the Commission and the complainant with a view to clarifying the factual and legal issues with which the complaint is concerned. In this stage, the Commission may give an initial reaction to the complainant allowing the complainant an opportunity to expand on his allegations in the light of that initial reaction.
56. In the second stage, the Commission may investigate the case further with a view to initiating proceedings pursuant to Article 7(1) of Regulation 1/2003 against the undertakings complained of. Where the Commission considers that there are insufficient grounds for acting on the complaint, it will inform the complainant of its reasons and offer the complainant the opportunity to submit any further comments within a time-limit which it fixes (Article 7(1) of Regulation 773/2004).
57. If the complainant fails to make known its views within the time-limit set by the Commission, the complaint is deemed to have been withdrawn (Article 7(3) of Regulation 773/2004). In all other cases, in the third stage of the procedure, the Commission takes cognisance of the observations submitted by the complainant and either initiates a procedure against the subject of the complaint or adopts a decision rejecting the complaint<sup>(58)</sup>.
58. Where the Commission rejects a complaint pursuant to Article 13 of Regulation 1/2003 on the grounds that another authority is dealing or has dealt with the case, the Commission proceeds in accordance with Article 9 of Regulation 773/2004.

#### D. THE COMMISSION'S PROCEDURES WHEN DEALING WITH COMPLAINTS

##### (a) Overview

53. As recalled above, the Commission is not obliged to carry out an investigation on the basis of every complaint submitted with a view to establishing whether an infringement has been committed. However, the Commission is under a duty to consider carefully the factual and legal issues brought to its attention by the complainant, in order to assess whether those issues indicate conduct which is liable to infringe Articles 81 and 82<sup>(56)</sup>.
54. In the Commission's procedure for dealing with complaints, different stages can be distinguished<sup>(57)</sup>.
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56. In the second stage, the Commission may investigate the case further with a view to initiating proceedings pursuant to Article 7(1) of Regulation 1/2003 against the undertakings complained of. Where the Commission considers that there are insufficient grounds for acting on the complaint, it will inform the complainant of its reasons and offer the complainant the opportunity to submit any further comments within a time-limit which it fixes (Article 7(1) of Regulation 773/2004).
57. If the complainant fails to make known its views within the time-limit set by the Commission, the complaint is deemed to have been withdrawn (Article 7(3) of Regulation 773/2004). In all other cases, in the third stage of the procedure, the Commission takes cognisance of the observations submitted by the complainant and either initiates a procedure against the subject of the complaint or adopts a decision rejecting the complaint<sup>(58)</sup>.
58. Where the Commission rejects a complaint pursuant to Article 13 of Regulation 1/2003 on the grounds that another authority is dealing or has dealt with the case, the Commission proceeds in accordance with Article 9 of Regulation 773/2004.
59. Throughout the procedure, complainants benefit from a range of rights as provided in particular in Articles 6 to 8 of Regulation 773/2004. However, proceedings of the Commission in competition cases do not constitute adversarial proceedings between the complainant on the one hand and the companies which are the subject of the investigation on the other hand. Accordingly, the procedural rights of complainants are less far-reaching than the right to a fair hearing of the companies which are the subject of an infringement procedure<sup>(59)</sup>.

**(b) Indicative time limit for informing the complainant of the Commission's proposed action**

60. The Commission is under an obligation to decide on complaints within a reasonable time<sup>(60)</sup>. What is a reasonable duration depends on the circumstances of each case and in particular, its context, the various procedural steps followed by the Commission, the conduct of the parties in the course of the procedure, the complexity of the case and its importance for the various parties involved<sup>(61)</sup>.
61. The Commission will in principle endeavour to inform complainants of the action that it proposes to take on a complaint within an indicative time frame of four months from the reception of the complaint. Thus, subject to the circumstances of the individual case and in particular the possible need to request complementary information from the complainant or third parties, the Commission will in principle inform the complainant within four months whether or not it intends to investigate its case further. This time-limit does not constitute a binding statutory term.
62. Accordingly, within this four month period, the Commission may communicate its proposed course of action to the complainant as an initial reaction within the first phase of the procedure (see point 55 above). The Commission may also, where the examination of the complaint has progressed to the second stage (see point 56 above), directly proceed to informing the complainant about its provisional assessment by a letter pursuant to Article 7(1) of Regulation 773/2004.
63. To ensure the most expeditious treatment of their complaint, it is desirable that complainants cooperate diligently in the procedures<sup>(62)</sup>, for example by informing the Commission of new developments.

**(c) Procedural rights of the complainant**

64. Where the Commission addresses a statement of objections to the companies complained of pursuant to Article 10(1) of Regulation 773/2004, the complainant is entitled to receive a copy of this document from which business secrets and other confidential information of the companies concerned have been removed (non-confidential version of the statement of objections; cf. Article 6(1) of Regulation 773/2004). The complainant is invited to comment in writing on the statement of objections. A time-limit will be set for such written comments.
65. Furthermore, the Commission may, where appropriate, afford complainants the opportunity of expressing their

views at the oral hearing of the parties to which a statement of objections has been addressed, if the complainants so request in their written comments<sup>(63)</sup>.

66. Complainants may submit, of their own initiative or following a request by the Commission, documents that contain business secrets or other confidential information. Confidential information will be protected by the Commission<sup>(64)</sup>. Under Article 16 of Regulation 773/2004, complainants are obliged to identify confidential information, give reasons why the information is considered confidential and submit a separate non-confidential version when they make their views known pursuant to Article 6(1) and 7(1) of Regulation 773/2004, as well as when they subsequently submit further information in the course of the same procedure. Moreover, the Commission may, in all other cases, request complainants which produce documents or statements to identify the documents or parts of the documents or statements which they consider to be confidential. It may in particular set a deadline for the complainant to specify why it considers a piece of information to be confidential and to provide a non-confidential version, including a concise description or non-confidential version of each piece of information deleted.
67. The qualification of information as confidential does not prevent the Commission from disclosing and using information where that is necessary to prove an infringement of Articles 81 or 82<sup>(65)</sup>. Where business secrets and confidential information are necessary to prove an infringement, the Commission must assess for each individual document whether the need to disclose is greater than the harm which might result from disclosure.
68. Where the Commission takes the view that a complaint should not be further examined, because there is no sufficient Community interest in pursuing the case further or on other grounds, it will inform the complainant in the form of a letter which indicates its legal basis (Article 7(1) of Regulation 773/2004), sets out the reasons that have led the Commission to provisionally conclude in the sense indicated and provides the complainant with the opportunity to submit supplementary information or observations within a time-limit set by the Commission. The Commission will also indicate the consequences of not replying pursuant to Article 7(3) of Regulation 773/2004, as explained below.
69. Pursuant to Article 8(1) of Regulation 773/2004, the complainant has the right to access the information on which the Commission bases its preliminary view. Such access is normally provided by annexing to the letter a copy of the relevant documents.

70. The time-limit for observations by the complainant on the letter pursuant to Article 7(1) of Regulation 773/2004 will be set in accordance with the circumstances of the case. It will not be shorter than four weeks (Article 17(2) of Regulation 773/2004). If the complainant does not respond within the time-limit set, the complaint is deemed to have been withdrawn pursuant to Article 7(3) of Regulation 773/2004. Complainants are also entitled to withdraw their complaint at any time if they so wish.
71. The complainant may request an extension of the time-limit for the provision of comments. Depending on the circumstances of the case, the Commission may grant such an extension.
72. In that case, where the complainant submits supplementary observations, the Commission takes cognisance of those observations. Where they are of such a nature as to make the Commission change its previous course of action, it may initiate a procedure against the companies complained of. In this procedure, the complainant has the procedural rights explained above.
73. Where the observations of the complainant do not alter the Commission's proposed course of action, it rejects the complaint by decision <sup>(66)</sup>.
- (d) The Commission decision rejecting a complaint**
74. Where the Commission rejects a complaint by decision pursuant to Article 7(2) of Regulation 773/2004, it must state the reasons in accordance with Article 253 EC, i.e. in a way that is appropriate to the act at issue and takes into account the circumstances of each case.
75. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the Commission in such a way as to enable the complainant to ascertain the reasons for the decision and to enable the competent Community Court to exercise its power of review. However, the Commission is not obliged to adopt a position on all the arguments relied on by the complainant in support of its complaint. It only needs to set out the facts and legal considerations which are of decisive importance in the context of the decision <sup>(67)</sup>.
76. Where the Commission rejects a complaint in a case that also gives rise to a decision pursuant to Article 10 of Regulation 1/2003 (Finding of inapplicability of Articles 81 or 82) or Article 9 of Regulation 1/2003 (Commitments), the decision rejecting a complaint may refer to that other decision adopted on the basis of the provisions mentioned.
77. A decision to reject a complaint is subject to appeal before the Community Courts <sup>(68)</sup>.
78. A decision rejecting a complaint prevents complainants from requiring the reopening of the investigation unless they put forward significant new evidence. Accordingly, further correspondence on the same alleged infringement by former complainants cannot be regarded as a new complaint unless significant new evidence is brought to the attention of the Commission. However, the Commission may re-open a file under appropriate circumstances.
79. A decision to reject a complaint does not definitively rule on the question of whether or not there is an infringement of Articles 81 or 82, even where the Commission has assessed the facts on the basis of Articles 81 and 82. The assessments made by the Commission in a decision rejecting a complaint therefore do not prevent a Member State court or competition authority from applying Articles 81 and 82 to agreements and practices brought before it. The assessments made by the Commission in a decision rejecting a complaint constitute facts which Member States' courts or competition authorities may take into account in examining whether the agreements or conduct in question are in conformity with Articles 81 and 82 <sup>(69)</sup>.
- (e) Specific situations**
80. According to Article 8 of Regulation 1/2003 the Commission may on its own initiative order interim measures where there is the risk of serious and irreparable damage to competition. Article 8 of Regulation 1/2003 makes it clear that interim measures cannot be applied for by complainants under Article 7(2) of Regulation 1/2003. Requests for interim measures by undertakings can be brought before Member States' courts which are well placed to decide on such measures <sup>(70)</sup>.
81. Some persons may wish to inform the Commission about suspected infringements of Articles 81 or 82 without having their identity revealed to the undertakings concerned by the allegations. These persons are welcome to contact the Commission. The Commission is bound to respect an informant's request for anonymity <sup>(71)</sup>, unless the request to remain anonymous is manifestly unjustified.

- (<sup>1</sup>) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, pages 1-25).
- (<sup>2</sup>) Cf. in particular Recitals 3-7 and 35 of Regulation 1/2003.
- (<sup>3</sup>) Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ 123, 27.4.2004).
- (<sup>4</sup>) The Commission handles correspondence from informants in accordance with its principles of good administrative practice.
- (<sup>5</sup>) Notice on cooperation within the Network of competition authorities (p. 43).
- (<sup>6</sup>) For the handling of such complaints, cf. Commission communication of 10 October 2002, COM(2002) 141.
- (<sup>7</sup>) Case C-344/98, *Masterfoods v HB Ice Cream*, [2000] ECR I-11369, para 46; Case C-119/97 P, *Union française de l'express (Ufex) and Others v Commission of the European Communities*, [1999] ECR I-1341, para 88; Case T-24/90, *Automec v Commission of the European Communities*, [1992] ECR II-2223, paras 73-77.
- (<sup>8</sup>) Cf. in particular Articles 5, 6, 11, 12, 15, 22, 29, 35 and Recitals 2 to 4 and 6 to 8 of Regulation 1/2003.
- (<sup>9</sup>) Cf. Notice on cooperation within the network of competition authorities . . . , points 5 ss.
- (<sup>10</sup>) Cf. Recital 3 of Regulation 1/2003.
- (<sup>11</sup>) Settled case law, cf. Case 127/73, *Belgische Radio en Televisie (BRT) v SABAM and Fonior*, [1974] ECR 51, para 16; Case C-282/95 P, *Guérin automobiles v Commission of the European Communities*, [1997] ECR I-1503, para 39; Case C-453/99, *Courage v Bernhard Crehan*, [2001] ECR I-6297, para 23.
- (<sup>12</sup>) Case C-453/99, *Courage v Bernhard Crehan*, [2001] ECR I-6297, paras 26 and 27; the power of national courts to grant damages is also underlined in Recital 7 of Regulation 1/2003.
- (<sup>13</sup>) Cf. Articles 1, 6 and 15 as well as Recital 7 of Regulation 1/2003.
- (<sup>14</sup>) Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty; OJ P 13 of 21 February 1962, p. 204-211; English special edition: Series I Chapter 1959-1962 p. 87. Regulation No 17 is repealed by Article 43 of Regulation 1/2003 with effect from 1 May 2004.
- (<sup>15</sup>) For more detailed explanations of this mechanism, cf. Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC . . .
- (<sup>16</sup>) Case T-24/90, *Automec v Commission of the European Communities*, [1992] ECR II-2223, para 93.
- (<sup>17</sup>) Case C-230/96, *Cabour and Nord Distribution Automobile v Arnor 'SOCO'*, [1998] ECR I-2055, para 51; Joined Cases T-185/96, T-189/96 and T-190/96, *Dalmasso and Others v Commission of the European Communities*, [1999] ECR II-93, para 50.
- (<sup>18</sup>) Cf. Article 8 of Regulation 1/2003 and para 80 below. Depending on the case, Member States' competition authorities may equally be well placed to adopt interim measures.
- (<sup>19</sup>) Cf. points 41 ss. below.
- (<sup>20</sup>) Notice on cooperation within the Network of competition authorities (p. 43).
- (<sup>21</sup>) Notice on cooperation within the Network of competition authorities . . . , points 8-15.
- (<sup>22</sup>) Article 11(2) and (3) of Regulation 1/2003; Notice on cooperation within the Network of Competition Authorities . . . , points 16/17.
- (<sup>23</sup>) Notice on cooperation within the Network of Competition Authorities, . . . , point 34.
- (<sup>24</sup>) For more extensive explanations on this notion in particular, cf. points 33 ss. below.
- (<sup>25</sup>) Case C-119/97 P, *Union française de l'express (Ufex) and Others v Commission of the European Communities*, [1999] ECR I-1341, para 88; Case T-24/90, *Automec v Commission of the European Communities*, [1992] ECR II-2223, paras 73-77 and 85.
- (<sup>26</sup>) Settled case law since Case T-24/90, *Automec v Commission of the European Communities*, [1992] ECR II-2223, para 85.
- (<sup>27</sup>) Case C-282/95 P, *Guérin automobiles v Commission of the European Communities*, [1997] ECR I-1503, para 36.
- (<sup>28</sup>) Cf. Article 5(1) of Regulation 773/2004.
- (<sup>29</sup>) Case T-114/92, *Bureau Européen des Médias et de l'Industrie Musicale (BEMIM) v Commission of the European Communities*, [1995] ECR II-147, para 28. Associations of undertakings were also the complainants in the cases underlying the judgments in Case 298/83, *Comité des industries cinématographiques des Communautés européennes (CICCE) v Commission of the European Communities*, [1985] ECR 1105 and Case T-319/99, *Federacion Nacional de Empresas (FENIN) v Commission of the European Communities*, not yet published in [2003] ECR.
- (<sup>30</sup>) Joined Cases T-133/95 and T-204/95, *International Express Carriers Conference (IECC) v Commission of the European Communities*, [1998] ECR II-3645, paras 79-83.
- (<sup>31</sup>) Case T-37/92, *Bureau Européen des Unions des Consommateurs (BEUC) v Commission of the European Communities*, [1994] ECR II-285, para 36.

- (<sup>32</sup>) This question is currently raised in a pending procedure before the Court of First Instance (joined cases T-213 and 214/01). The Commission has also accepted as complainant an individual consumer in its Decision of 9 December 1998 in Case IV/D-2/34.466, Greek Ferries, OJ L 109/24 of 27 April 1999, para 1.
- (<sup>33</sup>) Joined Cases T-133/95 and T-204/95, International Express Carriers Conference (IECC) v Commission of the European Communities, [1998] ECR II-3645, para 79.
- (<sup>34</sup>) Case T-24/90, Automec v Commission of the European Communities, [1992] ECR II-2223, para 76; Case C-91/95 P, Roger Tremblay and Others v Commission of the European Communities, [1996] ECR I-5547, para 30.
- (<sup>35</sup>) Case 125/78, GEMA v Commission of the European Communities, [1979] ECR 3173, para 17; Case C-119/97 P, Union française de l'express (Ufex) and Others v Commission of the European Communities, [1999] ECR I-1341, para 87.
- (<sup>36</sup>) Settled case law since the Case T-24/90, Automec v Commission of the European Communities, [1992] ECR II-2223, paras 77 and 85; Recital 18 of Regulation 1/2003 expressly confirms this possibility.
- (<sup>37</sup>) Settled case law since Case T-24/90, Automec v Commission of the European Communities, [1992] ECR II-2223, para 75. Under Regulation 1/2003, this principle may only be relevant in the context of Article 29 of that Regulation.
- (<sup>38</sup>) Case 210/81, Oswald Schmidt, trading as Demo-Studio Schmidt v Commission of the European Communities, [1983] ECR 3045, para 19; Case C-119/97 P, Union française de l'express (Ufex) and Others v Commission of the European Communities, [1999] ECR I-1341, para 86.
- (<sup>39</sup>) Case C-119/97 P, Union française de l'express (Ufex) and Others v Commission of the European Communities, [1999] ECR I-1341, paras 79-80.
- (<sup>40</sup>) Case C-450/98 P, International Express Carriers Conference (IECC) v Commission of the European Communities, [2001] ECR I-3947, paras 57-59.
- (<sup>41</sup>) Case T-24/90, Automec v Commission of the European Communities, [1992] ECR II-2223, paras 88ss.; Case T-5/93, Roger Tremblay and Others v Commission of the European Communities, [1995] ECR II-185, paras 65ss.; Case T-575/93, Casper Koelman v Commission of the European Communities, [1996] ECR II-1, paras 75-80; see also part II above where more detailed explanations concerning this situation are given.
- (<sup>42</sup>) Case C-119/97 P, Union française de l'express (Ufex) and Others v Commission of the European Communities, [1999] ECR I-1341, paras 92/93.
- (<sup>43</sup>) Settled case law since Case T-24/90, Automec v Commission of the European Communities, [1992] ECR II-2223, para 86.
- (<sup>44</sup>) Case C-449/98 P, International Express Carriers Conference (IECC) v Commission of the European Communities [2001] ECR I-3875, para 37.
- (<sup>45</sup>) Case T-77/95, Syndicat français de l'Express International and Others v Commission of the European Communities [1997] ECR II-1, para 57; Case C-119/97 P, Union française de l'express (Ufex) and Others v Commission of the European Communities, [1999] ECR I-1341, para 95. Cf. also Case T-37/92, Bureau Européen des Unions des Consommateurs (BEUC) v Commission of the European Communities, [1994] ECR II-285, para 113, where an unwritten commitment between a Member State and a third country outside the common commercial policy was held not to suffice to establish that the conduct complained of had ceased.
- (<sup>46</sup>) Case T-110/95, International Express Carriers (IECC) v Commission of the European Communities and Others, [1998] ECR II-3605, para 57, upheld by Case 449/98 P, International Express Carriers (IECC) v Commission of the European Communities and Others, [2001] ECR I-3875, paras 44-47.
- (<sup>47</sup>) Case C-449/98 P, International Express Carriers (IECC) v Commission of the European Communities e.a. [2001] ECR I-3875, para 37.
- (<sup>48</sup>) Cf. Case T-77/92, Parker Pen v Commission of the European Communities, [1994] ECR II-549, paras 64/65.
- (<sup>49</sup>) Case 298/83, Comité des industries cinématographiques des Communautés européennes (CICCE) v Commission of the European Communities, [1985] ECR 1105, paras 21-24; Case T-198/98, Micro Leader Business v Commission of the European Communities, [1999] ECR II-3989, paras 32-39.
- (<sup>50</sup>) Case T-319/99, Federación Nacional de Empresas (FENIN) v Commission of the European Communities, not yet published in [2003] ECR, para 43.
- (<sup>51</sup>) Extensive guidance can be found on the Commission's website at [http://europa.eu.int/comm/competition/index\\_en.html](http://europa.eu.int/comm/competition/index_en.html)
- (<sup>52</sup>) Notice on the effect on trade concept contained in Articles 81 and 82 of the Treaty (p. 81).
- (<sup>53</sup>) Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*), OJ C 368 of 22 December 2002, p. 13.
- (<sup>54</sup>) The texts of all block exemption regulations are available on the Commission's website at [http://europa.eu.int/comm/competition/index\\_en.html](http://europa.eu.int/comm/competition/index_en.html)
- (<sup>55</sup>) Commission Notice — Guidelines on the application of Article 81(3) of the Treaty (p. 97).
- (<sup>56</sup>) Case 210/81, Oswald Schmidt, trading as Demo-Studio Schmidt v Commission of the European Communities, [1983] ECR 3045, para 19; Case T-24/90, Automec v Commission of the European Communities, [1992] ECR II-2223, para 79.
- (<sup>57</sup>) Cf. Case T-64/89, Automec v Commission of the European Communities, [1990] ECR II-367, paras 45-47; Case T-37/92, Bureau Européen des Unions des Consommateurs (BEUC) v Commission of the European Communities, [1994] ECR II-285, para 29.

- (<sup>58</sup>) Case C-282/95 P, *Guérin automobiles v Commission of the European Communities*, [1997] ECR I-1503, para 36.
- (<sup>59</sup>) Joined Cases 142 and 156/84, *British American Tobacco Company and R. J. Reynolds Industries v Commission of the European Communities* [1987] ECR 249, paras 19/20.
- (<sup>60</sup>) Case C-282/95 P, *Guérin automobiles v Commission of the European Communities*, [1997] ECR I-1503, para 37.
- (<sup>61</sup>) Joined Cases T-213/95 and T-18/96, *Stichting Certificatie Kraanverhuurbedrijf (SCK) and Federatie van Nederlandse Kraanbedrijven (FNK) v Commission of the European Communities*, [1997] ECR 1739, para 57.
- (<sup>62</sup>) The notion of 'diligence' on the part of the complainant is used by the Court of First Instance in Case T-77/94, *Vereniging van Groothandelaren in Bloemkwekerijprodukten and Others v Commission of the European Communities*, [1997] ECR II-759, para 75.
- (<sup>63</sup>) Article 6(2) of Commission Regulation 773/2004.
- (<sup>64</sup>) Article 287 EC, Article 28 of Regulation 1/2003 and Articles 15 and 16 of Regulation 773/2004.
- (<sup>65</sup>) Article 27(2) of Regulation 1/2003.
- (<sup>66</sup>) Article 7(2) of Regulation 773/2004; Case C-282/95 P, *Guérin automobiles v Commission of the European Communities*, [1997] ECR I-1503, para 36.
- (<sup>67</sup>) Settled case law, cf. i.a. Case T-114/92, *Bureau Européen des Médias et de l'Industrie Musicale (BEMIM) v Commission of the European Communities*, [1995] ECR II-147, para 41.
- (<sup>68</sup>) Settled case law since Case 210/81, *Oswald Schmidt, trading as Demo-Studio Schmidt v Commission of the European Communities*, [1983] ECR 3045.
- (<sup>69</sup>) Case T-575/93, *Casper Koelman v Commission of the European Communities*, [1996] ECR II-1, paras 41-43.
- (<sup>70</sup>) Depending on the case, Member States' competition authorities may equally be well placed to adopt interim measures.
- (<sup>71</sup>) Case 145/83, *Stanley George Adams v Commission of the European Communities*, [1985] ECR 3539.
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## ANNEX

## FORM C

**Complaint pursuant to Article 7 of Regulation (EC) No 1/2003****I. Information regarding the complainant and the undertaking(s) or association of undertakings giving rise to the complaint**

1. Give full details on the identity of the legal or natural person submitting the complaint. Where the complainant is an undertaking, identify the corporate group to which it belongs and provide a concise overview of the nature and scope of its business activities. Provide a contact person (with telephone number, postal and e-mail-address) from which supplementary explanations can be obtained.
2. Identify the undertaking(s) or association of undertakings whose conduct the complaint relates to, including, where applicable, all available information on the corporate group to which the undertaking(s) complained of belong and the nature and scope of the business activities pursued by them. Indicate the position of the complainant vis-à-vis the undertaking(s) or association of undertakings complained of (e.g. customer, competitor).

**II. Details of the alleged infringement and evidence**

3. Set out in detail the facts from which, in your opinion, it appears that there exists an infringement of Article 81 or 82 of the Treaty and/or Article 53 or 54 of the EEA agreement. Indicate in particular the nature of the products (goods or services) affected by the alleged infringements and explain, where necessary, the commercial relationships concerning these products. Provide all available details on the agreements or practices of the undertakings or associations of undertakings to which this complaint relates. Indicate, to the extent possible, the relative market positions of the undertakings concerned by the complaint.
4. Submit all documentation in your possession relating to or directly connected with the facts set out in the complaint (for example, texts of agreements, minutes of negotiations or meetings, terms of transactions, business documents, circulars, correspondence, notes of telephone conversations ...). State the names and address of the persons able to testify to the facts set out in the complaint, and in particular of persons affected by the alleged infringement. Submit statistics or other data in your possession which relate to the facts set out, in particular where they show developments in the marketplace (for example information relating to prices and price trends, barriers to entry to the market for new suppliers etc.).
5. Set out your view about the geographical scope of the alleged infringement and explain, where that is not obvious, to what extent trade between Member States or between the Community and one or more EFTA States that are contracting parties of the EEA Agreement may be affected by the conduct complained of.

**III. Finding sought from the Commission and legitimate interest**

6. Explain what finding or action you are seeking as a result of proceedings brought by the Commission.
7. Set out the grounds on which you claim a legitimate interest as complainant pursuant to Article 7 of Regulation (EC) No 1/2003. State in particular how the conduct complained of affects you and explain how, in your view, intervention by the Commission would be liable to remedy the alleged grievance.

**IV. Proceedings before national competition authorities or national courts**

8. Provide full information about whether you have approached, concerning the same or closely related subject-matters, any other competition authority and/or whether a lawsuit has been brought before a national court. If so, provide full details about the administrative or judicial authority contacted and your submissions to such authority.

Declaration that the information given in this form and in the Annexes thereto is given entirely in good faith.

.....  
Date and signature

**Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters)**

(2004/C 101/06)

(Text with EEA relevance)

**I. REGULATION 1/2003**

1. Regulation 1/2003 <sup>(1)</sup> sets up a new enforcement system for Articles 81 and 82 of the Treaty. While designed to restore the focus on the primary task of effective enforcement of the competition rules, the Regulation also creates legal certainty inasmuch as it provides that agreements <sup>(2)</sup> which fall under Article 81(1) but fulfil the conditions in Article 81(3) are valid and fully enforceable *ab initio* without a prior decision by a competition authority (Article 1 of Regulation 1/2003).
2. The framework of Regulation 1/2003, while introducing parallel competence of the Commission, Member States' competition authorities and Member States' courts to apply Article 81 and 82 in their entirety, limits risks of inconsistent application by a range of measures, thereby ensuring the primary aspect of legal certainty for companies as reflected in the case law of the Court of Justice, i.e. that the competition rules are applied in a consistent way throughout the Community.
3. Undertakings are generally well placed to assess the legality of their actions in such a way as to enable them to take an informed decision on whether to go ahead with an agreement or practice and in what form. They are close to the facts and have at their disposal the framework of block exemption regulations, case law and case practice as well as extensive guidance in Commission guidelines and notices <sup>(3)</sup>.
4. Alongside the reform of the rules implementing Articles 81 and 82 brought about by Regulation 1/2003, the Commission has conducted a review of block exemption regulations, Commission notices and guidelines, with a view to further assist self-assessment by economic operators. The Commission has also produced guidelines on the application of Article 81(3) <sup>(4)</sup>. This allows undertakings in the vast majority of cases to reliably assess their agreements with regard to Article 81. Furthermore, it is the practice of the Commission to impose more than symbolic fines <sup>(5)</sup> only in cases where it is established, either in horizontal instruments or in the case law and practice that a certain behaviour constitutes an infringement.
5. Where cases, despite the above elements, give rise to genuine uncertainty because they present novel or unresolved questions for the application of Articles 81 and 82, individual undertakings may wish to seek informal guidance from the Commission. <sup>(6)</sup> Where it considers it appropriate and subject to its enforcement priorities, the Commission may provide such guidance on novel questions concerning the interpretation of Articles 81 and/or 82 in a written statement (guidance letter). The present Notice sets out details of this instrument.

**II. FRAMEWORK FOR ASSESSING WHETHER TO ISSUE A GUIDANCE LETTER**

6. Regulation 1/2003 confers powers on the Commission to effectively prosecute infringements of Articles 81 and 82 and to impose sanctions <sup>(7)</sup>. One major objective of the Regulation is to ensure efficient enforcement of the EC competition rules by removing the former notification system and thus allowing the Commission to focus its enforcement policy on the most serious infringements <sup>(8)</sup>.
7. While Regulation 1/2003 is without prejudice to the ability of the Commission to issue informal guidance to individual undertakings <sup>(9)</sup>, as set out in this Notice, this ability should not interfere with the primary objective of the Regulation, which is to ensure effective enforcement. The Commission may therefore only provide informal guidance to individual undertakings in so far as this is compatible with its enforcement priorities.

<sup>(1)</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, pages 1-25).

<sup>(2)</sup> In this Notice, the term 'agreement' is used for agreements, decisions by associations of undertakings and concerted practices. The term 'practices' refers to the conduct of dominant undertakings. The term 'undertakings' equally covers 'associations of undertakings'.

<sup>(3)</sup> All texts mentioned are available at: [http://europa.eu.int/comm/competition/index\\_en.html](http://europa.eu.int/comm/competition/index_en.html)

<sup>(4)</sup> Commission Notice – Guidelines on the application of Article 81(3) of the Treaty (p. 97).

<sup>(5)</sup> Symbolic fines are normally set at 1 000 EUR, cf. Commission Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, (OJ C 9, 14.1.1998).

<sup>(6)</sup> Cf. Recital 38 of Regulation 1/2003.

<sup>(7)</sup> Cf. in particular Articles 7 to 9, 12, 17-24, 29 of Regulation 1/2003.

<sup>(8)</sup> Cf. in particular Recital 3 of Regulation 1/2003.

<sup>(9)</sup> Cf. Recital 38 of Regulation 1/2003.

8. Subject to point 7, the Commission, seized of a request for a guidance letter, will consider whether it is appropriate to process it. Issuing a guidance letter may only be considered if the following cumulative conditions are fulfilled:
- (a) The substantive assessment of an agreement or practice with regard to Articles 81 and/or 82 of the Treaty, poses a question of application of the law for which there is no clarification in the existing EC legal framework including the case law of the Community Courts, nor publicly available general guidance or precedent in decision-making practice or previous guidance letters.
  - (b) A *prima facie* evaluation of the specificities and background of the case suggests that the clarification of the novel question through a guidance letter is useful, taking into account the following elements:
    - the economic importance from the point of view of the consumer of the goods or services concerned by the agreement or practice, and/or
    - the extent to which the agreement or practice corresponds or is liable to correspond to more widely spread economic usage in the marketplace and/or
    - the extent of the investments linked to the transaction in relation to the size of the companies concerned and the extent to which the transaction relates to a structural operation such as the creation of a non-full function joint venture.
  - (c) It is possible to issue a guidance letter on the basis of the information provided, i.e. no further fact-finding is required.
9. Furthermore, the Commission will not consider a request for a guidance letter in either of the following circumstances:
- the questions raised in the request are identical or similar to issues raised in a case pending before the European Court of First Instance or the European Court of Justice;
  - the agreement or practice to which the request refers is subject to proceedings pending with the Commission, a Member State court or Member State competition authority.
10. The Commission will not consider hypothetical questions and will not issue guidance letters on agreements or practices that are no longer being implemented by the parties. Undertakings may however present a request for a guidance letter to the Commission in relation to questions raised by an agreement or practice that they envisage, i.e. before the implementation of that agreement or practice. In this case the transaction must have reached a sufficiently advanced stage for a request to be considered.
11. A request for a guidance letter is without prejudice to the power of the Commission to open proceedings in accordance with Regulation 1/2003 with regard to the facts presented in the request.
- ### III. INDICATIONS ON HOW TO REQUEST GUIDANCE
12. A request can be presented by an undertaking or undertakings which have entered into or intend to enter into an agreement or practice that could fall within the scope of Articles 81 and/or 82 of the Treaty with regard to questions of interpretation raised by such agreement or practice.
13. A request for a guidance letter should be addressed to the following address:
- Commission européenne/Europese Commissie  
Competition DG  
B-1049 Bruxelles/Brussel.
14. There is no form. A memorandum should be presented which clearly states:
- the identity of all undertakings concerned as well as a single address for contacts with the Commission;
  - the specific questions on which guidance is sought;
  - full and exhaustive information on all points relevant for an informed evaluation of the questions raised, including pertinent documentation;
  - a detailed reasoning, having regard to point 8 a), why the request presents (a) novel question(s);
  - all other information that permits an evaluation of the request in the light of the aspects explained in points 8-10 of this Notice, including in particular a declaration that the agreement or practice to which the request refers is not subject to proceedings pending before a Member State court or competition authority;

- where the request contains elements that are considered business secrets, a clear identification of these elements;
- any other information or documentation relevant to the individual case.

#### IV. PROCESSING OF THE REQUEST

15. The Commission will in principle evaluate the request on the basis of the information provided. Notwithstanding point 8 c), the Commission may use additional information at its disposal from public sources, former proceedings or any other source and may ask the applicant(s) to provide supplementary information. The normal rules on professional secrecy apply to the information supplied by the applicant(s).
16. The Commission may share the information submitted to it with the Member States' competition authorities and receive input from them. It may discuss the substance of the request with the Member States' competition authorities before issuing a guidance letter.
17. Where no guidance letter is issued, the Commission shall inform the applicant(s) accordingly.
18. An undertaking can withdraw its request at any point in time. In any case, information supplied in the context of a request for guidance remains with the Commission and can be used in subsequent procedures under Regulation 1/2003 (cf. point 11 above).

#### V. GUIDANCE LETTERS

19. A guidance letter sets out:
  - a summary description of the facts on which it is based;

- the principal legal reasoning underlying the understanding of the Commission on novel questions relating to Articles 81 and/or 82 raised by the request.

20. A guidance letter may be limited to part of the questions raised in the request. It may also include additional aspects to those set out in the request.

21. Guidance letters will be posted on the Commission's web-site, having regard to the legitimate interest of undertakings in the protection of their business secrets. Before issuing a guidance letter, the Commission will agree with the applicants on a public version.

#### VI. THE EFFECTS OF GUIDANCE LETTERS

22. Guidance letters are in the first place intended to help undertakings carry out themselves an informed assessment of their agreements and practices.
23. A guidance letter cannot prejudice the assessment of the same question by the Community Courts.
24. Where an agreement or practice has formed the factual basis for a guidance letter, the Commission is not precluded from subsequently examining that same agreement or practice in a procedure under Regulation 1/2003, in particular following a complaint. In that case, the Commission will take the previous guidance letter into account, subject in particular to changes in the underlying facts, to any new aspects raised by a complaint, to developments in the case law of the European Courts or wider changes of the Commission's policy.
25. Guidance letters are not Commission decisions and do not bind Member States' competition authorities or courts that have the power to apply Articles 81 and 82. However, it is open to Member States' competition authorities and courts to take account of guidance letters issued by the Commission as they see fit in the context of a case.

**Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004**

(2005/C 325/07)

(Text with EEA relevance)

**I. INTRODUCTION AND SUBJECT-MATTER OF THE NOTICE**

1. Access to the Commission file is one of the procedural guarantees intended to apply the principle of equality of arms and to protect the rights of the defence. Access to the file is provided for in Article 27(1) and (2) of Council Regulation (EC) No 1/2003 <sup>(1)</sup>, Article 15(1) of Commission Regulation (EC) No 773/2004 ('the Implementing Regulation') <sup>(2)</sup>, Article 18(1) and (3) of the Council Regulation (EC) No 139/2004 ('Merger Regulation') <sup>(3)</sup> and Article 17(1) of Commission Regulation (EC) No 802/2004 ('the Merger Implementing Regulation') <sup>(4)</sup>. In accordance with these provisions, before taking decisions on the basis of Articles 7, 8, 23 and 24(2) of Regulation (EC) No 1/2003 and Articles 6(3), 7(3), 8(2) to (6), 14 and 15 of the Merger Regulation, the Commission shall give the persons, undertakings or associations of undertakings, as the case may be, an opportunity of making known their views on the objections against them and they shall be entitled to have access to the Commission's file in order to fully respect their rights of defence in the proceedings. The present notice provides the framework for the exercise of the right set out in these provisions. It does not cover the possibility of the provision of documents in the context of other proceedings. This notice is without prejudice to the interpretation of such provisions by the Community Courts. The principles set out in this Notice apply also when the Commission enforces Articles 53, 54 and 57 of the EEA Agreement <sup>(5)</sup>.
2. This specific right outlined above is distinct from the general right to access to documents under Regulation (EC) No 1049/2001 <sup>(6)</sup>, which is subject to different criteria and exceptions and pursues a different purpose.
3. The term access to the file is used in this notice exclusively to mean the access granted to the persons, undertakings or association of undertakings to whom the Commission has addressed a statement of objections. This notice clarifies who has access to the file for this purpose.
4. The same term, or the term access to documents, is also used in the above-mentioned regulations in respect of complainants or other involved parties. These situations are, however, distinct from that of the addressees of a statement of objections and therefore do not fall under the definition of access to the file for the purposes of this notice. These related situations are dealt with in a separate section of the notice.
5. This notice also explains to which information access is granted, when access takes place and what are the procedures for implementing access to the file.

<sup>(1)</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1-25.

<sup>(2)</sup> Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.4.2004, p. 18-24.

<sup>(3)</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1-22.

<sup>(4)</sup> Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 133, 30.4.2004, p. 1-39. Corrected in the OJ L 172, 6.5.2004, p. 9.

<sup>(5)</sup> References in this Notice to Articles 81 and 82 therefore apply also to Articles 53 and 54 of the EEA Agreement.

<sup>(6)</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43. See for instance Case T-2/03, *Verein für Konsumenteninformation v. Commission*, judgment of 13 April 2005, not yet reported.

6. As from its publication, this notice replaces the 1997 Commission notice on access to the file <sup>(1)</sup>. The new rules take account of the legislation applicable as of 1 May 2004, namely the above referred Regulation (EC) No 1/2003, Merger Regulation, Implementing Regulation and Merger Implementing Regulation, as well as the Commission Decision of 23 May 2001 on the terms of reference of Hearing Officers in certain competition proceedings <sup>(2)</sup>. It also takes into account the recent case law of the Court of Justice and the Court of First Instance of the European Communities <sup>(3)</sup> and the practice developed by the Commission since the adoption of the 1997 notice.

## II. SCOPE OF ACCESS TO THE FILE

### A. Who is entitled to access to the file?

7. Access to the file pursuant to the provisions mentioned in paragraph 1 is intended to enable the effective exercise of the rights of defence against the objections brought forward by the Commission. For this purpose, both in cases under Articles 81 and 82 EC and in cases under the Merger Regulation, access is granted, upon request, to the persons, undertakings or associations of undertakings <sup>(4)</sup>, as the case may be, to which the Commission addresses its objections <sup>(5)</sup> (hereinafter, 'the parties').

### B. To which documents is access granted?

1. *The content of the Commission file*
8. The 'Commission file' in a competition investigation (hereinafter also referred to as 'the file') consists of all documents <sup>(6)</sup>, which have been obtained, produced and/or assembled by the Commission Directorate General for Competition, during the investigation.
9. In the course of investigation under Articles 20, 21 and 22(2) of Regulation (EC) No 1/2003 and Articles 12 and 13 of the Merger Regulation, the Commission may collect a number of documents, some of which may, following a more detailed examination, prove to be unrelated to the subject matter of the case in question. Such documents may be returned to the undertaking from which those have been obtained. Upon return, these documents will no longer constitute part of the file.
2. *Accessible documents*
10. The parties must be able to acquaint themselves with the information in the Commission's file, so that, on the basis of this information, they can effectively express their views on the preliminary conclusions reached by the Commission in its objections. For this purpose they will be granted access to all documents making up the Commission file, as defined in paragraph 8, with the exception of internal documents, business secrets of other undertakings, or other confidential information <sup>(7)</sup>.

<sup>(1)</sup> Commission notice on the internal rules of procedure for processing requests for access to the file in cases under Articles 85 and 86 [now 81 and 82] of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Council Regulation (EEC) No 4064/89, OJ C 23, 23.1.1997, p. 3.

<sup>(2)</sup> OJ L 162, 19.6.2001, p. 21.

<sup>(3)</sup> In particular Joint Cases T-25/95 et al., *Cimenteries CBR SA et al. v Commission*, [2000] ECR II-0491.

<sup>(4)</sup> In the remainder of this Notice, the term 'undertaking' includes both undertakings and associations of undertakings. The term 'person' encompasses natural and legal persons. Many entities are legal persons and undertakings at the same time; in this case, they are covered by both terms. The same applies where a natural person is an undertaking within the meaning of Articles 81 and 82. In Merger proceedings, account must also be taken of persons referred to in Article 3(1)(b) of the Merger Regulation, even when they are natural persons. Where entities without legal personality which are also not undertakings become involved in Commission competition proceedings, the Commission applies, where appropriate, the principles set out in this Notice *mutatis mutandis*.

<sup>(5)</sup> Cf. Article 15(1) of the Implementing Regulation, Article 18(3) of the Merger Regulation and Article 17(1) of the Merger Implementing Regulation.

<sup>(6)</sup> In this notice the term 'document' is used for all forms of information support, irrespective of the storage medium. This covers also any electronic data storage device as may be or become available.

<sup>(7)</sup> Cf. Article 27(2) of Regulation (EC) No 1/2003, Articles 15(2) and 16(1) of the Implementing Regulation, and Article 17(3) of the Merger Implementing Regulation. Those exceptions are also mentioned in Case T-7/89, *Hercules Chemicals v Commission*, [1991] ECR II-1711, paragraph 54. The Court has ruled that it does not belong to the Commission alone to decide which documents in the file may be useful for the purposes of the defence (Cf. Case T-30/91 *Solvay v. Commission*, [1995] ECR II-1775, paragraphs 81-86, and Case T-36/91 *ICI vs. Commission*, [1995] ECR II-1847, paragraphs 91-96).

11. Results of a study commissioned in connection with proceedings are accessible together with the terms of reference and the methodology of the study. Precautions may however be necessary in order to protect intellectual property rights.

3. *Non-accessible documents*

- 3.1. Internal documents

- 3.1.1 General principles

12. Internal documents can be neither incriminating nor exculpatory <sup>(1)</sup>. They do not constitute part of the evidence on which the Commission can rely in its assessment of a case. Thus, the parties will not be granted access to internal documents in the Commission file <sup>(2)</sup>. Given their lack of evidential value, this restriction on access to internal documents does not prejudice the proper exercise of the parties' right of defence <sup>(3)</sup>.
13. There is no obligation on the Commission departments to draft any minutes of meetings <sup>(4)</sup> with any person or undertaking. If the Commission chooses to make notes of such meetings, such documents constitute the Commission's own interpretation of what was said at the meetings, for which reason they are classified as internal documents. Where, however, the person or undertaking in question has agreed the minutes, such minutes will be made accessible after deletion of any business secrets or other confidential information. Such agreed minutes constitute part of the evidence on which the Commission can rely in its assessment of a case <sup>(5)</sup>.
14. In the case of a study commissioned in connection with proceedings, correspondence between the Commission and its contractor containing evaluation of the contractor's work or relating to financial aspects of the study, are considered internal documents and will thus not be accessible.

- 3.1.2 Correspondence with other public authorities

15. A particular case of internal documents is the Commission's correspondence with other public authorities and the internal documents received from such authorities (whether from EC Member States ('the Member States') or non-member countries). Examples of such non-accessible documents include:
  - correspondence between the Commission and the competition authorities of the Member States, or between the latter <sup>(6)</sup>;
  - correspondence between the Commission and other public authorities of the Member States <sup>(7)</sup>;
  - correspondence between the Commission, the EFTA Surveillance Authority and public authorities of EFTA States <sup>(8)</sup>;
  - correspondence between the Commission and public authorities of non-member countries, including their competition authorities, in particular where the Community and a third country have concluded an agreement governing the confidentiality of the information exchanged <sup>(9)</sup>.

<sup>(1)</sup> Examples of internal documents are drafts, opinions, memos or notes from the Commission departments or other public authorities concerned.

<sup>(2)</sup> Cf. Article 27(2) of Regulation (EC) No 1/2003, Article 15(2) of the Implementing Regulation, and Article 17(3) of the Merger Implementing Regulation.

<sup>(3)</sup> Cf. paragraph 1 above.

<sup>(4)</sup> Cf. judgement of 30.9.2003 in Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and others v Commission* (TACA), [2003] ECR II-3275, paragraphs 349-359.

<sup>(5)</sup> Statements recorded pursuant to Article 19 or Article 20(2)(e) of Regulation 1/2003 or Article 13(2)(e) of Merger Regulation will also normally belong to the accessible documents (see paragraph 10 above).

<sup>(6)</sup> Cf. Article 27(2) of Regulation (EC) No 1/2003, Article 15(2) of the Implementing Regulation, Article 17(3) of the Merger Implementing Regulation.

<sup>(7)</sup> Cf. Order of the Court of First Instance in Cases T-134/94 et al *NMH Stahlwerke and Others v Commission* [1997] ECR II-2293, paragraph 36, and Case T-65/89, *BPB Industries and British Gypsum* [1993] ECR II-389, paragraph 33.

<sup>(8)</sup> In this notice the term 'EFTA States' includes the EFTA States that are parties to the EEA Agreement.

<sup>(9)</sup> For example, Article VIII.2 of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws (OJ No L 95, 27.4.1995, p. 47) stipulates that information provided to it in confidence under the Agreement must be protected 'to the fullest extent possible'. That Article creates an international-law obligation binding the Commission.



16. In certain exceptional circumstances, access is granted to documents originating from Member States, the EFTA Surveillance Authority or EFTA States, after deletion of any business secrets or other confidential information. The Commission will consult the entity submitting the document prior to granting access to identify business secrets or other confidential information.

This is the case where the documents originating from Member States contain allegations brought against the parties, which the Commission must examine, or form part of the evidence in the investigative process, in a way similar to documents obtained from private parties. These considerations apply, in particular, as regards:

- documents and information exchanged pursuant to Article 12 of Regulation (EC) No 1/2003, and information provided to the Commission pursuant to Article 18(6) of Regulation (EC) No 1/2003;
- complaints lodged by a Member State under Article 7(2) of Regulation (EC) No 1/2003.

Access will also be granted to documents originating from Member States or the EFTA Surveillance Authority in so far as they are relevant to the parties' defence with regard to the exercise of competence by the Commission <sup>(1)</sup>.

### 3.2. Confidential information

17. The Commission file may also include documents containing two categories of information, namely business secrets and other confidential information, to which access may be partially or totally restricted <sup>(2)</sup>. Access will be granted, where possible, to non-confidential versions of the original information. Where confidentiality can only be assured by summarising the relevant information, access will be granted to a summary. All other documents are accessible in their original form.

#### 3.2.1 *Business secrets*

18. In so far as disclosure of information about an undertaking's business activity could result in a serious harm to the same undertaking, such information constitutes business secrets <sup>(3)</sup>. Examples of information that may qualify as business secrets include: technical and/or financial information relating to an undertaking's know-how, methods of assessing costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost and price structure and sales strategy.

#### 3.2.2 *Other confidential information*

19. The category 'other confidential information' includes information other than business secrets, which may be considered as confidential, insofar as its disclosure would significantly harm a person or undertaking. Depending on the specific circumstances of each case, this may apply to information provided by third parties about undertakings which are able to place very considerable economic or commercial pressure on their competitors or on their trading partners, customers or suppliers. The Court of First Instance and the Court of Justice have acknowledged that it is legitimate to refuse to reveal to such undertakings certain letters received from their customers, since their disclosure might easily expose the authors to the risk of retaliatory measures <sup>(4)</sup>. Therefore the notion of other confidential information may include information that would enable the parties to identify complainants or other third parties where those have a justified wish to remain anonymous.

<sup>(1)</sup> In the merger control area, this may apply in particular to submissions by a Member State under Article 9 (2) of the Merger Regulation with regard to a case referral.

<sup>(2)</sup> Cf. Article 16(1) of the Implementing Regulation and Article 17(3) of the Merger Implementing Regulation; Case T-7/89 *Hercules Chemicals NV v Commission*, [1991] ECR II-1711, paragraph 54; Case T-23/99, *LR AF 1998 A/S v Commission*, [2002] ECR II-1705, paragraph 170.

<sup>(3)</sup> Judgement of 18.9.1996 in Case T-353/94, *Postbank NV v Commission*, [1996] ECR II-921, paragraph 87.

<sup>(4)</sup> The Community Courts have pronounced upon this question both in cases of alleged abuse of a dominant position (Article 82 of the EC Treaty) (Case T-65/89, *BPB Industries and British Gypsum* [1993] ECR II-389; and Case C-310/93P, *BPB Industries and British Gypsum* [1995] ECR I-865), and in merger cases (Case T-221/95 *Endemol v Commission* [1999] ECR II-1299, paragraph 69, and Case T-5/02 *Laval v. Commission* [2002] ECR II-4381, paragraph 98 et seq.).



20. The category of other confidential information also includes military secrets.

### 3.2.3 *Criteria for the acceptance of requests for confidential treatment.*

21. Information will be classified as confidential where the person or undertaking in question has made a claim to this effect and such claim has been accepted by the Commission <sup>(1)</sup>.
22. Claims for confidentiality must relate to information which is within the scope of the above descriptions of business secrets or other confidential information. The reasons for which information is claimed to be a business secret or other confidential information must be substantiated <sup>(2)</sup>. Confidentiality claims can normally only pertain to information obtained by the Commission from the same person or undertaking and not to information from any other source.
23. Information relating to an undertaking but which is already known outside the undertaking (in case of a group, outside the group), or outside the association to which it has been communicated by that undertaking, will not normally be considered confidential <sup>(3)</sup>. Information that has lost its commercial importance, for instance due to the passage of time, can no longer be regarded as confidential. As a general rule, the Commission presumes that information pertaining to the parties' turnover, sales, market-share data and similar information which is more than 5 years old is no longer confidential <sup>(4)</sup>.
24. In proceedings under Articles 81 and 82 of the Treaty, the qualification of a piece of information as confidential is not a bar to its disclosure if such information is necessary to prove an alleged infringement ('inculpatory document') or could be necessary to exonerate a party ('exculpatory document'). In this case, the need to safeguard the rights of the defence of the parties through the provision of the widest possible access to the Commission file may outweigh the concern to protect confidential information of other parties <sup>(5)</sup>. It is for the Commission to assess whether those circumstances apply to any specific situation. This calls for an assessment of all relevant elements, including:
- the relevance of the information in determining whether or not an infringement has been committed, and its probative value;
  - whether the information is indispensable;
  - the degree of sensitivity involved (to what extent would disclosure of the information harm the interests of the person or undertaking in question)
  - the preliminary view of the seriousness of the alleged infringement.

Similar considerations apply to proceedings under the Merger Regulation when the disclosure of information is considered necessary by the Commission for the purpose of the procedure <sup>(6)</sup>.

25. Where the Commission intends to disclose information, the person or undertaking in question shall be granted the possibility to provide a non-confidential version of the documents where that information is contained, with the same evidential value as the original documents <sup>(7)</sup>.

### C. When is access to the file granted?

26. Prior to the notification of the Commission's statement of objections pursuant to the provisions mentioned in paragraph 1, the parties have no right of access to the file.

<sup>(1)</sup> See paragraph 40 below.

<sup>(2)</sup> See paragraph 35 below.

<sup>(3)</sup> However, business secrets or other confidential information which are given to a trade or professional association by its members do not lose their confidential nature with regard to third parties and may therefore not be passed on to complainants. Cf. Joined Cases 209 to 215 and 218/78, *Fedetab*, [1980] ECR 3125, paragraph 46.

<sup>(4)</sup> See paragraphs 35-38 below on asking undertakings to identify confidential information.

<sup>(5)</sup> Cf. Article 27(2) of Regulation (EC) No 1/2003 and Article 15(3) of the Implementing Regulation.

<sup>(6)</sup> Article 18(1) of the Merger Implementing Regulation.

<sup>(7)</sup> Cf. paragraph 42 below.

1. *In antitrust proceedings under Articles 81 and 82 of the Treaty*
27. Access to the file will be granted upon request and, normally, on a single occasion, following the notification of the Commission's objections to the parties, in order to ensure the principle of equality of arms and to protect their rights of defence. As a general rule, therefore, no access will be granted to other parties' replies to the Commission's objections.

A party will, however, be granted access to documents received after notification of the objections at later stages of the administrative procedure, where such documents may constitute new evidence — whether of an incriminating or of an exculpatory nature —, pertaining to the allegations concerning that party in the Commission's statement of objections. This is particularly the case where the Commission intends to rely on new evidence.

2. *In proceedings under the Merger Regulation*
28. In accordance with Article 18(1) and (3) of the Merger Regulation and Article 17(1) of the Merger Implementing Regulation, the notifying parties will be given access to the Commission's file upon request at every stage of the procedure following the notification of the Commission's objections up to the consultation of the Advisory Committee. In contrast, this notice does not address the possibility of the provision of documents before the Commission states its objections to undertakings under the Merger Regulation <sup>(1)</sup>.

### III. PARTICULAR QUESTIONS REGARDING COMPLAINANTS AND OTHER INVOLVED PARTIES

29. The present section relates to situations where the Commission may or has to provide access to certain documents contained in its file to the complainants in antitrust proceedings and other involved parties in merger proceedings. Irrespective of the wording used in the antitrust and merger implementing regulations <sup>(2)</sup>, these two situations are distinct — in terms of scope, timing, and rights — from access to the file, as defined in the preceding section of this notice.

#### A. Provision of documents to complainants in antitrust proceedings

30. The Court of First Instance has ruled <sup>(3)</sup> that complainants do not have the same rights and guarantees as the parties under investigation. Therefore complainants cannot claim a right of access to the file as established for parties.
31. However, a complainant who, pursuant to Article 7(1) of the Implementing Regulation, has been informed of the Commission's intention to reject its complaint <sup>(4)</sup>, may request access to the documents on which the Commission has based its provisional assessment <sup>(5)</sup>. The complainant will be provided access to such documents on a single occasion, following the issuance of the letter informing the complainant of the Commission's intention to reject its complaint.
32. Complainants do not have a right of access to business secrets or other confidential information which the Commission has obtained in the course of its investigation <sup>(6)</sup>.

<sup>(1)</sup> This question is dealt with in the Directorate General Competition document 'DG COMP Best Practices on the conduct of EC merger control proceedings', available on the web-site of the Directorate General for Competition: [http://europa.eu.int/comm/competition/index\\_en.html](http://europa.eu.int/comm/competition/index_en.html).

<sup>(2)</sup> Cf. Article 8(1) of the Implementing Regulation, which speaks about 'access to documents' to complainants and Article 17(2) of Merger Implementing Regulation which speaks about 'access to file' to other involved parties 'in so far as this is necessary for the purposes of preparing their comments'.

<sup>(3)</sup> See Case T-17/93 *Matra-Hachette SA v Commission*, [1994] ECR II-595, paragraph 34. The Court ruled that the rights of third parties, as laid down by Article 19 of the Council Regulation No 17 of 6.2.1962 (now replaced by Article 27 of Regulation (EC) No 1/2003), were limited to the right to participate in the administrative procedure.

<sup>(4)</sup> By means of a letter issued in accordance with Article 7(1) of the Implementing Regulation.

<sup>(5)</sup> Cf. Article 8(1) of the Implementing Regulation.

<sup>(6)</sup> Cf. Article 8(1) of the Implementing Regulation.

## B. Provision of documents to other involved parties in merger proceedings

33. In accordance with Article 17(2) of the Merger Implementing Regulation, access to the file in merger proceedings shall also be given, upon request, to other involved parties who have been informed of the objections in so far as this is necessary for the purposes of preparing their comments.
34. Such other involved parties are parties to the proposed concentration other than the notifying parties, such as the seller and the undertaking which is the target of the concentration <sup>(1)</sup>.

## IV. PROCEDURE FOR IMPLEMENTING ACCESS TO THE FILE

### A. Preparatory procedure

35. Any person which submits information or comments in one of the situations listed hereunder, or subsequently submits further information to the Commission in the course of the same procedures, has an obligation to clearly identify any material which it considers to be confidential, giving reasons, and provide a separate non-confidential version by the date set by the Commission for making its views known <sup>(2)</sup>:
- a) In antitrust proceedings
- an addressee of a Commission's statement of objections making known its views on the objections <sup>(3)</sup>;
  - a complainant making known its views on a Commission statement of objections <sup>(4)</sup>;
  - any other natural or legal person, which applies to be heard and shows a sufficient interest, or which is invited by the Commission to express its views, making known its views in writing or at an oral hearing <sup>(5)</sup>;
  - a complainant making known his views on a Commission letter informing him on the Commission's intention to reject the complaint <sup>(6)</sup>.
- b) In merger proceedings
- notifying parties or other involved parties making known their views on Commission objections adopted with a view to take a decision with regard to a request for a derogation from suspension of a concentration and which adversely affects one or more of those parties, or on a provisional decision adopted in the matter <sup>(7)</sup>;
  - notifying parties to whom the Commission has addressed a statement of objections, other involved parties who have been informed of those objections or parties to whom the Commission has addressed objections with a view to inflict a fine or a periodic penalty payment, submitting their comments on the objections <sup>(8)</sup>;
  - third persons who apply to be heard, or any other natural or legal person invited by the Commission to express their views, making known their views in writing or at an oral hearing <sup>(9)</sup>;
  - any person which supplies information pursuant to Article 11 of the Merger Regulation.

<sup>(1)</sup> Cf. Article 11(b) of the Merger Implementing Regulation.

<sup>(2)</sup> Cf. Article 16(2) of the Implementing Regulation and Article 18(2) of the Merger Implementing Regulation.

<sup>(3)</sup> pursuant to Article 10(2) of the Implementing Regulation.

<sup>(4)</sup> pursuant to Article 6(1) of the Implementing Regulation.

<sup>(5)</sup> pursuant to Article 13(1) and (3) of the Implementing Regulation.

<sup>(6)</sup> pursuant to Article 7(1) of the Implementing Regulation.

<sup>(7)</sup> Article 12 of the Merger Implementing Regulation.

<sup>(8)</sup> Article 13 of the Merger Implementing Regulation.

<sup>(9)</sup> pursuant to Article 16 of the Merger Implementing Regulation.

36. Moreover, the Commission may require undertakings <sup>(1)</sup>, in all cases where they produce or have produced documents, to identify the documents or parts of documents, which they consider to contain business secrets or other confidential information belonging to them, and to identify the undertakings with regard to which such documents are to be considered confidential <sup>(2)</sup>.
37. For the purposes of quickly dealing with confidentiality claims referred to in paragraph 36 above, the Commission may set a time-limit within which the undertakings shall: (i) substantiate their claim for confidentiality with regard to each individual document or part of document; (ii) provide the Commission with a non-confidential version of the documents, in which the confidential passages are deleted <sup>(3)</sup>. In antitrust proceedings the undertakings in question shall also provide within the said time-limit a concise description of each piece of deleted information <sup>(4)</sup>.
38. The non-confidential versions and the descriptions of the deleted information must be established in a manner that enables any party with access to the file to determine whether the information deleted is likely to be relevant for its defence and therefore whether there are sufficient grounds to request the Commission to grant access to the information claimed to be confidential.

#### B. Treatment of confidential information

39. In antitrust proceedings, if undertakings fail to comply with the provisions set out in paragraphs 35 to 37 above, the Commission may assume that the documents or statements concerned do not contain confidential information <sup>(5)</sup>. The Commission may consequently assume that the undertaking has no objections to the disclosure of the documents or statements concerned in their entirety.
40. In both antitrust proceedings and in proceedings under the Merger Regulation, should the person or undertaking in question meet the conditions set out in paragraphs 35 to 37 above, to the extent they are applicable, the Commission will either:
- provisionally accept the claims which seem justified; or
  - inform the person or undertaking in question that it does not agree with the confidentiality claim in whole or in part, where it is apparent that the claim is unjustified.
41. The Commission may reverse its provisional acceptance of the confidentiality claim in whole or in part at a later stage.
42. Where the Directorate General for Competition does not agree with the confidentiality claim from the outset or where it takes the view that the provisional acceptance of the confidentiality claim should be reversed, and thus intends to disclose information, it will grant the person or undertaking in question an opportunity to express its views. In such cases, the Directorate General for Competition will inform the person or undertaking in writing of its intention to disclose information, give its reasons and set a time-limit within which such person or undertaking may inform it in writing of its views. If, following submission of those views, a disagreement on the confidentiality claim persists, the matter will be dealt with by the Hearing Officer according to the applicable Commission terms of reference of Hearing Officers <sup>(6)</sup>.

<sup>(1)</sup> In merger proceedings the principles set out in the present and subsequent paragraphs also apply to the persons referred to in Article 3(1)(b) of Merger Regulation.

<sup>(2)</sup> Cf. Article 16(3) of the Implementing Regulation and Article 18(3) of the Merger Implementing Regulation. This also applies to documents gathered by the Commission in an inspection pursuant to Article 13 of the Merger Regulation and Articles 20 and 21 of Regulation (EC) No 1/2003.

<sup>(3)</sup> Cf. Article 16(3) of the Implementing Regulation and Article 18(3) of the Merger Implementing Regulation.

<sup>(4)</sup> Cf. Article 16(3) of the Implementing Regulation.

<sup>(5)</sup> Cf. Article 16 of the Implementing Regulation.

<sup>(6)</sup> Cf. Article 9 of the Commission Decision of 23.5.2001 on the terms of reference of hearing officers in certain competition proceedings, OJ L 162 19.6.2001, p. 21.

43. Where there is a risk that an undertaking which is able to place very considerable economic or commercial pressure on its competitors or on its trading partners, customers or suppliers will adopt retaliatory measures against those, as a consequence of their collaboration in the investigation carried out by the Commission <sup>(1)</sup>, the Commission will protect the anonymity of the authors by providing access to a non-confidential version or summary of the responses in question <sup>(2)</sup>. Requests for anonymity in such circumstances, as well as requests for anonymity according to point 81 of the Commission Notice on the handling of complaints <sup>(3)</sup> will be dealt with according to paragraphs 40 to 42 above.

### C. Provision of access to file

44. The Commission may determine that access to the file shall be granted in one of the following ways, taking due account of the technical capabilities of the parties:
- by means of a CD-ROM(s) or any other electronic data storage device as may become available in future;
  - through copies of the accessible file in paper form sent to them by mail;
  - by inviting them to examine the accessible file on the Commission's premises.
- The Commission may choose any combination of these methods.
45. In order to facilitate access to the file, the parties will receive an enumerative list of documents setting out the content of the Commission file, as defined in paragraph 8 above.
46. Access is granted to evidence as contained in the Commission file, in its original form: the Commission is under no obligation to provide a translation of documents in the file <sup>(4)</sup>.
47. If a party considers that, after having obtained access to the file, it requires knowledge of specific non-accessible information for its defence, it may submit a reasoned request to that end to the Commission. If the services of the Directorate General for Competition are not in a position to accept the request and if the party disagrees with that view, the matter will be resolved by the Hearing Officer, in accordance with the applicable terms of reference of Hearing Officers <sup>(5)</sup>.
48. Access to the file in accordance with this notice is granted on the condition that the information thereby obtained may only be used for the purposes of judicial or administrative proceedings for the application of the Community competition rules at issue in the related administrative proceedings <sup>(6)</sup>. Should the information be used for a different purpose, at any point in time, with the involvement of an outside counsel, the Commission may report the incident to the bar of that counsel, with a view to disciplinary action.
49. With the exception of paragraphs 45 and 47, this section C applies equally to the grant of access to documents to complainants (in antitrust proceedings) and to other involved parties (in merger proceedings).

<sup>(1)</sup> Cf. paragraph 19 above.

<sup>(2)</sup> Cf. Case T-5/02, *Tetra Laval vs. Commission*, [2002] ECR II-4381, paragraph 98, 104 and 105.

<sup>(3)</sup> Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101, 27.4.2004, p. 65.

<sup>(4)</sup> Cf. Case T-25/95 et al. *Cimenteries*, paragraph 635.

<sup>(5)</sup> Cf. Article 8 of the Commission Decision of 23.5.2001 on the terms of reference of hearing officers in certain competition proceedings, OJ L 162, 19.6.2001, p. 21.

<sup>(6)</sup> Cf. Articles 15(4) and 8(2) of the Implementing Regulation, respectively, and Article 17(4) of the Merger Implementing Regulation.

**COMMISSION DECISION**  
**of 23 May 2001**  
**on the terms of reference of hearing officers in certain competition proceedings**

(notified under document number C(2001) 1461)

(Text with EEA relevance)

(2001/462/EC, ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

to contribute to the objectivity, transparency and efficiency of those proceedings.

Having regard to the Treaty establishing the European Community,

- (4) The Commission created the post of hearing officer for these purposes in 1982 and last laid down the terms of reference for that post in Commission Decision 94/810/ECSC, EC of 12 December 1994 on the terms of reference of hearing officers in competition procedures before the Commission (7).

Having regard to the Treaty establishing the European Coal and Steel Community,

Having regard to the Agreement on the European Economic Area,

- (5) It is necessary to further strengthen the role of the hearing officer and to adapt and consolidate those terms of reference in the light of developments in competition law.

Having regard to the Rules of Procedure of the Commission (1), and in particular Article 20 thereof,

Whereas:

- (1) The right of the parties concerned and of third parties to be heard before a final decision affecting their interests is taken is a fundamental principle of Community law. That right is also set out in Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (2), as last amended by Regulation (EC) No 1310/97 (3), Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty (4) and Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (5).
- (2) The Commission must ensure that that right is guaranteed in its competition proceedings, having regard in particular to the Charter of Fundamental Rights of the European Union (6).
- (3) The conduct of administrative proceedings should therefore be entrusted to an independent person experienced in competition matters who has the integrity necessary

- (6) In order to ensure the independence of the hearing officer, he should be attached, for administrative purposes, to the member of the Commission with special responsibility for competition. Transparency as regards the appointment, termination of appointment and transfer of hearing officers should be increased.
- (7) The hearing officer should be appointed in accordance with the rules laid down in the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities. In accordance with those rules, consideration may be given to candidates who are not officials of the Commission.
- (8) The terms of reference of the hearing officer in competition proceedings should be framed in such a way as to safeguard the right to be heard throughout the whole procedure.
- (9) When disclosing information on natural persons, particular attention should be paid to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (8).

(1) OJ L 308, 8.12.2000, p. 26.

(2) OJ L 395, 30.12.1989, p. 1 (corrected version in OJ L 257, 21.9.1990, p. 13).

(3) OJ L 180, 9.7.1997, p. 1.

(4) OJ L 354, 30.12.1998, p. 18.

(5) OJ L 61, 2.3.1998, p. 1.

(6) OJ C 364, 18.12.2000, p. 1.

(7) OJ L 330, 21.12.1994, p. 67.

(8) OJ L 8, 12.1.2001, p. 1.

- (10) This Decision should be without prejudice to the general rules granting or excluding access to Commission documents.
- (11) Decision 94/810/ECSC, EC should be repealed,

2. The provisions referred to in paragraph 1 are:
- (a) the first paragraph of Article 36 of the ECSC Treaty;
- (b) Regulation (EC) No 2842/98;
- (c) Regulation (EC) No 447/98.

HAS DECIDED AS FOLLOWS:

#### Article 1

The Commission shall appoint one or more hearing officers (hereinafter 'the hearing officer'), who shall ensure that the effective exercise of the right to be heard is respected in competition proceedings before the Commission under Articles 81 and 82 of the EC Treaty, Articles 65 and 66 of the ECSC Treaty, and Regulation (EEC) No 4064/89.

#### Article 2

1. The appointment of the hearing officer shall be published in the *Official Journal of the European Communities*. Any interruption, termination of appointment or transfer by whatever procedure, shall be the subject of a reasoned decision of the Commission. That decision shall be published in the *Official Journal of the European Communities*.

2. The hearing officer shall be attached, for administrative purposes, to the member of the Commission with special responsibility for competition (hereinafter 'the competent member of the Commission').

3. Where the hearing officer is unable to act, the competent member of the Commission, where appropriate after consultation of the hearing officer, shall designate another official, who is not involved in the case in question, to carry out the hearing officer's duties.

#### Article 3

1. In performing his duties, the hearing officer shall take account of the need for effective application of the competition rules in accordance with the Community legislation in force and the principles laid down by the Court of Justice and the Court of First Instance of the European Communities.

2. The hearing officer shall be kept informed by the director responsible for investigating the case (hereinafter 'the director responsible') about the development of the procedure up to the stage of the draft decision to be submitted to the competent member of the Commission.

3. The hearing officer may present observations on any matter arising out of any Commission competition proceeding to the competent member of the Commission.

#### Article 4

1. The hearing officer shall organise and conduct the hearings provided for in the provisions implementing Articles 81 and 82 of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Regulation (EEC) No 4064/89, in accordance with Articles 5 to 13 of this Decision.

#### Article 5

The hearing officer shall ensure that the hearing is properly conducted and contributes to the objectivity of the hearing itself and of any decision taken subsequently. The hearing officer shall seek to ensure in particular that, in the preparation of draft Commission decisions, due account is taken of all the relevant facts, whether favourable or unfavourable to the parties concerned, including the factual elements related to the gravity of any infringement.

#### Article 6

1. Applications to be heard from third parties, be they persons, undertakings or associations of persons or undertakings, shall be submitted in writing, together with a written statement explaining the applicant's interest in the outcome of the procedure.

2. Decisions as to whether third parties are to be heard shall be taken after consulting the director responsible.

3. Where it is found that an application has not shown a sufficient interest to be heard, he shall be informed in writing of the reasons for such finding. A time limit shall be fixed within which he may submit any further written comments.

#### Article 7

1. Applications to be heard orally shall be made in the applicant's written comments on letters which the Commission has addressed to him.

2. The letters referred to in paragraph 1 are those:

- (a) communicating a statement of objections;
- (b) inviting the written comments of a third party having shown sufficient interest to be heard;
- (c) informing a complainant that in the Commission's view there are insufficient grounds for finding an infringement and inviting him to submit any further written comments.

3. Decisions as to whether applicants are to be heard orally shall be taken after consulting the director responsible.

#### Article 8

1. Where a person, an undertaking or an association of persons or undertakings has received one or more of the letters listed in Article 7(2) and has reason to believe that the Commission has in its possession documents which have not been disclosed to it and that those documents are necessary for the proper exercise of the right to be heard, access to those documents may be sought by means of a reasoned request.



2. The reasoned decision on any such request shall be communicated to the person, undertaking or association that made the request and to any other person, undertaking or association concerned by the procedure.

#### Article 9

Where it is intended to disclose information which may constitute a business secret of an undertaking, it shall be informed in writing of this intention and the reasons for it. A time limit shall be fixed within which the undertaking concerned may submit any written comments.

Where the undertaking concerned objects to the disclosure of the information but it is found that the information is not protected and may therefore be disclosed, that finding shall be stated in a reasoned decision which shall be notified to the undertaking concerned. The decision shall specify the date after which the information will be disclosed. This date shall not be less than one week from the date of notification.

The first and second paragraphs shall apply *mutatis mutandis* to the disclosure of information by publication in the *Official Journal of the European Communities*.

#### Article 10

Where a person, undertaking or association of persons or undertakings considers that the time limit imposed for its reply to a letter referred to in Article 7(2) is too short, it may, within the original time limit, seek an extension of that time limit by means of a reasoned request. The applicant shall be informed in writing whether the request has been granted.

#### Article 11

Where appropriate, in view of the need to ensure that the hearing is properly prepared and particularly that questions of fact are clarified as far as possible, the hearing officer may, after consulting the director responsible, supply in advance to the parties invited to the hearing a list of the questions on which he wishes them to make known their views.

For this purpose, after consulting the director responsible, the hearing officer may hold a meeting with the parties invited to the hearing and, where appropriate, the Commission staff, in order to prepare for the hearing itself.

The hearing officer may also ask for prior written notification of the essential contents of the intended statement of persons whom the parties invited to the hearing have proposed for hearing.

#### Article 12

1. After consulting the director responsible, the hearing officer shall determine the date, the duration and the place of the hearing. Where a postponement is requested, the hearing officer shall decide whether or not to allow it.

2. The hearing officer shall be fully responsible for the conduct of the hearing.

3. The hearing officer shall decide whether fresh documents should be admitted during the hearing, what persons should be heard on behalf of a party and whether the persons concerned should be heard separately or in the presence of other persons attending the hearing.

4. Where appropriate, in view of the need to ensure the right to be heard, the hearing officer may, after consulting the Director responsible, afford persons, undertakings, and associations of persons or undertakings the opportunity of submitting further written comments after the oral hearing. The hearing officer shall fix a date by which such submissions may be made. The Commission shall not be obliged to take into account written comments received after that date.

#### Article 13

1. The hearing officer shall report to the competent member of the Commission on the hearing and the conclusions he draws from it, with regard to the respect of the right to be heard. The observations in this report shall concern procedural issues, including disclosure of documents and access to the file, time limits for replying to the statement of objections and the proper conduct of the oral hearing.

A copy of the report shall be given to the Director-General for Competition and to the director responsible.

2. In addition to the report referred to in paragraph 1, the hearing officer may make observations on the further progress of the proceedings. Such observations may relate among other things to the need for further information, the withdrawal of certain objections, or the formulation of further objections.

#### Article 14

Where appropriate, the hearing officer may report on the objectivity of any enquiry conducted in order to assess the competition impact of commitments proposed in relation to any proceeding initiated by the Commission in application of the provisions referred to in Article 1. This shall cover in particular the selection of respondents and the methodology used.

#### Article 15

The hearing officer shall, on the basis of the draft decision to be submitted to the Advisory Committee in the case in question, prepare a final report in writing on the respect of the right to be heard, as referred to in Article 13(1). This report will also consider whether the draft decision deals only with objections in respect of which the parties have been afforded the opportunity of making known their views, and, where appropriate, the objectivity of any enquiry within the meaning of Article 14.



The final report shall be submitted to the competent member of the Commission, the Director-General for Competition and the director responsible. It shall be communicated to the competent authorities of the Member States and, in accordance with the provisions on cooperation laid down in Protocol 23 and Protocol 24 of the EEA Agreement, to the EFTA Surveillance Authority.

*Article 16*

1. The hearing officer's final report shall be attached to the draft decision submitted to the Commission, in order to ensure that, when it reaches a decision on an individual case, the Commission is fully apprised of all relevant information as regards the course of the procedure and respect of the right to be heard.

2. The final report may be modified by the hearing officer in the light of any amendments to the draft decision up to the time the decision is adopted by the Commission.

3. The Commission shall communicate the hearing officer's final report, together with the decision, to the addressees of the decision. It shall publish the hearing officer's final report in the *Official Journal of the European Communities*, together with the decision, having regard to the legitimate interest of undertakings in the protection of their business secrets.

*Article 17*

Decision 94/810/ECSC, EC is repealed.

Procedural steps already taken under that Decision shall continue to have effect.

Done at Brussels, 23 May 2001.

*For the Commission*

Mario MONTI

*Member of the Commission*

## II

(Information)

## INFORMATION FROM EUROPEAN UNION INSTITUTIONS AND BODIES

## COMMISSION

**Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases**

(Text with EEA relevance)

(2008/C 167/01)

## 1. INTRODUCTION

1. This Notice sets out the framework for rewarding cooperation in the conduct of proceedings commenced in view of the application of Article 81 of the EC Treaty <sup>(1)</sup> to cartel cases <sup>(2)</sup>. The settlement procedure may allow the Commission to handle more cases with the same resources, thereby fostering the public interest in the Commission's delivery of effective and timely punishment, while increasing overall deterrence. The cooperation covered by this Notice is different from the voluntary production of evidence to trigger or advance the Commission's investigation, which is covered by the Commission Notice on Immunity from fines and reduction of fines in cartel cases <sup>(3)</sup> (the Leniency Notice). Provided that the cooperation offered by an undertaking qualifies under both Commission Notices, it can be cumulatively rewarded accordingly <sup>(4)</sup>.

2. When parties to the proceedings are prepared to acknowledge their participation in a cartel violating Article 81 of the Treaty and their liability therefore, they may also contribute to expediting the proceedings leading to the

adoption of the corresponding decision pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty <sup>(5)</sup> in the way and with the safeguards specified in this Notice. Whilst the Commission, as the investigative authority and the guardian of the Treaty empowered to adopt enforcement decisions subject to judicial control by the Community Courts, does not negotiate the question of the existence of an infringement of Community law and the appropriate sanction, it can reward the cooperation described in this Notice.

3. Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty <sup>(6)</sup> lays down the core practical rules concerning the conduct of proceedings in antitrust cases including those applicable in the variant for settlement. In this regard, Regulation (EC) No 773/2004 bestows on the Commission the discretion whether to explore the settlement procedure or not in cartel cases, while ensuring that the choice of the settlement procedure cannot be imposed on the parties.

4. Effective enforcement of Community competition law is compatible with full respect of the parties' rights of defence, which constitutes a fundamental principle of Community law to be respected in all circumstances, and in particular in antitrust procedures which may give rise to

<sup>(1)</sup> References in this text to Article 81 also cover Article 53 EEA when applied by the Commission in accordance with the rules laid down in Article 56 of the EEA Agreement.

<sup>(2)</sup> Cartels are agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid rigging, restrictions of imports or exports and/or anti competitive actions against other competitors. Such practices are among the most serious violations of Article 81 EC.

<sup>(3)</sup> OJ C 298, 8.12.2006, p. 17.

<sup>(4)</sup> See point 33.

<sup>(5)</sup> OJ L 1, 4.1.2003, p. 1. Regulation as last amended by Regulation (EC) No 1419/2006 (OJ L 269, 28.9.2006, p. 1).

<sup>(6)</sup> OJ L 123, 27.4.2004, p. 18. Regulation as last amended by Regulation (EC) No 622/2008 (OJ L 171, 1.7.2008, p. 3).

penalties. It follows that the rules established to conduct the Commission proceedings to enforce Article 81 of the Treaty should ensure that the undertakings and associations of undertakings concerned are afforded the opportunity effectively to make known their views on the truth and relevance of the facts, objections and circumstances put forward by the Commission <sup>(1)</sup>, throughout the administrative procedure.

## 2. PROCEDURE

5. The Commission retains a broad margin of discretion to determine which cases may be suitable to explore the parties' interest to engage in settlement discussions, as well as to decide to engage in them or discontinue them or to definitely settle. In this regard, account may be taken of the probability of reaching a common understanding regarding the scope of the potential objections with the parties involved within a reasonable timeframe, in view of factors such as number of parties involved, foreseeable conflicting positions on the attribution of liability, extent of contestation of the facts. The prospect of achieving procedural efficiencies in view of the progress made overall in the settlement procedure, including the scale of burden involved in providing access to non confidential versions of documents from the file, will be considered. Other concerns such as the possibility of setting a precedent might apply. The Commission may also decide to discontinue settlement discussions if the parties to the proceedings coordinate to distort or destroy any evidence relevant to the establishment of the infringement or any part thereof or to the calculation of the applicable fine. Distortion or destruction of evidence relevant to the establishment of the infringement or any part thereof may also constitute an aggravating circumstance within the meaning of point 28 of the Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 <sup>(2)</sup> (the Guidelines on fines), and may be regarded as lack of cooperation within the meaning of points 12 and 27 of the Leniency Notice. The Commission may only engage in settlement discussions upon the written request of the parties concerned.
6. While parties to the proceedings do not have a right to settle, should the Commission consider that a case may, in principle, be suitable for settlement, it will explore the interest in settlement of all parties to the same proceedings.
7. The parties to the proceedings may not disclose to any third party in any jurisdiction the contents of the discussions or of the documents which they have had access to in view of settlement, unless they have a prior explicit authorization by the Commission. Any breach in this regard may lead the Commission to disregard the undertaking's request to follow the settlement procedure. Such disclosure may also constitute an aggravating circumstance,

within the meaning of point 28 of the Guidelines on fines and may be regarded as lack of cooperation within the meaning of points 12 and 27 of the Leniency Notice.

### 2.1. Initiation of proceedings and exploratory steps regarding settlement

8. Where the Commission contemplates the adoption of a decision pursuant to Article 7 and/or Article 23 of Regulation (EC) No 1/2003, it is required in advance to identify and recognize as parties to the proceedings the legal persons on whom a penalty may be imposed for an infringement of Article 81 of the Treaty.
9. To this end, the initiation of proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003 in view of adopting such a decision can take place at any point in time, but no later than the date on which the Commission issues a statement of objections against the parties concerned. Article 2(1) of Regulation (EC) No 773/2004 further specifies that, should the Commission consider it suitable to explore the parties' interest in engaging in settlement discussions, it will initiate proceedings no later than the date on which it either issues a statement of objections or requests the parties to express in writing their interest to engage in settlement discussions, whichever is the earlier.
10. After the initiation of proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003, the Commission becomes the only competition authority competent to apply Article 81 of the Treaty to the case in point.
11. Should the Commission consider it suitable to explore the parties' interest to engage in settlement discussions, it will set a time limit of no less than two weeks pursuant to Articles 10a(1) and 17(3) of Regulation (EC) No 773/2004 within which parties to the same proceedings should declare in writing whether they envisage engaging in settlement discussions in view of possibly introducing settlement submissions at a later stage. This written declaration does not imply an admission by the parties of having participated in an infringement or of being liable for it.
12. Whenever the Commission initiates proceedings against two or more parties within the same undertaking, the Commission will inform each of them of the other legal entities which it identifies within the same undertaking and which are also concerned by the proceedings. In such a case, should the concerned parties wish to engage in settlement discussions, they must appoint joint representatives duly empowered to act on their behalf by the end of the time limit referred to in point 11. The appointment of joint representatives aims solely to facilitate the settlement discussions and it does not prejudice in any way the attribution of liability for the infringement amongst the different parties.

<sup>(1)</sup> Case 85/76, *Hoffmann La Roche v Commission* [1979] ECR 461, at paragraphs 9 and 11.

<sup>(2)</sup> OJ C 210, 1.9.2006, p. 2.

13. The Commission may disregard any application for immunity from fines or reduction of fines on the ground that it has been submitted after the expiry of the time limit referred to in point 11.

## 2.2. Commencing the settlement procedure: settlement discussions

14. Should some of the parties to the proceedings request settlement discussions and comply with the requirements referred to in points 11 and 12, the Commission may decide to pursue the settlement procedure by means of bilateral contacts between the Commission Directorate General for Competition and the settlement candidates.
15. The Commission retains discretion to determine the appropriateness and the pace of the bilateral settlement discussions with each undertaking. In line with Article 10a(2) of Regulation (EC) No 773/2004, this includes determining, in view of the progress made overall in the settlement procedure, the order and sequence of the bilateral settlement discussions as well as the timing of the disclosure of information, including the evidence in the Commission file used to establish the envisaged objections and the potential fine <sup>(1)</sup>. Information will be disclosed in a timely manner as settlement discussions progress.
16. Such an early disclosure in the context of settlement discussions pursuant to Article 10a(2) and Article 15(1a) of Regulation (EC) No 773/2004 will allow the parties to be informed of the essential elements taken into consideration so far, such as the facts alleged, the classification of those facts, the gravity and duration of the alleged cartel, the attribution of liability, an estimation of the range of likely fines, as well as the evidence used to establish the potential objections. This will enable the parties effectively to assert their views on the potential objections against them and will allow them to make an informed decision on whether or not to settle. Upon request by a party, the Commission services will also grant it access to non confidential versions of any specified accessible document listed in the case file at that point in time, in so far as this is justified for the purpose of enabling the party to ascertain its position regarding a time period or any other aspect of the cartel <sup>(2)</sup>.
17. When the progress made during the settlement discussions leads to a common understanding regarding the scope of the potential objections and the estimation of the range of likely fines to be imposed by the Commission, and the Commission takes the preliminary view that procedural efficiencies are likely to be achieved in view of the progress made overall, the Commission may grant a final time limit of at least 15 working days for an undertaking to introduce a final settlement submission pursuant to Articles 10a(2) and 17(3) of Regulation (EC) No 773/2004. The time limit can be extended following a reasoned request. Before granting such time limit, the parties will be entitled to have the information specified in point 16 disclosed to them upon request.
18. The parties may call upon the Hearing Officer at any time during the settlement procedure in relation to issues that might arise relating to due process. The Hearing Officer's duty is to ensure that the effective exercise of the rights of defence is respected.
19. Should the parties concerned fail to introduce a settlement submission, the procedure leading to the final decision in their regard will follow the general provisions, in particular Articles 10(2), 12(1) and 15(1) of Regulation (EC) No 773/2004, instead of those regulating the settlement procedure.

## 2.3. Settlement submissions

20. Parties opting for a settlement procedure must introduce a formal request to settle in the form of a settlement submission. The settlement submission provided for in Article 10a(2) of Regulation (EC) No 773/2004 should contain:
- (a) an acknowledgement in clear and unequivocal terms of the parties' liability for the infringement summarily described as regards its object, its possible implementation, the main facts, their legal qualification, including the party's role and the duration of their participation in the infringement in accordance with the results of the settlement discussions;
  - (b) an indication <sup>(3)</sup> of the maximum amount of the fine the parties foresee to be imposed by the Commission and which the parties would accept in the framework of a settlement procedure;
  - (c) the parties' confirmation that, they have been sufficiently informed of the objections the Commission envisages raising against them and that they have been given sufficient opportunity to make their views known to the Commission;

<sup>(1)</sup> Reference to the 'potential fine' in Article 10a(2) of Regulation (EC) No 773/2004 affords the Commission services the possibility to inform the parties concerned by settlement discussions of an estimate of their potential fine in view of the guidance contained in the Guide lines on fines, the provisions of this Notice and the Leniency Notice, where applicable.

<sup>(2)</sup> For that purpose, the parties will be provided with a list of all accessible documents in the case file at that point in time.

<sup>(3)</sup> This would result from the discussions as set out in points 16 and 17.

- (d) the parties' confirmation that, in view of the above, they do not envisage requesting access to the file or requesting to be heard again in an oral hearing, unless the Commission does not reflect their settlement submissions in the statement of objections and the decision;
- (e) the parties' agreement to receive the statement of objections and the final decision pursuant to Articles 7 and 23 of Regulation (EC) No 1/2003 in an agreed official language of the European Community.
21. The acknowledgments and confirmations provided by the parties in view of settlement constitute the expression of their commitment to cooperate in the expeditious handling of the case following the settlement procedure. However, those acknowledgments and confirmations are conditional upon the Commission meeting their settlement request, including the anticipated maximum amount of the fine.
22. Settlement requests cannot be revoked unilaterally by the parties which have provided them unless the Commission does not meet the settlement requests by reflecting the settlement submissions first in a statement of objections and ultimately, in a final decision (see in this regard points 27 and 29). The statement of objections would be deemed to have endorsed the settlement submissions if it reflects their contents on the issues mentioned in point 20(a). Additionally, for a final decision to be deemed to have reflected the settlement submissions, it should also impose a fine which does not exceed the maximum amount indicated therein.
- 2.4. Statement of objections and reply**
23. Pursuant to Article 10(1) of Regulation (EC) No 773/2004, the notification of a written statement of objections to each of the parties against whom objections are raised is a mandatory preparatory step before adopting any final decision. Therefore, the Commission will issue a statement of objections also in a settlement procedure <sup>(1)</sup>.
24. For the parties' rights of defence to be exercised effectively, the Commission should hear their views on the objections against them and supporting evidence before adopting a final decision and take them into account by amending its preliminary analysis, where appropriate <sup>(2)</sup>. The Commission must be able not only to accept or reject the parties' relevant arguments expressed during the administrative
- procedure, but also to make its own analysis of the matters put forward by them in order to either abandon such objections because they have been shown to be unfounded or to supplement and reassess its arguments both in fact and in law, in support of the objections which it maintains.
25. By introducing a formal settlement request in the form of a settlement submission prior to the notification of the statement of objections, the parties concerned enable the Commission to effectively take their views into account <sup>(3)</sup> already when drafting the statement of objections, rather than only before the consultation of the Advisory Committee on Restrictive Practices and Dominant Positions (hereinafter the 'Advisory Committee') or before the adoption of the final decision <sup>(4)</sup>.
26. Should the statement of objections reflect the parties' settlement submissions, the parties concerned should within a time limit of at least two weeks set by the Commission in accordance with Articles 10a(3) and 17(3) of Regulation (EC) No 773/2004, reply to it by simply confirming (in unequivocal terms) that the statement of objections corresponds to the contents of their settlement submissions and that they therefore remain committed to follow the settlement procedure. In the absence of such a reply, the Commission will take note of the party's breach of its commitment and may also disregard the party's request to follow the settlement procedure.
27. The Commission retains the right to adopt a statement of objections which does not reflect the parties' settlement submission. If so, the general provisions in Articles 10(2), 12(1) and 15(1) of Regulation (EC) No 773/2004 will apply. The acknowledgements provided by the parties in the settlement submission would be deemed to be withdrawn and could not be used in evidence against any of the parties to the proceedings. Hence, the parties concerned would no longer be bound by their settlement submissions and would be granted a time limit allowing them, upon request, to present their defence anew, including the possibility to access the file and to request an oral hearing.
- 2.5. Commission decision and settlement reward**
28. Upon the parties' replies to the statement of objections confirming their commitment to settle, Regulation (EC) No 773/2004 allows the Commission to proceed, without any other procedural step, to the adoption of the

<sup>(1)</sup> In the context of settlement procedures, statements of objections should contain the information necessary to enable the parties to corroborate that it reflects their settlement submissions.

<sup>(2)</sup> In line with settled case law, the Commission shall base its decisions only on objections on which the parties concerned have been able to comment and, to this end, they shall be entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets.

<sup>(3)</sup> In this regard, recital 2 of Regulation (EC) No 622/2008 states: '(...) Such early disclosure should enable the parties concerned to put forward their views on the objections which the Commission intends to raise against them as well as on their potential liability'.

<sup>(4)</sup> As required by Article 11(1) of Regulation (EC) No 773/2004 and Article 27(1) of Regulation (EC) No 1/2003, respectively.

- subsequent final decision pursuant to Articles 7 and/or 23 of Regulation (EC) No 1/2003, after consultation of the Advisory Committee pursuant to Article 14 of Regulation (EC) No 1/2003. In particular, this implies that no oral hearing or access to the file may be requested by those parties once their settlement submissions have been reflected by the statement of objections, in line with Articles 12(2) and 15(1a) of Regulation (EC) No 773/2004.
29. The Commission retains the right to adopt a final position which departs from its preliminary position expressed in a statement of objections endorsing the parties' settlement submissions, either in view of the opinion provided by the Advisory Committee or for other appropriate considerations in view of the ultimate decisional autonomy of the Commission to this effect. However, should the Commission opt to follow that course, it will inform the parties and notify to them a new statement of objections in order to allow for the exercise of their rights of defence in accordance with the applicable general rules of procedure. It follows that the parties would then be entitled to have access to the file, to request an oral hearing and to reply to the statement of objections. The acknowledgments provided by the parties in the settlement submissions would be deemed to have been withdrawn and could not be used in evidence against any of the parties to the proceedings.
30. The final amount of the fine in a particular case is determined in the decision finding an infringement pursuant to Article 7 and imposing a fine pursuant to Article 23 of Regulation (EC) No 1/2003.
31. In line with the Commission's practice, the fact that an undertaking cooperated with the Commission under this Notice during the administrative procedure will be indicated in the final decision, so as to explain the reason for the level of the fine.
32. Should the Commission decide to reward a party for settlement in the framework of this Notice, it will reduce by 10 % the amount of the fine to be imposed after the 10 % cap has been applied having regard to the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 <sup>(1)</sup>. Any specific increase for deterrence <sup>(2)</sup> used in their regard will not exceed a multiplication by two.
33. When settled cases involve also leniency applicants, the reduction of the fine granted to them for settlement will be added to their leniency reward.
34. This Notice applies to any case pending before the Commission at the time of or after its publication in the Official Journal of the European Union.
35. Access to settlement submissions is only granted to those addressees of a statement of objections who have not requested settlement, provided that they commit — together with the legal counsels getting access on their behalf — not to make any copy by mechanical or electronic means of any information in the settlement submissions to which access is being granted and to ensure that the information to be obtained from the settlement submission will solely be used for the purposes of judicial or administrative proceedings for the application of the Community competition rules at issue in the related proceedings. Other parties such as complainants will not be granted access to settlement submissions.
36. The use of such information for a different purpose during the proceeding may be regarded as lack of cooperation within the meaning of points 12 and 27 of the Leniency Notice. Moreover, if any such use is made after the Commission has already adopted a prohibition decision in the proceedings, the Commission may, in any legal proceedings before the Community Courts, ask the Court to increase the fine in respect of the responsible undertaking. Should the information be used for a different purpose, at any point in time, with the involvement of an outside counsel, the Commission may report the incident to the bar of that counsel, with a view to disciplinary action.
37. Settlement submissions made under this Notice will only be transmitted to the competition authorities of the Member States pursuant to Article 12 of Regulation (EC) No 1/2003, provided that the conditions set out in the Network Notice <sup>(3)</sup> are met and provided that the level of protection against disclosure awarded by the receiving competition authority is equivalent to the one conferred by the Commission.
38. Upon the applicant's request, the Commission may accept that settlement submissions be provided orally. Oral settlement submissions will be recorded and transcribed at the Commission's premises. In accordance with Article 19 of Regulation (EC) No 1/2003 and Articles 3(3) and 17(3) of Regulation (EC) No 773/2004 undertakings making oral settlement submissions will be granted the opportunity to check the technical accuracy of the recording, which will be available at the Commission's premises and to correct the substance of their oral settlement submissions and the accuracy of the transcript without delay.
39. The Commission will not transmit settlement submissions to national courts without the consent of the relevant applicants, in line with the provisions in the Commission Notice on the co operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC <sup>(4)</sup>.
40. The Commission considers that normally public disclosure of documents and written or recorded statements (including settlement submissions) received in the context of this Notice would undermine certain public or private

### 3. GENERAL CONSIDERATIONS

34. This Notice applies to any case pending before the Commission at the time of or after its publication in the Official Journal of the European Union.

<sup>(1)</sup> OJ C 210, 1.9.2006, p. 2.

<sup>(2)</sup> Point 30 of the Guidelines on fines.

<sup>(3)</sup> Commission Notice on cooperation within the Network of Competition Authorities (OJ C 101, 27.4.2004, p. 43).

<sup>(4)</sup> OJ C 101, 27.4.2004, p. 54; point 26.

interests, for example the protection of the purpose of inspections and investigations, within the meaning of Article 4 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents <sup>(1)</sup>, even after the decision has been taken.

41. Final decisions taken by the Commission under Regulation (EC) No 1/2003 are subject to judicial review in accordance with Article 230 of the Treaty. Moreover, as provided in Article 229 of the Treaty and Article 31 of Regulation (EC) No 1/2003, the Court of Justice has unlimited jurisdiction to review decisions on fines adopted pursuant to Article 23 of Regulation (EC) No 1/2003.

### **Overview of the procedure leading to the adoption of a (settlement) Decision pursuant to Articles 7 and 23 of Regulation No (EC) 1/2003**

#### **I. Investigation as usual**

- Parties may express their interest in a hypothetical settlement.

#### **II. Exploratory steps regarding settlement**

- Letter to all companies (and MS) informing of the decision to initiate proceedings in view of settlement (Article 11(6)) and requesting them to express their interest in settlement.

#### **III. Bilateral rounds of settlement discussions**

- Disclosure and exchange of arguments on potential objections, liability, fines range.
- Disclosure of evidence used to establish potential objections, liability, fines.
- Disclosure of other non confidential versions of documents in the file, when justified.

#### **IV. Settlement**

- Conditional settlement submissions by the companies, jointly represented where applicable.
- DG COMP sends acknowledgement of receipt.

#### **V. 'Settled' statement of objections**

- Notification of streamlined SO endorsing company's settlement submissions, where appropriate.
- Company's reply to SO confirming clearly that it reflects its settlement submission.

#### **VI. 'Settlement' Decision pursuant to Articles 7 and 23 of Regulation No (EC) 1/2003**

- Advisory Committee on a draft streamlined final decision.

If College of Commissioners agrees:

- Adoption of streamlined final decision.

<sup>(1)</sup> OJ L 145, 31.5.2001, p. 43.

## Commission Notice on Immunity from fines and reduction of fines in cartel cases

(Text with EEA relevance)

(2006/C 298/11)

### I. INTRODUCTION

- (1) This notice sets out the framework for rewarding cooperation in the Commission investigation by undertakings which are or have been party to secret cartels affecting the Community. Cartels are agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors. Such practices are among the most serious violations of Article 81 EC <sup>(1)</sup>.
- (2) By artificially limiting the competition that would normally prevail between them, undertakings avoid exactly those pressures that lead them to innovate, both in terms of product development and the introduction of more efficient production methods. Such practices also lead to more expensive raw materials and components for the Community companies that purchase from such producers. They ultimately result in artificial prices and reduced choice for the consumer. In the long term, they lead to a loss of competitiveness and reduced employment opportunities.
- (3) By their very nature, secret cartels are often difficult to detect and investigate without the cooperation of undertakings or individuals implicated in them. Therefore, the Commission considers that it is in the Community interest to reward undertakings involved in this type of illegal practices which are willing to put an end to their participation and co-operate in the Commission's investigation, independently of the rest of the undertakings involved in the cartel. The interests of consumers and citizens in ensuring that secret cartels are detected and punished outweigh the interest in fining those undertakings that enable the Commission to detect and prohibit such practices.
- (4) The Commission considers that the collaboration of an undertaking in the detection of the existence of a cartel has an intrinsic value. A decisive contribution to the opening of an investigation or to the finding of an infringement may justify the granting of immunity from any fine to the undertaking in question, on condition that certain additional requirements are fulfilled.
- (5) Moreover, co-operation by one or more undertakings may justify a reduction of a fine by the Commission. Any reduction of a fine must reflect an undertaking's actual contribution, in terms of quality and timing, to the Commission's establishment of the infringement. Reductions are to be limited to those undertakings that provide the Commission with evidence that adds significant value to that already in the Commission's possession.
- (6) In addition to submitting pre-existing documents, undertakings may provide the Commission with voluntary presentations of their knowledge of a cartel and their role therein prepared specially to be submitted under this leniency programme. These initiatives have proved to be useful for the effective investigation and termination of cartel infringements and they should not be discouraged by discovery orders issued in civil litigation. Potential leniency applicants might be dissuaded from cooperating with the Commission under this Notice if this could impair their position in civil proceedings, as compared to companies who do not cooperate. Such undesirable effect would significantly harm the public interest in ensuring effective public enforcement of Article 81 EC in cartel cases and thus its subsequent or parallel effective private enforcement.
- (7) The supervisory task conferred on the Commission by the Treaty in competition matters does not only include the duty to investigate and punish individual infringements, but also encompasses the duty to pursue a general policy. The protection of corporate statements in the public interest is not a bar to their disclosure to other addressees of the statement of objections in order to safeguard their rights of defence in the procedure before the Commission, to the extent that it is technically possible to combine both interests by rendering corporate statements accessible only at the Commission premises and normally on a single occasion following the formal notification of the objections. Moreover, the Commission will process personal data in the context of this notice in conformity with its obligations under Regulation (EC) No 45/2001. <sup>(2)</sup>

### II. IMMUNITY FROM FINES

#### A. Requirements to qualify for immunity from fines

- (8) The Commission will grant immunity from any fine which would otherwise have been imposed to an undertaking disclosing its participation in an alleged cartel

<sup>(1)</sup> Reference in this text to Article 81 EC also covers Article 53 EEA when applied by the Commission according to the rules laid down in Article 56 of the EEA Agreement.

<sup>(2)</sup> OJ L 8, 12.1.2001, p. 1.



affecting the Community if that undertaking is the first to submit information and evidence which in the Commission's view will enable it to:

- (a) carry out a targeted inspection in connection with the alleged cartel <sup>(1)</sup>; or
  - (b) find an infringement of Article 81 EC in connection with the alleged cartel.
- (9) For the Commission to be able to carry out a targeted inspection within the meaning of point (8)(a), the undertaking must provide the Commission with the information and evidence listed below, to the extent that this, in the Commission's view, would not jeopardize the inspections:
- (a) A corporate statement <sup>(2)</sup> which includes, in so far as it is known to the applicant at the time of the submission:
    - A detailed description of the alleged cartel arrangement, including for instance its aims, activities and functioning; the product or service concerned, the geographic scope, the duration of and the estimated market volumes affected by the alleged cartel; the specific dates, locations, content of and participants in alleged cartel contacts, and all relevant explanations in connection with the pieces of evidence provided in support of the application.
    - The name and address of the legal entity submitting the immunity application as well as the names and addresses of all the other undertakings that participate(d) in the alleged cartel;
    - The names, positions, office locations and, where necessary, home addresses of all individuals who, to the applicant's knowledge, are or have been involved in the alleged cartel, including those individuals which have been involved on the applicant's behalf;
    - Information on which other competition authorities, inside or outside the EU, have been approached or are intended to be approached in relation to the alleged cartel; and
  - (b) Other evidence relating to the alleged cartel in possession of the applicant or available to it at the time of the submission, including in particular any evidence contemporaneous to the infringement.

<sup>(1)</sup> The assessment of the threshold will have to be carried out *ex ante*, i.e. without taking into account whether a given inspection has or has not been successful or whether or not an inspection has or has not been carried out. The assessment will be made exclusively on the basis of the type and the quality of the information submitted by the applicant.

<sup>(2)</sup> Corporate statements may take the form of written documents signed by or on behalf of the undertaking or be made orally.

(10) Immunity pursuant to point (8)(a) will not be granted if, at the time of the submission, the Commission had already sufficient evidence to adopt a decision to carry out an inspection in connection with the alleged cartel or had already carried out such an inspection.

(11) Immunity pursuant to point (8)(b) will only be granted on the cumulative conditions that the Commission did not have, at the time of the submission, sufficient evidence to find an infringement of Article 81 EC in connection with the alleged cartel and that no undertaking had been granted conditional immunity from fines under point (8)(a) in connection with the alleged cartel. In order to qualify, an undertaking must be the first to provide contemporaneous, incriminating evidence of the alleged cartel as well as a corporate statement containing the kind of information specified in point (9)(a), which would enable the Commission to find an infringement of Article 81 EC.

(12) In addition to the conditions set out in points (8)(a), (9) and (10) or in points (8)(b) and 11, all the following conditions must be met in any case to qualify for any immunity from a fine:

- (a) The undertaking cooperates genuinely <sup>(3)</sup>, fully, on a continuous basis and expeditiously from the time it submits its application throughout the Commission's administrative procedure. This includes:
  - providing the Commission promptly with all relevant information and evidence relating to the alleged cartel that comes into its possession or is available to it;
  - remaining at the Commission's disposal to answer promptly to any request that may contribute to the establishment of the facts;
  - making current (and, if possible, former) employees and directors available for interviews with the Commission;
  - not destroying, falsifying or concealing relevant information or evidence relating to the alleged cartel; and
  - not disclosing the fact or any of the content of its application before the Commission has issued a statement of objections in the case, unless otherwise agreed;

<sup>(3)</sup> This requires in particular that the applicant provides accurate, not misleading, and complete information. Cfr judgement of the European Court of Justice of 29 June 2006 in case C-301/04 P, *Commission v SGL Carbon AG a.o.*, at paragraphs 68-70, and judgement of the European Court of Justice of 28 June 2005 in cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P and C-213/02 P, *Dansk Rørindustri A/S a.o. v. Commission*, at paragraphs 395-399.

- (b) The undertaking ended its involvement in the alleged cartel immediately following its application, except for what would, in the Commission's view, be reasonably necessary to preserve the integrity of the inspections;
  - (c) When contemplating making its application to the Commission, the undertaking must not have destroyed, falsified or concealed evidence of the alleged cartel nor disclosed the fact or any of the content of its contemplated application, except to other competition authorities.
- (13) An undertaking which took steps to coerce other undertakings to join the cartel or to remain in it is not eligible for immunity from fines. It may still qualify for a reduction of fines if it fulfils the relevant requirements and meets all the conditions therefor.
- (a) provide the Commission with all information and evidence relating to the alleged cartel available to it, as specified in points (8) and (9), including corporate statements; or
  - (b) initially present this information and evidence in hypothetical terms, in which case the undertaking must present a detailed descriptive list of the evidence it proposes to disclose at a later agreed date. This list should accurately reflect the nature and content of the evidence, whilst safeguarding the hypothetical nature of its disclosure. Copies of documents, from which sensitive parts have been removed, may be used to illustrate the nature and content of the evidence. The name of the applying undertaking and of other undertakings involved in the alleged cartel need not be disclosed until the evidence described in its application is submitted. However, the product or service concerned by the alleged cartel, the geographic scope of the alleged cartel and the estimated duration must be clearly identified.

#### B. Procedure

- (14) An undertaking wishing to apply for immunity from fines should contact the Commission's Directorate General for Competition. The undertaking may either initially apply for a marker or immediately proceed to make a formal application to the Commission for immunity from fines in order to meet the conditions in points (8)(a) or (8)(b), as appropriate. The Commission may disregard any application for immunity from fines on the ground that it has been submitted after the statement of objections has been issued.
- (15) The Commission services may grant a marker protecting an immunity applicant's place in the queue for a period to be specified on a case-by-case basis in order to allow for the gathering of the necessary information and evidence. To be eligible to secure a marker, the applicant must provide the Commission with information concerning its name and address, the parties to the alleged cartel, the affected product(s) and territory(-ies), the estimated duration of the alleged cartel and the nature of the alleged cartel conduct. The applicant should also inform the Commission on other past or possible future leniency applications to other authorities in relation to the alleged cartel and justify its request for a marker. Where a marker is granted, the Commission services determine the period within which the applicant has to perfect the marker by submitting the information and evidence required to meet the relevant threshold for immunity. Undertakings which have been granted a marker cannot perfect it by making a formal application in hypothetical terms. If the applicant perfects the marker within the period set by the Commission services, the information and evidence provided will be deemed to have been submitted on the date when the marker was granted.
- (16) An undertaking making a formal immunity application to the Commission must:
- (17) If requested, the Directorate General for Competition will provide an acknowledgement of receipt of the undertaking's application for immunity from fines, confirming the date and, where appropriate, time of the application.
  - (18) Once the Commission has received the information and evidence submitted by the undertaking under point (16)(a) and has verified that it meets the conditions set out in points (8)(a) or (8)(b), as appropriate, it will grant the undertaking conditional immunity from fines in writing.
  - (19) If the undertaking has presented information and evidence in hypothetical terms, the Commission will verify that the nature and content of the evidence described in the detailed list referred to in point (16)(b) will meet the conditions set out in points (8)(a) or (8)(b), as appropriate, and inform the undertaking accordingly. Following the disclosure of the evidence no later than on the date agreed and having verified that it corresponds to the description made in the list, the Commission will grant the undertaking conditional immunity from fines in writing.
  - (20) If it becomes apparent that immunity is not available or that the undertaking failed to meet the conditions set out in points (8)(a) or (8)(b), as appropriate, the Commission will inform the undertaking in writing. In such case, the undertaking may withdraw the evidence disclosed for the purposes of its immunity application or request the Commission to consider it under section III of this notice. This does not prevent the Commission from using its normal powers of investigation in order to obtain the information.

(21) The Commission will not consider other applications for immunity from fines before it has taken a position on an existing application in relation to the same alleged infringement, irrespective of whether the immunity application is presented formally or by requesting a marker.

(22) If at the end of the administrative procedure, the undertaking has met the conditions set out in point (12), the Commission will grant it immunity from fines in the relevant decision. If at the end of the administrative procedure, the undertaking has not met the conditions set out in point (12), the undertaking will not benefit from any favorable treatment under this Notice. If the Commission, after having granted conditional immunity ultimately finds that the immunity applicant has acted as a coercer, it will withhold immunity.

### III. REDUCTION OF A FINE

#### A. Requirements to qualify for reduction of a fine

(23) Undertakings disclosing their participation in an alleged cartel affecting the Community that do not meet the conditions under section II above may be eligible to benefit from a reduction of any fine that would otherwise have been imposed.

(24) In order to qualify, an undertaking must provide the Commission with evidence of the alleged infringement which represents significant added value with respect to the evidence already in the Commission's possession and must meet the cumulative conditions set out in points (12)(a) to (12)(c) above.

(25) The concept of 'added value' refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission's ability to prove the alleged cartel. In this assessment, the Commission will generally consider written evidence originating from the period of time to which the facts pertain to have a greater value than evidence subsequently established. Incriminating evidence directly relevant to the facts in question will generally be considered to have a greater value than that with only indirect relevance. Similarly, the degree of corroboration from other sources required for the evidence submitted to be relied upon against other undertakings involved in the case will have an impact on the value of that evidence, so that compelling evidence will be attributed a greater value than evidence such as statements which require corroboration if contested.

(26) The Commission will determine in any final decision adopted at the end of the administrative procedure the level of reduction an undertaking will benefit from, relative to the fine which would otherwise be imposed. For the:

- first undertaking to provide significant added value: a reduction of 30-50 %,

- second undertaking to provide significant added value: a reduction of 20-30 %,

- subsequent undertakings that provide significant added value: a reduction of up to 20 %.

In order to determine the level of reduction within each of these bands, the Commission will take into account the time at which the evidence fulfilling the condition in point (24) was submitted and the extent to which it represents added value.

If the applicant for a reduction of a fine is the first to submit compelling evidence in the sense of point (25) which the Commission uses to establish additional facts increasing the gravity or the duration of the infringement, the Commission will not take such additional facts into account when setting any fine to be imposed on the undertaking which provided this evidence.

#### B. Procedure

(27) An undertaking wishing to benefit from a reduction of a fine must make a formal application to the Commission and it must present it with sufficient evidence of the alleged cartel to qualify for a reduction of a fine in accordance with point (24) of this Notice. Any voluntary submission of evidence to the Commission which the undertaking that submits it wishes to be considered for the beneficial treatment of section III of this Notice must be clearly identified at the time of its submission as being part of a formal application for a reduction of a fine.

(28) If requested, the Directorate General for Competition will provide an acknowledgement of receipt of the undertaking's application for a reduction of a fine and of any subsequent submissions of evidence, confirming the date and, where appropriate, time of each submission. The Commission will not take any position on an application for a reduction of a fine before it has taken a position on any existing applications for conditional immunity from fines in relation to the same alleged cartel.

(29) If the Commission comes to the preliminary conclusion that the evidence submitted by the undertaking constitutes significant added value within the meaning of points (24) and (25), and that the undertaking has met the conditions of points (12) and (27), it will inform the undertaking in writing, no later than the date on which a statement of objections is notified, of its intention to apply a reduction of a fine within a specified band as provided in point (26). The Commission will also, within the same time frame, inform the undertaking in writing if it comes to the preliminary conclusion that the undertaking does not qualify for a reduction of a fine. The Commission may disregard any application for a reduction of fines on the grounds that it has been submitted after the statement of objections has been issued.

(30) The Commission will evaluate the final position of each undertaking which filed an application for a reduction of a fine at the end of the administrative procedure in any decision adopted. The Commission will determine in any such final decision:

- (a) whether the evidence provided by an undertaking represented significant added value with respect to the evidence in the Commission's possession at that same time;
- (b) whether the conditions set out in points (12)(a) to (12)(c) above have been met;
- (c) the exact level of reduction an undertaking will benefit from within the bands specified in point (26).

If the Commission finds that the undertaking has not met the conditions set out in point (12), the undertaking will not benefit from any favourable treatment under this Notice.

#### IV. CORPORATE STATEMENTS MADE TO QUALIFY UNDER THIS NOTICE

- (31) A corporate statement is a voluntary presentation by or on behalf of an undertaking to the Commission of the undertaking's knowledge of a cartel and its role therein prepared specially to be submitted under this Notice. Any statement made vis-à-vis the Commission in relation to this notice, forms part of the Commission's file and can thus be used in evidence.
- (32) Upon the applicant's request, the Commission may accept that corporate statements be provided orally unless the applicant has already disclosed the content of the corporate statement to third parties. Oral corporate statements will be recorded and transcribed at the Commission's premises. In accordance with Article 19 of Council Regulation (EC) No 1/2003<sup>(1)</sup> and Articles 3 and 17 of Commission Regulation (EC) No 773/2004<sup>(2)</sup>, undertakings making oral corporate statements will be granted the opportunity to check the technical accuracy of the recording, which will be available at the Commission's premises and to correct the substance of their oral statements within a given time limit. Undertakings may waive these rights within the said time-limit, in which case the recording will from that moment on be deemed to have been approved. Following the explicit or implicit approval of the oral statement or the submission of any corrections to it, the undertaking shall listen to the recordings at the Commission's premises and check the accuracy of the transcript within a given time limit. Non-compliance with the last requirement may lead to the loss of any beneficial treatment under this Notice.

(33) Access to corporate statements is only granted to the addressees of a statement of objections, provided that they commit, — together with the legal counsels getting access on their behalf —, not to make any copy by mechanical or electronic means of any information in the corporate statement to which access is being granted and to ensure that the information to be obtained from the corporate statement will solely be used for the purposes mentioned below. Other parties such as complainants will not be granted access to corporate statements. The Commission considers that this specific protection of a corporate statement is not justified as from the moment when the applicant discloses to third parties the content thereof.

(34) In accordance with the Commission Notice on rules for access to the Commission file<sup>(3)</sup>, access to the file is only granted to the addressees of a statement of objections on the condition that the information thereby obtained may only be used for the purposes of judicial or administrative proceedings for the application of the Community competition rules at issue in the related administrative proceedings. The use of such information for a different purpose during the proceeding may be regarded as lack of cooperation within the meaning of points (12) and (27) of this Notice. Moreover, if any such use is made after the Commission has already adopted a prohibition decision in the proceeding, the Commission may, in any legal proceedings before the Community Courts, ask the Court to increase the fine in respect of the responsible undertaking. Should the information be used for a different purpose, at any point in time, with the involvement of an outside counsel, the Commission may report the incident to the bar of that counsel, with a view to disciplinary action.

(35) Corporate statements made under the present Notice will only be transmitted to the competition authorities of the Member States pursuant to Article 12 of Regulation No 1/2003, provided that the conditions set out in the Network Notice<sup>(4)</sup> are met and provided that the level of protection against disclosure awarded by the receiving competition authority is equivalent to the one conferred by the Commission.

#### V. GENERAL CONSIDERATIONS

(36) The Commission will not take a position on whether or not to grant conditional immunity, or otherwise on whether or not to reward any application, if it becomes apparent that the application concerns infringements covered by the five years limitation period for the imposition of penalties stipulated in Article 25(1)(b) of Regulation 1/2003, as such applications would be devoid of purpose.

<sup>(1)</sup> OJ L 1, 4.1.2003, p. 1.

<sup>(2)</sup> OJ L 123, 27.4.2004, p. 18.

<sup>(3)</sup> OJ C 325, 22.12.2005, p. 7.

<sup>(4)</sup> Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.4.2004, p. 43.

- (37) From the date of its publication in the Official Journal, this notice replaces the 2002 Commission notice on immunity from fines and reduction of fines in cartel cases for all cases in which no undertaking has contacted the Commission in order to take advantage of the favourable treatment set out in that notice. However, points (31) to (35) of the current notice will be applied from the moment of its publication to all pending and new applications for immunity from fines or reduction of fines.
- (38) The Commission is aware that this notice will create legitimate expectations on which undertakings may rely when disclosing the existence of a cartel to the Commission.
- (39) In line with the Commission's practice, the fact that an undertaking cooperated with the Commission during its administrative procedure will be indicated in any decision, so as to explain the reason for the immunity or reduction of the fine. The fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 81 EC.
- (40) The Commission considers that normally public disclosure of documents and written or recorded statements received in the context of this notice would undermine certain public or private interests, for example the protection of the purpose of inspections and investigations, within the meaning of Article 4 of Regulation (EC) No 1049/2001 <sup>(1)</sup>, even after the decision has been taken.
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<sup>(1)</sup> OJ L 145, 31.5.2001, p. 43.



## **E. BLOCK EXEMPTIONS (ARTICLE 101(3) OF THE TFEU)**





## **E.1 VERTICAL AGREEMENTS**



This document is meant purely as a documentation tool and the institutions do not assume any liability for its contents

► **B**

**REGULATION No 19/65/EEC OF THE COUNCIL  
of 2 March 1965**

**on application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices**

(OJ P 36, 6.3.1965, p. 533)

Amended by:

		Official Journal		
		No	page	date
► <b><u>M1</u></b>	Council Regulation (EC) No 1215/1999 of 10 June 1999	L 148	1	15.6.1999
► <b><u>M2</u></b>	Council Regulation (EC) No 1/2003 of 16 December 2002	L 1	1	4.1.2003

Amended by:

► <b><u>A1</u></b>	Act of Accession of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland	L 73	14	27.3.1972
► <b><u>A2</u></b>	Act of Accession of Greece	L 291	17	19.11.1979
► <b><u>A3</u></b>	Act of Accession of Spain and Portugal	L 302	23	15.11.1985
► <b><u>A4</u></b>	Act of Accession of Austria, Sweden and Finland	C 241	21	29.8.1994
	(adapted by Council Decision 95/1/EC, Euratom, ECSC)	L 1	1	1.1.1995



**REGULATION No 19/65/EEC OF THE COUNCIL  
of 2 March 1965**

**on application of Article 85 (3) of the Treaty to certain categories  
of agreements and concerted practices**

THE COUNCIL OF THE EUROPEAN ECONOMIC COMMUNITY,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 87 thereof;

Having regard to the proposal from the Commission;

Having regard to the Opinion of the European Parliament <sup>(1)</sup>;

Having regard to the Opinion of the Economic and Social Committee <sup>(2)</sup>;

Whereas Article 85 (1) of the Treaty may in accordance with Article 85 (3) be declared inapplicable to certain categories of agreements, decisions and concerted practices which fulfil the conditions contained in Article 85 (3);

Whereas the provisions for implementation of Article 85 (3) must be adopted by way of regulation pursuant to Article 87;

Whereas in view of the large number of notifications submitted in pursuance of Regulation No 17 <sup>(3)</sup> it is desirable that in order to facilitate the task of the Commission it should be enabled to declare by way of regulation that the provisions of Article 85 (1) do not apply to certain categories of agreements and concerted practices;

Whereas it should be laid down under what conditions the Commission, in close and constant liaison with the competent authorities of the Member States, may exercise such powers after sufficient experience has been gained in the light of individual decisions and it becomes possible to define categories of agreements and concerted practices in respect of which the conditions of Article 85 (3) may be considered as being fulfilled;

Whereas the Commission has indicated by the action it has taken, in particular by Regulation No 153, <sup>(4)</sup> that there can be no easing of the procedures prescribed by Regulation No 17 in respect of certain types of agreements and concerted practices that are particularly liable to distort competition in the common market;

Whereas under Article 6 of Regulation No 17 the Commission may provide that a decision taken pursuant to Article 85 (3) of the Treaty shall apply with retroactive effect; whereas it is desirable that the Commission be also empowered to adopt, by regulation, provisions to the like effect;

Whereas under Article 7 of Regulation No 17 agreements, decisions and concerted practices may, by decision of the Commission, be exempted from prohibition in particular if they are modified in such manner that they satisfy the requirements of Article 85 (3); whereas it is desirable that the Commission be enabled to grant like exemption by regulation to such agreements and concerted practices if they are modified in such manner as to fall within a category defined in an exempting regulation;

Whereas, since there can be no exemption if the conditions set out in Article 85 (3) are not satisfied, the Commission must have power to lay down by decision the conditions that must be satisfied by an agreement

<sup>(1)</sup> OJ No 81, 27.5.1964, p. 1275/64.

<sup>(2)</sup> OJ No 197, 30.11.1964, p. 3320/64.

<sup>(3)</sup> OJ No 13, 21.2.1962, p. 204/62 (Regulation No 17 as amended by Regulation No 59 - OJ No 58, 10.7.1962, p. 1655/62 - and Regulation No 118/63/EEC - OJ No 162, 7.11.1963, p. 2696/63.

<sup>(4)</sup> OJ No 139, 24.12.1962, p. 2918/62.

**▼B**

or concerted practice which owing to special circumstances has certain effects incompatible with Article 85 (3);

HAS ADOPTED THIS REGULATION:

*Article 1***▼M1**

1. Without prejudice to the application of Regulation No 17 and in accordance with Article 81(3) of the Treaty the Commission may by regulation declare that Article 81(1) shall not apply to:

- (a) categories of agreements which are entered into by two or more undertakings, each operating, for the purposes of the agreement, at a different level of the production or distribution chain, and which relate to the conditions under which the parties may purchase, sell or resell certain goods or services,
- (b) categories of agreements to which only two undertakings are party and which include restrictions imposed in relation to the acquisition or use of industrial property rights, in particular of patents, utility models, designs or trade marks, or to the rights arising out of contracts for assignment of, or the right to use, a method of manufacture or knowledge relating to the use or to the application of industrial processes.

**▼B**

2. The regulation shall define the categories of agreements to which it applies and shall specify in particular:

- (a) the restrictions or clauses which must not be contained in the agreements;
- (b) ►**M1** ————— ◀ the other conditions which must be satisfied.

**▼M1**

3. Paragraphs 1 and 2 shall apply by analogy to categories of concerted practices.

*Article 1a*

A regulation pursuant to Article 1 may stipulate the conditions which may lead to the exclusion from its application of certain parallel networks of similar agreements or concerted practices operating on particular market; when these circumstances are fulfilled the Commission may establish this by means of regulation and fix a period at the expiry of which the Regulation pursuant to Article 1 would no longer be applicable in respect of the relevant agreements or concerted practices on that market; such period must not be shorter than six months.

**▼B***Article 2*

- 1. A regulation pursuant to Article 1 shall be made for a specified period.
- 2. It may be repealed or amended where circumstances have changed with respect to any factor which was basic to its being made; in such case, a period shall be fixed for modification of the agreements and concerted practices to which the earlier regulation applies.

*Article 3*

A regulation pursuant to Article 1 may stipulate that it shall apply with retroactive effect to agreements and concerted practices to which, at the date of entry into force of that regulation, a decision issued with retroactive effect in pursuance of Article 6 of Regulation No 17 would have applied.

**▼B***Article 4*

1. A regulation pursuant to Article 1 may stipulate that the prohibition contained in Article 85 (1) of the Treaty shall not apply, for such period as shall be fixed by that regulation, to agreements and concerted practices already in existence on 13 March 1962 which do not satisfy the conditions of Article 85 (3), where:

- within three months from the entry into force of the Regulation, they are so modified as to satisfy the said conditions in accordance with the provisions of the regulation; and
- the modifications are brought to the notice of the Commission within the time limit fixed by the regulation.

**▼A1**

A regulation pursuant to Article 1 may stipulate that the prohibition contained in Article 85(1) of the Treaty shall not apply, for such period as shall be fixed by that regulation, to agreements and concerted practices already in existence at the date of accession to which Article 85 applies by virtue of accession and which do not satisfy the conditions of Article 85(3), where:

**▼A3**

The provisions of the preceding subparagraph shall apply in the same way in the case of the accession of the Hellenic Republic, the Kingdom of Spain and of the Portuguese Republic.

**▼A4**

The provisions of the preceding subparagraphs shall apply in the same way in the case of the accession of Austria, Finland and Sweden.

**▼B**

2. Paragraph 1 shall apply to agreements and concerted practices which had to be notified before 1 February 1963, in accordance with Article 5 of Regulation No 17, only where they have been so notified before that date.

**▼A1**

Paragraph 1 shall not apply to agreements and concerted practices to which Article 85(1) of the Treaty applies by virtue of accession and which must be notified before 1 July 1973, in accordance with Articles 5 and 25 of Regulation No 17, unless they have been so notified before that date.

**▼A2**

Paragraph 1 shall not apply to agreements and concerted practices to which Article 85 (1) of the Treaty applies by virtue of the accession of the Hellenic Republic and which must be notified before 1 July 1981, in accordance with Articles 5 and 25 of Regulation No 17, unless they have been so notified before that date.

**▼A3**

Paragraph 2 shall not apply to agreements and concerted practices to which Article 85 (1) of the Treaty applies by virtue of the accession of the Kingdom of Spain and of the Portuguese Republic and which must be notified before 1 July 1986, in accordance with Articles 5 and 25 of Regulation No 17, unless they have been so notified before that date.

**▼A4**

Paragraph 1 shall not apply to agreements and concerted practices to which Article 85 (1) of the Treaty applies by virtue of the accession of Austria, Finland and Sweden and which must be notified within six months of accession, in accordance with Articles 5 and 25 of Regulation No 17, unless they have been so notified within that period. The present paragraph shall not apply to agreements and concerted practices which at the date of accession already fall under Article 53 (1) of the EEA Agreement.

**▼B**

3. The benefit of the provisions laid down pursuant to paragraph 1 may not be claimed in actions pending at the date of entry into force

**▼B**

of a regulation adopted pursuant to Article 1; neither may it be relied on as grounds for claims for damages against third parties.

*Article 5*

Before adopting a regulation, the Commission shall publish a draft thereof and invite all persons concerned to submit their comments within such time limit, being not less than one month, as the Commission shall fix.

*Article 6***▼M1**

1. The Commission shall consult the Advisory Committee on Restrictive Practices and Monopolies:

- (a) with regard to a regulation pursuant to Article 1 before publishing a draft regulation and before adopting a regulation;
- (b) with regard to a regulation pursuant to Article 1a before publishing a draft regulation if requested by a Member State, and before adopting a regulation.

**▼B**

2. Article 10 (5) and (6) of Regulation No 17, relating to consultation with the Advisory Committee, shall apply by analogy, it being understood that joint meetings with the Commission shall take place not earlier than one month after dispatch of the notice convening them.

**▼M2****▼B***Article 8*

The Commission shall, before 1 January 1970, submit to the Council a proposal for a Regulation for such amendment of this Regulation as may prove necessary in the light of experience.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

## II

(Non-legislative acts)

## REGULATIONS

## 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**

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation No 19/65/EEC of the Council of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices <sup>(1)</sup>, and in particular Article 1 thereof,

Having published a draft of this Regulation,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

of the Treaty to categories of vertical agreements and concerted practices <sup>(2)</sup> defines a category of vertical agreements which the Commission regarded as normally satisfying the conditions laid down in Article 101(3) of the Treaty. In view of the overall positive experience with the application of that Regulation, which expires on 31 May 2010, and taking into account further experience acquired since its adoption, it is appropriate to adopt a new block exemption regulation.

(3) The category of agreements which can be regarded as normally satisfying the conditions laid down in Article 101(3) of the Treaty includes vertical agreements for the purchase or sale of goods or services where those agreements are concluded between non-competing undertakings, between certain competitors or by certain associations of retailers of goods. It also includes vertical agreements containing ancillary provisions on the assignment or use of intellectual property rights. The term 'vertical agreements' should include the corresponding concerted practices.

(1) Regulation No 19/65/EEC empowers the Commission to apply Article 101(3) of the Treaty on the Functioning of the European Union (\*) by regulation to certain categories of vertical agreements and corresponding concerted practices falling within Article 101(1) of the Treaty.

(2) Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3)

(4) For the application of Article 101(3) of the Treaty by regulation, it is not necessary to define those vertical agreements which are capable of falling within Article 101(1) of the Treaty. In the individual assessment of agreements under Article 101(1) of the Treaty, account has to be taken of several factors, and in particular the market structure on the supply and purchase side.

(5) The benefit of the block exemption established by this Regulation should be limited to vertical agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty.

<sup>(1)</sup> OJ 36, 6.3.1965, p. 533.

(\*) With effect from 1 December 2009, Article 81 of the EC Treaty has become Article 101 of the Treaty on the Functioning of the European Union. The two Articles are, in substance, identical. For the purposes of this Regulation, references to Article 101 of the Treaty on the Functioning of the European Union should be understood as references to Article 81 of the EC Treaty where appropriate.

<sup>(2)</sup> OJ L 336, 29.12.1999, p. 21.



- (6) Certain types of vertical agreements can improve economic efficiency within a chain of production or distribution by facilitating better coordination between the participating undertakings. In particular, they can lead to a reduction in the transaction and distribution costs of the parties and to an optimisation of their sales and investment levels.
- (7) The likelihood that such efficiency-enhancing effects will outweigh any anti-competitive effects due to restrictions contained in vertical agreements depends on the degree of market power of the parties to the agreement and, therefore, on the extent to which those undertakings face competition from other suppliers of goods or services regarded by their customers as interchangeable or substitutable for one another, by reason of the products' characteristics, their prices and their intended use.
- (8) It can be presumed that, where the market share held by each of the undertakings party to the agreement on the relevant market does not exceed 30 %, vertical agreements which do not contain certain types of severe restrictions of competition generally lead to an improvement in production or distribution and allow consumers a fair share of the resulting benefits.
- (9) Above the market share threshold of 30 %, there can be no presumption that vertical agreements falling within the scope of Article 101(1) of the Treaty will usually give rise to objective advantages of such a character and size as to compensate for the disadvantages which they create for competition. At the same time, there is no presumption that those vertical agreements are either caught by Article 101(1) of the Treaty or that they fail to satisfy the conditions of Article 101(3) of the Treaty.
- (10) This Regulation should not exempt vertical agreements containing restrictions which are likely to restrict competition and harm consumers or which are not indispensable to the attainment of the efficiency-enhancing effects. In particular, vertical agreements containing certain types of severe restrictions of competition such as minimum and fixed resale-prices, as well as certain types of territorial protection, should be excluded from the benefit of the block exemption established by this Regulation irrespective of the market share of the undertakings concerned.
- (11) In order to ensure access to or to prevent collusion on the relevant market, certain conditions should be attached to the block exemption. To this end, the exemption of non-compete obligations should be limited to obligations which do not exceed a defined duration. For the same reasons, any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers should be excluded from the benefit of this Regulation.
- (12) The market-share limitation, the non-exemption of certain vertical agreements and the conditions provided for in this Regulation normally ensure that the agreements to which the block exemption applies do not enable the participating undertakings to eliminate competition in respect of a substantial part of the products in question.
- (13) The Commission may withdraw the benefit of this Regulation, pursuant to Article 29(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty <sup>(1)</sup>, where it finds in a particular case that an agreement to which the exemption provided for in this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty.
- (14) The competition authority of a Member State may withdraw the benefit of this Regulation pursuant to Article 29(2) of Regulation (EC) No 1/2003 in respect of the territory of that Member State, or a part thereof where, in a particular case, an agreement to which the exemption provided for in this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty in the territory of that Member State, or in a part thereof, and where such territory has all the characteristics of a distinct geographic market.
- (15) In determining whether the benefit of this Regulation should be withdrawn pursuant to Article 29 of Regulation (EC) No 1/2003, the anti-competitive effects that may derive from the existence of parallel networks of vertical agreements that have similar effects which significantly restrict access to a relevant market or competition therein are of particular importance. Such cumulative effects may for example arise in the case of selective distribution or non compete obligations.
- (16) In order to strengthen supervision of parallel networks of vertical agreements which have similar anti-competitive effects and which cover more than 50 % of a given market, the Commission may by regulation declare this Regulation inapplicable to vertical agreements containing specific restraints relating to the market concerned, thereby restoring the full application of Article 101 of the Treaty to such agreements,

<sup>(1)</sup> OJ L 1, 4.1.2003, p. 1.

HAS ADOPTED THIS REGULATION:

#### Article 1

#### Definitions

1. For the purposes of this Regulation, the following definitions shall apply:

- (a) 'vertical agreement' means an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services;
- (b) 'vertical restraint' means a restriction of competition in a vertical agreement falling within the scope of Article 101(1) of the Treaty;
- (c) 'competing undertaking' means an actual or potential competitor; 'actual competitor' means an undertaking that is active on the same relevant market; 'potential competitor' means an undertaking that, in the absence of the vertical agreement, would, on realistic grounds and not just as a mere theoretical possibility, in case of a small but permanent increase in relative prices be likely to undertake, within a short period of time, the necessary additional investments or other necessary switching costs to enter the relevant market;
- (d) 'non-compete obligation' means any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80 % of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market, calculated on the basis of the value or, where such is standard industry practice, the volume of its purchases in the preceding calendar year;
- (e) 'selective distribution system' means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system;

(f) 'intellectual property rights' includes industrial property rights, know how, copyright and neighbouring rights;

(g) 'know-how' means a package of non-patented practical information, resulting from experience and testing by the supplier, which is secret, substantial and identified: in this context, 'secret' means that the know-how is not generally known or easily accessible; 'substantial' means that the know-how is significant and useful to the buyer for the use, sale or resale of the contract goods or services; 'identified' means that the know-how is described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;

(h) 'buyer' includes an undertaking which, under an agreement falling within Article 101(1) of the Treaty, sells goods or services on behalf of another undertaking;

(i) 'customer of the buyer' means an undertaking not party to the agreement which purchases the contract goods or services from a buyer which is party to the agreement.

2. For the purposes of this Regulation, the terms 'undertaking', 'supplier' and 'buyer' shall include their respective connected undertakings.

'Connected undertakings' means:

- (a) undertakings in which a party to the agreement, directly or indirectly:
  - (i) has the power to exercise more than half the voting rights, or
  - (ii) has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or
  - (iii) has the right to manage the undertaking's affairs;
- (b) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in point (a);

- (c) undertakings in which an undertaking referred to in point (b) has, directly or indirectly, the rights or powers listed in point (a);
- (d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in points (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in point (a);
- (e) undertakings in which the rights or the powers listed in point (a) are jointly held by:
  - (i) parties to the agreement or their respective connected undertakings referred to in points (a) to (d), or
  - (ii) one or more of the parties to the agreement or one or more of their connected undertakings referred to in points (a) to (d) and one or more third parties.

## Article 2

### Exemption

1. Pursuant to Article 101(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 101(1) of the Treaty shall not apply to vertical agreements.

This exemption shall apply to the extent that such agreements contain vertical restraints.

2. The exemption provided for in paragraph 1 shall apply to vertical agreements entered into between an association of undertakings and its members, or between such an association and its suppliers, only if all its members are retailers of goods and if no individual member of the association, together with its connected undertakings, has a total annual turnover exceeding EUR 50 million. Vertical agreements entered into by such associations shall be covered by this Regulation without prejudice to the application of Article 101 of the Treaty to horizontal agreements concluded between the members of the association or decisions adopted by the association.

3. The exemption provided for in paragraph 1 shall apply to vertical agreements containing provisions which relate to the assignment to the buyer or use by the buyer of intellectual

property rights, provided that those provisions do not constitute the primary object of such agreements and are directly related to the use, sale or resale of goods or services by the buyer or its customers. The exemption applies on condition that, in relation to the contract goods or services, those provisions do not contain restrictions of competition having the same object as vertical restraints which are not exempted under this Regulation.

4. The exemption provided for in paragraph 1 shall not apply to vertical agreements entered into between competing undertakings. However, it shall apply where competing undertakings enter into a non-reciprocal vertical agreement and:

- (a) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level; or
- (b) the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services.

5. This Regulation shall not apply to vertical agreements the subject matter of which falls within the scope of any other block exemption regulation, unless otherwise provided for in such a regulation.

## Article 3

### Market share threshold

1. The exemption provided for in Article 2 shall apply on condition that the market share held by the supplier does not exceed 30 % of the relevant market on which it sells the contract goods or services and the market share held by the buyer does not exceed 30 % of the relevant market on which it purchases the contract goods or services.

2. For the purposes of paragraph 1, where in a multi party agreement an undertaking buys the contract goods or services from one undertaking party to the agreement and sells the contract goods or services to another undertaking party to the agreement, the market share of the first undertaking must respect the market share threshold provided for in that paragraph both as a buyer and a supplier in order for the exemption provided for in Article 2 to apply.

*Article 4***Restrictions that remove the benefit of the block exemption — hardcore restrictions**

The exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

- (a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;
- (b) the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract goods or services, except:
  - (i) the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer,
  - (ii) the restriction of sales to end users by a buyer operating at the wholesale level of trade,
  - (iii) the restriction of sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier to operate that system, and
  - (iv) the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;
- (c) the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility

of prohibiting a member of the system from operating out of an unauthorised place of establishment;

- (d) the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different level of trade;
- (e) the restriction, agreed between a supplier of components and a buyer who incorporates those components, of the supplier's ability to sell the components as spare parts to end-users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods.

*Article 5***Excluded restrictions**

1. The exemption provided for in Article 2 shall not apply to the following obligations contained in vertical agreements:

- (a) any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years;
- (b) any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services;
- (c) any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers.

For the purposes of point (a) of the first subparagraph, a non-compete obligation which is tacitly renewable beyond a period of five years shall be deemed to have been concluded for an indefinite duration.

2. By way of derogation from paragraph 1(a), the time limitation of five years shall not apply where the contract goods or services are sold by the buyer from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer, provided that the duration of the non-compete obligation does not exceed the period of occupancy of the premises and land by the buyer.

3. By way of derogation from paragraph 1(b), the exemption provided for in Article 2 shall apply to any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services where the following conditions are fulfilled:

- (a) the obligation relates to goods or services which compete with the contract goods or services;
- (b) the obligation is limited to the premises and land from which the buyer has operated during the contract period;
- (c) the obligation is indispensable to protect know-how transferred by the supplier to the buyer;
- (d) the duration of the obligation is limited to a period of one year after termination of the agreement.

Paragraph 1(b) is without prejudice to the possibility of imposing a restriction which is unlimited in time on the use and disclosure of know-how which has not entered the public domain.

#### Article 6

##### Non-application of this Regulation

Pursuant to Article 1a of Regulation No 19/65/EEC, the Commission may by regulation declare that, where parallel networks of similar vertical restraints cover more than 50 % of a relevant market, this Regulation shall not apply to vertical agreements containing specific restraints relating to that market.

#### Article 7

##### Application of the market share threshold

For the purposes of applying the market share thresholds provided for in Article 3 the following rules shall apply:

- (a) the market share of the supplier shall be calculated on the basis of market sales value data and the market share of the buyer shall be calculated on the basis of market purchase value data. If market sales value or market purchase value data are not available, estimates based on other reliable market information, including market sales and purchase volumes, may be used to establish the market share of the undertaking concerned;

(b) the market shares shall be calculated on the basis of data relating to the preceding calendar year;

(c) the market share of the supplier shall include any goods or services supplied to vertically integrated distributors for the purposes of sale;

(d) if a market share is initially not more than 30 % but subsequently rises above that level without exceeding 35 %, the exemption provided for in Article 2 shall continue to apply for a period of two consecutive calendar years following the year in which the 30 % market share threshold was first exceeded;

(e) if a market share is initially not more than 30 % but subsequently rises above 35 %, the exemption provided for in Article 2 shall continue to apply for one calendar year following the year in which the level of 35 % was first exceeded;

(f) the benefit of points (d) and (e) may not be combined so as to exceed a period of two calendar years;

(g) the market share held by the undertakings referred to in point (e) of the second subparagraph of Article 1(2) shall be apportioned equally to each undertaking having the rights or the powers listed in point (a) of the second subparagraph of Article 1(2).

#### Article 8

##### Application of the turnover threshold

1. For the purpose of calculating total annual turnover within the meaning of Article 2(2), the turnover achieved during the previous financial year by the relevant party to the vertical agreement and the turnover achieved by its connected undertakings in respect of all goods and services, excluding all taxes and other duties, shall be added together. For this purpose, no account shall be taken of dealings between the party to the vertical agreement and its connected undertakings or between its connected undertakings.

2. The exemption provided for in Article 2 shall remain applicable where, for any period of two consecutive financial years, the total annual turnover threshold is exceeded by no more than 10 %.

*Article 9***Transitional period**

The prohibition laid down in Article 101(1) of the Treaty shall not apply during the period from 1 June 2010 to 31 May 2011 in respect of agreements already in force on 31 May 2010 which do not satisfy the conditions for exemption provided for in this Regulation but which, on 31 May 2010, satisfied the conditions for exemption provided for in Regulation (EC) No 2790/1999.

*Article 10***Period of validity**

This Regulation shall enter into force on 1 June 2010.

It shall expire on 31 May 2022.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 20 April 2010.

*For the Commission*

*The President*

José Manuel BARROSO

## II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES  
AND AGENCIES

## EUROPEAN COMMISSION

**Guidelines on Vertical Restraints**

(Text with EEA relevance)

(2010/C 130/01)

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## I. INTRODUCTION

### 1. Purpose of the Guidelines

- (1) These Guidelines set out the principles for the assessment of vertical agreements under Article 101 of the Treaty on the Functioning of the European Union (\*) (hereinafter 'Article 101')<sup>(1)</sup>. Article 1(1)(a) of 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<sup>(2)</sup> (hereinafter referred to as the 'Block Exemption Regulation') (see paragraphs (24) to (46)) defines the term 'vertical agreement'. These Guidelines are without prejudice to the possible parallel application of Article 102 of the Treaty on the Functioning of the European Union (hereinafter 'Article 102') to vertical agreements. These Guidelines are structured in the following way:

- Section II (paragraphs (8) to (22)) describes vertical agreements which generally fall outside Article 101(1);
- Section III (paragraphs (23) to (73)) clarifies the conditions for the application of the Block Exemption Regulation;
- Section IV (paragraphs (74) to (85)) describes the principles concerning the withdrawal of the block exemption and the disapplication of the Block Exemption Regulation;
- Section V (paragraphs (86) to (95)) provides guidance on how to define the relevant market and calculate market shares;
- Section VI (paragraphs (96) to (229)) describes the general framework of analysis and the enforcement policy of the Commission in individual cases concerning vertical agreements.

- (2) Throughout these Guidelines, the analysis applies to both goods and services, although certain vertical restraints are mainly used in the distribution of goods. Similarly,

vertical agreements can be concluded for intermediate and final goods and services. Unless otherwise stated, the analysis and arguments in these Guidelines apply to all types of goods and services and to all levels of trade. Thus, the term 'products' includes both goods and services. The terms 'supplier' and 'buyer' are used for all levels of trade. The Block Exemption Regulation and these Guidelines do not apply to agreements with final consumers where the latter are not undertakings, since Article 101 only applies to agreements between undertakings.

- (3) By issuing these Guidelines, the Commission aims to help companies conduct their own assessment of vertical agreements under EU competition rules. The standards set forth in these Guidelines cannot be applied mechanically, but must be applied with due consideration for the specific circumstances of each case. Each case must be evaluated in the light of its own facts.
- (4) These Guidelines are without prejudice to the case-law of the General Court and the Court of Justice of the European Union concerning the application of Article 101 to vertical agreements. The Commission will continue to monitor the operation of the Block Exemption Regulation and Guidelines based on market information from stakeholders and national competition authorities and may revise this notice in the light of future developments and of evolving insight.

### 2. Applicability of Article 101 to vertical agreements

- (5) Article 101 applies to vertical agreements that may affect trade between Member States and that prevent, restrict or distort competition ('vertical restraints')<sup>(3)</sup>. Article 101 provides a legal framework for the assessment of vertical restraints, which takes into consideration the distinction between anti-competitive and pro-competitive effects. Article 101(1) prohibits those agreements which appreciably restrict or distort competition, while Article 101(3) exempts those agreements which confer sufficient benefits to outweigh the anti-competitive effects<sup>(4)</sup>.

(\*) With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ('TFEU'). The two sets of provisions are, in substance, identical. For the purposes of these Guidelines, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout these Guidelines.

(1) These Guidelines replace the Commission Notice – Guidelines on Vertical Restraints, OJ C 291, 13.10.2000, p. 1.

(2) OJ L 102, 23.4.2010, p. 1.

(3) See *inter alia* judgments of the Court of Justice in Joined Cases 56/64 and 58/64 *Grundig-Consten v Commission* [1966] ECR 299; Case 56/65 *Technique Minière v Maschinenbau Ulm* [1966] ECR 235; and judgment of the Court of First Instance in Case T-77/92 *Parker Pen v Commission* [1994] ECR II-549.

(4) See Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97 for the Commission's general methodology and interpretation of the conditions for applying Article 101(1) and in particular Article 101(3).

- (6) For most vertical restraints, competition concerns can only arise if there is insufficient competition at one or more levels of trade, that is, if there is some degree of market power at the level of the supplier or the buyer or at both levels. Vertical restraints are generally less harmful than horizontal restraints and may provide substantial scope for efficiencies.

- (7) The objective of Article 101 is to ensure that undertakings do not use agreements – in this context, vertical agreements – to restrict competition on the market to the detriment of consumers. Assessing vertical restraints is also important in the context of the wider objective of achieving an integrated internal market. Market integration enhances competition in the European Union. Companies should not be allowed to re-establish private barriers between Member States where State barriers have been successfully abolished.

## II. VERTICAL AGREEMENTS WHICH GENERALLY FALL OUTSIDE THE SCOPE OF ARTICLE 101(1)

### 1. Agreements of minor importance and SMEs

- (8) Agreements that are not capable of appreciably affecting trade between Member States or of appreciably restricting competition by object or effect do not fall within the scope of Article 101(1). The Block Exemption Regulation applies only to agreements falling within the scope of application of Article 101(1). These Guidelines are without prejudice to the application of Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*)<sup>(1)</sup> or any future *de minimis* notice.
- (9) Subject to the conditions set out in the *de minimis* notice concerning hardcore restrictions and cumulative effect issues, vertical agreements entered into by non-competing undertakings whose individual market share on the relevant market does not exceed 15 % are generally considered to fall outside the scope of Article 101(1)<sup>(2)</sup>. There is no presumption that vertical agreements concluded by undertakings having more than 15 % market share automatically infringe Article 101(1). Agreements between undertakings whose market share exceeds the 15 % threshold may still not have an appreciable effect on trade between Member States or

may not constitute an appreciable restriction of competition<sup>(3)</sup>. Such agreements need to be assessed in their legal and economic context. The criteria for the assessment of individual agreements are set out in paragraphs (96) to (229).

- (10) As regards hardcore restrictions referred to in the *de minimis* notice, Article 101(1) may apply below the 15 % threshold, provided that there is an appreciable effect on trade between Member States and on competition. The applicable case-law of the Court of Justice and the General Court is relevant in this respect<sup>(4)</sup>. Reference is also made to the possible need to assess positive and negative effects of hardcore restrictions as described in particular in paragraph (47) of these Guidelines.
- (11) In addition, the Commission considers that, subject to cumulative effect and hardcore restrictions, vertical agreements between small and medium-sized undertakings as defined in the Annex to Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises<sup>(5)</sup> are rarely capable of appreciably affecting trade between Member States or of appreciably restricting competition within the meaning of Article 101(1), and therefore generally fall outside the scope of Article 101(1). In cases where such agreements nonetheless meet the conditions for the application of Article 101(1), the Commission will normally refrain from opening proceedings for lack of sufficient interest for the European Union unless those undertakings collectively or individually hold a dominant position in a substantial part of the internal market.

### 2. Agency agreements

#### 2.1 Definition of agency agreements

- (12) An agent is a legal or physical person vested with the power to negotiate and/or conclude contracts on behalf of another person (the principal), either in the agent's own name or in the name of the principal, for the:

— purchase of goods or services by the principal, or

— sale of goods or services supplied by the principal.

<sup>(1)</sup> OJ C 368, 22.12.2001, p. 13.

<sup>(2)</sup> For agreements between competing undertakings the *de minimis* market share threshold is 10 % for their collective market share on each affected relevant market.

<sup>(3)</sup> See judgment of the Court of First Instance in Case T-7/93 *Langnese-Iglo v Commission* [1995] ECR II-1533, paragraph 98.

<sup>(4)</sup> See judgments of the Court of Justice in Case 5/69 *Völk v Vervaecke* [1969] ECR 295; Case 1/71 *Cadillon v Höss* [1971] ECR 351 and Case C-306/96 *Javico v Yves Saint Laurent* [1998] ECR I-1983, paragraphs 16 and 17.

<sup>(5)</sup> OJ L 124, 20.5.2003, p. 36.

- (13) The determining factor in defining an agency agreement for the application of Article 101(1) is the financial or commercial risk borne by the agent in relation to the activities for which it has been appointed as an agent by the principal.<sup>(1)</sup> In this respect it is not material for the assessment whether the agent acts for one or several principals. Neither is material for this assessment the qualification given to their agreement by the parties or national legislation.
- (14) There are three types of financial or commercial risk that are material to the definition of an agency agreement for the application of Article 101(1). First, there are the contract-specific risks which are directly related to the contracts concluded and/or negotiated by the agent on behalf of the principal, such as financing of stocks. Secondly, there are the risks related to market-specific investments. These are investments specifically required for the type of activity for which the agent has been appointed by the principal, that is, which are required to enable the agent to conclude and/or negotiate this type of contract. Such investments are usually sunk, which means that upon leaving that particular field of activity the investment cannot be used for other activities or sold other than at a significant loss. Thirdly, there are the risks related to other activities undertaken on the same product market, to the extent that the principal requires the agent to undertake such activities, but not as an agent on behalf of the principal but for its own risk.
- (15) For the purposes of applying Article 101(1), the agreement will be qualified as an agency agreement if the agent does not bear any, or bears only insignificant, risks in relation to the contracts concluded and/or negotiated on behalf of the principal, in relation to market-specific investments for that field of activity, and in relation to other activities required by the principal to be undertaken on the same product market. However, risks that are related to the activity of providing agency services in general, such as the risk of the agent's income being dependent upon its success as an agent or general investments in for instance premises or personnel, are not material to this assessment.
- (16) For the purpose of applying Article 101(1), an agreement will thus generally be considered an agency agreement where property in the contract goods bought or sold does not vest in the agent, or the agent does not himself supply the contract services and where the agent:
- (a) does not contribute to the costs relating to the supply/purchase of the contract goods or services, including the costs of transporting the goods. This does not preclude the agent from carrying out the transport service, provided that the costs are covered by the principal;
  - (b) does not maintain at its own cost or risk stocks of the contract goods, including the costs of financing the stocks and the costs of loss of stocks and can return unsold goods to the principal without charge, unless the agent is liable for fault (for example, by failing to comply with reasonable security measures to avoid loss of stocks);
  - (c) does not undertake responsibility towards third parties for damage caused by the product sold (product liability), unless, as agent, it is liable for fault in this respect;
  - (d) does not take responsibility for customers' non-performance of the contract, with the exception of the loss of the agent's commission, unless the agent is liable for fault (for example, by failing to comply with reasonable security or anti-theft measures or failing to comply with reasonable measures to report theft to the principal or police or to communicate to the principal all necessary information available to him on the customer's financial reliability);
  - (e) is not, directly or indirectly, obliged to invest in sales promotion, such as contributions to the advertising budgets of the principal;
  - (f) does not make market-specific investments in equipment, premises or training of personnel, such as for example the petrol storage tank in the case of petrol retailing or specific software to sell insurance policies in case of insurance agents, unless these costs are fully reimbursed by the principal;
  - (g) does not undertake other activities within the same product market required by the principal, unless these activities are fully reimbursed by the principal.

<sup>(1)</sup> See judgment of the Court of First Instance in Case T-325/01 *Daimler Chrysler v Commission* [2005] ECR II-3319; judgments of the Court of Justice in Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio v CEPSA* [2006] ECR I-11987; and Case C-279/06 *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL* [2008] ECR I-6681.

- (17) This list is not exhaustive. However, where the agent incurs one or more of the risks or costs mentioned in paragraphs (14), (15) and (16), the agreement between agent and principal will not be qualified as an agency agreement. The question of risk must be assessed on a case-by-case basis, and with regard to the economic reality of the situation rather than the legal form. For practical reasons, the risk analysis may start with the assessment of the contract-specific risks. If contract-specific risks are incurred by the agent, it will be enough to conclude that the agent is an independent distributor. On the contrary, if the agent does not incur contract-specific risks, then it will be necessary to continue further the analysis by assessing the risks related to market-specific investments. Finally, if the agent does not incur any contract-specific risks and risks related to market-specific investments, the risks related to other required activities within the same product market may have to be considered.

## 2.2 The application of Article 101(1) to agency agreements

- (18) In the case of agency agreements as defined in section 2.1, the selling or purchasing function of the agent forms part of the principal's activities. Since the principal bears the commercial and financial risks related to the selling and purchasing of the contract goods and services all obligations imposed on the agent in relation to the contracts concluded and/or negotiated on behalf of the principal fall outside Article 101(1). The following obligations on the agent's part will be considered to form an inherent part of an agency agreement, as each of them relates to the ability of the principal to fix the scope of activity of the agent in relation to the contract goods or services, which is essential if the principal is to take the risks and therefore to be in a position to determine the commercial strategy:

- (a) limitations on the territory in which the agent may sell these goods or services;
- (b) limitations on the customers to whom the agent may sell these goods or services;
- (c) the prices and conditions at which the agent must sell or purchase these goods or services.

- (19) In addition to governing the conditions of sale or purchase of the contract goods or services by the agent on behalf of the principal, agency agreements often contain provisions which concern the relationship between the agent and the principal. In particular, they may contain a provision preventing the principal from appointing other agents in respect of a given type of transaction, customer or territory (exclusive agency provisions) and/or a provision preventing the agent from acting as an agent or distributor of undertakings which compete with the principal (single branding

provisions). Since the agent is a separate undertaking from the principal, the provisions which concern the relationship between the agent and the principal may infringe Article 101(1). Exclusive agency provisions will in general not lead to anti-competitive effects. However, single branding provisions and post-term non-compete provisions, which concern inter-brand competition, may infringe Article 101(1) if they lead to or contribute to a (cumulative) foreclosure effect on the relevant market where the contract goods or services are sold or purchased (see in particular Section VI.2.1). Such provisions may benefit from the Block Exemption Regulation, in particular when the conditions provided in Article 5 of that Regulation are fulfilled. They can also be individually justified by efficiencies under Article 101(3) as for instance described in paragraphs (144) to (148).

- (20) An agency agreement may also fall within the scope of Article 101(1), even if the principal bears all the relevant financial and commercial risks, where it facilitates collusion. That could, for instance, be the case when a number of principals use the same agents while collectively excluding others from using these agents, or when they use the agents to collude on marketing strategy or to exchange sensitive market information between the principals.

- (21) Where the agent bears one or more of the relevant risks as described in paragraph (16), the agreement between agent and principal does not constitute an agency agreement for the purpose of applying Article 101(1). In that situation, the agent will be treated as an independent undertaking and the agreement between agent and principal will be subject to Article 101(1) as any other vertical agreement.

## 3. Subcontracting agreements

- (22) Subcontracting concerns a contractor providing technology or equipment to a subcontractor that undertakes to produce certain products on the basis thereof (exclusively) for the contractor. Subcontracting is covered by Commission notice of 18 December 1978 concerning the assessment of certain subcontracting agreements in relation to Article 85(1) of the EEC Treaty <sup>(1)</sup> (hereinafter 'subcontracting notice'). According to that notice, which remains applicable, subcontracting agreements whereby the subcontractor undertakes to produce certain products exclusively for the contractor generally fall outside the scope of Article 101(1) provided that the technology or equipment is necessary to enable the subcontractor to produce the products. However, other restrictions imposed on the subcontractor such as the obligation not to conduct or exploit its own research and development or not to produce for third parties in general may fall within the scope of Article 101 <sup>(2)</sup>.

<sup>(1)</sup> OJ C 1, 3.1.1979, p. 2.

<sup>(2)</sup> See paragraph 3 of the subcontracting notice.



### III. APPLICATION OF THE BLOCK EXEMPTION REGULATION

#### 1. Safe harbour created by the Block Exemption Regulation

- (23) For most vertical restraints, competition concerns can only arise if there is insufficient competition at one or more levels of trade, that is, if there is some degree of market power at the level of the supplier or the buyer or at both levels. Provided that they do not contain hardcore restrictions of competition, which are restrictions of competition by object, the Block Exemption Regulation creates a presumption of legality for vertical agreements depending on the market share of the supplier and the buyer. Pursuant to Article 3 of the Block Exemption Regulation, it is the supplier's market share on the market where it sells the contract goods or services and the buyer's market share on the market where it purchases the contract goods or services which determine the applicability of the block exemption. In order for the block exemption to apply, the supplier's and the buyer's market share must each be 30 % or less. Section V of these Guidelines provides guidance on how to define the relevant market and calculate the market shares. Above the market share threshold of 30 %, there is no presumption that vertical agreements fall within the scope of Article 101(1) or fail to satisfy the conditions of Article 101(3) but there is also no presumption that vertical agreements falling within the scope of Article 101(1) will usually satisfy the conditions of Article 101(3).

#### 2. Scope of the Block Exemption Regulation

##### 2.1 Definition of vertical agreements

- (24) Article 1(1)(a) of the Block Exemption Regulation defines a 'vertical agreement' as 'an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services'.
- (25) The definition of 'vertical agreement' referred to in paragraph (24) has four main elements:
- (a) The Block Exemption Regulation applies to agreements and concerted practices. The Block Exemption Regulation does not apply to unilateral conduct of the undertakings concerned. Such unilateral conduct can fall within the scope of Article 102 which prohibits abuses of a dominant position. For there to be an agreement within the meaning of Article 101 it is sufficient that the parties have expressed their joint intention to conduct themselves on the market in a specific

way. The form in which that intention is expressed is irrelevant as long as it constitutes a faithful expression of the parties' intention. In case there is no explicit agreement expressing the concurrence of wills, the Commission will have to prove that the unilateral policy of one party receives the acquiescence of the other party. For vertical agreements, there are two ways in which acquiescence with a particular unilateral policy can be established. First, the acquiescence can be deduced from the powers conferred upon the parties in a general agreement drawn up in advance. If the clauses of the agreement drawn up in advance provide for or authorise a party to adopt subsequently a specific unilateral policy which will be binding on the other party, the acquiescence of that policy by the other party can be established on the basis thereof<sup>(1)</sup>. Secondly, in the absence of such an explicit acquiescence, the Commission can show the existence of tacit acquiescence. For that it is necessary to show first that one party requires explicitly or implicitly the cooperation of the other party for the implementation of its unilateral policy and second that the other party complied with that requirement by implementing that unilateral policy in practice<sup>(2)</sup>. For instance, if after a supplier's announcement of a unilateral reduction of supplies in order to prevent parallel trade, distributors reduce immediately their orders and stop engaging in parallel trade, then those distributors tacitly acquiesce to the supplier's unilateral policy. This can however not be concluded if the distributors continue to engage in parallel trade or try to find new ways to engage in parallel trade. Similarly, for vertical agreements, tacit acquiescence may be deduced from the level of coercion exerted by a party to impose its unilateral policy on the other party or parties to the agreement in combination with the number of distributors that are actually implementing in practice the unilateral policy of the supplier. For instance, a system of monitoring and penalties, set up by a supplier to penalise those distributors that do not comply with its unilateral policy, points to tacit acquiescence with the supplier's unilateral policy if this system allows the supplier to implement in practice its policy. The two ways of establishing acquiescence described in this paragraph can be used jointly;

- (b) The agreement or concerted practice is between two or more undertakings. Vertical agreements with final consumers not operating as an undertaking are not covered by the Block Exemption Regulation. More generally, agreements with final consumers do not fall under Article 101(1), as that article applies only to agreements between undertakings, decisions by associations of undertakings and concerted practices of undertakings. This is without prejudice to the possible application of Article 102;

<sup>(1)</sup> Judgment of the Court of Justice in Case C-74/04 P *Commission v Volkswagen AG* [2006] ECR I-6585.

<sup>(2)</sup> Judgment of the Court of First Instance in Case T-41/96 *Bayer AG v Commission* [2000] ECR II-3383.

(c) The agreement or concerted practice is between undertakings each operating, for the purposes of the agreement, at a different level of the production or distribution chain. This means for instance that one undertaking produces a raw material which the other undertaking uses as an input, or that the first is a manufacturer, the second a wholesaler and the third a retailer. This does not preclude an undertaking from being active at more than one level of the production or distribution chain;

(d) The agreements or concerted practices relate to the conditions under which the parties to the agreement, the supplier and the buyer, 'may purchase, sell or resell certain goods or services'. This reflects the purpose of the Block Exemption Regulation to cover purchase and distribution agreements. These are agreements which concern the conditions for the purchase, sale or resale of the goods or services supplied by the supplier and/or which concern the conditions for the sale by the buyer of the goods or services which incorporate these goods or services. Both the goods or services supplied by the supplier and the resulting goods or services are considered to be contract goods or services under the Block Exemption Regulation. Vertical agreements relating to all final and intermediate goods and services are covered. The only exception is the automobile sector, as long as this sector remains covered by a specific block exemption such as that granted by Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector<sup>(1)</sup> or its successor. The goods or services provided by the supplier may be resold by the buyer or may be used as an input by the buyer to produce its own goods or services.

(26) The Block Exemption Regulation also applies to goods sold and purchased for renting to third parties. However, rent and lease agreements as such are not covered, as no good or service is sold by the supplier to the buyer. More generally, the Block Exemption Regulation does not cover restrictions or obligations that do not relate to the conditions of purchase, sale and resale, such as an obligation preventing parties from carrying out independent research and development which the parties may have included in an otherwise vertical agreement. In addition, Article 2(2) to (5) of the Block Exemption Regulation directly or indirectly excludes certain vertical agreements from the application of that Regulation.

<sup>(1)</sup> OJ L 203, 1.8.2002, p. 30.

## 2.2 Vertical agreements between competitors

(27) Article 2(4) of the Block Exemption Regulation explicitly excludes 'vertical agreements entered into between competing undertakings' from its application. Vertical agreements between competitors are dealt with, as regards possible collusion effects, in the Commission Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements<sup>(2)</sup>. However, the vertical aspects of such agreements need to be assessed under these Guidelines. Article 1(1)(c) of the Block Exemption Regulation defines a competing undertaking as 'an actual or potential competitor'. Two companies are treated as actual competitors if they are active on the same relevant market. A company is treated as a potential competitor of another company if, absent the agreement, in case of a small but permanent increase in relative prices it is likely that this first company, within a short period of time normally not longer than one year, would undertake the necessary additional investments or other necessary switching costs to enter the relevant market on which the other company is active. That assessment must be based on realistic grounds; the mere theoretical possibility of entering a market is not sufficient.<sup>(3)</sup> A distributor that provides specifications to a manufacturer to produce particular goods under the distributor's brand name is not to be considered a manufacturer of such own-brand goods.

(28) Article 2(4) of the Block Exemption Regulation contains two exceptions to the general exclusion of vertical agreements between competitors. These exceptions concern non-reciprocal agreements. Non-reciprocal agreements between competitors are covered by the Block Exemption Regulation where (a) the supplier is a manufacturer and distributor of goods, while the buyer is only a distributor and not also a competing undertaking at the manufacturing level, or (b) the supplier is a provider of services operating at several levels of trade, while the buyer operates at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services. The first exception covers situations of dual distribution, that is, the manufacturer of particular goods also acts as a distributor of the goods in competition with independent distributors of its goods. In case of dual distribution it is considered that in general any potential impact on the competitive relationship between the manufacturer and retailer at the retail level is of lesser importance than the potential impact of the vertical supply agreement on competition in general at the manufacturing or retail level. The second exception covers similar situations of dual distribution, but in this case for services, when the supplier is also a provider of products at the retail level where the buyer operates.

<sup>(2)</sup> OJ C 3, 6.1.2001, p. 2. A revision of those Guidelines is forthcoming.

<sup>(3)</sup> See Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5, paragraphs 20 to 24, the Commission's Thirteenth Report on Competition Policy, point 55, and Commission Decision 90/410/EEC in Case No IV/32.009 — *Elopak/Metal Box-Odin*, OJ L 209, 8.8.1990, p. 15.

### 2.3 Associations of retailers

(29) Article 2(2) of the Block Exemption Regulation includes in its application vertical agreements entered into by an association of undertakings which fulfils certain conditions and thereby excludes from the Block Exemption Regulation vertical agreements entered into by all other associations. Vertical agreements entered into between an association and its members, or between an association and its suppliers, are covered by the Block Exemption Regulation only if all the members are retailers of goods (not services) and if each individual member of the association has a turnover not exceeding EUR 50 million. Retailers are distributors reselling goods to final consumers. Where only a limited number of the members of the association have a turnover exceeding the EUR 50 million threshold and where these members together represent less than 15 % of the collective turnover of all the members combined, the assessment under Article 101 will normally not be affected.

(30) An association of undertakings may involve both horizontal and vertical agreements. The horizontal agreements must be assessed according to the principles set out in the Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements<sup>(1)</sup>. If that assessment leads to the conclusion that a cooperation between undertakings in the area of purchasing or selling is acceptable, a further assessment will be necessary to examine the vertical agreements concluded by the association with its suppliers or its individual members. The latter assessment will follow the rules of the Block Exemption Regulation and these Guidelines. For instance, horizontal agreements concluded between the members of the association or decisions adopted by the association, such as the decision to require the members to purchase from the association or the decision to allocate exclusive territories to the members must first be assessed as a horizontal agreement. Once that assessment leads to the conclusion that the horizontal agreement is not anticompetitive, an assessment of the vertical agreements between the association and individual members or between the association and suppliers is necessary.

### 2.4 Vertical agreements containing provisions on intellectual property rights (IPRs)

(31) Article 2(3) of the Block Exemption Regulation includes vertical agreements containing certain provisions relating to the assignment of IPRs to or use of IPRs by the buyer in its application and thereby excludes all other vertical agreements containing IPR provisions from the Block Exemption Regulation. The Block Exemption Regulation applies to vertical agreements containing IPR provisions where five conditions are fulfilled:

(a) The IPR provisions must be part of a vertical agreement, that is, an agreement with conditions

under which the parties may purchase, sell or resell certain goods or services;

(b) The IPRs must be assigned to, or licensed for use by, the buyer;

(c) The IPR provisions must not constitute the primary object of the agreement;

(d) The IPR provisions must be directly related to the use, sale or resale of goods or services by the buyer or its customers. In the case of franchising where marketing forms the object of the exploitation of the IPRs, the goods or services are distributed by the master franchisee or the franchisees;

(e) The IPR provisions, in relation to the contract goods or services, must not contain restrictions of competition having the same object as vertical restraints which are not exempted under the Block Exemption Regulation.

(32) Such conditions ensure that the Block Exemption Regulation applies to vertical agreements where the use, sale or resale of goods or services can be performed more effectively because IPRs are assigned to or licensed for use by the buyer. In other words, restrictions concerning the assignment or use of IPRs can be covered when the main object of the agreement is the purchase or distribution of goods or services.

(33) The first condition makes clear that the context in which the IPRs are provided is an agreement to purchase or distribute goods or an agreement to purchase or provide services and not an agreement concerning the assignment or licensing of IPRs for the manufacture of goods, nor a pure licensing agreement. The Block Exemption Regulation does not cover for instance:

(a) agreements where a party provides another party with a recipe and licenses the other party to produce a drink with this recipe;

(b) agreements under which one party provides another party with a mould or master copy and licenses the other party to produce and distribute copies;

(c) the pure licence of a trade mark or sign for the purposes of merchandising;

<sup>(1)</sup> See paragraph (27).

(d) sponsorship contracts concerning the right to advertise oneself as being an official sponsor of an event;

(e) copyright licensing such as broadcasting contracts concerning the right to record and/or broadcast an event.

(34) The second condition makes clear that the Block Exemption Regulation does not apply when the IPRs are provided by the buyer to the supplier, no matter whether the IPRs concern the manner of manufacture or of distribution. An agreement relating to the transfer of IPRs to the supplier and containing possible restrictions on the sales made by the supplier is not covered by the Block Exemption Regulation. That means, in particular, that subcontracting involving the transfer of know-how to a subcontractor<sup>(1)</sup> does not fall within the scope of application of the Block Exemption Regulation (see also paragraph (22)). However, vertical agreements under which the buyer provides only specifications to the supplier which describe the goods or services to be supplied fall within the scope of application of the Block Exemption Regulation.

(35) The third condition makes clear that in order to be covered by the Block Exemption Regulation, the primary object of the agreement must not be the assignment or licensing of IPRs. The primary object must be the purchase, sale or resale of goods or services and the IPR provisions must serve the implementation of the vertical agreement.

(36) The fourth condition requires that the IPR provisions facilitate the use, sale or resale of goods or services by the buyer or its customers. The goods or services for use or resale are usually supplied by the licensor but may also be purchased by the licensee from a third supplier. The IPR provisions will normally concern the marketing of goods or services. An example would be a franchise agreement where the franchisor sells goods for resale to the franchisee and licenses the franchisee to use its trade mark and know-how to market the goods or where the supplier of a concentrated extract licenses the buyer to dilute and bottle the extract before selling it as a drink.

(37) The fifth condition highlights the fact that the IPR provisions should not have the same object as any of the hardcore restrictions listed in Article 4 of the Block Exemption Regulation or any of the restrictions excluded from the coverage of the Block Exemption Regulation by Article 5 of that Regulation (see paragraphs (47) to (69) of these Guidelines).

<sup>(1)</sup> See the subcontracting notice (referred to in paragraph (22)).

(38) Intellectual property rights relevant to the implementation of vertical agreements within the meaning of Article 2(3) of the Block Exemption Regulation generally concern three main areas: trade marks, copyright and know-how.

#### Trade mark

(39) A trade mark licence to a distributor may be related to the distribution of the licensor's products in a particular territory. If it is an exclusive licence, the agreement amounts to exclusive distribution.

#### Copyright

(40) Resellers of goods covered by copyright (books, software, etc.) may be obliged by the copyright holder only to resell under the condition that the buyer, whether another reseller or the end user, shall not infringe the copyright. Such obligations on the reseller, to the extent that they fall under Article 101(1) at all, are covered by the Block Exemption Regulation.

(41) Agreements, under which hard copies of software are supplied for resale and where the reseller does not acquire a licence to any rights over the software but only has the right to resell the hard copies, are to be regarded as agreements for the supply of goods for resale for the purpose of the Block Exemption Regulation. Under that form of distribution, licensing the software only occurs between the copyright owner and the user of the software. It may take the form of a 'shrink wrap' licence, that is, a set of conditions included in the package of the hard copy which the end user is deemed to accept by opening the package.

(42) Buyers of hardware incorporating software protected by copyright may be obliged by the copyright holder not to infringe the copyright, and must therefore not make copies and resell the software or make copies and use the software in combination with other hardware. Such use-restrictions, to the extent that they fall within Article 101(1) at all, are covered by the Block Exemption Regulation.

#### Know-how

(43) Franchise agreements, with the exception of industrial franchise agreements, are the most obvious example of where know-how for marketing purposes is communicated to the buyer<sup>(2)</sup>. Franchise agreements contain licences of intellectual property rights relating

<sup>(2)</sup> Paragraphs 43-45 apply by analogy to other types of distribution agreements which involve the transfer of substantial know-how from supplier to buyer.



to trade marks or signs and know-how for the use and distribution of goods or the provision of services. In addition to the licence of IPR, the franchisor usually provides the franchisee during the life of the agreement with commercial or technical assistance, such as procurement services, training, advice on real estate, financial planning etc. The licence and the assistance are integral components of the business method being franchised.

(44) Licensing contained in franchise agreements is covered by the Block Exemption Regulation where all five conditions listed in paragraph (31) are fulfilled. Those conditions are usually fulfilled as under most franchise agreements, including master franchise agreements, the franchisor provides goods and/or services, in particular commercial or technical assistance services, to the franchisee. The IPRs help the franchisee to resell the products supplied by the franchisor or by a supplier designated by the franchisor or to use those products and sell the resulting goods or services. Where the franchise agreement only or primarily concerns licensing of IPRs, it is not covered by the Block Exemption Regulation, but the Commission will, as a general rule, apply the principles set out in the Block Exemption Regulation and these Guidelines to such an agreement.

(45) The following IPR-related obligations are generally considered necessary to protect the franchisor's intellectual property rights and are, where these obligations fall under Article 101(1), also covered by the Block Exemption Regulation:

- (a) an obligation on the franchisee not to engage, directly or indirectly, in any similar business;
- (b) an obligation on the franchisee not to acquire financial interests in the capital of a competing undertaking such as would give the franchisee the power to influence the economic conduct of such undertaking;
- (c) an obligation on the franchisee not to disclose to third parties the know-how provided by the franchisor as long as this know-how is not in the public domain;
- (d) an obligation on the franchisee to communicate to the franchisor any experience gained in exploiting the franchise and to grant the franchisor, and other franchisees, a non-exclusive licence for the know-how resulting from that experience;
- (e) an obligation on the franchisee to inform the franchisor of infringements of licensed intellectual

property rights, to take legal action against infringers or to assist the franchisor in any legal actions against infringers;

- (f) an obligation on the franchisee not to use know-how licensed by the franchisor for purposes other than the exploitation of the franchise;
- (g) an obligation on the franchisee not to assign the rights and obligations under the franchise agreement without the franchisor's consent.

### 2.5 Relationship to other block exemption regulations

- (46) Article 2(5) states that the Block Exemption Regulation does 'not apply to vertical agreements the subject matter of which falls within the scope of any other block exemption regulation, unless otherwise provided for in such a regulation'. The Block Exemption Regulation does not therefore apply to vertical agreements covered by Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements <sup>(1)</sup>, Regulation 1400/2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector <sup>(2)</sup> or 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 <sup>(3)</sup> and 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 <sup>(4)</sup> exempting vertical agreements concluded in connection with horizontal agreements, or any future regulations of that kind, unless otherwise provided for in such a regulation.

### 3. Hardcore restrictions under the Block Exemption Regulation

- (47) Article 4 of the Block Exemption Regulation contains a list of hardcore restrictions which lead to the exclusion of the whole vertical agreement from the scope of application of the Block Exemption Regulation <sup>(5)</sup>. Where such a hardcore restriction is included in an agreement, that agreement is presumed to fall within Article 101(1). It is also presumed that the agreement is unlikely to fulfil the conditions of Article 101(3), for which reason the block exemption does not apply. However, undertakings

<sup>(1)</sup> OJ L 123, 27.4.2004, p. 11.

<sup>(2)</sup> See paragraph (25).

<sup>(3)</sup> OJ L 304, 5.12.2000, p. 3.

<sup>(4)</sup> OJ L 304, 5.12.2000, p. 7.

<sup>(5)</sup> This list of hardcore restrictions applies to vertical agreements concerning trade within the Union. In so far as vertical agreements concern exports outside the Union or imports/re-imports from outside the Union see judgment of the Court of Justice in Case C-306/96 *Javico v Yves Saint Laurent* [1998] ECR I-1983. In that judgment the ECJ held in paragraph 20 that 'an agreement in which the reseller gives to the producer an undertaking that it will sell the contractual products on a market outside the Community cannot be regarded as having the object of appreciably restricting competition within the common market or as being capable of affecting, as such, trade between Member States'.

may demonstrate pro-competitive effects under Article 101(3) in an individual case<sup>(1)</sup>. Where the undertakings substantiate that likely efficiencies result from including the hardcore restriction in the agreement and demonstrate that in general all the conditions of Article 101(3) are fulfilled, the Commission will be required to effectively assess the likely negative impact on competition before making an ultimate assessment of whether the conditions of Article 101(3) are fulfilled<sup>(2)</sup>.

- (48) The hardcore restriction set out in Article 4(a) of the Block Exemption Regulation concerns resale price maintenance (RPM), that is, agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer. In the case of contractual provisions or concerted practices that directly establish the resale price, the restriction is clear cut. However, RPM can also be achieved through indirect means. Examples of the latter are an agreement fixing the distribution margin, fixing the maximum level of discount the distributor can grant from a prescribed price level, making the grant of rebates or reimbursement of promotional costs by the supplier subject to the observance of a given price level, linking the prescribed resale price to the resale prices of competitors, threats, intimidation, warnings, penalties, delay or suspension of deliveries or contract terminations in relation to observance of a given price level. Direct or indirect means of achieving price fixing can be made more effective when combined with measures to identify price-cutting distributors, such as the implementation of a price monitoring system, or the obligation on retailers to report other members of the distribution network that deviate from the standard price level. Similarly, direct or indirect price fixing can be made more effective when combined with measures which may reduce the buyer's incentive to lower the resale price, such as the supplier printing a recommended resale price on the product or the supplier obliging the buyer to apply a most-favoured-customer clause. The same indirect means and the same 'supportive' measures can be used to make maximum or recommended prices work as RPM. However, the use of a particular supportive measure or the provision of a list of recommended prices or maximum prices by the supplier to the buyer is not considered in itself as leading to RPM.

<sup>(1)</sup> See in particular paragraphs 106 to 109 describing in general possible efficiencies related to vertical restraints and Section VI.2.10 on resale price restrictions. See for general guidance on this the Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97.

<sup>(2)</sup> Although, in legal terms, these are two distinct steps, they may in practice be an iterative process where the parties and Commission in several steps enhance and improve their respective arguments.

- (49) In the case of agency agreements, the principal normally establishes the sales price, as the agent does not become the owner of the goods. However, where such an agreement cannot be qualified as an agency agreement for the purposes of applying Article 101(1) (see paragraphs (12) to (21)) an obligation preventing or restricting the agent from sharing its commission, fixed or variable, with the customer would be a hardcore restriction under Article 4(a) of the Block Exemption Regulation. In order to avoid including such a hardcore restriction in the agreement, the agent should thus be left free to lower the effective price paid by the customer without reducing the income for the principal<sup>(3)</sup>.

- (50) The hardcore restriction set out in Article 4(b) of the Block Exemption Regulation concerns agreements or concerted practices that have as their direct or indirect object the restriction of sales by a buyer party to the agreement or its customers, in as far as those restrictions relate to the territory into which or the customers to whom the buyer or its customers may sell the contract goods or services. This hardcore restriction relates to market partitioning by territory or by customer group. That may be the result of direct obligations, such as the obligation not to sell to certain customers or to customers in certain territories or the obligation to refer orders from these customers to other distributors. It may also result from indirect measures aimed at inducing the distributor not to sell to such customers, such as refusal or reduction of bonuses or discounts, termination of supply, reduction of supplied volumes or limitation of supplied volumes to the demand within the allocated territory or customer group, threat of contract termination, requiring a higher price for products to be exported, limiting the proportion of sales that can be exported or profit pass-over obligations. It may further result from the supplier not providing a Union-wide guarantee service under which normally all distributors are obliged to provide the guarantee service and are reimbursed for this service by the supplier, even in relation to products sold by other distributors into their territory<sup>(4)</sup>. Such practices are even more likely to be viewed as a restriction of the buyer's sales when used in conjunction with the implementation by the supplier of a monitoring system aimed at verifying the effective

<sup>(3)</sup> See, for instance, Commission Decision 91/562/EEC in Case No IV/32.737 — *Eirpage*, OJ L 306, 7.11.1991, p. 22, in particular recital (6).

<sup>(4)</sup> If the supplier decides not to reimburse its distributors for services rendered under the Union-wide guarantee, it may be agreed with these distributors that a distributor which makes a sale outside its allocated territory, will have to pay the distributor appointed in the territory of destination a fee based on the cost of the services (to be) carried out including a reasonable profit margin. This type of scheme may not be seen as a restriction of the distributors' sales outside their territory (see judgment of the Court of First Instance in Case T-67/01 *JCB Service v Commission* [2004] ECR II-49, paragraphs 136 to 145).

destination of the supplied goods, such as the use of differentiated labels or serial numbers. However, obligations on the reseller relating to the display of the supplier's brand name are not classified as hardcore. As Article 4(b) only concerns restrictions of sales by the buyer or its customers, this implies that restrictions of the supplier's sales are also not a hardcore restriction, subject to what is stated in paragraph (59) regarding sales of spare parts in the context of Article 4(e) of the Block Exemption Regulation. Article 4(b) applies without prejudice to a restriction on the buyer's place of establishment. Thus, the benefit of the Block Exemption Regulation is not lost if it is agreed that the buyer will restrict its distribution outlet(s) and warehouse(s) to a particular address, place or territory.

(51) There are four exceptions to the hardcore restriction in Article 4(b) of the Block Exemption Regulation. The first exception in Article 4(b)(i) allows a supplier to restrict active sales by a buyer party to the agreement to a territory or a customer group which has been allocated exclusively to another buyer or which the supplier has reserved to itself. A territory or customer group is exclusively allocated when the supplier agrees to sell its product only to one distributor for distribution in a particular territory or to a particular customer group and the exclusive distributor is protected against active selling into its territory or to its customer group by all the other buyers of the supplier within the Union, irrespective of sales by the supplier. The supplier is allowed to combine the allocation of an exclusive territory and an exclusive customer group by for instance appointing an exclusive distributor for a particular customer group in a certain territory. Such protection of exclusively allocated territories or customer groups must, however, permit passive sales to such territories or customer groups. For the application of Article 4(b) of the Block Exemption Regulation, the Commission interprets 'active' and 'passive' sales as follows:

— 'Active' sales mean actively approaching individual customers by for instance direct mail, including the sending of unsolicited e-mails, or visits; or actively approaching a specific customer group or customers in a specific territory through advertisement in media, on the internet or other promotions specifically targeted at that customer group or targeted at customers in that territory. Advertisement or promotion that is only attractive for the buyer if it (also) reaches a specific group of customers or customers in a specific territory, is considered active

selling to that customer group or customers in that territory.

— 'Passive' sales mean responding to unsolicited requests from individual customers including delivery of goods or services to such customers. General advertising or promotion that reaches customers in other distributors' (exclusive) territories or customer groups but which is a reasonable way to reach customers outside those territories or customer groups, for instance to reach customers in one's own territory, are considered passive selling. General advertising or promotion is considered a reasonable way to reach such customers if it would be attractive for the buyer to undertake these investments also if they would not reach customers in other distributors' (exclusive) territories or customer groups.

(52) The internet is a powerful tool to reach a greater number and variety of customers than by more traditional sales methods, which explains why certain restrictions on the use of the internet are dealt with as (re)sales restrictions. In principle, every distributor must be allowed to use the internet to sell products. In general, where a distributor uses a website to sell products that is considered a form of passive selling, since it is a reasonable way to allow customers to reach the distributor. The use of a website may have effects that extend beyond the distributor's own territory and customer group; however, such effects result from the technology allowing easy access from everywhere. If a customer visits the web site of a distributor and contacts the distributor and if such contact leads to a sale, including delivery, then that is considered passive selling. The same is true if a customer opts to be kept (automatically) informed by the distributor and it leads to a sale. Offering different language options on the website does not, of itself, change the passive character of such selling. The Commission thus regards the following as examples of hardcore restrictions of passive selling given the capability of these restrictions to limit the distributor's access to a greater number and variety of customers:

(a) an agreement that the (exclusive) distributor shall prevent customers located in another (exclusive) territory from viewing its website or shall automatically re-route its customers to the manufacturer's or other (exclusive) distributors' websites. This does not exclude an agreement that the distributor's website shall also offer a number of links to websites of other distributors and/or the supplier;

- (b) an agreement that the (exclusive) distributor shall terminate consumers' transactions over the internet once their credit card data reveal an address that is not within the distributor's (exclusive) territory;
- (c) an agreement that the distributor shall limit its proportion of overall sales made over the internet. This does not exclude the supplier requiring, without limiting the online sales of the distributor, that the buyer sells 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 (physical point of sales), nor does it preclude the supplier from making sure that the online activity of the distributor remains consistent with the supplier's distribution model (see paragraphs (54) and (56)). This absolute amount of required offline sales can be the same for all buyers, or determined individually for each buyer on the basis of objective criteria, such as the buyer's size in the network or its geographic location;
- (d) an agreement that the distributor shall pay a higher price for products intended to be resold by the distributor online than for products intended to be resold offline. This does not exclude the supplier agreeing with the buyer a fixed fee (that is, not a variable fee where the sum increases with the realised offline turnover as this would amount indirectly to dual pricing) to support the latter's offline or online sales efforts.
- (53) A restriction on the use of the internet by distributors that are party to the agreement is compatible with the Block Exemption Regulation to the extent that promotion on the internet or use of the internet would lead to active selling into, for instance, other distributors' exclusive territories or customer groups. The Commission considers online advertisement specifically addressed to certain customers as a form of active selling to those customers. For instance, territory-based banners on third party websites are a form of active sales into the territory where these banners are shown. In general, efforts to be found specifically in a certain territory or by a certain customer group is active selling into that territory or to that customer group. For instance, paying a search engine or online advertisement provider to have advertisements displayed specifically to users in a particular territory is active selling into that territory.
- (54) However, under the Block Exemption the supplier may require quality standards for the use of the internet site to resell its goods, just as the supplier may require quality standards for a shop or for selling by catalogue or for advertising and promotion in general. This may be relevant in particular for selective distribution. Under the Block Exemption, the supplier may, for example, require that its distributors have one or more brick and mortar shops or showrooms as a condition for becoming a member of its distribution system. Subsequent changes to such a condition are also possible under the Block Exemption, except where those changes have as their object to directly or indirectly limit the online sales by the distributors. Similarly, 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.
- (55) There are three further exceptions to the hardcore restriction set out in Article 4(b) of the Block Exemption Regulation. All three exceptions allow for the restriction of both active and passive sales. Under the first exception, it is permissible to restrict a wholesaler from selling to end users, which allows a supplier to keep the wholesale and retail level of trade separate. However, that exception does not exclude the possibility that the wholesaler can sell to certain end users, such as bigger end users, while not allowing sales to (all) other end users. The second exception allows a supplier to restrict an appointed distributor in a selective distribution system from selling, at any level of trade, to unauthorised distributors located in any territory where the system is currently operated or where the supplier does not yet sell the contract products (referred to as 'the territory reserved by the supplier to operate that system' in Article 4(b)(iii)). The third exception allows a supplier to restrict a buyer of components, to whom the components are supplied for incorporation, from reselling them to competitors of the supplier. The term 'component' includes any intermediate goods and the term 'incorporation' refers to the use of any input to produce goods.
- (56) The hardcore restriction set out in Article 4(c) of the Block Exemption Regulation excludes the restriction of active or passive sales to end users, whether professional end users or final consumers, by members of a selective distribution network, without prejudice to the possibility of prohibiting a member of the network from operating out of an unauthorised place of establishment. Accordingly, dealers in a selective distribution system, as defined in Article 1(1)(e) of the Block Exemption Regulation, cannot be restricted in the choice of users to whom they may sell, or purchasing agents acting on behalf of those users except to protect an exclusive distribution system operated elsewhere (see paragraph (51)). Within a selective distribution system the dealers should be free to sell, both actively and passively, to all end users, also with the help of the internet. Therefore, the Commission considers any obligations which dissuade appointed dealers from using the internet to reach a greater number and variety of customers by imposing criteria for online sales which are not overall



equivalent to the criteria imposed for the sales from the brick and mortar shop as a hardcore restriction. This does not mean that the criteria imposed for online sales must 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. Such a requirement may have to be stricter for online sales if it is easier for an unauthorised dealer to obtain those products by using the internet. Similarly, it may have to be stricter for offline sales if it is easier to obtain them from a brick and mortar shop. In order to ensure timely delivery of contract products, a supplier may impose that the products be delivered instantly in the case of offline sales. Whereas an identical requirement cannot be imposed for online sales, the supplier may specify certain practicable delivery times for such sales. Specific requirements may have to be formulated for an online after-sales help desk, so as to cover the costs of customers returning the product and for applying secure payment systems.

- (57) Within the territory where the supplier operates selective distribution, this system may not be combined with exclusive distribution as that would lead to a hardcore restriction of active or passive selling by the dealers under Article 4(c) of the Block Exemption Regulation, with the exception that restrictions can be imposed on the dealer's ability to determine the location of its business premises. Selected dealers may be prevented from operating their business from different premises or from opening a new outlet in a different location. In that context, the use by a distributor of its own website cannot be considered to be the same thing as the opening of a new outlet in a different location. If the dealer's outlet is mobile, an area may be defined outside which the mobile outlet cannot be operated. In addition, the supplier may commit itself to supplying only one dealer or a limited number of dealers in a particular part of the territory where the selective distribution system is applied.

- (58) The hardcore restriction set out in Article 4(d) of the Block Exemption Regulation concerns the restriction of cross-supplies between appointed distributors within a selective distribution system. Accordingly, an agreement or concerted practice may not have as its direct or indirect object to prevent or restrict the active or

passive selling of the contract products between the selected distributors. Selected distributors must remain free to purchase the contract products from other appointed distributors within the network, operating either at the same or at a different level of trade. Consequently, selective distribution cannot be combined with vertical restraints aimed at forcing distributors to purchase the contract products exclusively from a given source. It also means that within a selective distribution network, no restrictions can be imposed on appointed wholesalers as regards their sales of the product to appointed retailers.

- (59) The hardcore restriction set out in Article 4(e) of the Block Exemption Regulation concerns agreements that prevent or restrict end-users, independent repairers and service providers from obtaining spare parts directly from the manufacturer of those spare parts. An agreement between a manufacturer of spare parts and a buyer that incorporates those parts into its own products (original equipment manufacturer (OEM)), may not, either directly or indirectly, prevent or restrict sales by the manufacturer of those spare parts to end users, independent repairers or service providers. Indirect restrictions may arise particularly when the supplier of the spare parts is restricted in supplying technical information and special equipment which are necessary for the use of spare parts by users, independent repairers or service providers. However, the agreement may place restrictions on the supply of the spare parts to the repairers or service providers entrusted by the original equipment manufacturer with the repair or servicing of its own goods. In other words, the original equipment manufacturer may require its own repair and service network to buy spare parts from it.

#### **4. Individual cases of hardcore sales restrictions that may fall outside the scope of Article 101(1) or may fulfil the conditions of Article 101(3)**

- (60) Hardcore restrictions may be objectively necessary in exceptional cases for an agreement of a particular type or nature <sup>(1)</sup> and therefore fall outside Article 101(1). For example, a hardcore restriction may be objectively necessary to ensure that a public ban on selling dangerous substances to certain customers for reasons of safety or health is respected. In addition, undertakings may plead an efficiency defence under Article 101(3) in an individual case. This section provides some examples for (re)sales restrictions, whereas for RPM this is dealt with in section VI.2.10.

<sup>(1)</sup> See paragraph 18 of Communication from the Commission - Notice – Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97.

- (61) A distributor which will be the first to sell a new brand or the first to sell an existing brand on a new market, thereby ensuring a genuine entry on the relevant market, may have to commit substantial investments where there was previously no demand for that type of product in general or for that type of product from that producer. Such expenses may often be sunk and in such circumstances the distributor may not enter into the distribution agreement without protection for a certain period of time against (active and) passive sales into its territory or to its customer group by other distributors. For example such a situation may occur where a manufacturer established in a particular national market enters another national market and introduces its products with the help of an exclusive distributor and where this distributor needs to invest in launching and establishing the brand on this new market. Where substantial investments by the distributor to start up and/or develop the new market are necessary, restrictions of passive sales by other distributors into such a territory or to such a customer group which are necessary for the distributor to recoup those investments generally fall outside the scope of Article 101(1) during the first two years that the distributor is selling the contract goods or services in that territory or to that customer group, even though such hardcore restrictions are in general presumed to fall within the scope of Article 101(1).
- (62) In the case of genuine testing of a new product in a limited territory or with a limited customer group and in the case of a staggered introduction of a new product, the distributors appointed to sell the new product on the test market or to participate in the first round(s) of the staggered introduction may be restricted in their active selling outside the test market or the market(s) where the product is first introduced without falling within the scope of Article 101(1) for the period necessary for the testing or introduction of the product.
- (63) In the case of a selective distribution system, cross supplies between appointed distributors must normally remain free (see paragraph (58)). However, if appointed wholesalers located in different territories are obliged to invest in promotional activities in 'their' territories to support the sales by appointed retailers and it is not practical to specify in a contract the required promotional activities, restrictions on active sales by the wholesalers to appointed retailers in other wholesalers' territories to overcome possible free riding may, in an individual case, fulfil the conditions of Article 101(3).
- (64) In general, an agreement that a distributor shall pay a higher price for products intended to be resold by the distributor online than for products intended to be resold

offline ('dual pricing') is a hardcore restriction (see paragraph (52)). However, in some specific circumstances, such an agreement may fulfil the conditions of Article 101(3). Such circumstances may be present where a manufacturer agrees such dual pricing with its distributors, because selling online leads to substantially higher costs for the manufacturer than offline sales. For example, where 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. In that context, the Commission will also consider to what extent the restriction is likely to limit internet sales and hinder the distributor to reach more and different customers.

### 5. Excluded restrictions under the Block Exemption Regulation

- (65) Article 5 of the Block Exemption Regulation excludes certain obligations from the coverage of the Block Exemption Regulation even though the market share threshold is not exceeded. However, the Block Exemption Regulation continues to apply to the remaining part of the vertical agreement if that part is severable from the non-exempted obligations.
- (66) The first exclusion is provided for in Article 5(1)(a) of the Block Exemption Regulation and concerns non-compete obligations. Non-compete obligations are arrangements that result in the buyer purchasing from the supplier or from another undertaking designated by the supplier more than 80 % of the buyer's total purchases of the contract goods and services and their substitutes during the preceding calendar year (as defined by Article 1(1)(d) of the Block Exemption Regulation), thereby preventing the buyer from purchasing competing goods or services or limiting such purchases to less than 20 % of total purchases. Where, in the first year after entering in the agreement, for the year preceding the conclusion of the contract no relevant purchasing data for the buyer are available, the buyer's best estimate of its annual total requirements may be used. Such non-compete obligations are not covered by the Block Exemption Regulation where the duration is indefinite or exceeds five years. Non-compete obligations that are tacitly renewable beyond a period of five years are also not covered by the Block Exemption Regulation (see the second subparagraph of Article 5(1)). In general, non-compete obligations are exempted under that Regulation where their duration is limited to five years or less and no obstacles exist that hinder the buyer from effectively terminating the non-compete obligation at the end of the five year period. If, for instance, the agreement provides for a five-year non-compete obligation and the supplier provides a loan to the buyer, the repayment of that loan should not hinder the buyer from effectively terminating the non-compete obligation at the end of the five-year period. Similarly, when the supplier provides the buyer

with equipment which is not relationship-specific, the buyer should have the possibility to take over the equipment at its market asset value once the non-compete obligation expires.

(67) The five-year duration limit does not apply when the goods or services are resold by the buyer 'from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer'. In such cases the non-compete obligation may be of the same duration as the period of occupancy of the point of sale by the buyer (Article 5(2) of the Block Exemption Regulation). The reason for this exception is that it is normally unreasonable to expect a supplier to allow competing products to be sold from premises and land owned by the supplier without its permission. By analogy, the same principles apply where the buyer operates from a mobile outlet owned by the supplier or leased by the supplier from third parties not connected with the buyer. Artificial ownership constructions, such as a transfer by the distributor of its proprietary rights over the land and premises to the supplier for only a limited period, intended to avoid the five-year limit cannot benefit from this exception.

(68) The second exclusion from the block exemption is provided for in Article 5(1)(b) of the Block Exemption Regulation and concerns post term non-compete obligations on the buyer. Such obligations are normally not covered by the Block Exemption Regulation, unless the obligation is indispensable to protect know-how transferred by the supplier to the buyer, is limited to the point of sale from which the buyer has operated during the contract period, and is limited to a maximum period of one year (see Article 5(3) of the Block Exemption Regulation). According to the definition in Article 1(1)(g) of the Block Exemption Regulation the know-how needs to be 'substantial', meaning that the know-how includes information which is significant and useful to the buyer for the use, sale or resale of the contract goods or services.

(69) The third exclusion from the block exemption is provided for in Article 5(1)(c) of the Block Exemption Regulation and concerns the sale of competing goods in a selective distribution system. The Block Exemption Regulation covers the combination of selective distribution with a non-compete obligation, obliging the dealers not to resell competing brands in general. However, if the supplier prevents its appointed dealers, either directly or indirectly, from buying products for resale from specific competing suppliers, such an obligation cannot enjoy the benefit of the Block Exemption Regulation. The objective of the exclusion of such an obligation is to avoid a situation whereby a number of suppliers using the same selective distribution outlets prevent one specific competitor or certain specific

competitors from using these outlets to distribute their products (foreclosure of a competing supplier which would be a form of collective boycott) <sup>(1)</sup>.

## 6. Severability

(70) The Block Exemption Regulation exempts vertical agreements on condition that no hardcore restriction, as set out in Article 4 of that Regulation, is contained in or practised with the vertical agreement. If there are one or more hardcore restrictions, the benefit of the Block Exemption Regulation is lost for the entire vertical agreement. There is no severability for hardcore restrictions.

(71) The rule of severability does apply, however, to the excluded restrictions set out in Article 5 of the Block Exemption Regulation. Therefore, the benefit of the block exemption is only lost in relation to that part of the vertical agreement which does not comply with the conditions set out in Article 5.

## 7. Portfolio of products distributed through the same distribution system

(72) Where a supplier uses the same distribution agreement to distribute several goods/services some of these may, in view of the market share threshold, be covered by the Block Exemption Regulation while others may not. In that case, the Block Exemption Regulation applies to those goods and services for which the conditions of application are fulfilled.

(73) In respect of the goods or services which are not covered by the Block Exemption Regulation, the ordinary rules of competition apply, which means:

(a) there is no block exemption but also no presumption of illegality;

(b) if there is an infringement of Article 101(1) which is not exemptible, consideration may be given to whether there are appropriate remedies to solve the competition problem within the existing distribution system;

(c) if there are no such appropriate remedies, the supplier concerned will have to make other distribution arrangements.

Such a situation can also arise where Article 102 applies in respect of some products but not in respect of others.

<sup>(1)</sup> An example of indirect measures having such exclusionary effects can be found in Commission Decision 92/428/EEC in Case No IV/33.542 — *Parfum Givenchy*, OJ L 236, 19.8.1992, p. 11.

#### IV. WITHDRAWAL OF THE BLOCK EXEMPTION AND DISAPPLICATION OF THE BLOCK EXEMPTION REGULATION

##### 1. Withdrawal procedure

- (74) The presumption of legality conferred by the Block Exemption Regulation may be withdrawn where a vertical agreement, considered either in isolation or in conjunction with similar agreements enforced by competing suppliers or buyers, comes within the scope of Article 101(1) and does not fulfil all the conditions of Article 101(3).
- (75) The conditions of Article 101(3) may in particular not be fulfilled when access to the relevant market or competition therein is significantly restricted by the cumulative effect of parallel networks of similar vertical agreements practised by competing suppliers or buyers. Parallel networks of vertical agreements are to be regarded as similar if they contain restraints producing similar effects on the market. Such a situation may arise for example when, on a given market, certain suppliers practise purely qualitative selective distribution while other suppliers practise quantitative selective distribution. Such a situation may also arise when, on a given market, the cumulative use of qualitative criteria forecloses more efficient distributors. In such circumstances, the assessment must take account of the anti-competitive effects attributable to each individual network of agreements. Where appropriate, withdrawal may concern only a particular qualitative criterion or only the quantitative limitations imposed on the number of authorised distributors.
- (76) Responsibility for an anti-competitive cumulative effect can only be attributed to those undertakings which make an appreciable contribution to it. Agreements entered into by undertakings whose contribution to the cumulative effect is insignificant do not fall under the prohibition provided for in Article 101(1)<sup>(1)</sup> and are therefore not subject to the withdrawal mechanism. The assessment of such a contribution will be made in accordance with the criteria set out in paragraphs (128) to (229).
- (77) Where the withdrawal procedure is applied, the Commission bears the burden of proof that the agreement falls within the scope of Article 101(1) and that the agreement does not fulfil one or several of the conditions of Article 101(3). A withdrawal decision can only have *ex nunc* effect, which means that the exempted status of the agreements concerned will not be affected until the date at which the withdrawal becomes effective.

<sup>(1)</sup> Judgment of the Court of Justice of 28 February 1991 in Case C-234/89, *Stergios Delimitis v Henninger Bräu AG* [1991] ECR I-935.

- (78) As referred to in recital 14 of the Block Exemption Regulation, the competition authority of a Member State may withdraw the benefit of the Block Exemption Regulation in respect of vertical agreements whose anti-competitive effects are felt in the territory of the Member State concerned or a part thereof, which has all the characteristics of a distinct geographic market. The Commission has the exclusive power to withdraw the benefit of the Block Exemption Regulation in respect of vertical agreements restricting competition on a relevant geographic market which is wider than the territory of a single Member State. When the territory of a single Member State, or a part thereof, constitutes the relevant geographic market, the Commission and the Member State concerned have concurrent competence for withdrawal.

##### 2. Disapplication of the Block Exemption Regulation

- (79) Article 6 of the Block Exemption Regulation enables the Commission to exclude from the scope of the Block Exemption Regulation, by means of regulation, parallel networks of similar vertical restraints where these cover more than 50 % of a relevant market. Such a measure is not addressed to individual undertakings but concerns all undertakings whose agreements are defined in the regulation disapplying the Block Exemption Regulation.
- (80) Whereas the withdrawal of the benefit of the Block Exemption Regulation implies the adoption of a decision establishing an infringement of Article 101 by an individual company, the effect of a regulation under Article 6 is merely to remove, in respect of the restraints and the markets concerned, the benefit of the application of the Block Exemption Regulation and to restore the full application of Article 101(1) and (3). Following the adoption of a regulation declaring the Block Exemption Regulation inapplicable in respect of certain vertical restraints on a particular market, the criteria developed by the relevant case-law of the Court of Justice and the General Court and by notices and previous decisions adopted by the Commission will guide the application of Article 101 to individual agreements. Where appropriate, the Commission will take a decision in an individual case, which can provide guidance to all the undertakings operating on the market concerned.
- (81) For the purpose of calculating the 50 % market coverage ratio, account must be taken of each individual network of vertical agreements containing restraints, or combinations of restraints, producing similar effects on the market. Article 6 of the Block Exemption Regulation does not entail an obligation on the part of the Commission to act where the 50 % market-coverage ratio is exceeded. In general, disapplication is appropriate



when it is likely that access to the relevant market or competition therein is appreciably restricted. This may occur in particular when parallel networks of selective distribution covering more than 50 % of a market are liable to foreclose the market by using selection criteria which are not required by the nature of the relevant goods or which discriminate against certain forms of distribution capable of selling such goods.

(82) In assessing the need to apply Article 6 of the Block Exemption Regulation, the Commission will consider whether individual withdrawal would be a more appropriate remedy. This may depend, in particular, on the number of competing undertakings contributing to a cumulative effect on a market or the number of affected geographic markets within the Union.

(83) Any regulation referred to in Article 6 of the Block Exemption Regulation must clearly set out its scope. Therefore, the Commission must first define the relevant product and geographic market(s) and, secondly, must identify the type of vertical restraint in respect of which the Block Exemption Regulation will no longer apply. As regards the latter aspect, the Commission may modulate the scope of its regulation according to the competition concern which it intends to address. For instance, while all parallel networks of single-branding type arrangements shall be taken into account in view of establishing the 50 % market coverage ratio, the Commission may nevertheless restrict the scope of the disapplication regulation only to non-compete obligations exceeding a certain duration. Thus, agreements of a shorter duration or of a less restrictive nature might be left unaffected, in consideration of the lesser degree of foreclosure attributable to such restraints. Similarly, when on a particular market selective distribution is practised in combination with additional restraints such as non-compete or quantity-forcing on the buyer, the disapplication regulation may concern only such additional restraints. Where appropriate, the Commission may also provide guidance by specifying the market share level which, in the specific market context, may be regarded as insufficient to bring about a significant contribution by an individual undertaking to the cumulative effect.

(84) Pursuant to Regulation No 19/65/EEC of 2 March 1965 of the Council on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices<sup>(1)</sup>, the Commission will have to set a transitional period of not less than six months before a regulation disapplying the Block Exemption Regulation becomes applicable. This should allow the undertakings concerned to adapt their agreements to take account of the regulation disapplying the Block Exemption Regulation.

<sup>(1)</sup> OJ 36, 6.3.1965, p. 533/65, English special edition: OJ Series I Chapter 1965-1966, p. 35.

(85) A regulation disapplying the Block Exemption Regulation will not affect the exempted status of the agreements concerned for the period preceding its date of application.

## V. MARKET DEFINITION AND MARKET SHARE CALCULATION

### 1. Commission Notice on definition of the relevant market

(86) The Commission Notice on definition of the relevant market for the purposes of Community competition law<sup>(2)</sup> provides guidance on the rules, criteria and evidence which the Commission uses when considering market definition issues. That Notice will not be further explained in these Guidelines and should serve as the basis for market definition issues. These Guidelines will only deal with specific issues that arise in the context of vertical restraints and that are not dealt with in that notice.

### 2. The relevant market for calculating the 30 % market share threshold under the Block Exemption Regulation

(87) Under Article 3 of the Block Exemption Regulation, the market share of both the supplier and the buyer are decisive to determine if the block exemption applies. In order for the block exemption to apply, the market share of the supplier on the market where it sells the contract products to the buyer, and the market share of the buyer on the market where it purchases the contract products, must each be 30 % or less. For agreements between small and medium-sized undertakings it is in general not necessary to calculate market shares (see paragraph (11)).

(88) In order to calculate an undertaking's market share, it is necessary to determine the relevant market where that undertaking sells and purchases, respectively, the contract products. Accordingly, the relevant product market and the relevant geographic market must be defined. The relevant product market comprises any goods or services which are regarded by the buyers as interchangeable, by reason of their characteristics, prices and intended use. The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of relevant goods or services, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring geographic areas because, in particular, conditions of competition are appreciably different in those areas.

<sup>(2)</sup> OJ C 372, 9.12.1997, p. 5.

- (89) The product market definition primarily depends on substitutability from the buyers' perspective. When the supplied product is used as an input to produce other products and is generally not recognisable in the final product, the product market is normally defined by the direct buyers' preferences. The customers of the buyers will normally not have a strong preference concerning the inputs used by the buyers. Usually, the vertical restraints agreed between the supplier and buyer of the input only relate to the sale and purchase of the intermediate product and not to the sale of the resulting product. In the case of distribution of final goods, substitutes for the direct buyers will normally be influenced or determined by the preferences of the final consumers. A distributor, as reseller, cannot ignore the preferences of final consumers when it purchases final goods. In addition, at the distribution level the vertical restraints usually concern not only the sale of products between supplier and buyer, but also their resale. As different distribution formats usually compete, markets are in general not defined by the form of distribution that is applied. Where suppliers generally sell a portfolio of products, the entire portfolio may determine the product market when the portfolios and not the individual products are regarded as substitutes by the buyers. As distributors are professional buyers, the geographic wholesale market is usually wider than the retail market, where the product is resold to final consumers. Often, this will lead to the definition of national or wider wholesale markets. But retail markets may also be wider than the final consumers' search area where homogeneous market conditions and overlapping local or regional catchment areas exist.
- (90) Where a vertical agreement involves three parties, each operating at a different level of trade, each party's market share must be 30 % or less in order for the block exemption to apply. As specified in Article 3(2) of the Block Exemption Regulation, where in a multi party agreement an undertaking buys the contract goods or services from one undertaking party to the agreement and sells the contract goods or services to another undertaking party to the agreement, the block exemption applies only if its market share does not exceed the 30 % threshold both as a buyer and a supplier. If, for instance, in an agreement between a manufacturer, a wholesaler (or association of retailers) and a retailer, a non-compete obligation is agreed, then the market shares of the manufacturer and the wholesaler (or association of retailers) on their respective downstream markets must not exceed 30 % and the market share of the wholesaler (or association of retailers) and the retailer must not exceed 30 % on their respective purchase markets in order to benefit from the block exemption.
- (91) Where a supplier produces both original equipment and the repair or replacement parts for that equipment, the supplier will often be the only or the major supplier on the after-market for the repair and replacement parts. This may also arise where the supplier (OEM supplier) subcontracts the manufacturing of the repair or replacement parts. The relevant market for application of the Block Exemption Regulation may be the original equipment market including the spare parts or a separate original equipment market and after-market depending on the circumstances of the case, such as the effects of the restrictions involved, the lifetime of the equipment and importance of the repair or replacement costs<sup>(1)</sup>. In practice, the issue is whether a significant proportion of buyers make their choice taking into account the lifetime costs of the product. If so, it indicates there is one market for the original equipment and spare parts combined.
- (92) Where the vertical agreement, in addition to the supply of the contract goods, also contains IPR provisions — such as a provision concerning the use of the supplier's trademark — which help the buyer to market the contract goods, the supplier's market share on the market where it sells the contract goods is relevant for the application of the Block Exemption Regulation. Where a franchisor does not supply goods to be resold but provides a bundle of services and goods combined with IPR provisions which together form the business method being franchised, the franchisor needs to take account of its market share as a provider of a business method. For that purpose, the franchisor needs to calculate its market share on the market where the business method is exploited, which is the market where the franchisees exploit the business method to provide goods or services to end users. The franchisor must base its market share on the value of the goods or services supplied by its franchisees on this market. On such a market, the competitors may be providers of other franchised business methods but also suppliers of substitutable goods or services not applying franchising. For instance, without prejudice to the definition of such market, if there was a market for fast-food services, a franchisor operating on such a market would need to calculate its market share on the basis of the relevant sales figures of its franchisees on this market.

<sup>(1)</sup> See for example Commission Decision in *Pelikan/Kyocera* (1995), COM(96) 126 (not published), point 87, and Commission Decision 91/595/EEC in Case No IV/M.12 — *Varta/Bosch*, OJ L 320, 22.11.1991, p. 26, Commission Decision in Case No IV/M.1094 — *Caterpillar/Perkins Engines*, OJ C 94, 28.3.1998, p. 23, and Commission Decision in Case No IV/M.768 — *Lucas/Varity*, OJ C 266, 13.9.1996, p. 6. See also point 56 of the Notice on the definition of the relevant market for the purposes of Community competition law (see paragraph 86).

### 3. Calculation of market shares under the Block Exemption Regulation

- (93) The calculation of market shares needs to be based in principle on value figures. Where value figures are not available substantiated estimates can be made. Such estimates may be based on other reliable market information such as volume figures (see Article 7(a) of the Block Exemption Regulation).
- (94) In-house production, that is, production of an intermediate product for own use, may be very important in a competition analysis as one of the competitive constraints or to accentuate the market position of a company. However, for the purpose of market definition and the calculation of market share for intermediate goods and services, in-house production will not be taken into account.
- (95) However, in the case of dual distribution of final goods, that is, where a producer of final goods also acts as a distributor on the market, the market definition and market share calculation need to include sales of their own goods made by the producers through their vertically integrated distributors and agents (see Article 7(c) of the Block Exemption Regulation). 'Integrated distributors' are connected undertakings within the meaning of Article 1(2) of the Block Exemption Regulation <sup>(1)</sup>.

## VI. ENFORCEMENT POLICY IN INDIVIDUAL CASES

### 1. The framework of analysis

- (96) Outside the scope of the block exemption, it is relevant to examine whether in the individual case the agreement falls within the scope of Article 101(1) and if so whether the conditions of Article 101(3) are satisfied. Provided that they do not contain restrictions of competition by object and in particular hardcore restrictions of competition, there is no presumption that vertical agreements falling outside the block exemption because

the market share threshold is exceeded fall within the scope of Article 101(1) or fail to satisfy the conditions of Article 101(3). Individual assessment of the likely effects of the agreement is required. Companies are encouraged to do their own assessment. Agreements that either do not restrict competition within the meaning of Article 101(1) or which fulfil the conditions of Article 101(3) are valid and enforceable. Pursuant to Article 1(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty <sup>(2)</sup> no notification needs to be made to benefit from an individual exemption under Article 101(3). In the case of an individual examination by the Commission, the latter will bear the burden of proof that the agreement in question infringes Article 101(1). The undertakings claiming the benefit of Article 101(3) bear the burden of proving that the conditions of that paragraph are fulfilled. When likely anti-competitive effects are demonstrated, undertakings may substantiate efficiency claims and explain why a certain distribution system is indispensable to bring likely benefits to consumers without eliminating competition, before the Commission decides whether the agreement satisfies the conditions of Article 101(3).

- (97) The assessment of whether a vertical agreement has the effect of restricting competition will be made by comparing the actual or likely future situation on the relevant market with the vertical restraints in place with the situation that would prevail in the absence of the vertical restraints in the agreement. In the assessment of individual cases, the Commission will take, as appropriate, both actual and likely effects into account. For vertical agreements to be restrictive of competition by effect they must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation, or the variety or quality of goods and services can be expected with a reasonable degree of probability. The likely negative effects on competition must be appreciable <sup>(3)</sup>. Appreciable anticompetitive effects are likely to occur when at least one of the parties has or obtains some degree of market power and the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power. Market power is the ability to maintain prices above competitive levels or to maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a not insignificant period of time. The degree of market power normally required for a finding of an infringement under Article 101(1) is less than the degree of market power required for a finding of dominance under Article 102.

<sup>(1)</sup> For these market definition and market share calculation purposes, it is not relevant whether the integrated distributor sells in addition products of competitors.

<sup>(2)</sup> OJ L 1, 4.1.2003, p. 1.

<sup>(3)</sup> See Section II.1.

- (98) Vertical restraints are generally less harmful than horizontal restraints. The main reason for the greater focus on horizontal restraints is that such restraints may concern an agreement between competitors producing identical or substitutable goods or services. In such horizontal relationships, the exercise of market power by one company (higher price of its product) may benefit its competitors. This may provide an incentive to competitors to induce each other to behave anti-competitively. In vertical relationships, the product of the one is the input for the other-, in other words, the activities of the parties to the agreement are complementary to each other. The exercise of market power by either the upstream or downstream company would therefore normally hurt the demand for the product of the other. The companies involved in the agreement therefore usually have an incentive to prevent the exercise of market power by the other.
- (99) Such self-restraining character should not, however, be over-estimated. When a company has no market power, it can only try to increase its profits by optimising its manufacturing and distribution processes, with or without the help of vertical restraints. More generally, because of the complementary role of the parties to a vertical agreement in getting a product on the market, vertical restraints may provide substantial scope for efficiencies. However, when an undertaking does have market power it can also try to increase its profits at the expense of its direct competitors by raising their costs and at the expense of its buyers and ultimately consumers by trying to appropriate some of their surplus. This can happen when the upstream and downstream company share the extra profits or when one of the two uses vertical restraints to appropriate all the extra profits.
- these competitors, often referred to as reduction of intra-brand competition if it concerns distributors' competition on the basis of the brand or product of the same supplier;
- (d) the creation of obstacles to market integration, including, above all, limitations on the possibilities for consumers to purchase goods or services in any Member State they may choose.
- (101) Foreclosure, softening of competition and collusion at the manufacturers' level may harm consumers in particular by increasing the wholesale prices of the products, limiting the choice of products, lowering their quality or reducing the level of product innovation. Foreclosure, softening of competition and collusion at the distributors' level may harm consumers in particular by increasing the retail prices of the products, limiting the choice of price-service combinations and distribution formats, lowering the availability and quality of retail services and reducing the level of innovation of distribution.
- (102) On a market where individual distributors distribute the brand(s) of only one supplier, a reduction of competition between the distributors of the same brand will lead to a reduction of intra-brand competition between these distributors, but may not have a negative effect on competition between distributors in general. In such a case, if inter-brand competition is fierce, it is unlikely that a reduction of intra-brand competition will have negative effects for consumers.

### 1.1 Negative effects of vertical restraints

- (100) The negative effects on the market that may result from vertical restraints which EU competition law aims at preventing are the following:
- (a) anticompetitive foreclosure of other suppliers or other buyers by raising barriers to entry or expansion;
- (b) softening of competition between the supplier and its competitors and/or facilitation of collusion amongst these suppliers, often referred to as reduction of inter-brand competition <sup>(1)</sup>;
- (c) softening of competition between the buyer and its competitors and/or facilitation of collusion amongst
- (103) Exclusive arrangements are generally more anti-competitive than non-exclusive arrangements. Exclusive arrangements, whether by means of express contractual language or their practical effects, result in one party sourcing all or practically all of its demand from another party. For instance, under a non-compete obligation the buyer purchases only one brand. Quantity forcing, on the other hand, leaves the buyer some scope to purchase competing goods. The degree of foreclosure may therefore be less with quantity forcing.
- (104) Vertical restraints agreed for non-branded goods and services are in general less harmful than restraints affecting the distribution of branded goods and services. Branding tends to increase product differentiation and reduce substitutability of the product, leading to a reduced elasticity of demand and an increased possibility to raise price. The distinction between branded and non-branded goods or services will often coincide with the distinction between intermediate goods and services and final goods and services.
- <sup>(1)</sup> By collusion is meant both explicit collusion and tacit collusion (conscious parallel behaviour).



(105) In general, a combination of vertical restraints aggravates their individual negative effects. However, certain combinations of vertical restraints are less anti-competitive than their use in isolation. For instance, in an exclusive distribution system, the distributor may be tempted to increase the price of the products as intra-brand competition has been reduced. The use of quantity forcing or the setting of a maximum resale price may limit such price increases. Possible negative effects of vertical restraints are reinforced when several suppliers and their buyers organise their trade in a similar way, leading to so-called cumulative effects.

### 1.2. Positive effects of vertical restraints

(106) It is important to recognise that vertical restraints may have positive effects by, in particular, promoting non-price competition and improved quality of services. When a company has no market power, it can only try to increase its profits by optimising its manufacturing or distribution processes. In a number of situations vertical restraints may be helpful in this respect since the usual arm's length dealings between supplier and buyer, determining only price and quantity of a certain transaction, can lead to a sub-optimal level of investments and sales.

(107) While trying to give a fair overview of the various justifications for vertical restraints, these Guidelines do not claim to be complete or exhaustive. The following reasons may justify the application of certain vertical restraints:

(a) To solve a 'free-rider' problem. One distributor may free-ride on the promotion efforts of another distributor. That type of problem is most common at the wholesale and retail level. Exclusive distribution or similar restrictions may be helpful in avoiding such free-riding. Free-riding can also occur between suppliers, for instance where one invests in promotion at the buyer's premises, in general at the retail level, that may also attract customers for its competitors. Non-compete type restraints can help to overcome free-riding<sup>(1)</sup>.

<sup>(1)</sup> Whether consumers actually benefit overall from extra promotional efforts depends on whether the extra promotion informs and convinces and thus benefits many new customers or mainly reaches customers who already know what they want to buy and for whom the extra promotion only or mainly implies a price increase.

For there to be a problem, there needs to be a real free-rider issue. Free-riding between buyers can only occur on pre-sales services and other promotional activities, but not on after-sales services for which the distributor can charge its customers individually. The product will usually need to be relatively new or technically complex or the reputation of the product must be a major determinant of its demand, as the customer may otherwise very well know what it wants, based on past purchases. And the product must be of a reasonably high value as it is otherwise not attractive for a customer to go to one shop for information and to another to buy. Lastly, it must not be practical for the supplier to impose on all buyers, by contract, effective promotion or service requirements.

Free-riding between suppliers is also restricted to specific situations, namely to cases where the promotion takes place at the buyer's premises and is generic, not brand specific.

(b) To 'open up or enter new markets'. Where a manufacturer wants to enter a new geographic market, for instance by exporting to another country for the first time, this may involve special 'first time investments' by the distributor to establish the brand on the market. In order to persuade a local distributor to make these investments, it may be necessary to provide territorial protection to the distributor so that it can recoup these investments by temporarily charging a higher price. Distributors based in other markets should then be restrained for a limited period from selling on the new market (see also paragraph (61) in Section III.4). This is a special case of the free-rider problem described under point (a).

(c) The 'certification free-rider issue'. In some sectors, certain retailers have a reputation for stocking only 'quality' products. In such a case, selling through those retailers may be vital for the introduction of a new product. If the manufacturer cannot initially limit its sales to the premium stores, it runs the risk of being de-listed and the product introduction may fail. There may, therefore, be a reason for allowing for a limited duration a restriction such as exclusive distribution or selective distribution. It must be enough to guarantee introduction of the new product but not so long as to hinder large-scale dissemination. Such benefits are more likely with 'experience' goods or complex goods that represent a relatively large purchase for the final consumer.

- (d) The so-called 'hold-up problem'. Sometimes there are client-specific investments to be made by either the supplier or the buyer, such as in special equipment or training. For instance, a component manufacturer that has to build new machines and tools in order to satisfy a particular requirement of one of its customers. The investor may not commit the necessary investments before particular supply arrangements are fixed.

However, as in the other free-riding examples, there are a number of conditions that have to be met before the risk of under-investment is real or significant. Firstly, the investment must be relationship-specific. An investment made by the supplier is considered to be relationship-specific when, after termination of the contract, it cannot be used by the supplier to supply other customers and can only be sold at a significant loss. An investment made by the buyer is considered to be relationship-specific when, after termination of the contract, it cannot be used by the buyer to purchase and/or use products supplied by other suppliers and can only be sold at a significant loss. An investment is thus relationship-specific because it can only, for instance, be used to produce a brand-specific component or to store a particular brand and thus cannot be used profitably to produce or resell alternatives. Secondly, it must be a long-term investment that is not recouped in the short run. And thirdly, the investment must be asymmetric, that is, one party to the contract invests more than the other party. Where these conditions are met, there is usually a good reason to have a vertical restraint for the duration it takes to depreciate the investment. The appropriate vertical restraint will be of the non-compete type or quantity-forcing type when the investment is made by the supplier and of the exclusive distribution, exclusive customer allocation or exclusive supply type when the investment is made by the buyer.

- (e) The 'specific hold-up problem that may arise in the case of transfer of substantial know-how'. The know-how, once provided, cannot be taken back and the provider of the know-how may not want it to be used for or by its competitors. In as far as the know-how was not readily available to the buyer, is substantial and indispensable for the operation of the agreement, such a transfer may justify a non-compete type of restriction, which would normally fall outside Article 101(1).

- (f) The 'vertical externality issue'. A retailer may not gain all the benefits of its action taken to improve sales; some may go to the manufacturer. For every extra unit a retailer sells by lowering its resale price or by increasing its sales effort, the manufacturer benefits if its wholesale price exceeds its marginal production costs. Thus, there may be a positive externality bestowed on the manufacturer by such retailer's actions and from the manufacturer's perspective the retailer may be pricing too high and/or making too little sales efforts. The negative externality of too high pricing by the retailer is sometimes called the "double marginalisation problem" and it can be avoided by imposing a maximum resale price on the retailer. To increase the retailer's sales efforts selective distribution, exclusive distribution or similar restrictions may be helpful <sup>(1)</sup>.

- (g) 'Economies of scale in distribution'. In order to have scale economies exploited and thereby see a lower retail price for its product, the manufacturer may want to concentrate the resale of its products on a limited number of distributors. To do so, it could use exclusive distribution, quantity forcing in the form of a minimum purchasing requirement, selective distribution containing such a requirement or exclusive sourcing.

- (h) 'Capital market imperfections'. The usual providers of capital (banks, equity markets) may provide capital sub-optimally when they have imperfect information on the quality of the borrower or there is an inadequate basis to secure the loan. The buyer or supplier may have better information and be able, through an exclusive relationship, to obtain extra security for its investment. Where the supplier provides the loan to the buyer, this may lead to non-compete or quantity forcing on the buyer. Where the buyer provides the loan to the supplier, this may be the reason for having exclusive supply or quantity forcing on the supplier.

- (i) 'Uniformity and quality standardisation'. A vertical restraint may help to create a brand image by imposing a certain measure of uniformity and quality standardisation on the distributors, thereby increasing the attractiveness of the product to the final consumer and increasing its sales. This can for instance be found in selective distribution and franchising.

<sup>(1)</sup> See however the previous footnote.

(108) The nine situations listed in paragraph (107) make clear that under certain conditions, vertical agreements are likely to help realise efficiencies and the development of new markets and that this may offset possible negative effects. The case is in general strongest for vertical restraints of a limited duration which help the introduction of new complex products or protect relationship-specific investments. A vertical restraint is sometimes necessary for as long as the supplier sells its product to the buyer (see in particular the situations described in paragraph (107)(a), (e), (f), (g) and (i)).

(109) A large measure of substitutability exists between the different vertical restraints. As a result, the same inefficiency problem can be solved by different vertical restraints. For instance, economies of scale in distribution may possibly be achieved by using exclusive distribution, selective distribution, quantity forcing or exclusive sourcing. However, the negative effects on competition may differ between the various vertical restraints, which plays a role when indispensability is discussed under Article 101(3).

### 1.3. Methodology of analysis

(110) The assessment of a vertical restraint generally involves the following four steps <sup>(1)</sup>:

- (a) First, the undertakings involved need to establish the market shares of the supplier and the buyer on the market where they respectively sell and purchase the contract products.
- (b) If the relevant market share of the supplier and the buyer each do not exceed the 30 % threshold, the vertical agreement is covered by the Block Exemption Regulation, subject to the hardcore restrictions and excluded restrictions set out in that Regulation.
- (c) If the relevant market share is above the 30 % threshold for supplier and/or buyer, it is necessary to assess whether the vertical agreement falls within Article 101(1).
- (d) If the vertical agreement falls within Article 101(1), it is necessary to examine whether it fulfils the conditions for exemption under Article 101(3).

#### 1.3.1. Relevant factors for the assessment under Article 101(1)

(111) In assessing cases above the market share threshold of 30 %, the Commission will undertake a full competition

analysis. The following factors are particularly relevant to establish whether a vertical agreement brings about an appreciable restriction of competition under Article 101(1):

- (a) nature of the agreement;
- (b) market position of the parties;
- (c) market position of competitors;
- (d) market position of buyers of the contract products;
- (e) entry barriers;
- (f) maturity of the market;
- (g) level of trade;
- (h) nature of the product;
- (i) other factors.

(112) The importance of individual factors may vary from case to case and depends on all other factors. For instance, a high market share of the parties is usually a good indicator of market power, but in the case of low entry barriers it may not be indicative of market power. It is therefore not possible to provide firm rules on the importance of the individual factors.

(113) Vertical agreements can take many shapes and forms. It is therefore important to analyse the nature of the agreement in terms of the restraints that it contains, the duration of those restraints and the percentage of total sales on the market affected by those restraints. It may be necessary to go beyond the express terms of the agreement. The existence of implicit restraints may be derived from the way in which the agreement is implemented by the parties and the incentives that they face.

(114) The market position of the parties provides an indication of the degree of market power, if any, possessed by the supplier, the buyer or both. The higher their market share, the greater their market power is likely to be. This is particularly so where the market share reflects cost advantages or other competitive advantages vis-à-vis competitors. Such competitive advantages may, for instance, result from being a first mover on the market (having the best site, etc.), from holding essential patents or having superior technology, from being the brand leader or having a superior portfolio.

<sup>(1)</sup> These steps are not intended to present a legal reasoning that the Commission should follow in this order to take a decision.

- (115) Such indicators, namely market share and possible competitive advantages, are used to assess the market position of competitors. The stronger the competitors are and the greater their number, the less risk there is that the parties will be able to individually exercise market power and foreclose the market or soften competition. It is also relevant to consider whether there are effective and timely counterstrategies that competitors would be likely to deploy. However, if the number of competitors becomes rather small and their market position (size, costs, R&D potential, etc.) is rather similar, such a market structure may increase the risk of collusion. Fluctuating or rapidly changing market shares are in general an indication of intense competition.
- (116) The market position of the parties' customers provides an indication of whether or not one or more of those customers possess buyer power. The first indicator of buyer power is the market share of the customer on the purchase market. That share reflects the importance of its demand for possible suppliers. Other indicators focus on the position of the customer on its resale market, including characteristics such as a wide geographic spread of its outlets, own brands including private labels and its brand image amongst final consumers. In some circumstances, buyer power may prevent the parties from exercising market power and thereby solve a competition problem that would otherwise have existed. This is particularly so when strong customers have the capacity and incentive to bring new sources of supply on to the market in the case of a small but permanent increase in relative prices. Where strong customers merely extract favourable terms for themselves or simply pass on any price increase to their customers, their position does not prevent the parties from exercising market power.
- (117) Entry barriers are measured by the extent to which incumbent companies can increase their price above the competitive level without attracting new entry. In the absence of entry barriers, easy and quick entry would render price increases unprofitable. When effective entry, preventing or eroding the exercise of market power, is likely to occur within one or two years, entry barriers can, as a general rule, be said to be low. Entry barriers may result from a wide variety of factors such as economies of scale and scope, government regulations, especially where they establish exclusive rights, state aid, import tariffs, intellectual property rights, ownership of resources where the supply is limited due to for instance natural limitations<sup>(1)</sup>, essential facilities, a first mover advantage and brand loyalty of consumers created by strong advertising over a period of time. Vertical restraints and vertical integration may also work as an entry barrier by making access more difficult and foreclosing (potential) competitors. Entry barriers may be present at only the supplier or buyer level or at both levels. The question whether certain of those factors should be described as entry barriers depends particularly on whether they entail sunk costs. Sunk costs are those costs that have to be incurred to enter or be active on a market but that are lost when the market is exited. Advertising costs to build consumer loyalty are normally sunk costs, unless an exiting firm could either sell its brand name or use it somewhere else without a loss. The more costs are sunk, the more potential entrants have to weigh the risks of entering the market and the more credibly incumbents can threaten that they will match new competition, as sunk costs make it costly for incumbents to leave the market. If, for instance, distributors are tied to a manufacturer via a non-compete obligation, the foreclosing effect will be more significant if setting up its own distributors will impose sunk costs on the potential entrant. In general, entry requires sunk costs, sometimes minor and sometimes major. Therefore, actual competition is in general more effective and will weigh more heavily in the assessment of a case than potential competition.
- (118) A mature market is a market that has existed for some time, where the technology used is well known and widespread and not changing very much, where there are no major brand innovations and in which demand is relatively stable or declining. In such a market, negative effects are more likely than in more dynamic markets.
- (119) The level of trade is linked to the distinction between intermediate and final goods and services. Intermediate goods and services are sold to undertakings for use as an input to produce other goods or services and are generally not recognisable in the final goods or services. The buyers of intermediate products are usually well-informed customers, able to assess quality and therefore less reliant on brand and image. Final goods are, directly or indirectly, sold to final consumers that often rely more on brand and image. As distributors have to respond to the demand of final consumers, competition may suffer more when distributors are foreclosed from selling one or a number of brands than when buyers of intermediate products are prevented from buying competing products from certain sources of supply.
- <sup>(1)</sup> See Commission Decision 97/26/EC (Case No IV/M.619 — *Gencor/Lonrho*), OJ L 11, 14.1.1997, p. 30.



(120) The nature of the product plays a role in particular for final products in assessing both the likely negative and the likely positive effects. When assessing the likely negative effects, it is important whether the products on the market are more homogeneous or heterogeneous, whether the product is expensive, taking up a large part of the consumer's budget, or is inexpensive and whether the product is a one-off purchase or repeatedly purchased. In general, when the product is more heterogeneous, less expensive and resembles more a one-off purchase, vertical restraints are more likely to have negative effects.

(121) In the assessment of particular restraints other factors may have to be taken into account. Among these factors can be the cumulative effect, that is, the coverage of the market by similar agreements of others, whether the agreement is 'imposed' (mainly one party is subject to the restrictions or obligations) or 'agreed' (both parties accept restrictions or obligations), the regulatory environment and behaviour that may indicate or facilitate collusion like price leadership, pre-announced price changes and discussions on the 'right' price, price rigidity in response to excess capacity, price discrimination and past collusive behaviour.

### 1.3.2. Relevant factors for the assessment under Article 101(3)

(122) Restrictive vertical agreements may also produce pro-competitive effects in the form of efficiencies, which may outweigh their anti-competitive effects. Such an assessment takes place within the framework of Article 101(3), which contains an exception from the prohibition rule of Article 101(1). For that exception to be applicable, the vertical agreement must produce objective economic benefits, the restrictions on competition must be indispensable to attain the efficiencies, consumers must receive a fair share of the efficiency gains, and the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products concerned <sup>(1)</sup>.

(123) The assessment of restrictive agreements under Article 101(3) is made within the actual context in which they occur <sup>(2)</sup> and on the basis of the facts existing at any given point in time. The assessment is

sensitive to material changes in the facts. The exception rule of Article 101(3) applies as long as the four conditions are fulfilled and ceases to apply when that is no longer the case <sup>(3)</sup>. When applying Article 101(3) in accordance with these principles it is necessary to take into account the investments made by any of the parties and the time needed and the restraints required to commit and recoup an efficiency enhancing investment.

(124) The first condition of Article 101(3) requires an assessment of what are the objective benefits in terms of efficiencies produced by the agreement. In this respect, vertical agreements often have the potential to help realise efficiencies, as explained in section 1.2, by improving the way in which the parties conduct their complementary activities.

(125) In the application of the indispensability test contained in Article 101(3), the Commission will in particular examine whether individual restrictions make it possible to perform the production, purchase and/or (re)sale of the contract products more efficiently than would have been the case in the absence of the restriction concerned. In making such an assessment, the market conditions and the realities facing the parties must be taken into account. Undertakings invoking the benefit of Article 101(3) are not required to consider hypothetical and theoretical alternatives. They must, however, explain and demonstrate why seemingly realistic and significantly less restrictive alternatives would be significantly less efficient. If the application of what appears to be a commercially realistic and less restrictive alternative would lead to a significant loss of efficiencies, the restriction in question is treated as indispensable.

(126) The condition that consumers must receive a fair share of the benefits implies that consumers of the products purchased and/or (re)sold under the vertical agreement must at least be compensated for the negative effects of the agreement. <sup>(4)</sup> In other words, the efficiency gains must fully off-set the likely negative impact on prices, output and other relevant factors caused by the agreement.

<sup>(1)</sup> See Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97.

<sup>(2)</sup> See Judgment of the Court of Justice in Joined Cases 25/84 and 26/84 *Ford* [1985] ECR 2725.

<sup>(3)</sup> See in this respect for example Commission Decision 1999/242/EC (Case No IV/36.237 - *TPS*), OJ L 90, 2.4.1999, p. 6. Similarly, the prohibition of Article 101(1) also only applies as long as the agreement has a restrictive object or restrictive effects.

<sup>(4)</sup> See paragraph 85 of Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97.

(127) The last condition of Article 101(3), according to which the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products concerned, presupposes an analysis of remaining competitive pressures on the market and the impact of the agreement on such sources of competition. In the application of the last condition of Article 101(3), the relationship between Article 101(3) and Article 102 must be taken into account. According to settled case law, the application of Article 101(3) cannot prevent the application of Article 102<sup>(1)</sup>. Moreover, since Articles 101 and 102 both pursue the aim of maintaining effective competition on the market, consistency requires that Article 101(3) be interpreted as precluding any application of the exception rule to restrictive agreements that constitute an abuse of a dominant position<sup>(2)</sup>. The vertical agreement may not eliminate effective competition, by removing all or most existing sources of actual or potential competition. Rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the form of innovation. In its absence, the dominant undertaking will lack adequate incentives to continue to create and pass on efficiency gains. Where there is no residual competition and no foreseeable threat of entry, the protection of rivalry and the competitive process outweighs possible efficiency gains. A restrictive agreement which maintains, creates or strengthens a market position approaching that of a monopoly can normally not be justified on the grounds that it also creates efficiency gains.

## 2. Analysis of specific vertical restraints

(128) The most common vertical restraints and combinations of vertical restraints are analysed in the remainder of these Guidelines following the framework of analysis developed in paragraphs (96) to (127). Other restraints and combinations exist for which no direct guidance is provided in these Guidelines. They will, however, be treated according to the same principles and with the same emphasis on the effect on the market.

### 2.1. Single branding

(129) Under the heading of 'single branding' fall those agreements which have as their main element the fact that the buyer is obliged or induced to concentrate its orders for a particular type of product with one supplier.

That component can be found amongst others in non-compete and quantity-forcing on the buyer. A non-compete arrangement is based on an obligation or incentive scheme which makes the buyer purchase more than 80% of its requirements on a particular market from only one supplier. It does not mean that the buyer can only buy directly from the supplier, but that the buyer will not buy and resell or incorporate competing goods or services. Quantity-forcing on the buyer is a weaker form of non-compete, where incentives or obligations agreed between the supplier and the buyer make the latter concentrate its purchases to a large extent with one supplier. Quantity-forcing may for example take the form of minimum purchase requirements, stocking requirements or non-linear pricing, such as conditional rebate schemes or a two-part tariff (fixed fee plus a price per unit). A so-called 'English clause', requiring the buyer to report any better offer and allowing him only to accept such an offer when the supplier does not match it, can be expected to have the same effect as a single branding obligation, especially when the buyer has to reveal who makes the better offer.

(130) The possible competition risks of single branding are foreclosure of the market to competing suppliers and potential suppliers, softening of competition and facilitation of collusion between suppliers in case of cumulative use and, where the buyer is a retailer selling to final consumers, a loss of in-store inter-brand competition. Such restrictive effects have a direct impact on inter-brand competition.

(131) Single branding is exempted by the Block Exemption Regulation where the supplier's and buyer's market share each do not exceed 30 % and are subject to a limitation in time of five years for the non-compete obligation. The remainder of this section provides guidance for the assessment of individual cases above the market share threshold or beyond the time limit of five years.

(132) The capacity for single branding obligations of one specific supplier to result in anticompetitive foreclosure arises in particular where, without the obligations, an important competitive constraint is exercised by competitors that either are not yet present on the market at the time the obligations are concluded, or that are not in a position to compete for the full supply of the customers. Competitors may not be able to compete for an individual customer's entire demand

<sup>(1)</sup> See Judgment of the Court of Justice in Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge* [2000] ECR I-1365, paragraph 130. Similarly, the application of Article 101(3) does not prevent the application of the Treaty rules on the free movement of goods, services, persons and capital. These provisions are in certain circumstances applicable to agreements, decisions and concerted practices within the meaning of Article 101(1), see to that effect Judgment of the Court of Justice in Case C-309/99 *Wouters* [2002] ECR I-1577, paragraph 120.

<sup>(2)</sup> See in this respect Judgment of the Court of First Instance in Case T-51/89 *Tetra Pak (I)* [1990] ECR II-309. See also paragraph 106 of Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97.

because the supplier in question is an unavoidable trading partner at least for part of the demand on the market, for instance because its brand is a 'must stock item' preferred by many final consumers or because the capacity constraints on the other suppliers are such that a part of demand can only be provided for by the supplier in question.<sup>(1)</sup> The market position of the supplier is thus of main importance to assess possible anti-competitive effects of single branding obligations.

(133) If competitors can compete on equal terms for each individual customer's entire demand, single branding obligations of one specific supplier are generally unlikely to hamper effective competition unless the switching of supplier by customers is rendered difficult due to the duration and market coverage of the single branding obligations. The higher its tied market share, that is, the part of its market share sold under a single branding obligation, the more significant foreclosure is likely to be. Similarly, the longer the duration of the single branding obligations, the more significant foreclosure is likely to be. Single branding obligations shorter than one year entered into by non-dominant companies are generally not considered to give rise to appreciable anti-competitive effects or net negative effects. Single branding obligations between one and five years entered into by non-dominant companies usually require a proper balancing of pro- and anti-competitive effects, while single branding obligations exceeding five years are for most types of investments not considered necessary to achieve the claimed efficiencies or the efficiencies are not sufficient to outweigh their foreclosure effect. Single branding obligations are more likely to result in anti-competitive foreclosure when entered into by dominant companies.

(134) When assessing the supplier's market power, the market position of its competitors is important. As long as the competitors are sufficiently numerous and strong, no appreciable anti-competitive effects can be expected. Foreclosure of competitors is not very likely where they have similar market positions and can offer similarly attractive products. In such a case, foreclosure may, however, occur for potential entrants when a number of major suppliers enter into single branding contracts with a significant number of buyers on the relevant market (cumulative effect situation). This is also a situation where single branding agreements may facilitate collusion between competing suppliers. If, individually, those suppliers are covered by the Block Exemption

Regulation, a withdrawal of the block exemption may be necessary to deal with such a negative cumulative effect. A tied market share of less than 5 % is not considered in general to contribute significantly to a cumulative foreclosure effect.

(135) In cases where the market share of the largest supplier is below 30 % and the market share of the five largest suppliers is below 50 %, there is unlikely to be a single or a cumulative anti-competitive effect situation. Where a potential entrant cannot penetrate the market profitably, it is likely to be due to factors other than single branding obligations, such as consumer preferences.

(136) Entry barriers are important to establish whether there is anticompetitive foreclosure. Wherever it is relatively easy for competing suppliers to create new buyers or find alternative buyers for their product, foreclosure is unlikely to be a real problem. However, there are often entry barriers, both at the manufacturing and at the distribution level.

(137) Countervailing power is relevant, as powerful buyers will not easily allow themselves to be cut off from the supply of competing goods or services. More generally, in order to convince customers to accept single branding, the supplier may have to compensate them, in whole or in part, for the loss in competition resulting from the exclusivity. Where such compensation is given, it may be in the individual interest of a customer to enter into a single branding obligation with the supplier. But it would be wrong to conclude automatically from this that all single branding obligations, taken together, are overall beneficial for customers on that market and for the final consumers. It is in particular unlikely that consumers as a whole will benefit if there are many customers and the single branding obligations, taken together, have the effect of preventing the entry or expansion of competing undertakings.

(138) Lastly, 'the level of trade' is relevant. Anticompetitive foreclosure is less likely in case of an intermediate product. When the supplier of an intermediate product is not dominant, the competing suppliers still have a substantial part of demand that is free. Below the level of dominance an anticompetitive foreclosure effect may however arise in a cumulative effect situation. A cumulative anticompetitive effect is unlikely to arise as long as less than 50 % of the market is tied.

<sup>(1)</sup> Judgment of the Court of First Instance in Case T-65/98 *Van den Bergh Foods v Commission* [2003] ECR II-4653, paragraphs 104 and 156.

- (139) Where the agreement concerns the supply of a final product at the wholesale level, the question whether a competition problem is likely to arise depends in large part on the type of wholesaling and the entry barriers at the wholesale level. There is no real risk of anticompetitive foreclosure if competing manufacturers can easily establish their own wholesaling operation. Whether entry barriers are low depends in part on the type of wholesaling, that is, whether or not wholesalers can operate efficiently with only the product concerned by the agreement (for example ice cream) or whether it is more efficient to trade in a whole range of products (for example frozen foodstuffs). In the latter case, it is not efficient for a manufacturer selling only one product to set up its own wholesaling operation. In that case, anti-competitive effects may arise. In addition, cumulative effect problems may arise if several suppliers tie most of the available wholesalers.
- (140) For final products, foreclosure is in general more likely to occur at the retail level, given the significant entry barriers for most manufacturers to start retail outlets just for their own products. In addition, it is at the retail level that single branding agreements may lead to reduced in-store inter-brand competition. It is for these reasons that for final products at the retail level, significant anti-competitive effects may start to arise, taking into account all other relevant factors, if a non-dominant supplier ties 30 % or more of the relevant market. For a dominant company, even a modest tied market share may already lead to significant anti-competitive effects.
- (141) At the retail level, a cumulative foreclosure effect may also arise. Where all suppliers have market shares below 30 %, a cumulative anticompetitive foreclosure effect is unlikely if the total tied market share is less than 40 % and withdrawal of the block exemption is therefore unlikely. That figure may be higher when other factors like the number of competitors, entry barriers etc. are taken into account. Where not all companies have market shares below the threshold of the Block Exemption Regulation but none is dominant, a cumulative anticompetitive foreclosure effect is unlikely if the total tied market share is below 30 %.
- (142) Where the buyer operates from premises and land owned by the supplier or leased by the supplier from a third party not connected with the buyer, the possibility of imposing effective remedies for a possible foreclosure effect will be limited. In that case, intervention by the Commission below the level of dominance is unlikely.
- (143) In certain sectors, the selling of more than one brand from a single site may be difficult, in which case a foreclosure problem can better be remedied by limiting the effective duration of contracts.
- (144) Where appreciable anti-competitive effects are established, the question of a possible exemption under Article 101(3) arises. For non-compete obligations, the efficiencies described in points (a) (free riding between suppliers), (d), (e) (hold-up problems) and (h) (capital market imperfections) of paragraph (107), may be particularly relevant.
- (145) In the case of an efficiency as described in paragraph (107)(a), (107)(d) and (107)(h), quantity forcing on the buyer could possibly be a less restrictive alternative. A non-compete obligation may be the only viable way to achieve an efficiency as described in paragraph (107)(e), (hold-up problem related to the transfer of know-how).
- (146) In the case of a relationship-specific investment made by the supplier (see paragraph (107)(d) ), a non-compete or quantity forcing agreement for the period of depreciation of the investment will in general fulfil the conditions of Article 101(3). In the case of high relationship-specific investments, a non-compete obligation exceeding five years may be justified. A relationship-specific investment could, for instance, be the installation or adaptation of equipment by the supplier when this equipment can be used afterwards only to produce components for a particular buyer. General or market-specific investments in (extra) capacity are normally not relationship-specific investments. However, where a supplier creates new capacity specifically linked to the operations of a particular buyer, for instance a company producing metal cans which creates new capacity to produce cans on the premises of or next to the canning facility of a food producer, this new capacity may only be economically viable when producing for this particular customer, in which case the investment would be considered to be relationship-specific.
- (147) Where the supplier provides the buyer with a loan or provides the buyer with equipment which is not relationship-specific, this in itself is normally not sufficient to justify the exemption of an anticompetitive foreclosure effect on the market. In case of capital market imperfection, it may be more efficient for the supplier of a product than for a bank to provide a loan (see paragraph (107)(h)). However, in such a case the loan should be provided in the least restrictive way and the buyer should thus in general not be prevented from terminating the obligation and repaying the outstanding part of the loan at any point in time and without payment of any penalty.



(148) The transfer of substantial know-how (paragraph (107)(e)) usually justifies a non-compete obligation for the whole duration of the supply agreement, as for example in the context of franchising.

(149) *Example of non-compete obligation*

The market leader in a national market for an impulse consumer product, with a market share of 40 %, sells most of its products (90 %) through tied retailers (tied market share 36 %). The agreements oblige the retailers to purchase only from the market leader for at least four years. The market leader is especially strongly represented in the more densely populated areas like the capital. Its competitors, 10 in number, of which some are only locally available, all have much smaller market shares, the biggest having 12 %. Those 10 competitors together supply another 10 % of the market via tied outlets. There is strong brand and product differentiation in the market. The market leader has the strongest brands. It is the only one with regular national advertising campaigns. It provides its tied retailers with special stocking cabinets for its product.

The result on the market is that in total 46 % (36 % + 10 %) of the market is foreclosed to potential entrants and to incumbents not having tied outlets. Potential entrants find entry even more difficult in the densely populated areas where foreclosure is even higher, although it is there that they would prefer to enter the market. In addition, owing to the strong brand and product differentiation and the high search costs relative to the price of the product, the absence of in-store inter-brand competition leads to an extra welfare loss for consumers. The possible efficiencies of the outlet exclusivity, which the market leader claims result from reduced transport costs and a possible hold-up problem concerning the stocking cabinets, are limited and do not outweigh the negative effects on competition. The efficiencies are limited, as the transport costs are linked to quantity and not exclusivity and the stocking cabinets do not contain special know-how and are not brand specific. Accordingly, it is unlikely that the conditions of Article 101(3) are fulfilled.

(150) *Example of quantity forcing*

A producer X with a 40 % market share sells 80 % of its products through contracts which specify that the reseller is required to purchase at least 75 % of its requirements for that type of product from X. In return X is offering financing and equipment at favourable rates. The contracts have a duration of five years in which repayment of the loan is foreseen in equal instalments. However, after the first two years buyers have the possi-

bility to terminate the contract with a six-month notice period if they repay the outstanding loan and take over the equipment at its market asset value. At the end of the five-year period the equipment becomes the property of the buyer. Most of the competing producers are small, twelve in total with the biggest having a market share of 20 %, and engage in similar contracts with different durations. The producers with market shares below 10 % often have contracts with longer durations and with less generous termination clauses. The contracts of producer X leave 25 % of requirements free to be supplied by competitors. In the last three years, two new producers have entered the market and gained a combined market share of around 8 %, partly by taking over the loans of a number of resellers in return for contracts with these resellers.

Producer X's tied market share is 24 % ( $0,75 \times 0,80 \times 40 \%$ ). The other producers' tied market share is around 25 %. Therefore, in total around 49 % of the market is foreclosed to potential entrants and to incumbents not having tied outlets for at least the first two years of the supply contracts. The market shows that the resellers often have difficulty in obtaining loans from banks and are too small in general to obtain capital through other means like the issuing of shares. In addition, producer X is able to demonstrate that concentrating its sales on a limited number of resellers allows him to plan its sales better and to save transport costs. In the light of the efficiencies on the one hand and the 25 % non-tied part in the contracts of producer X, the real possibility for early termination of the contract, the recent entry of new producers and the fact that around half the resellers are not tied on the other hand, the quantity forcing of 75 % applied by producer X is likely to fulfil the conditions of Article 101(3).

## 2.2 Exclusive distribution

(151) In an exclusive distribution agreement, the supplier agrees to sell its products to only one distributor for resale in a particular territory. At the same time, the distributor is usually limited in its active selling into other (exclusively allocated) territories. The possible competition risks are mainly reduced intra-brand competition and market partitioning, which may facilitate price discrimination in particular. When most or all of the suppliers apply exclusive distribution, it may soften competition and facilitate collusion, both at the suppliers' and distributors' level. Lastly, exclusive distribution may lead to foreclosure of other distributors and therewith reduce competition at that level.

- (152) Exclusive distribution is exempted by the Block Exemption Regulation where both the supplier's and buyer's market share each do not exceed 30 %, even if combined with other non-hardcore vertical restraints, such as a non-compete obligation limited to five years, quantity forcing or exclusive purchasing. A combination of exclusive distribution and selective distribution is only exempted by the Block Exemption Regulation if active selling in other territories is not restricted. The remainder of this section provides guidance for the assessment of exclusive distribution in individual cases above the 30 % market share threshold.
- (153) The market position of the supplier and its competitors is of major importance, as the loss of intra-brand competition can only be problematic if inter-brand competition is limited. The stronger the position of the supplier, the more serious is the loss of intra-brand competition. Above the 30 % market share threshold, there may be a risk of a significant reduction of intra-brand competition. In order to fulfil the conditions of Article 101(3), the loss of intra-brand competition may need to be balanced with real efficiencies.
- (154) The position of the competitors can have a dual significance. Strong competitors will generally mean that the reduction in intra-brand competition is outweighed by sufficient inter-brand competition. However, if the number of competitors becomes rather small and their market position is rather similar in terms of market share, capacity and distribution network, there is a risk of collusion and/or softening of competition. The loss of intra-brand competition can increase that risk, especially when several suppliers operate similar distribution systems. Multiple exclusive dealerships, that is, when different suppliers appoint the same exclusive distributor in a given territory, may further increase the risk of collusion and/or softening of competition. If a dealer is granted the exclusive right to distribute two or more important competing products in the same territory, inter-brand competition may be substantially restricted for those brands. The higher the cumulative market share of the brands distributed by the exclusive multiple brand dealers, the higher the risk of collusion and/or softening of competition and the more inter-brand competition will be reduced. If a retailer is the exclusive distributor for a number of brands this may have as result that if one producer cuts the wholesale price for its brand, the exclusive retailer will not be eager to transmit this price cut to the final consumer as it would reduce its sales and profits made with the other brands. Hence, compared to the situation without multiple exclusive dealerships, producers have a reduced interest in entering into price competition with one another. Such cumulative effect situations may be a reason to withdraw the benefit of the Block Exemption Regulation where the market shares of the suppliers and buyers are below the threshold of the Block Exemption Regulation.
- (155) Entry barriers that may hinder suppliers from creating new distributors or finding alternative distributors are less important in assessing the possible anti-competitive effects of exclusive distribution. Foreclosure of other suppliers does not arise as long as exclusive distribution is not combined with single branding.
- (156) Foreclosure of other distributors is not an issue where the supplier which operates the exclusive distribution system appoints a high number of exclusive distributors on the same market and those exclusive distributors are not restricted in selling to other non-appointed distributors. Foreclosure of other distributors may however become an issue where there is buying power and market power downstream, in particular in the case of very large territories where the exclusive distributor becomes the exclusive buyer for a whole market. An example would be a supermarket chain which becomes the only distributor of a leading brand on a national food retail market. The foreclosure of other distributors may be aggravated in the case of multiple exclusive dealership.
- (157) Buying power may also increase the risk of collusion on the buyers' side when the exclusive distribution arrangements are imposed by important buyers, possibly located in different territories, on one or several suppliers.
- (158) Maturity of the market is important, as loss of intra-brand competition and price discrimination may be a serious problem in a mature market but may be less relevant on a market with growing demand, changing technologies and changing market positions.
- (159) The level of trade is important as the possible negative effects may differ between the wholesale and retail level. Exclusive distribution is mainly applied in the distribution of final goods and services. A loss of intra-brand competition is especially likely at the retail level if coupled with large territories, since final consumers may be confronted with little possibility of choosing between a high price/high service and a low price/low service distributor for an important brand.

(160) A manufacturer that chooses a wholesaler to be its exclusive distributor will normally do so for a larger territory, such as a whole Member State. As long as the wholesaler can sell the products without limitation to downstream retailers there are not likely to be appreciable anti-competitive effects. A possible loss of intra-brand competition at the wholesale level may be easily outweighed by efficiencies obtained in logistics, promotion etc., especially when the manufacturer is based in a different country. The possible risks for inter-brand competition of multiple exclusive dealerships are however higher at the wholesale than at the retail level. Where one wholesaler becomes the exclusive distributor for a significant number of suppliers, not only is there a risk that competition between these brands is reduced, but also that there is foreclosure at the wholesale level of trade.

(161) As stated in paragraph (155), foreclosure of other suppliers does not arise as long as exclusive distribution is not combined with single branding. But even when exclusive distribution is combined with single branding anticompetitive foreclosure of other suppliers is unlikely, except possibly when the single branding is applied to a dense network of exclusive distributors with small territories or in case of a cumulative effect. In such a case it may be necessary to apply the principles on single branding set out in section 2.1. However, when the combination does not lead to significant foreclosure, the combination of exclusive distribution and single branding may be pro-competitive by increasing the incentive for the exclusive distributor to focus its efforts on the particular brand. Therefore, in the absence of such a foreclosure effect, the combination of exclusive distribution with non-compete may very well fulfil the conditions of Article 101(3) for the whole duration of the agreement, particularly at the wholesale level.

(162) The combination of exclusive distribution with exclusive sourcing increases the possible competition risks of reduced intra-brand competition and market partitioning which may facilitate price discrimination in particular. Exclusive distribution already limits arbitrage by customers, as it limits the number of distributors and usually also restricts the distributors in their freedom of active selling. Exclusive sourcing, requiring the exclusive distributors to buy their supplies for the particular brand directly from the manufacturer, eliminates in addition possible arbitrage by the exclusive distributors, which are prevented from buying from other distributors in the system. As a result, the supplier's possibilities to limit intra-brand competition by applying dissimilar conditions of sale to the detriment of consumers are enhanced, unless the combination allows the creation

of efficiencies leading to lower prices to all final consumers.

(163) The nature of the product is not particularly relevant to the assessment of possible anti-competitive effects of exclusive distribution. It is, however, relevant to an assessment of possible efficiencies, that is, after an appreciable anti-competitive effect is established.

(164) Exclusive distribution may lead to efficiencies, especially where investments by the distributors are required to protect or build up the brand image. In general, the case for efficiencies is strongest for new products, complex products, and products whose qualities are difficult to judge before consumption (so-called experience products) or whose qualities are difficult to judge even after consumption (so-called credence products). In addition, exclusive distribution may lead to savings in logistic costs due to economies of scale in transport and distribution.

(165) Example of exclusive distribution at the wholesale level

On the market for a consumer durable, A is the market leader. A sells its product through exclusive wholesalers. Territories for the wholesalers correspond to the entire Member State for small Member States, and to a region for larger Member States. Those exclusive distributors deal with sales to all the retailers in their territories. They do not sell to final consumers. The wholesalers are in charge of promotion in their markets, including sponsoring of local events, but also explaining and promoting the new products to the retailers in their territories. Technology and product innovation are evolving fairly quickly on this market, and pre-sale service to retailers and to final consumers plays an important role. The wholesalers are not required to purchase all their requirements of the brand of supplier A from the producer himself, and arbitrage by wholesalers or retailers is practicable because the transport costs are relatively low compared to the value of the product. The wholesalers are not under a non-compete obligation. Retailers also sell a number of brands of competing suppliers, and there are no exclusive or selective distribution agreements at the retail level. On the EU market of sales to wholesalers A has around 50 % market share. Its market share on the various national retail markets varies between 40 % and 60 %. A has between 6 and 10 competitors on every national market. B, C and D are its biggest competitors and are also present on each national market, with market shares varying between 20 % and 5 %. The remaining producers are national producers, with smaller market shares. B, C and D have similar distribution networks, whereas the local producers tend to sell their products directly to retailers.

On the wholesale market described in this example, the risk of reduced intra-brand competition and price discrimination is low. Arbitrage is not hindered, and the absence of intra-brand competition is not very relevant at the wholesale level. At the retail level, neither intra- nor inter-brand competition are hindered. Moreover, inter-brand competition is largely unaffected by the exclusive arrangements at the wholesale level. Therefore it is likely, even if anti-competitive effects exist, that also the conditions of Article 101(3) are fulfilled.

(166) Example of multiple exclusive dealerships in an oligopolistic market

On a national market for a final product, there are four market leaders, which each have a market share of around 20 %. Those four market leaders sell their product through exclusive distributors at the retail level. Retailers are given an exclusive territory which corresponds to the town in which they are located or a district of the town for large towns. In most territories, the four market leaders happen to appoint the same exclusive retailer ('multiple dealership'), often centrally located and rather specialised in the product. The remaining 20 % of the national market is composed of small local producers, the largest of these producers having a market share of 5 % on the national market. Those local producers sell their products in general through other retailers, in particular because the exclusive distributors of the four largest suppliers show in general little interest in selling less well-known and cheaper brands. There is strong brand and product differentiation on the market. The four market leaders have large national advertising campaigns and strong brand images, whereas the fringe producers do not advertise their products at the national level. The market is rather mature, with stable demand and no major product and technological innovation. The product is relatively simple.

In such an oligopolistic market, there is a risk of collusion between the four market leaders. That risk is increased through multiple dealerships. Intra-brand competition is limited by the territorial exclusivity. Competition between the four leading brands is reduced at the retail level, since one retailer fixes the price of all four brands in each territory. The multiple dealership implies that, if one producer cuts the price for its brand, the retailer will not be eager to transmit this price cut to the final consumer as it would reduce its sales and profits made with the other brands. Hence, producers have a reduced interest in entering into price competition with one another. Inter-brand price competition exists mainly with the low brand image

goods of the fringe producers. The possible efficiency arguments for (joint) exclusive distributors are limited, as the product is relatively simple, the resale does not require any specific investments or training and advertising is mainly carried out at the level of the producers.

Even though each of the market leaders has a market share below the threshold, the conditions of Article 101(3) may not be fulfilled and withdrawal of the block exemption may be necessary for the agreements concluded with distributors whose market share is below 30 % of the procurement market.

(167) Example of exclusive distribution combined with exclusive sourcing

Manufacturer A is the European market leader for a bulky consumer durable, with a market share of between 40 % and 60 % in most national retail markets. In Member States where it has a high market share, it has less competitors with much smaller market shares. The competitors are present on only one or two national markets. A's long time policy is to sell its product through its national subsidiaries to exclusive distributors at the retail level, which are not allowed to sell actively into each other's territories. Those distributors are thereby incentivised to promote the product and provide pre-sales services. Recently the retailers are in addition obliged to purchase manufacturer A's products exclusively from the national subsidiary of manufacturer A in their own country. The retailers selling the brand of manufacturer A are the main resellers of that type of product in their territory. They handle competing brands, but with varying degrees of success and enthusiasm. Since the introduction of exclusive sourcing, A applies price differences of 10 % to 15 % between markets with higher prices in the markets where it has less competition. The markets are relatively stable on the demand and the supply side, and there are no significant technological changes.

In the high price markets, the loss of intra-brand competition results not only from the territorial exclusivity at the retail level but is aggravated by the exclusive sourcing obligation imposed on the retailers. The exclusive sourcing obligation helps to keep markets and territories separate by making arbitrage between the exclusive retailers, the main resellers of that type of product, impossible. The exclusive retailers also cannot sell actively into each other's territory and in practice tend to avoid delivering outside their own territory. As a result, price discrimination is possible, without it leading to a significant increase in total sales. Arbitrage by consumers or independent traders is limited due to the bulkiness of the product.



While the possible efficiency arguments for appointing exclusive distributors may be convincing, in particular because of the incentivising of retailers, the possible efficiency arguments for the combination of exclusive distribution and exclusive sourcing, and in particular the possible efficiency arguments for exclusive sourcing, linked mainly to economies of scale in transport, are unlikely to outweigh the negative effect of price discrimination and reduced intra-brand competition. Consequently, it is unlikely that the conditions of Article 101(3) are fulfilled.

### 2.3. Exclusive customer allocation

(168) In an exclusive customer allocation agreement, the supplier agrees to sell its products to only one distributor for resale to a particular group of customers. At the same time, the distributor is usually limited in its active selling to other (exclusively allocated) groups of customers. The Block Exemption Regulation does not limit the way an exclusive customer group can be defined; it could for instance be a particular type of customers defined by their occupation but also a list of specific customers selected on the basis of one or more objective criteria. The possible competition risks are mainly reduced intra-brand competition and market partitioning, which may in particular facilitate price discrimination. Where most or all of the suppliers apply exclusive customer allocation, competition may be softened and collusion, both at the suppliers' and the distributors' level, may be facilitated. Lastly, exclusive customer allocation may lead to foreclosure of other distributors and therewith reduce competition at that level.

(169) Exclusive customer allocation is exempted by the Block Exemption Regulation when both the supplier's and buyer's market share does not exceed the 30 % market share threshold, even if combined with other non-hardcore vertical restraints such as non-compete, quantity-forcing or exclusive sourcing. A combination of exclusive customer allocation and selective distribution is normally a hardcore restriction, as active selling to end-users by the appointed distributors is usually not left free. Above the 30 % market share threshold, the guidance provided in paragraphs (151) to (167) applies also to the assessment of exclusive customer allocation, subject to the specific remarks in the remainder of this section.

(170) The allocation of customers normally makes arbitrage by the customers more difficult. In addition, as each appointed distributor has its own class of customers, non-appointed distributors not falling within such a class may find it difficult to obtain the product. Consequently, possible arbitrage by non-appointed distributors will be reduced.

(171) Exclusive customer allocation is mainly applied to intermediate products and at the wholesale level when it concerns final products, where customer groups with different specific requirements concerning the product can be distinguished.

(172) Exclusive customer allocation may lead to efficiencies, especially when the distributors are required to make investments in for instance specific equipment, skills or know-how to adapt to the requirements of their group of customers. The depreciation period of these investments indicates the justified duration of an exclusive customer allocation system. In general the case is strongest for new or complex products and for products requiring adaptation to the needs of the individual customer. Identifiable differentiated needs are more likely for intermediate products, that is, products sold to different types of professional buyers. Allocation of final consumers is unlikely to lead to efficiencies.

### (173) Example of exclusive customer allocation

A company has developed a sophisticated sprinkler installation. The company has currently a market share of 40 % on the market for sprinkler installations. When it started selling the sophisticated sprinkler it had a market share of 20 % with an older product. The installation of the new type of sprinkler depends on the type of building that it is installed in and on the use of the building (office, chemical plant, hospital etc.). The company has appointed a number of distributors to sell and install the sprinkler installation. Each distributor needed to train its employees for the general and specific requirements of installing the sprinkler installation for a particular class of customers. To ensure that distributors would specialise, the company assigned to each distributor an exclusive class of customers and prohibited active sales to each others' exclusive customer classes. After five years, all the exclusive distributors will be allowed to sell actively to all classes of customers, thereby ending the system of exclusive customer allocation. The supplier may then also start selling to new distributors. The market is quite dynamic, with two recent entries and a number of technological developments. Competitors, with market shares between 25 % and 5 %, are also upgrading their products.

As the exclusivity is of limited duration and helps to ensure that the distributors may recoup their investments and concentrate their sales efforts first on a certain class of customers in order to learn the trade, and as the possible anti-competitive effects seem limited in a dynamic market, the conditions of Article 101(3) are likely to be fulfilled.

#### 2.4. Selective distribution

(174) Selective distribution agreements, like exclusive distribution agreements, restrict the number of authorised distributors on the one hand and the possibilities of resale on the other. The difference with exclusive distribution is that the restriction of the number of dealers does not depend on the number of territories but on selection criteria linked in the first place to the nature of the product. Another difference with exclusive distribution is that the restriction on resale is not a restriction on active selling to a territory but a restriction on any sales to non-authorised distributors, leaving only appointed dealers and final customers as possible buyers. Selective distribution is almost always used to distribute branded final products.

(175) The possible competition risks are a reduction in intra-brand competition and, especially in case of cumulative effect, foreclosure of certain type(s) of distributors and softening of competition and facilitation of collusion between suppliers or buyers. To assess the possible anti-competitive effects of selective distribution under Article 101(1), a distinction needs to be made between purely qualitative selective distribution and quantitative selective distribution. Purely qualitative selective distribution selects dealers only on the basis of objective criteria required by the nature of the product such as training of sales personnel, the service provided at the point of sale, a certain range of the products being sold etc. <sup>(1)</sup> The application of such criteria does not put a direct limit on the number of dealers. Purely qualitative selective distribution is in general considered to fall outside Article 101(1) for lack of anti-competitive effects, provided that three conditions are satisfied. First, the nature of the product in question must necessitate a selective distribution system, in the sense that such a system must constitute a legitimate requirement, having regard to the nature of the product concerned, to preserve its quality and ensure its proper use. Secondly, resellers must be chosen on the basis of objective criteria of a qualitative nature which are laid down uniformly for all and made available to all potential resellers and are not applied in a discriminatory manner. Thirdly, the criteria laid down must not go beyond what is necessary <sup>(2)</sup>. Quantitative selective distribution adds further criteria for selection that more directly limit the potential number of dealers by, for instance, requiring minimum or maximum sales, by fixing the number of dealers, etc.

(176) Qualitative and quantitative selective distribution is exempted by the Block Exemption Regulation as long

<sup>(1)</sup> See for example judgment of the Court of First Instance in Case T-88/92 *Groupement d'achat Edouard Leclerc v Commission* [1996] ECR II-1961.

<sup>(2)</sup> See judgments of the Court of Justice in Case 31/80 *L'Oréal v PVBA* [1980] ECR 3775, paragraphs 15 and 16; Case 26/76 *Metro I* [1977] ECR 1875, paragraphs 20 and 21; Case 107/82 *AEG* [1983] ECR 3151, paragraph 35; and judgment of the Court of First Instance in Case T-19/91 *Vichy v Commission* [1992] ECR II-415, paragraph 65.

as the market share of both supplier and buyer each do not exceed 30 %, even if combined with other non-hardcore vertical restraints, such as non-compete or exclusive distribution, provided active selling by the authorised distributors to each other and to end users is not restricted. The Block Exemption Regulation exempts selective distribution regardless of the nature of the product concerned and regardless of the nature of the selection criteria. However, where the characteristics of the product <sup>(3)</sup> 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 or to provide specific services, such a distribution system does not generally bring about sufficient efficiency enhancing effects to counterbalance a significant reduction in intra-brand competition. Where appreciable anti-competitive effects occur, the benefit of the Block Exemption Regulation is likely to be withdrawn. In addition, the remainder of this section provides guidance for the assessment of selective distribution in individual cases which are not covered by the Block Exemption Regulation or in the case of cumulative effects resulting from parallel networks of selective distribution.

(177) The market position of the supplier and its competitors is of central importance in assessing possible anti-competitive effects, as the loss of intra-brand competition can only be problematic if inter-brand competition is limited. The stronger the position of the supplier, the more problematic is the loss of intra-brand competition. Another important factor is the number of selective distribution networks present in the same market. Where selective distribution is applied by only one supplier on the market, quantitative selective distribution does not normally create net negative effects provided that the contract goods, having regard to their nature, require the use of a selective distribution system and on condition that the selection criteria applied are necessary to ensure efficient distribution of the goods in question. The reality, however, seems to be that selective distribution is often applied by a number of the suppliers on a given market.

(178) The position of competitors can have a dual significance and plays in particular a role in case of a cumulative effect. Strong competitors will mean in general that the reduction in intra-brand competition is easily outweighed by sufficient inter-brand competition. However, when a majority of the main suppliers apply selective distribution, there will be a significant loss of intra-brand competition and possible foreclosure of certain

<sup>(3)</sup> See for example judgments of the Court of First Instance in Case T-19/92, *Groupement d'achat Edouard Leclerc v Commission* [1996] ECR II-1851, paragraphs 112 to 123; Case T-88/92 *Groupement d'achat Edouard Leclerc v Commission* [1996] ECR II-1961, paragraphs 106 to 117, and the case law referred to in the preceding footnote.

types of distributors as well as an increased risk of collusion between those major suppliers. The risk of foreclosure of more efficient distributors has always been greater with selective distribution than with exclusive distribution, given the restriction on sales to non-authorised dealers in selective distribution. That restriction is designed to give selective distribution systems a closed character, making it impossible for non-authorised dealers to obtain supplies. Accordingly, selective distribution is particularly well suited to avoid pressure by price discounters (whether offline or online-only distributors) on the margins of the manufacturer, as well as on the margins of the authorised dealers. Foreclosure of such distribution formats, whether resulting from the cumulative application of selective distribution or from the application by a single supplier with a market share exceeding 30 %, reduces the possibilities for consumers to take advantage of the specific benefits offered by these formats such as lower prices, more transparency and wider access.

total turnover achieved with the type of products in question and it does not go beyond what is necessary for the supplier to recoup its relationship-specific investment and/or realise economies of scale in distribution. As regards individual contributions, a supplier with a market share of less than 5 % is in general not considered to contribute significantly to a cumulative effect.

- (179) Where the Block Exemption Regulation applies to individual networks of selective distribution, withdrawal of the block exemption or disapplication of the Block Exemption Regulation may be considered in case of cumulative effects. However, a cumulative effect problem is unlikely to arise when the share of the market covered by selective distribution is below 50 %. Also, no problem is likely to arise where the market coverage ratio exceeds 50 %, but the aggregate market share of the five largest suppliers (CR5) is below 50 %. Where both the CR5 and the share of the market covered by selective distribution exceed 50 %, the assessment may vary depending on whether or not all five largest suppliers apply selective distribution. The stronger the position of the competitors which do not apply selective distribution, the less likely other distributors will be foreclosed. If all five largest suppliers apply selective distribution, competition concerns may arise with respect to those agreements in particular that apply quantitative selection criteria by directly limiting the number of authorised dealers or that apply qualitative criteria, such as a requirement to have one or more brick and mortar shops or to provide specific services, which forecloses certain distribution formats. The conditions of Article 101(3) are in general unlikely to be fulfilled if the selective distribution systems at issue prevent access to the market by new distributors capable of adequately selling the products in question, especially price discounters or online-only distributors offering lower prices to consumers, thereby limiting distribution to the advantage of certain existing channels and to the detriment of final consumers. More indirect forms of quantitative selective distribution, resulting for instance from the combination of purely qualitative selection criteria with the requirement imposed on the dealers to achieve a minimum amount of annual purchases, are less likely to produce net negative effects, if such an amount does not represent a significant proportion of the dealer's
- (180) Entry barriers are mainly of interest in the case of foreclosure of the market to non-authorised dealers. In general, entry barriers will be considerable as selective distribution is usually applied by manufacturers of branded products. It will in general take time and considerable investment for excluded retailers to launch their own brands or obtain competitive supplies elsewhere.
- (181) Buying power may increase the risk of collusion between dealers and thus appreciably change the analysis of possible anti-competitive effects of selective distribution. Foreclosure of the market to more efficient retailers may especially result where a strong dealer organisation imposes selection criteria on the supplier aimed at limiting distribution to the advantage of its members.
- (182) Article 5(1)(c) of the Block Exemption Regulation provides that the supplier may not impose an obligation causing the authorised dealers, either directly or indirectly, not to sell the brands of particular competing suppliers. Such a condition aims specifically at avoiding horizontal collusion to exclude particular brands through the creation of a selective club of brands by the leading suppliers. That kind of obligation is unlikely to be exemptible when the CR5 is equal to or above 50 %, unless none of the suppliers imposing such an obligation belongs to the five largest suppliers on the market.
- (183) Foreclosure of other suppliers is normally not a problem as long as other suppliers can use the same distributors, that is, as long as the selective distribution system is not combined with single branding. In the case of a dense network of authorised distributors or in the case of a cumulative effect, the combination of selective

distribution and a non-compete obligation may pose a risk of foreclosure to other suppliers. In that case, the principles set out in section 2.1. on single branding apply. Where selective distribution is not combined with a non-compete obligation, foreclosure of the market to competing suppliers may still be a problem where the leading suppliers apply not only purely qualitative selection criteria, but impose on their dealers certain additional obligations such as the obligation to reserve a minimum shelf-space for their products or to ensure that the sales of their products by the dealer achieve a minimum percentage of the dealer's total turnover. Such a problem is unlikely to arise if the share of the market covered by selective distribution is below 50 % or, where this coverage ratio is exceeded, if the market share of the five largest suppliers is below 50 %.

(184) Maturity of the market is important, as loss of intra-brand competition and possible foreclosure of suppliers or dealers may be a serious problem on a mature market but is less relevant on a market with growing demand, changing technologies and changing market positions.

(185) Selective distribution may be efficient when it leads to savings in logistical costs due to economies of scale in transport and that may occur irrespective of the nature of the product (paragraph (107)(g)). However, such an efficiency is usually only marginal in selective distribution systems. To help solve a free-rider problem between the distributors (paragraph (107)(a) ) or to help create a brand image (paragraph (107)(i) ), the nature of the product is very relevant. In general, the case is strongest for new products, complex products, products whose qualities are difficult to judge before consumption (so-called experience products) or whose qualities are difficult to judge even after consumption (so-called credence products). The combination of selective distribution with a location clause, protecting an appointed dealer against other appointed dealers opening up a shop in its vicinity, may in particular fulfil the conditions of Article 101(3) if the combination is indispensable to protect substantial and relationship-specific investments made by the authorised dealer (paragraph (107)(d)).

(186) To ensure that the least anti-competitive restraint is chosen, it is relevant to see whether the same efficiencies can be obtained at a comparable cost by for instance service requirements alone.

(187) Example of quantitative selective distribution

On a market for consumer durables, the market leader (brand A) with a market share of 35 %, sells its product to final consumers through a selective distribution network. There are several criteria for admission to the network: the shop must employ trained staff and provide pre-sales services, there must be a specialised area in the shop devoted to the sales of the product and similar hi-tech products, and the shop is required to sell a wide range of models of the supplier and to display them in an attractive manner. Moreover, the number of admissible retailers in the network is directly limited through the establishment of a maximum number of retailers per number of inhabitants in each province or urban area. Manufacturer A has 6 competitors in that market. Its largest competitors, B, C and D, have market shares of respectively 25, 15 and 10 %, whilst the other producers have smaller market shares. A is the only manufacturer to use selective distribution. The selective distributors of brand A always handle a few competing brands. However, competing brands are also widely sold in shops which are not member of A's selective distribution network. Channels of distribution are various: for instance, brands B and C are sold in most of A's selected shops, but also in other shops providing a high quality service and in hypermarkets. Brand D is mainly sold in high service shops. Technology is evolving quite rapidly in this market, and the main suppliers maintain a strong quality image for their products through advertising.

On that market, the coverage ratio of selective distribution is 35 %. Inter-brand competition is not directly affected by the selective distribution system of A. Intra-brand competition for brand A may be reduced, but consumers have access to low service/low price retailers for brands B and C, which have a comparable quality image to brand A. Moreover, access to high service retailers for other brands is not foreclosed, since there is no limitation on the capacity of selected distributors to sell competing brands, and the quantitative limitation on the number of retailers for brand A leaves other high service retailers free to distribute competing brands. In this case, in view of the service requirements and the efficiencies these are likely to provide and the limited effect on intra-brand competition the conditions of Article 101(3) are likely to be fulfilled.



(188) Example of selective distribution with cumulative effects

On a market for a particular sports article, there are seven manufacturers, whose respective market shares are: 25 %, 20 %, 15 %, 15 %, 10 %, 8 % and 7 %. The five largest manufacturers distribute their products through quantitative selective distribution, whilst the two smallest use different types of distribution systems, which results in a coverage ratio of selective distribution of 85 %. The criteria for access to the selective distribution networks are remarkably uniform amongst manufacturers: the distributors are required to have one or more brick and mortar shops, those shops are required to have trained personnel and to provide pre-sale services, there must be a specialised area in the shop devoted to the sales of the article and a minimum size for this area is specified. The shop is required to sell a wide range of the brand in question and to display the article in an attractive manner, the shop must be located in a commercial street, and that type of article must represent at least 30 % of the total turnover of the shop. In general, the same dealer is appointed selective distributor for all five brands. The two brands which do not use selective distribution usually sell through less specialised retailers with lower service levels. The market is stable, both on the supply and on the demand side, and there is strong brand image and product differentiation. The five market leaders have strong brand images, acquired through advertising and sponsoring, whereas the two smaller manufacturers have a strategy of cheaper products, with no strong brand image.

On that market, access by general price discounters and online-only distributors to the five leading brands is denied. Indeed, the requirement that this type of article represents at least 30 % of the activity of the dealers and the criteria on presentation and pre-sales services rule out most price discounters from the network of authorised dealers. The requirement to have one or more brick and mortar shops excludes online-only distributors from the network. As a consequence, consumers have no choice but to buy the five leading brands in high service/high price shops. This leads to reduced inter-brand competition between the five leading brands. The fact that the two smallest brands can be bought in low service/low price shops does not compensate for this, because the brand image of the five market leaders is much better. Inter-brand competition is also limited through multiple dealership. Even though there exists some degree of intra-brand competition and the number of retailers is not directly limited, the criteria for admission are strict enough to lead to a small number of retailers for the five leading brands in each territory.

The efficiencies associated with these quantitative selective distribution systems are low: the product is not very complex and does not justify a particularly high service. Unless the manufacturers can prove that there are clear efficiencies linked to their network of selective distribution, it is probable that the block exemption will have to be withdrawn because of its cumulative effects resulting in less choice and higher prices for consumers.

## 2.5. Franchising

(189) Franchise agreements contain licences of intellectual property rights relating in particular to trade marks or signs and know-how for the use and distribution of goods or services. In addition to the licence of IPRs, the franchisor usually provides the franchisee during the life of the agreement with commercial or technical assistance. The licence and the assistance are integral components of the business method being franchised. The franchisor is in general paid a franchise fee by the franchisee for the use of the particular business method. Franchising may enable the franchisor to establish, with limited investments, a uniform network for the distribution of its products. In addition to the provision of the business method, franchise agreements usually contain a combination of different vertical restraints concerning the products being distributed, in particular selective distribution and/or non-compete and/or exclusive distribution or weaker forms thereof.

(190) The coverage by the Block Exemption Regulation of the licensing of IPRs contained in franchise agreements is dealt with in paragraphs (24) to (46). As for the vertical restraints on the purchase, sale and resale of goods and services within a franchising arrangement, such as selective distribution, non-compete obligations or exclusive distribution, the Block Exemption Regulation applies up to the 30 % market share threshold<sup>(1)</sup>. The guidance provided in respect of those types of restraints applies also to franchising, subject to the following two specific remarks:

- (a) The more important the transfer of know-how, the more likely it is that the restraints create efficiencies and/or are indispensable to protect the know-how and that the vertical restraints fulfil the conditions of Article 101(3);

<sup>(1)</sup> See also paragraphs (86) to (95), in particular paragraph (92).

- (b) A non-compete obligation on the goods or services purchased by the franchisee falls outside the scope of Article 101(1) where the obligation is necessary to maintain the common identity and reputation of the franchised network. In such cases, the duration of the non-compete obligation is also irrelevant under Article 101(1), as long as it does not exceed the duration of the franchise agreement itself.

#### (191) Example of franchising

A manufacturer has developed a new format for selling sweets in so-called fun shops where the sweets can be coloured specially on demand from the consumer. The manufacturer of the sweets has also developed the machines to colour the sweets. The manufacturer also produces the colouring liquids. The quality and freshness of the liquid is of vital importance to producing good sweets. The manufacturer made a success of its sweets through a number of own retail outlets all operating under the same trade name and with the uniform fun image (style of lay-out of the shops, common advertising etc.). In order to expand sales the manufacturer started a franchising system. The franchisees are obliged to buy the sweets, liquid and colouring machine from the manufacturer, to have the same image and operate under the trade name, pay a franchise fee, contribute to common advertising and ensure the confidentiality of the operating manual prepared by the franchisor. In addition, the franchisees are only allowed to sell from the agreed premises, to sell to end users or other franchisees and are not allowed to sell other sweets. The franchisor is obliged not to appoint another franchisee nor operate a retail outlet himself in a given contract territory. The franchisor is also under the obligation to update and further develop its products, the business outlook and the operating manual and make these improvements available to all retail franchisees. The franchise agreements are concluded for a duration of 10 years.

Sweet retailers buy their sweets on a national market from either national producers that cater for national tastes or from wholesalers which import sweets from foreign producers in addition to selling products from national producers. On that market the franchisor's products compete with other brands of sweets. The franchisor has a market share of 30 % on the market for sweets sold to retailers. Competition comes from a number of national and international brands, sometimes produced by large diversified food companies. There are many potential points of sale of sweets in the form of tobacconists, general food retailers, cafeterias and specialised sweet shops. The franchisor's market share of the market for machines for colouring food is below 10 %.

Most of the obligations contained in the franchise agreements can be deemed necessary to protect the intellectual property rights or maintain the common identity and reputation of the franchised network and fall outside Article 101(1). The restrictions on selling (contract territory and selective distribution) provide an incentive to the franchisees to invest in the colouring machine and the franchise concept and, if not necessary to, at least help maintain the common identity, thereby offsetting the loss of intra-brand competition. The non-compete clause excluding other brands of sweets from the shops for the full duration of the agreements does allow the franchisor to keep the outlets uniform and prevent competitors from benefiting from its trade name. It does not lead to any serious foreclosure in view of the great number of potential outlets available to other sweet producers. The franchise agreements of this franchisor are likely to fulfil the conditions for exemption under Article 101(3) in as far as the obligations contained therein fall under Article 101(1).

#### 2.6 Exclusive supply

- (192) Under the heading of exclusive supply fall those restrictions that have as their main element that the supplier is obliged or induced to sell the contract products only or mainly to one buyer, in general or for a particular use. Such restrictions may take the form of an exclusive supply obligation, restricting the supplier to sell to only one buyer for the purposes of resale or a particular use, but may for instance also take the form of quantity forcing on the supplier, where incentives are agreed between the supplier and buyer which make the former concentrate its sales mainly with one buyer. For intermediate goods or services, exclusive supply is often referred to as industrial supply.
- (193) Exclusive supply is exempted by the Block Exemption Regulation where both the supplier's and buyer's market share does not exceed 30 %, even if combined with other non-hardcore vertical restraints such as non-compete. The remainder of this section provides guidance for the assessment of exclusive supply in individual cases above the market share threshold.
- (194) The main competition risk of exclusive supply is anti-competitive foreclosure of other buyers. There is a similarity with the possible effects of exclusive distribution, in particular when the exclusive distributor becomes the exclusive buyer for a whole market (see section 2.2, in particular paragraph (156)). The market share of the buyer on the upstream purchase market is obviously important for assessing the ability of the buyer to impose exclusive supply which forecloses other buyers from access to supplies. The importance of the buyer on the downstream market is however the factor which

determines whether a competition problem may arise. If the buyer has no market power downstream, then no appreciable negative effects for consumers can be expected. Negative effects may arise when the market share of the buyer on the downstream supply market as well as the upstream purchase market exceeds 30 %. Where the market share of the buyer on the upstream market does not exceed 30 %, significant foreclosure effects may still result, especially when the market share of the buyer on its downstream market exceeds 30 % and the exclusive supply relates to a particular use of the contract products. Where a company is dominant on the downstream market, any obligation to supply the products only or mainly to the dominant buyer may easily have significant anti-competitive effects.

(195) It is not only the market position of the buyer on the upstream and downstream market that is important but also the extent to and the duration for which it applies an exclusive supply obligation. The higher the tied supply share, and the longer the duration of the exclusive supply, the more significant the foreclosure is likely to be. Exclusive supply agreements shorter than five years entered into by non-dominant companies usually require a balancing of pro- and anti-competitive effects, while agreements lasting longer than five years are for most types of investments not considered necessary to achieve the claimed efficiencies or the efficiencies are not sufficient to outweigh the foreclosure effect of such long-term exclusive supply agreements.

(196) The market position of the competing buyers on the upstream market is important as it is likely that competing buyers will be foreclosed for anti-competitive reasons, that is, to increase their costs, if they are significantly smaller than the foreclosing buyer. Foreclosure of competing buyers is not very likely where those competitors have similar buying power and can offer the suppliers similar sales possibilities. In such a case, foreclosure could only occur for potential entrants, which may not be able to secure supplies when a number of major buyers all enter into exclusive supply contracts with the majority of suppliers on the market. Such a cumulative effect may lead to withdrawal of the benefit of the Block Exemption Regulation.

(197) Entry barriers at the supplier level are relevant to establishing whether there is real foreclosure. In as far as it is efficient for competing buyers to provide the goods or services themselves via upstream vertical integration,

foreclosure is unlikely to be a real problem. However, there are often significant entry barriers.

(198) Countervailing power of suppliers is relevant, as important suppliers will not easily allow themselves to be cut off from alternative buyers. Foreclosure is therefore mainly a risk in the case of weak suppliers and strong buyers. In the case of strong suppliers, the exclusive supply may be found in combination with non-compete obligations. The combination with non-compete obligations brings in the rules developed for single branding. Where there are relationship-specific investments involved on both sides (hold-up problem) the combination of exclusive supply and non-compete obligations that is, reciprocal exclusivity in industrial supply agreements may often be justified, in particular below the level of dominance.

(199) Lastly, the level of trade and the nature of the product are relevant for foreclosure. Anticompetitive foreclosure is less likely in the case of an intermediate product or where the product is homogeneous. Firstly, a foreclosed manufacturer that uses a certain input usually has more flexibility to respond to the demand of its customers than the wholesaler or retailer has in responding to the demand of the final consumer for whom brands may play an important role. Secondly, the loss of a possible source of supply matters less for the foreclosed buyers in the case of homogeneous products than in the case of a heterogeneous product with different grades and qualities. For final branded products or differentiated intermediate products where there are entry barriers, exclusive supply may have appreciable anti-competitive effects where the competing buyers are relatively small compared to the foreclosing buyer, even if the latter is not dominant on the downstream market.

(200) Efficiencies can be expected in the case of a hold-up problem (paragraph (107)(d) and (107)(e)), and such efficiencies are more likely for intermediate products than for final products. Other efficiencies are less likely. Possible economies of scale in distribution (paragraph (107)(g)) do not seem likely to justify exclusive supply.

(201) In the case of a hold-up problem and even more so in the case of economies of scale in distribution, quantity forcing on the supplier, such as minimum supply requirements, could well be a less restrictive alternative.

## (202) Example of exclusive supply

On a market for a certain type of components (intermediate product market) supplier A agrees with buyer B to develop, with its own know-how and considerable investment in new machines and with the help of specifications supplied by buyer B, a different version of the component. B will have to make considerable investments to incorporate the new component. It is agreed that A will supply the new product only to buyer B for a period of five years from the date of first entry on the market. B is obliged to buy the new product only from A for the same period of five years. Both A and B can continue to sell and buy respectively other versions of the component elsewhere. The market share of buyer B on the upstream component market and on the downstream final goods market is 40 %. The market share of the component supplier is 35 %. There are two other component suppliers with around 20-25 % market share and a number of small suppliers.

Given the considerable investments, the agreement is likely to fulfil the conditions of Article 101(3) in view of the efficiencies and the limited foreclosure effect. Other buyers are foreclosed from a particular version of a product of a supplier with 35 % market share and there are other component suppliers that could develop similar new products. The foreclosure of part of buyer B's demand to other suppliers is limited to maximum 40 % of the market.

## 2.7. Upfront access payments

(203) 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<sup>(1)</sup>, the so called pay-to-stay fees<sup>(2)</sup>, payments to have access to a distributor's promotion campaigns etc. Upfront access payments are exempted under the Block Exemption Regulation when both the supplier's and buyer's market share does not exceed 30 %. The remainder of this section provides guidance for the assessment of upfront access payments in individual cases above the market share threshold.

(204) Upfront access payments may sometimes result in anti-competitive foreclosure of other distributors if such

payments induce the supplier to channel its products through only one or a limited number of distributors. A high fee may make that a supplier wants to channel a substantial volume of its sales through this distributor in order to cover the costs of the fee. In such a case, upfront access payments may have the same downstream foreclosure effect as an exclusive supply type of obligation. The assessment of that negative effect is made by analogy to the assessment of exclusive supply obligations (in particular paragraphs (194) to (199)).

(205) Exceptionally, upfront access payments may also result in anticompetitive foreclosure of other suppliers, where the widespread use of upfront access payments increases barriers to entry for small entrants. The assessment of that possible negative effect is made by analogy to the assessment of single branding obligations (in particular paragraphs (132) to (141)).

(206) In addition to possible foreclosure effects, upfront access payments may soften competition and facilitate collusion between distributors. Upfront access payments are likely to increase the price charged by the supplier for the contract products since the supplier must cover the expense of those payments. Higher supply prices may reduce the incentive of the retailers to compete on price on the downstream market, while the profits of distributors are increased as a result of the access payments. Such reduction of competition between distributors through the cumulative use of upfront access payments normally requires the distribution market to be highly concentrated.

(207) However, the use of upfront access payments may in many cases contribute to an efficient allocation of shelf space for new products. Distributors often have less information than suppliers on the potential for success of new products to be introduced on the market and, as a result, the amount of products to be stocked may be sub-optimal. Upfront access payments may be used to reduce this asymmetry in information between suppliers and distributors by explicitly allowing suppliers to compete for shelf space. The distributor may thus receive a signal of which products are most likely to be successful since a supplier would normally agree to pay an upfront access fee if it estimates a low probability of failure of the product introduction.

<sup>(1)</sup> Fixed fees that manufacturers pay to retailers in order to get access to their shelf space.

<sup>(2)</sup> Lump sum payments made to ensure the continued presence of an existing product on the shelf for some further period.



(208) Furthermore, due to the asymmetry in information mentioned in paragraph (207), suppliers may have incentives to free-ride on distributors' promotional efforts in order to introduce sub-optimal products. If a product is not successful, the distributors will pay part of the costs of the product failure. The use of upfront access fees may prevent such free riding by shifting the risk of product failure back to the suppliers, thereby contributing to an optimal rate of product introductions.

## 2.8. Category Management Agreements

(209) 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. The category captain may thus have an influence on for instance the product placement and product promotion in the shop and product selection for the shop. Category management agreements are exempted under the Block Exemption Regulation when both the supplier's and buyer's market share does not exceed 30 %. The remainder of this section provides guidance for the assessment of category management agreements in individual cases above the market share threshold.

(210) While in most cases category management agreements will not be problematic, they may sometimes distort competition between suppliers, and finally result in anti-competitive foreclosure of other suppliers, where the category captain is able, due to its influence over the marketing decisions of the distributor, to limit or disadvantage the distribution of products of competing suppliers. While in most cases the distributor may not have an interest in limiting its choice of products, when the distributor also sells competing products under its own brand (private labels), the distributor may also have incentives to exclude certain suppliers, in particular intermediate range products. The assessment of such upstream foreclosure effect is made by analogy to the assessment of single branding obligations (in particular paragraphs (132) to (141)) by addressing issues like the market coverage of these agreements, the market position of competing suppliers and the possible cumulative use of such agreements.

(211) In addition, category management agreements may facilitate collusion between distributors when the same supplier serves as a category captain for all or most of the competing distributors on a market and provides these distributors with a common point of reference for their marketing decisions.

(212) Category management may also facilitate collusion between suppliers through increased opportunities to exchange via retailers sensitive market information,

such as for instance information related to future pricing, promotional plans or advertising campaigns <sup>(1)</sup>.

(213) However, the use of category management agreements may also lead to efficiencies. Category management agreements may allow distributors to have access to the supplier's marketing expertise for a certain group of products and to achieve economies of scale as they ensure that the optimal quantity of products is presented timely and directly on the shelves. As category management is based on customers' habits, category management agreements may lead to higher customer satisfaction as they help to better meet demand expectations. In general, the higher the inter-brand competition and the lower consumers' switching costs, the greater the economic benefits achieved through category management.

## 2.9 Tying

(214) Tying refers to situations where customers that purchase one product (the tying product) are required also to purchase another distinct product (the tied product) from the same supplier or someone designated by the latter. Tying may constitute an abuse within the meaning of Article 102 <sup>(2)</sup>. Tying may also constitute a vertical restraint falling under Article 101 where it results in a single branding type of obligation (see paragraphs (129) to (150)) for the tied product. Only the latter situation is dealt with in these Guidelines.

(215) Whether products will be considered as distinct depends on customer demand. Two products are distinct where, in the absence of the tying, a substantial number of customers would purchase or would have purchased the tying product without also buying the tied product from the same supplier, thereby allowing stand-alone production for both the tying and the tied product <sup>(3)</sup>. Evidence that two products are distinct could include direct evidence that, when given a choice, customers purchase the tying and the tied products separately from different sources of supply, or indirect evidence, such as the presence on the market of undertakings specialised in the manufacture or sale of the tied product without the tying product <sup>(4)</sup>, or evidence indicating that undertakings with little market power,

<sup>(1)</sup> Direct information exchange between competitors is not covered by the Block Exemption Regulation, see Article 2(4) of that Regulation and paragraphs 27-28 of these Guidelines.

<sup>(2)</sup> Judgment of the Court of Justice in Case C-333/94 P *Tetrapak v Commission* [1996] ECR I-5951, paragraph 37. See also Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7.

<sup>(3)</sup> Judgment of the Court of First Instance in Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, paragraphs 917, 921 and 922.

<sup>(4)</sup> Judgment of the Court of First Instance in Case T-30/89 *Hilti v Commission* [1991] ECR II-1439, paragraph 67.

particularly on competitive markets, tend not to tie or not to bundle such products. For instance, since customers want to buy shoes with laces and it is not practicable for distributors to lace new shoes with the laces of their choice, it has become commercial usage for shoe manufacturers to supply shoes with laces. Therefore, the sale of shoes with laces is not a tying practice.

(216) Tying may lead to anticompetitive foreclosure effects on the tied market, the tying market, or both at the same time. The foreclosure effect depends on the tied percentage of total sales on the market of the tied product. On the question of what can be considered appreciable foreclosure under Article 101(1), the analysis for single branding can be applied. Tying means that there is at least a form of quantity-forcing on the buyer in respect of the tied product. Where in addition a non-compete obligation is agreed in respect of the tied product, this increases the possible foreclosure effect on the market of the tied product. The tying may lead to less competition for customers interested in buying the tied product, but not the tying product. If there is not a sufficient number of customers that will buy the tied product alone to sustain competitors of the supplier on the tied market, the tying can lead to those customers facing higher prices. If the tied product is an important complementary product for customers of the tying product, a reduction of alternative suppliers of the tied product and hence a reduced availability of that product can make entry onto the tying market alone more difficult.

(217) Tying may also directly lead to prices that are above the competitive level, especially in three situations. Firstly, if the tying and the tied product can be used in variable proportions as inputs to a production process, customers may react to an increase in price for the tying product by increasing their demand for the tied product while decreasing their demand for the tying product. By tying the two products the supplier may seek to avoid this substitution and as a result be able to raise its prices. Secondly, when the tying allows price discrimination according to the use the customer makes of the tying product, for example the tying of ink cartridges to the sale of photocopying machines (metering). Thirdly, when in the case of long-term contracts or in the case of after-markets with original equipment with a long replacement time, it becomes difficult for the customers to calculate the consequences of the tying.

(218) Tying is exempted under the Block Exemption Regulation when the market share of the supplier, on both the market of the tied product and the market of the tying product, and the market share of the buyer, on the relevant upstream markets, do not exceed 30 %. It may be combined with other vertical restraints, which are not

hardcore restrictions under that Regulation, such as non-compete obligations or quantity forcing in respect of the tying product, or exclusive sourcing. The remainder of this section provides guidance for the assessment of tying in individual cases above the market share threshold.

(219) The market position of the supplier on the market of the tying product is obviously of central importance to assess possible anti-competitive effects. In general, this type of agreement is imposed by the supplier. The importance of the supplier on the market of the tying product is the main reason why a buyer may find it difficult to refuse a tying obligation.

(220) The market position of the supplier's competitors on the market of the tying product is important in assessing the supplier's market power. As long as its competitors are sufficiently numerous and strong, no anti-competitive effects can be expected, as buyers have sufficient alternatives to purchase the tying product without the tied product, unless other suppliers are applying similar tying. In addition, entry barriers on the market of the tying product are relevant to establish the market position of the supplier. When tying is combined with a non-compete obligation in respect of the tying product, this considerably strengthens the position of the supplier.

(221) Buying power is relevant, as important buyers will not easily be forced to accept tying without obtaining at least part of the possible efficiencies. Tying not based on efficiency is therefore mainly a risk where buyers do not have significant buying power.

(222) Where appreciable anti-competitive effects are established, the question whether the conditions of Article 101(3) are fulfilled arises. Tying obligations may help to produce efficiencies arising from joint production or joint distribution. Where the tied product is not produced by the supplier, an efficiency may also arise from the supplier buying large quantities of the tied product. For tying to fulfil the conditions of Article 101(3), it must, however, be shown that at least part of these cost reductions are passed on to the consumer, which is normally not the case when the retailer is able to obtain, on a regular basis, supplies of the same or equivalent products on the same or better conditions than those offered by the supplier which applies the tying practice. Another efficiency may exist where tying helps to ensure a certain uniformity and quality standardisation (see paragraph (107)(i)). However, it needs to be demonstrated that the positive

effects cannot be realised equally efficiently by requiring the buyer to use or resell products satisfying minimum quality standards, without requiring the buyer to purchase these from the supplier or someone designated by the latter. The requirements concerning minimum quality standards would not normally fall within the scope of Article 101(1). Where the supplier of the tying product imposes on the buyer the suppliers from which the buyer must purchase the tied product, for instance because the formulation of minimum quality standards is not possible, this may also fall outside the scope of Article 101(1), especially where the supplier of the tying product does not derive a direct (financial) benefit from designating the suppliers of the tied product.

### 2.10 Resale price restrictions

(223) As explained in section III.3, resale price maintenance (RPM), that is, agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer, are treated as a hardcore restriction. Where an agreement includes RPM, that agreement is presumed to restrict competition and thus to fall within Article 101(1). It also gives rise to the presumption that the agreement is unlikely to fulfil the conditions of Article 101(3), for which reason the block exemption does not apply. However, undertakings have the possibility to plead an efficiency defence under Article 101(3) in an individual case. It is incumbent on the parties to substantiate that likely efficiencies result from including RPM in their agreement and demonstrate that all the conditions of Article 101(3) are fulfilled. It then falls to the Commission to effectively assess the likely negative effects on competition and consumers before deciding whether the conditions of Article 101(3) are fulfilled.

(224) RPM may restrict competition in a number of ways. Firstly, RPM may facilitate collusion between suppliers by enhancing price transparency on the market, thereby making it easier to detect whether a supplier deviates from the collusive equilibrium by cutting its price. RPM also undermines the incentive for the supplier to cut its price to its distributors, as the fixed resale price will prevent it from benefiting from expanded sales. Such a negative effect is particularly plausible where the market is prone to collusive outcomes, for instance if the manufacturers form a tight oligopoly, and a significant part of the market is covered by RPM agreements. Second, by eliminating intra-brand price competition, RPM may also facilitate collusion between the buyers, that is, at the distribution level. Strong or well organised distributors

may be able to force or convince one or more suppliers to fix their resale price above the competitive level and thereby help them to reach or stabilise a collusive equilibrium. The resulting loss of price competition seems especially problematic when the RPM is inspired by the buyers, whose collective horizontal interests can be expected to work out negatively for consumers. Third, RPM may more generally soften competition between manufacturers and/or between retailers, in particular when manufacturers use the same distributors to distribute their products and RPM is applied by all or many of them. Fourth, the immediate effect of RPM will be that all or certain distributors are prevented from lowering their sales price for that particular brand. In other words, the direct effect of RPM is a price increase. Fifth, RPM may lower the pressure on the margin of the manufacturer, in particular where the manufacturer has a commitment problem, that is, where it has an interest in lowering the price charged to subsequent distributors. In such a situation, the manufacturer may prefer to agree to RPM, so as to help it to commit not to lower the price for subsequent distributors and to reduce the pressure on its own margin. Sixth, RPM may be implemented by a manufacturer with market power to foreclose smaller rivals. The increased margin that RPM may offer distributors, may entice the latter to favour the particular brand over rival brands when advising customers, even where such advice is not in the interest of these customers, or not to sell these rival brands at all. Lastly, RPM may reduce dynamism and innovation at the distribution level. By preventing price competition between different distributors, RPM may prevent more efficient retailers from entering the market or acquiring sufficient scale with low prices. It also may prevent or hinder the entry and expansion of distribution formats based on low prices, such as price discounters.

(225) However, RPM may not only restrict competition but may also, in particular where it is supplier driven, lead to efficiencies, which will be assessed under Article 101(3). Most notably, where a manufacturer introduces a new product, RPM may be helpful during the introductory period of expanding demand to induce distributors to better take into account the manufacturer's interest to promote the product. RPM may provide the distributors with the means to increase sales efforts and if the distributors on this market are under competitive pressure this may induce them to expand overall demand for the product and make the launch of the product a success, also for the benefit of consumers<sup>(1)</sup>. Similarly, fixed resale prices, and not just maximum

<sup>(1)</sup> This assumes that it is not practical for the supplier to impose on all buyers by contract effective promotion requirements, see also paragraph 107 point (a).

resale prices, may be necessary to organise in a franchise system or similar distribution system applying a uniform distribution format a coordinated short term low price campaign (2 to 6 weeks in most cases) which will also benefit the consumers. In some situations, the extra margin provided by RPM may allow retailers to provide (additional) pre-sales services, in particular in case of experience or complex products. If enough customers take advantage from such services to make their choice but then purchase at a lower price with retailers that do not provide such services (and hence do not incur these costs), high-service retailers may reduce or eliminate these services that enhance the demand for the supplier's product. RPM may help to prevent such free-riding at the distribution level. The parties will have to convincingly demonstrate that the RPM agreement can be expected to not only provide the means but also the incentive to overcome possible free riding between retailers on these services and that the pre-sales services overall benefit consumers as part of the demonstration that all the conditions of Article 101(3) are fulfilled.

- (226) The practice of recommending a resale price to a reseller or requiring the reseller to respect a maximum resale price is covered by the Block Exemption Regulation when the market share of each of the parties to the agreement does not exceed the 30 % threshold, provided it does not amount to a minimum or fixed sale price as a result of pressure from, or incentives offered by, any of the parties. The remainder of this section provides guidance for the assessment of maximum or recommended prices above the market

share threshold and for cases of withdrawal of the block exemption.

- (227) The possible competition risk of maximum and recommended prices is that they will work as a focal point for the resellers and might be followed by most or all of them and/or that maximum or recommended prices may soften competition or facilitate collusion between suppliers.
- (228) An important factor for assessing possible anti-competitive effects of maximum or recommended resale prices is the market position of the supplier. The stronger the market position of the supplier, the higher the risk that a maximum resale price or a recommended resale price leads to a more or less uniform application of that price level by the resellers, because they may use it as a focal point. They may find it difficult to deviate from what they perceive to be the preferred resale price proposed by such an important supplier on the market.
- (229) Where appreciable anti-competitive effects are established for maximum or recommended resale prices, the question of a possible exemption under Article 101(3) arises. For maximum resale prices, the efficiency described in paragraph (107)(f) (avoiding double marginalisation), may be particularly relevant. A maximum resale price may also help to ensure that the brand in question competes more forcefully with other brands, including own label products, distributed by the same distributor.

## **E.2 HORIZONTAL COOPERATION AGREEMENTS**

This document is meant purely as a documentation tool and the institutions do not assume any liability for its contents

► **B****REGULATION (EEC) No 2821/71 OF THE COUNCIL**

**of 20 December 1971**

**on application of Article 85 (3) of the Treaty to categories of agreements, decisions and concerted practices**

(OJ L 285, 29.12.1971, p. 46)

Amended by:

		Official Journal		
		No	page	date
► <b><u>M1</u></b>	Regulation (EEC) No 2743/72 of the Council of 19 December 1972	L 291	144	28.12.1972
► <b><u>M2</u></b>	Council Regulation (EC) No 1/2003 of 16 December 2002	L 1	1	4.1.2003

Amended by:

► <b><u>A1</u></b>	Act of Accession of Greece	L 291	17	19.11.1979
► <b><u>A2</u></b>	Act of Accession of Spain and Portugal	L 302	23	15.11.1985
► <b><u>A3</u></b>	Act of Accession of Austria, Sweden and Finland	C 241	21	29.8.1994
	(adapted by Council Decision 95/1/EC, Euratom, ECSC)	L 1	1	1.1.1995



**REGULATION (EEC) No 2821/71 OF THE COUNCIL  
of 20 December 1971**

**on application of Article 85 (3) of the Treaty to categories of agreements, decisions and concerted practices**

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 87 thereof;

Having regard to the proposal from the Commission;

Having regard to the Opinion of the European Parliament;

Having regard to the Opinion of the Economic and Social Committee;

Whereas Article 85 (1) of the Treaty may in accordance with Article 85 (3) be declared inapplicable to categories of agreements, decisions and concerted practices which fulfil the conditions contained in Article 85 (3);

Whereas the provisions for implementation of Article 85 (3) must be adopted by way of regulation pursuant to Article 87;

Whereas the creation of a common market requires that undertakings be adapted to the conditions of the enlarged market and whereas co-operation between undertakings can be a suitable means of achieving this;

Whereas agreements, decisions and concerted practices for co-operation between undertakings which enable the undertakings to work more rationally and adapt their productivity and competitiveness to the enlarged market may, in so far as they fall within the prohibition contained in Article 85 (1), be exempted therefrom under certain conditions; whereas this measure is necessary in particular as regards agreements, decisions and concerted practices relating to the application of standards and types, research and development of products or processes up to the stage of industrial application, exploitation of the results thereof and specialisation;

Whereas it is desirable that the Commission be enabled to declare by way of regulation that the provisions of Article 85 (1) do not apply to those categories of agreements, decisions and concerted practices, in order to make it easier for undertakings to co-operate in ways which are economically desirable and without adverse effect from the point of view of competition policy;

Whereas it should be laid down under what conditions the Commission, in close and constant liaison with the competent authorities of the Member States, may exercise such powers;

Whereas under Article 6 of Regulation No 17 <sup>(1)</sup> the Commission may provide that a decision taken in accordance with Article 85 (3) of the Treaty shall apply with retroactive effect; whereas it is desirable that the Commission be empowered to issue regulations whose provisions are to the like effect;

Whereas under Article 7 of Regulation No 17 agreements, decisions and concerted practices may by decision of the Commission be exempted from prohibition, in particular if they are modified in such manner that Article 85 (3) applies to them; whereas it is desirable that the Commission be enabled to grant by regulation like exemption to such agreements, decisions and concerted practices if they are modified in such manner as to fall within a category defined in an exempting regulation;

Whereas the possibility cannot be excluded that, in a specific case, the conditions set out in Article 85 (3) may not be fulfilled; whereas the

<sup>(1)</sup> OJ No 13, 21.2.1962, p. 204/62.

**▼B**

Commission must have power to regulate such a case in pursuance of Regulation No 17 by way of decision having effect for the future;

HAS ADOPTED THIS REGULATION:

*Article 1*

1. Without prejudice to the application of Regulation No 17 the Commission may, by regulation and in accordance with Article 85 (3) of the Treaty, declare that Article 85 (1) shall not apply to categories of agreements between undertakings, decisions of associations of undertakings and concerted practices which have as their object:

- (a) the application of standards or types;
- (b) the research and development of products or processes up to the stage of industrial application, and exploitation of the results, including provisions regarding industrial property rights and confidential technical knowledge;
- (c) specialisation, including agreements necessary for achieving it.

2. Such regulation shall define the categories of agreements, decisions and concerted practices to which it applies and shall specify in particular:

- (a) the restrictions or clauses which may, or may not, appear in the agreements, decisions and concerted practices;
- (b) the clauses which must be contained in the agreements, decisions and concerted practices or the other conditions which must be satisfied.

*Article 2*

1. Any regulation pursuant to Article 1 shall be made for a specified period.

2. It may be repealed or amended where circumstances have changed with respect to any of the facts which were basic to it being made; in such case, a period shall be fixed for modification of the agreements, decisions and concerted practices to which the earlier regulation applies.

*Article 3*

A regulation pursuant to Article 1 may provide that it shall apply with retroactive effect to agreements, decisions and concerted practices to which, at the date of entry into force of that regulation, a decision issued with retroactive effect in pursuance of Article 6 of Regulation No 17 would have applied.

*Article 4*

1. A regulation pursuant to Article 1 may provide that the prohibition contained in Article 85 (1) of the Treaty shall not apply, for such period as shall be fixed by that regulation, to agreements, decisions and concerted practices already in existence on 13 March 1962 which do not satisfy the conditions of Article 85 (3), where:

- within six months from the entry into force of the regulation, they are so modified as to satisfy the said conditions in accordance with the provisions of the regulation; and
- the modifications are brought to the notice of the Commission within the time limit fixed by the regulation.

**▼M1**

A Regulation adopted pursuant to Article 1 may lay down that the prohibition referred to in Article 85 (1) of the Treaty shall not apply, for the period fixed in the same Regulation, to agreements and concerted practices which existed at the date of accession and which, by virtue of accession, come within the scope of Article 85 and do not fulfil the conditions set out in Article 85 (3).



**▼A2**

The provisions of the preceding subparagraph shall apply in the same way in the case of the accession of the Hellenic Republic, the Kingdom of Spain and of the Portuguese Republic.

**▼A3**

The provisions of the preceding subparagraphs shall apply in the same way in the case of the accession of Austria, Finland and Sweden.

**▼B**

2. Paragraph 1 shall apply to agreements, decisions and concerted practices which had to be notified before 1 February 1963, in accordance with Article 5 of Regulation No 17, only where they have been so notified before that date.

**▼M1**

Paragraph 1 shall be applicable to those agreements and concerted practices which, by virtue of the accession, come within the scope of Article 85 (1) of the Treaty and for which notification before 1 July 1973 is mandatory, in accordance with Articles 5 and 25 of Regulation No 17, only if notification was given before that date.

**▼A1**

Paragraph 1 shall not apply to agreements and concerted practices to which Article 85 (1) of the Treaty applies by virtue of the accession of the Hellenic Republic and which must be notified before 1 July 1981, in accordance with Articles 5 and 25 of Regulation No 17, unless they have been so notified before that date.

**▼A2**

Paragraph 1 shall not apply to agreements and concerted practices to which Article 85 (1) of the Treaty applies by virtue of the accession of the Kingdom of Spain and of the Portuguese Republic and which must be notified before 1 July 1986, in accordance with Articles 5 and 25 of Regulation No 17, unless they have been so notified before that date.

**▼A3**

Paragraph 1 shall not apply to agreements and concerted practices to which Article 85 (1) of the Treaty applies by virtue of the accession of Austria, Finland and Sweden and which must be notified within six months of accession, in accordance with Articles 5 and 25 of Regulation No 17, unless they have been so notified within that period. The present paragraph shall not apply to agreements and concerted practices which at the date of accession already fall under Article 53 (1) of the EEA Agreement.

**▼B**

3. The benefit of the provisions laid down pursuant to paragraph 1 may not be claimed in actions pending at the date of entry into force of a regulation adopted pursuant to Article 1; neither may it be relied on as grounds for claims for damages against third parties.

*Article 5*

Before making a regulation, the Commission shall publish a draft thereof to enable all persons and organisations concerned to submit their comments within such time limit, being not less than one month, as the Commission shall fix.

*Article 6*

1. The Commission shall consult the Advisory Committee on Restrictive Practices and Monopolies:

- (a) before publishing a draft regulation;
- (b) before making a regulation.

2. Paragraphs 5 and 6 of Article 10 of Regulation No 17, relating to consultation with the Advisory Committee, shall apply by analogy, it being understood that joint meetings with the Commission shall take place not earlier than one month after dispatch of the notice convening them.

**▼ M2****▼ B**

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This Regulation shall be binding in its entirety and directly applicable in all Member States.

## COMMISSION REGULATION (EU) No 1217/2010

of 14 December 2010

## on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EEC) No 2821/71 of the Council of 20 December 1971 on application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices <sup>(1)</sup>,

Having published a draft of this Regulation,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

- (1) Regulation (EEC) No 2821/71 empowers the Commission to apply Article 101(3) of the Treaty on the Functioning of the European Union (\*) by regulation to certain categories of agreements, decisions and concerted practices falling within the scope of Article 101(1) of the Treaty which have as their object the research and development of products, technologies or processes up to the stage of industrial application, and exploitation of the results, including provisions regarding intellectual property rights.
- (2) Article 179(2) of the Treaty calls upon the Union to encourage undertakings, including small and medium-sized undertakings, in their research and technological development activities of high quality, and to support their efforts to cooperate with one another. This Regulation is intended to facilitate research and development while at the same time effectively protecting competition.
- (3) 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 <sup>(2)</sup> defines categories of research and development agreements which the Commission regarded as normally satisfying the conditions laid down

in Article 101(3) of the Treaty. In view of the overall positive experience with the application of that Regulation, which expires on 31 December 2010, and taking into account further experience acquired since its adoption, it is appropriate to adopt a new block exemption regulation.

- (4) This Regulation should meet the two requirements of ensuring effective protection of competition and providing adequate legal security for undertakings. The pursuit of those objectives should take account of the need to simplify administrative supervision and the legislative framework to as great an extent as possible. Below a certain level of market power it can in general be presumed, for the application of Article 101(3) of the Treaty, that the positive effects of research and development agreements will outweigh any negative effects on competition.
- (5) For the application of Article 101(3) of the Treaty by regulation, it is not necessary to define those agreements which are capable of falling within Article 101(1) of the Treaty. In the individual assessment of agreements under Article 101(1) of the Treaty, account has to be taken of several factors, and in particular the market structure on the relevant market.
- (6) Agreements on the joint execution of research work or the joint development of the results of the research, up to but not including the stage of industrial application, generally do not fall within the scope of Article 101(1) of the Treaty. In certain circumstances, however, such as where the parties agree not to carry out other research and development in the same field, thereby forgoing the opportunity of gaining competitive advantages over the other parties, such agreements may fall within Article 101(1) of the Treaty and should therefore be included within the scope of this Regulation.
- (7) The benefit of the exemption established by this Regulation should be limited to those agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty.
- (8) Cooperation in research and development and in the exploitation of the results is most likely to promote technical and economic progress if the parties contribute complementary skills, assets or activities to the co-operation. This also includes scenarios where one party merely finances the research and development activities of another party.

<sup>(1)</sup> OJ L 285, 29.12.1971, p. 46.

<sup>(2)</sup> OJ L 304, 5.12.2000, p. 7.

(\*) With effect from 1 December 2009, Article 81 of the EC Treaty has become Article 101 of the Treaty on the Functioning of the European Union (TFEU). The two articles are, in substance, identical. For the purposes of this Regulation, references to Article 101 of the TFEU should be understood as references to Article 81 of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this Regulation.

- (9) The joint exploitation of results can be considered as the natural consequence of joint research and development. It can take different forms such as manufacture, the exploitation of intellectual property rights that substantially contribute to technical or economic progress, or the marketing of new products.
- (10) Consumers can generally be expected to benefit from the increased volume and effectiveness of research and development through the introduction of new or improved products or services, a quicker launch of those products or services, or the reduction of prices brought about by new or improved technologies or processes.
- (11) In order to justify the exemption, the joint exploitation should relate to products, technologies or processes for which the use of the results of the research and development is decisive. Moreover, all the parties should agree in the research and development agreement that they will all have full access to the final results of the joint research and development, including any arising intellectual property rights and know-how, for the purposes of further research and development and exploitation, as soon as the final results become available. Access to the results should generally not be limited as regards the use of the results for the purposes of further research and development. However, where the parties, in accordance with this Regulation, limit their rights of exploitation, in particular where they specialise in the context of exploitation, access to the results for the purposes of exploitation may be limited accordingly. Moreover, where academic bodies, research institutes or undertakings which supply research and development as a commercial service without normally being active in the exploitation of results participate in research and development, they may agree to use the results of research and development solely for the purpose of further research. Depending on their capabilities and commercial needs, the parties may make unequal contributions to their research and development cooperation. Therefore, in order to reflect, and to make up for, the differences in the value or the nature of the parties' contributions, a research and development agreement benefiting from this Regulation may provide that one party is to compensate another for obtaining access to the results for the purposes of further research or exploitation. However, the compensation should not be so high as to effectively impede such access.
- (12) Similarly, where the research and development agreement does not provide for any joint exploitation of the results, the parties should agree in the research and development agreement to grant each other access to their respective pre-existing know-how, as long as this know-how is indispensable for the purposes of the exploitation of the results by the other parties. The rates of any licence fee charged should not be so high as to effectively impede access to the know-how by the other parties.
- (13) The exemption established by this Regulation should be limited to research and development agreements which do not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products, services or technologies in question. It is necessary to exclude from the block exemption agreements between competitors whose combined share of the market for products, services or technologies capable of being improved or replaced by the results of the research and development exceeds a certain level at the time the agreement is entered into. However, there is no presumption that research and development agreements are either caught by Article 101(1) of the Treaty or that they fail to satisfy the conditions of Article 101(3) of the Treaty once the market share threshold set out in this Regulation is exceeded or other conditions of this Regulation are not met. In such cases, an individual assessment of the research and development agreement needs to be conducted under Article 101 of the Treaty.
- (14) In order to ensure the maintenance of effective competition during joint exploitation of the results, provision should be made for the block exemption to cease to apply if the parties' combined share of the market for the products, services or technologies arising out of the joint research and development becomes too great. The exemption should continue to apply, irrespective of the parties' market shares, for a certain period after the commencement of joint exploitation, so as to await stabilisation of their market shares, particularly after the introduction of an entirely new product, and to guarantee a minimum period of return on the investments involved.
- (15) This Regulation should not exempt agreements containing restrictions which are not indispensable to the attainment of the positive effects generated by a research and development agreement. In principle, agreements containing certain types of severe restrictions of competition such as limitations on the freedom of parties to carry out research and development in a field unconnected to the agreement, the fixing of prices charged to third parties, limitations on output or sales, and limitations on effecting passive sales for the contract products or contract technologies in territories or to customers reserved for other parties should be excluded from the benefit of the exemption established by this Regulation irrespective of the market share of the parties. In this context, field of use restrictions do not constitute limitations of output or sales, and also do not constitute territorial or customer restrictions.
- (16) The market share limitation, the non-exemption of certain agreements and the conditions provided for in this Regulation normally ensure that the agreements to which the block exemption applies do not enable the parties to eliminate competition in respect of a substantial part of the products or services in question.

- (17) The possibility cannot be ruled out that anti-competitive foreclosure effects may arise where one party finances several research and development projects carried out by competitors with regard to the same contract products or contract technologies, in particular where it obtains the exclusive right to exploit the results vis-à-vis third parties. Therefore the benefit of this Regulation should be conferred on such paid-for research and development agreements only if the combined market share of all the parties involved in the connected agreements, that is to say, the financing party and all the parties carrying out the research and development, does not exceed 25 %.
- (18) Agreements between undertakings which are not competing manufacturers of products, technologies or processes capable of being improved, substituted or replaced by the results of the research and development will only eliminate effective competition in research and development in exceptional circumstances. It is therefore appropriate to enable such agreements to benefit from the exemption established by this Regulation irrespective of market share and to address any exceptional cases by way of withdrawal of its benefit.
- (19) The Commission may withdraw the benefit of this Regulation, pursuant to Article 29(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty <sup>(1)</sup>, where it finds in a particular case that an agreement to which the exemption provided for in this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty.
- (20) The competition authority of a Member State may withdraw the benefit of this Regulation pursuant to Article 29(2) of Regulation (EC) No 1/2003 in respect of the territory of that Member State, or a part thereof where, in a particular case, an agreement to which the exemption established by this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty in the territory of that Member State, or in a part thereof, and where such territory has all the characteristics of a distinct geographic market.
- (21) The benefit of this Regulation could be withdrawn pursuant to Article 29 of Regulation (EC) No 1/2003, for example, where the existence of a research and development agreement substantially restricts the scope for third parties to carry out research and development in the relevant field because of the limited research capacity available elsewhere, where because of the particular structure of supply, the existence of the research and development agreement substantially restricts the access of third parties to the market for the contract products or contract technologies, where without any objectively valid reason, the parties do not exploit the results of the joint research and development vis-à-vis third parties, where the contract products or contract technologies are not subject in the whole or a substantial part of

the internal market to effective competition from products, technologies or processes considered by users as equivalent in view of their characteristics, price and intended use, or where the existence of the research and development agreement would restrict competition in innovation or eliminate effective competition in research and development on a particular market.

- (22) As research and development agreements are often of a long-term nature, especially where the cooperation extends to the exploitation of the results, the period of validity of this Regulation should be fixed at 12 years,

HAS ADOPTED THIS REGULATION:

#### Article 1

#### Definitions

1. For the purposes of this Regulation, the following definitions shall apply:

- (a) 'research and development agreement' means an agreement entered into between two or more parties which relate to the conditions under which those parties pursue:
- (i) joint research and development of contract products or contract technologies and joint exploitation of the results of that research and development;
  - (ii) joint exploitation of the results of research and development of contract products or contract technologies jointly carried out pursuant to a prior agreement between the same parties;
  - (iii) joint research and development of contract products or contract technologies excluding joint exploitation of the results;
  - (iv) paid-for research and development of contract products or contract technologies and joint exploitation of the results of that research and development;
  - (v) joint exploitation of the results of paid-for research and development of contract products or contract technologies pursuant to a prior agreement between the same parties; or
  - (vi) paid-for research and development of contract products or contract technologies excluding joint exploitation of the results;
- (b) 'agreement' means an agreement, a decision by an association of undertakings or a concerted practice;

<sup>(1)</sup> OJ L 1, 4.1.2003, p. 1.

- (c) 'research and development' means the acquisition of know-how relating to products, technologies or processes and the carrying out of theoretical analysis, systematic study or experimentation, including experimental production, technical testing of products or processes, the establishment of the necessary facilities and the obtaining of intellectual property rights for the results;
  - (d) 'product' means a good or a service, including both intermediary goods or services and final goods or services;
  - (e) 'contract technology' means a technology or process arising out of the joint research and development;
  - (f) 'contract product' means a product arising out of the joint research and development or manufactured or provided applying the contract technologies;
  - (g) 'exploitation of the results' means the production or distribution of the contract products or the application of the contract technologies or the assignment or licensing of intellectual property rights or the communication of know-how required for such manufacture or application;
  - (h) 'intellectual property rights' means intellectual property rights, including industrial property rights, copyright and neighbouring rights;
  - (i) 'know-how' means a package of non-patented practical information, resulting from experience and testing, which is secret, substantial and identified;
  - (j) 'secret', in the context of know-how, means that the know-how is not generally known or easily accessible;
  - (k) 'substantial', in the context of know-how, means that the know-how is significant and useful for the manufacture of the contract products or the application of the contract technologies;
  - (l) 'identified', in the context of know-how, means that the know-how is described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;
  - (m) 'joint', in the context of activities carried out under a research and development agreement, means activities where the work involved is:
    - (i) carried out by a joint team, organisation or undertaking;
    - (ii) jointly entrusted to a third party; or
    - (iii) allocated between the parties by way of specialisation in the context of research and development or exploitation;
  - (n) 'specialisation in the context of research and development' means that each of the parties is involved in the research and development activities covered by the research and development agreement and they divide the research and development work between them in any way that they consider most appropriate; this does not include paid-for research and development;
  - (o) 'specialisation in the context of exploitation' means that the parties allocate between them individual tasks such as production or distribution, or impose restrictions upon each other regarding the exploitation of the results such as restrictions in relation to certain territories, customers or fields of use; this includes a scenario where only one party produces and distributes the contract products on the basis of an exclusive licence granted by the other parties;
  - (p) 'paid-for research and development' means research and development that is carried out by one party and financed by a financing party;
  - (q) 'financing party' means a party financing paid-for research and development while not carrying out any of the research and development activities itself;
  - (r) 'competing undertaking' means an actual or potential competitor;
  - (s) 'actual competitor' means an undertaking that is supplying a product, technology or process capable of being improved, substituted or replaced by the contract product or the contract technology on the relevant geographic market;
  - (t) 'potential competitor' means an undertaking that, in the absence of the research and development agreement, would, on realistic grounds and not just as a mere theoretical possibility, in case of a small but permanent increase in relative prices be likely to undertake, within not more than 3 years, the necessary additional investments or other necessary switching costs to supply a product, technology or process capable of being improved, substituted or replaced by the contract product or contract technology on the relevant geographic market;
  - (u) 'relevant product market' means the relevant market for the products capable of being improved, substituted or replaced by the contract products;
  - (v) 'relevant technology market' means the relevant market for the technologies or processes capable of being improved, substituted or replaced by the contract technologies.
2. For the purposes of this Regulation, the terms 'undertaking' and 'party' shall include their respective connected undertakings.



‘Connected undertakings’ means:

- (a) undertakings in which a party to the research and development agreement, directly or indirectly:
  - (i) has the power to exercise more than half the voting rights;
  - (ii) has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking; or
  - (iii) has the right to manage the undertaking's affairs;
- (b) undertakings which directly or indirectly have, over a party to the research and development agreement, the rights or powers listed in point (a);
- (c) undertakings in which an undertaking referred to in point (b) has, directly or indirectly, the rights or powers listed in point (a);
- (d) undertakings in which a party to the research and development agreement together with one or more of the undertakings referred to in points (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in point (a);
- (e) undertakings in which the rights or the powers listed in point (a) are jointly held by:
  - (i) parties to the research and development agreement or their respective connected undertakings referred to in points (a) to (d); or
  - (ii) one or more of the parties to the research and development agreement or one or more of their connected undertakings referred to in points (a) to (d) and one or more third parties.

#### Article 2

##### Exemption

1. Pursuant to Article 101(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 101(1) of the Treaty shall not apply to research and development agreements.

This exemption shall apply to the extent that such agreements contain restrictions of competition falling within the scope of Article 101(1) of the Treaty.

2. The exemption provided for in paragraph 1 shall apply to research and development agreements containing provisions which relate to the assignment or licensing of intellectual property rights to one or more of the parties or to an entity the parties establish to carry out the joint research and development, paid-for research and development or joint exploitation, provided that those provisions do not constitute the primary object of such agreements, but are directly related to and necessary for their implementation.

#### Article 3

##### Conditions for exemption

1. The exemption provided for in Article 2 shall apply subject to the conditions set out in paragraphs 2 to 5.

2. The research and development agreement must stipulate that all the parties have full access to the final results of the joint research and development or paid-for research and development, including any resulting intellectual property rights and know-how, for the purposes of further research and development and exploitation, as soon as they become available. Where the parties limit their rights of exploitation in accordance with this Regulation, in particular where they specialise in the context of exploitation, access to the results for the purposes of exploitation may be limited accordingly. Moreover, research institutes, academic bodies, or undertakings which supply research and development as a commercial service without normally being active in the exploitation of results may agree to confine their use of the results for the purposes of further research. The research and development agreement may foresee that the parties compensate each other for giving access to the results for the purposes of further research or exploitation, but the compensation must not be so high as to effectively impede such access.

3. Without prejudice to paragraph 2, where the research and development agreement provides only for joint research and development or paid-for research and development, the research and development agreement must stipulate that each party must be granted access to any pre-existing know-how of the other parties, if this know-how is indispensable for the purposes of its exploitation of the results. The research and development agreement may foresee that the parties compensate each other for giving access to their pre-existing know-how, but the compensation must not be so high as to effectively impede such access.

4. Any joint exploitation may only pertain to results which are protected by intellectual property rights or constitute know-how and which are indispensable for the manufacture of the contract products or the application of the contract technologies.

5. Parties charged with the manufacture of the contract products by way of specialisation in the context of exploitation must be required to fulfil orders for supplies of the contract products from the other parties, except where the research and development agreement also provides for joint distribution within the meaning of point (m)(i) or (ii) of Article 1(1) or where the parties have agreed that only the party manufacturing the contract products may distribute them.

#### Article 4

##### Market share threshold and duration of exemption

1. Where the parties are not competing undertakings, the exemption provided for in Article 2 shall apply for the duration of the research and development. Where the results are jointly exploited, the exemption shall continue to apply for 7 years from the time the contract products or contract technologies are first put on the market within the internal market.

2. Where two or more of the parties are competing undertakings, the exemption provided for in Article 2 shall apply for the period referred to in paragraph 1 of this Article only if, at the time the research and development agreement is entered into:

- (a) in the case of research and development agreements referred to in point (a)(i), (ii) or (iii) of Article 1(1), the combined market share of the parties to a research and development agreement does not exceed 25 % on the relevant product and technology markets; or
- (b) in the case of research and agreements referred to in point (a)(iv), (v) or (vi) of Article 1(1), the combined market share of the financing party and all the parties with which the financing party has entered into research and development agreements with regard to the same contract products or contract technologies, does not exceed 25 % on the relevant product and technology markets.

3. After the end of the period referred to in paragraph 1, the exemption shall continue to apply as long as the combined market share of the parties does not exceed 25 % on the relevant product and technology markets.

#### Article 5

##### Hardcore restrictions

The exemption provided for in Article 2 shall not apply to research and development agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object any of the following:

- (a) the restriction of the freedom of the parties to carry out research and development independently or in cooperation with third parties in a field unconnected with that to which the research and development agreement relates or, after the completion of the joint research and development or the paid-for research and development, in the field to which it relates or in a connected field;
- (b) the limitation of output or sales, with the exception of:
  - (i) the setting of production targets where the joint exploitation of the results includes the joint production of the contract products;
  - (ii) the setting of sales targets where the joint exploitation of the results includes the joint distribution of the contract products or the joint licensing of the contract technologies within the meaning of point (m)(i) or (ii) of Article 1(1);
  - (iii) practices constituting specialisation in the context of exploitation; and
  - (iv) the restriction of the freedom of the parties to manufacture, sell, assign or license products, technologies or processes which compete with the contract products or contract technologies during the period for which the parties have agreed to jointly exploit the results;

- (c) the fixing of prices when selling the contract product or licensing the contract technologies to third parties, with the exception of the fixing of prices charged to immediate customers or the fixing of licence fees charged to immediate licensees where the joint exploitation of the results includes the joint distribution of the contract products or the joint licensing of the contract technologies within the meaning of point (m)(i) or (ii) of Article 1(1);
- (d) the restriction of the territory in which, or of the customers to whom, the parties may passively sell the contract products or license the contract technologies, with the exception of the requirement to exclusively license the results to another party;
- (e) the requirement not to make any, or to limit, active sales of the contract products or contract technologies in territories or to customers which have not been exclusively allocated to one of the parties by way of specialisation in the context of exploitation;
- (f) the requirement to refuse to meet demand from customers in the parties' respective territories, or from customers otherwise allocated between the parties by way of specialisation in the context of exploitation, who would market the contract products in other territories within the internal market;
- (g) the requirement to make it difficult for users or resellers to obtain the contract products from other resellers within the internal market.

#### Article 6

##### Excluded restrictions

The exemption provided for in Article 2 shall not apply to the following obligations contained in research and development agreements:

- (a) the obligation not to challenge after completion of the research and development the validity of intellectual property rights which the parties hold in the internal market and which are relevant to the research and development or, after the expiry of the research and development agreement, the validity of intellectual property rights which the parties hold in the internal market and which protect the results of the research and development, without prejudice to the possibility to provide for termination of the research and development agreement in the event of one of the parties challenging the validity of such intellectual property rights;
- (b) the obligation not to grant licences to third parties to manufacture the contract products or to apply the contract technologies unless the agreement provides for the exploitation of the results of the joint research and development or paid-for research and development by at least one of the parties and such exploitation takes place in the internal market vis-à-vis third parties.



*Article 7***Application of the market share threshold**

For the purposes of applying the market share threshold provided for in Article 4 the following rules shall apply:

- (a) the market share shall be calculated on the basis of the market sales value; if market sales value data are not available, estimates based on other reliable market information, including market sales volumes, may be used to establish the market share of the parties;
- (b) the market share shall be calculated on the basis of data relating to the preceding calendar year;
- (c) the market share held by the undertakings referred to in point (e) of the second subparagraph of Article 1(2) shall be apportioned equally to each undertaking having the rights or the powers listed in point (a) of that subparagraph;
- (d) if the market share referred to in Article 4(3) is initially not more than 25 % but subsequently rises above that level without exceeding 30 %, the exemption provided for in Article 2 shall continue to apply for a period of two consecutive calendar years following the year in which the 25 % threshold was first exceeded;

(e) if the market share referred to in Article 4(3) is initially not more than 25 % but subsequently rises above 30 %, the exemption provided for in Article 2 shall continue to apply for a period of one calendar year following the year in which the level of 30 % was first exceeded;

(f) the benefit of points (d) and (e) may not be combined so as to exceed a period of two calendar years.

*Article 8***Transitional period**

The prohibition laid down in Article 101(1) of the Treaty shall not apply during the period from 1 January 2011 to 31 December 2012 in respect of agreements already in force on 31 December 2010 which do not satisfy the conditions for exemption provided for in this Regulation but which satisfy the conditions for exemption provided for in Regulation (EC) No 2659/2000.

*Article 9***Period of validity**

This Regulation shall enter into force on 1 January 2011.

It shall expire on 31 December 2022.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 14 December 2010.

*For the Commission*

*The President*

José Manuel BARROSO

## COMMISSION REGULATION (EU) No 1218/2010

of 14 December 2010

**on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements**

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EEC) No 2821/71 of the Council of 20 December 1971 on application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices <sup>(1)</sup>,

Having published a draft of this Regulation,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation (EEC) No 2821/71 empowers the Commission to apply Article 101(3) of the Treaty on the Functioning of the European Union (\*) by regulation to certain categories of agreements, decisions and concerted practices falling within the scope of Article 101(1) of the Treaty which have as their object specialisation, including agreements necessary for achieving it.

(2) 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 <sup>(2)</sup> defines categories of specialisation agreements which the Commission regarded as normally satisfying the conditions laid down in Article 101(3) of the Treaty. In view of the overall positive experience with the application of that Regulation, which expires on 31 December 2010, and taking into account further experience acquired since its adoption, it is appropriate to adopt a new block exemption regulation.

(3) This Regulation should meet the two requirements of ensuring effective protection of competition and providing adequate legal security for undertakings. The pursuit of those objectives should take account of the need to simplify administrative supervision and the legislative framework to as great an extent as possible. Below a certain level of market power it can in general be presumed, for the application of Article 101(3) of the Treaty, that the positive effects of specialisation agreements will outweigh any negative effects on competition.

(4) For the application of Article 101(3) of the Treaty by regulation, it is not necessary to define those agreements which are capable of falling within Article 101(1) of the Treaty. In the individual assessment of agreements under Article 101(1) of the Treaty, account has to be taken of several factors, and in particular the market structure on the relevant market.

(5) The benefit of the exemption established by this Regulation should be limited to those agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty.

(6) Agreements on specialisation in production are most likely to contribute to improving the production or distribution of goods if the parties have complementary skills, assets or activities, because they can concentrate on the manufacture of certain products and thus operate more efficiently and supply the products more cheaply. The same can generally be said about agreements on specialisation in the preparation of services. Given effective competition, it is likely that consumers will receive a fair share of the resulting benefits.

(7) Such advantages can arise from agreements whereby one party fully or partly gives up the manufacture of certain products or preparation of certain services in favour of another party (unilateral specialisation), from agreements whereby each party fully or partly gives up the manufacture of certain products or preparation of certain services in favour of another party (reciprocal specialisation) and from agreements whereby the parties

<sup>(1)</sup> OJ L 285, 29.12.1971, p. 46.

<sup>(2)</sup> OJ L 304, 5.12.2000, p. 3.

(\*) With effect from 1 December 2009, Article 81 of the EC Treaty has become Article 101 of the Treaty on the Functioning of the European Union (TFEU). The two Articles are, in substance, identical. For the purposes of this Regulation, references to Article 101 of the TFEU should be understood as references to Article 81 of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this Regulation.

undertake to jointly manufacture certain products or prepare certain services (joint production). In the context of this Regulation, the concepts of unilateral and reciprocal specialisation do not require a party to reduce capacity, as it is sufficient if they reduce their production volumes. The concept of joint production, however, does not require the parties to reduce their individual production activities outside the scope of their envisaged joint production arrangement.

- (8) The nature of unilateral and reciprocal specialisation agreements presupposes that the parties are active on the same product market. It is not necessary for the parties to be active on the same geographic market. Consequently, the application of this Regulation to unilateral and reciprocal specialisation agreements should be limited to scenarios where the parties are active on the same product market. Joint production agreements can be entered into by parties who are already active on the same product market but also by parties who wish to enter a product market by way of the agreement. Therefore, joint production agreements should fall within the scope of this Regulation irrespective of whether the parties are already active in the same product market.
- (9) To ensure that the benefits of specialisation will materialise without one party leaving the market downstream of production entirely, unilateral and reciprocal specialisation agreements should only be covered by this Regulation where they provide for supply and purchase obligations or joint distribution. Supply and purchase obligations may, but do not have to, be of an exclusive nature.
- (10) It can be presumed that, where the parties' share of the relevant market for the products which are the subject matter of a specialisation agreement does not exceed a certain level, the agreements will, as a general rule, give rise to economic benefits in the form of economies of scale or scope or better production technologies, while allowing consumers a fair share of the resulting benefits. However, where the products manufactured under a specialisation agreement are intermediary products which one or more of the parties fully or partly use as an input for their own production of certain downstream products which they subsequently sell on the market, the exemption conferred by this Regulation should also be conditional on the parties' share on the relevant market for these downstream products not exceeding a certain level. In such a case, merely looking at the parties' market share at the level of the intermediary product would ignore the potential risk of foreclosing or increasing the price of inputs for competitors at the level of the downstream products. However, there is no presumption that specialisation agreements are either caught by Article 101(1) of the Treaty or that they fail to satisfy the conditions of Article 101(3) of the Treaty once the market share threshold set out in this Regulation is

exceeded or other conditions of this Regulation are not met. In such cases, an individual assessment of the specialisation agreement needs to be conducted under Article 101 of the Treaty.

- (11) This Regulation should not exempt agreements containing restrictions which are not indispensable to the attainment of the positive effects generated by a specialisation agreement. In principle, agreements containing certain types of severe restrictions of competition relating to the fixing of prices charged to third parties, limitation of output or sales, and allocation of markets or customers should be excluded from the benefit of the exemption established by this Regulation irrespective of the market share of the parties.
- (12) The market share limitation, the non-exemption of certain agreements and the conditions provided for in this Regulation normally ensure that the agreements to which the block exemption applies do not enable the parties to eliminate competition in respect of a substantial part of the products or services in question.
- (13) The Commission may withdraw the benefit of this Regulation, pursuant to Article 29(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty<sup>(1)</sup>, where it finds in a particular case that an agreement to which the exemption provided for in this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty.
- (14) The competition authority of a Member State may withdraw the benefit of this Regulation pursuant to Article 29(2) of Regulation (EC) No 1/2003 in respect of the territory of that Member State, or a part thereof where, in a particular case, an agreement to which the exemption established by this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty in the territory of that Member State, or in a part thereof, and where such territory has all the characteristics of a distinct geographic market.
- (15) The benefit of this Regulation could be withdrawn pursuant to Article 29 of Regulation (EC) No 1/2003 where, for example, the relevant market is very concentrated and competition is already weak, in particular because of the individual market positions of other market participants or links between other market participants created by parallel specialisation agreements.

<sup>(1)</sup> OJ L 1, 4.1.2003, p. 1.

- (16) In order to facilitate the conclusion of specialisation agreements, which can have a bearing on the structure of the parties, the period of validity of this Regulation should be fixed at 12 years,

HAS ADOPTED THIS REGULATION:

#### Article 1

#### Definitions

1. For the purposes of this Regulation, the following definitions shall apply:

- (a) 'specialisation agreement' means a unilateral specialisation agreement, a reciprocal specialisation agreement or a joint production agreement;
  - (b) 'unilateral specialisation agreement' means an agreement between two parties which are active on the same product market by virtue of which one party agrees to fully or partly cease production of certain products or to refrain from producing those products and to purchase them from the other party, who agrees to produce and supply those products;
  - (c) 'reciprocal specialisation agreement' means an agreement between two or more parties which are active on the same product market, by virtue of which two or more parties on a reciprocal basis agree to fully or partly cease or refrain from producing certain but different products and to purchase these products from the other parties, who agree to produce and supply them;
  - (d) 'joint production agreement' means an agreement by virtue of which two or more parties agree to produce certain products jointly;
  - (e) 'agreement' means an agreement, a decision by an association of undertakings or a concerted practice;
  - (f) 'product' means a good or a service, including both intermediary goods or services and final goods or services, with the exception of distribution and rental services;
  - (g) 'production' means the manufacture of goods or the preparation of services and includes production by way of subcontracting;
  - (h) 'preparation of services' means activities upstream of the provision of services to customers;
  - (i) 'relevant market' means the relevant product and geographic market to which the specialisation products belong, and, in addition, where the specialisation products are intermediary products which one or more of the parties fully or partly use captively for the production of downstream products, the relevant product and geographic market to which the downstream products belong;
  - (j) 'specialisation product' means a product which is produced under a specialisation agreement;
  - (k) 'downstream product' means a product for which a specialisation product is used by one or more of the parties as an input and which is sold by those parties on the market;
  - (l) 'competing undertaking' means an actual or potential competitor;
  - (m) 'actual competitor' means an undertaking that is active on the same relevant market;
  - (n) 'potential competitor' means an undertaking that, in the absence of the specialisation agreement, would, on realistic grounds and not just as a mere theoretical possibility, in case of a small but permanent increase in relative prices be likely to undertake, within not more than 3 years, the necessary additional investments or other necessary switching costs to enter the relevant market;
  - (o) 'exclusive supply obligation' means an obligation not to supply a competing undertaking other than a party to the agreement with the specialisation product;
  - (p) 'exclusive purchase obligation' means an obligation to purchase the specialisation product only from a party to the agreement;
  - (q) 'joint', in the context of distribution, means that the parties:
    - (i) carry out the distribution of the products by way of a joint team, organisation or undertaking; or
    - (ii) appoint a third party distributor on an exclusive or non-exclusive basis, provided that the third party is not a competing undertaking;
  - (r) 'distribution' means distribution, including the sale of goods and the provision of services.
2. For the purposes of this Regulation, the terms 'undertaking' and 'party' shall include their respective connected undertakings.

‘Connected undertakings’ means:

- (a) undertakings in which a party to the specialisation agreement, directly or indirectly:
  - (i) has the power to exercise more than half the voting rights;
  - (ii) has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking; or
  - (iii) has the right to manage the undertaking's affairs;
- (b) undertakings which directly or indirectly have, over a party to the specialisation agreement, the rights or powers listed in point (a);
- (c) undertakings in which an undertaking referred to in point (b) has, directly or indirectly, the rights or powers listed in point (a);
- (d) undertakings in which a party to the specialisation agreement together with one or more of the undertakings referred to in points (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in point (a);
- (e) undertakings in which the rights or the powers listed in point (a) are jointly held by:
  - (i) parties to the specialisation agreement or their respective connected undertakings referred to in points (a) to (d); or
  - (ii) one or more of the parties to the specialisation agreement or one or more of their connected undertakings referred to in points (a) to (d) and one or more third parties.

#### Article 2

##### Exemption

1. Pursuant to Article 101(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 101(1) of the Treaty shall not apply to specialisation agreements.

This exemption shall apply to the extent that such agreements contain restrictions of competition falling within the scope of Article 101(1) of the Treaty.

2. The exemption provided for in paragraph 1 shall apply to specialisation agreements containing provisions which relate to the assignment or licensing of intellectual property rights to one or more of the parties, provided that those provisions do not

constitute the primary object of such agreements, but are directly related to and necessary for their implementation.

3. The exemption provided for in paragraph 1 shall apply to specialisation agreements whereby:

- (a) the parties accept an exclusive purchase or exclusive supply obligation; or
- (b) the parties do not independently sell the specialisation products but jointly distribute those products.

#### Article 3

##### Market share threshold

The exemption provided for in Article 2 shall apply on condition that the combined market share of the parties does not exceed 20 % on any relevant market.

#### Article 4

##### Hardcore restrictions

The exemption provided for in Article 2 shall not apply to specialisation agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object any of the following:

- (a) the fixing of prices when selling the products to third parties with the exception of the fixing of prices charged to immediate customers in the context of joint distribution;
- (b) the limitation of output or sales with the exception of:
  - (i) provisions on the agreed amount of products in the context of unilateral or reciprocal specialisation agreements or the setting of the capacity and production volume in the context of a joint production agreement; and
  - (ii) the setting of sales targets in the context of joint distribution;
- (c) the allocation of markets or customers.

#### Article 5

##### Application of the market share threshold

For the purposes of applying the market share threshold provided for in Article 3 the following rules shall apply:

- (a) the market share shall be calculated on the basis of the market sales value; if market sales value data are not available, estimates based on other reliable market information, including market sales volumes, may be used to establish the market share of the parties;

(b) the market share shall be calculated on the basis of data relating to the preceding calendar year;

(c) the market share held by the undertakings referred to in point (e) of the second subparagraph of Article 1(2) shall be apportioned equally to each undertaking having the rights or the powers listed in point (a) of that subparagraph;

(d) if the market share referred to in Article 3 is initially not more than 20 % but subsequently rises above that level without exceeding 25 %, the exemption provided for in Article 2 shall continue to apply for a period of 2 consecutive calendar years following the year in which the 20 % threshold was first exceeded;

(e) if the market share referred to in Article 3 is initially not more than 20 % but subsequently rises above 25 %, the exemption provided for in Article 2 shall continue to apply for a period of 1 calendar year following the year in which the level of 25 % was first exceeded;

(f) the benefit of points (d) and (e) may not be combined so as to exceed a period of 2 calendar years.

#### *Article 6*

##### **Transitional period**

The prohibition laid down in Article 101(1) of the Treaty shall not apply during the period from 1 January 2011 to 31 December 2012 in respect of agreements already in force on 31 December 2010 which do not satisfy the conditions for exemption provided for in this Regulation but which satisfy the conditions for exemption provided for in Regulation (EC) No 2658/2000.

#### *Article 7*

##### **Period of validity**

This Regulation shall enter into force on 1 January 2011.

It shall expire on 31 December 2022.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 14 December 2010.

*For the Commission*

*The President*

José Manuel BARROSO



## IV

(Notices)

## NOTICES FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

## EUROPEAN COMMISSION

## COMMUNICATION FROM THE COMMISSION

**Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements**

(Text with EEA relevance)

(2011/C 11/01)

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## 1. INTRODUCTION

### 1.1. Purpose and scope

1. These guidelines set out the principles for the assessment under Article 101 of the Treaty on the Functioning of the European Union (\*) ('Article 101') of agreements between undertakings, decisions by associations of undertakings and concerted practices (collectively referred to as 'agreements') pertaining to horizontal co-operation. Co-operation is of a 'horizontal nature' if an agreement is entered into between actual or potential competitors. In addition, these guidelines also cover horizontal co-operation agreements between non-competitors, for example, between two companies active in the same product markets but in different geographic markets without being potential competitors.
2. Horizontal co-operation agreements can lead to substantial economic benefits, in particular if they combine complementary activities, skills or assets. Horizontal co-operation can be a means to share risk, save costs, increase investments, pool know-how, enhance product quality and variety, and launch innovation faster.
3. On the other hand, horizontal co-operation agreements may lead to competition problems. This is, for example, the case if the parties agree to fix prices or output or to share markets, or if the co-operation enables the parties to maintain, gain or increase market power and thereby is likely to give rise to negative market effects with respect to prices, output, product quality, product variety or innovation.
4. The Commission, while recognising the benefits that can be generated by horizontal co-operation agreements, has to ensure that effective competition is maintained. Article 101 provides the legal framework for a balanced assessment taking into account both adverse effects on competition and pro-competitive effects.
5. The purpose of these guidelines is to provide an analytical framework for the most common types of horizontal co-operation agreements; they deal with research and development agreements, production agreements including subcontracting and specialisation agreements, purchasing agreements, commercialisation agreements, standardisation agreements including standard contracts, and information exchange. This framework is primarily based on legal and economic criteria that help to analyse a horizontal co-operation agreement and the context in which it occurs. Economic criteria such as the market power of the parties and other factors relating to the market structure form a key element of the assessment of the market impact likely to be caused by a horizontal co-operation agreement and, therefore, for the assessment under Article 101.
6. These guidelines apply to the most common types of horizontal co-operation agreements irrespective of the level of integration they entail with the exception of operations constituting a concentration within the meaning of Article 3 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings <sup>(1)</sup> ('the Merger Regulation') as would be the case, for example, with joint ventures performing on a lasting basis all the functions of an autonomous economic entity ('full-function joint ventures') <sup>(2)</sup>.

(\*) With effect from 1 December 2009, Article 81 of the EC Treaty has become Article 101 of the Treaty on the Functioning of the European Union ('TFEU'). The two Articles are, in substance, identical. For the purposes of these guidelines, references to Article 101 of the TFEU should be understood as references to Article 81 of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout these guidelines.

<sup>(1)</sup> OJ L 24, 29.1.2004, p. 1.

<sup>(2)</sup> See Article 3(4) of the Merger Regulation. However, in assessing whether there is a full-function joint venture, the Commission examines whether the joint venture is autonomous in an operational sense. This does not mean that it enjoys autonomy from its parent companies as regards the adoption of its strategic decisions (see Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 16.4.2008, p. 1, paragraphs 91–109 ('Consolidated Jurisdictional Notice')). It also needs to be recalled that if the creation of a joint venture constituting a concentration under Article 3 of the Merger Regulation has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, then that coordination will be appraised under Article 101 of the Treaty (see Article 2(4) of the Merger Regulation).

7. Given the potentially large number of types and combinations of horizontal co-operation and market circumstances in which they operate, it is difficult to provide specific answers for every possible scenario. These guidelines will nevertheless assist businesses in assessing the compatibility of an individual co-operation agreement with Article 101. Those criteria do not, however, constitute a 'checklist' which can be applied mechanically. Each case must be assessed on the basis of its own facts, which may require a flexible application of these guidelines.
8. The criteria set out in these guidelines apply to horizontal co-operation agreements concerning both goods and services (collectively referred to as 'products'). These guidelines complement Commission Regulation (EU) No [...] of [...] on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements <sup>(1)</sup> ('the R&D Block Exemption Regulation') and Commission Regulation (EU) No [...] of [...] on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements <sup>(2)</sup> ('the Specialisation Block Exemption Regulation').
9. Although these guidelines contain certain references to cartels, they are not intended to give any guidance as to what does and does not constitute a cartel as defined by the decisional practice of the Commission and the case-law of the Court of Justice of the European Union.
10. The term 'competitors' as used in these guidelines includes both actual and potential competitors. Two companies are treated as actual competitors if they are active on the same relevant market. A company is treated as a potential competitor of another company if, in the absence of the agreement, in case of a small but permanent increase in relative prices it is likely that the former, within a short period of time <sup>(3)</sup>, would undertake the necessary additional investments or other necessary switching costs to enter the relevant market on which the latter is active. This assessment has to be based on realistic grounds, the mere theoretical possibility to enter a market is not sufficient (see Commission Notice on the definition of the relevant market for the purposes of Community competition law) <sup>(4)</sup> ('the Market Definition Notice').
11. Companies that form part of the same 'undertaking' within the meaning of Article 101(1) are not considered to be competitors for the purposes of these guidelines. Article 101 only applies to agreements between independent undertakings. When a company exercises decisive influence over another company they form a single economic entity and, hence, are part of the same undertaking. <sup>(5)</sup> The same is true for sister companies, that is to say, companies over which decisive influence is exercised by the same parent company. They are consequently not considered to be competitors even if they are both active on the same relevant product and geographic markets.
12. Agreements that are entered into between undertakings operating at a different level of the production or distribution chain, that is to say, vertical agreements, are in principle dealt with in Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on

<sup>(1)</sup> OJ L [...], [...], p. [...].

<sup>(2)</sup> OJ L [...], [...], p. [...].

<sup>(3)</sup> What constitutes a 'short period of time' depends on the facts of the case at hand, its legal and economic context, and, in particular, on whether the company in question is a party to the agreement or a third party. In the first case, that is to say, where it is analysed whether a party to an agreement should be considered a potential competitor of the other party, the Commission would normally consider a longer period to be a 'short period of time' than in the second case, that is to say, where the capacity of a third party to act as a competitive constraint on the parties to an agreement is analysed. For a third party to be considered a potential competitor, market entry would need to take place sufficiently fast so that the threat of potential entry is a constraint on the parties' and other market participants' behaviour. For these reasons, both the R&D and the Specialisation Block Exemption Regulations consider a period of not more than three years a 'short period of time'.

<sup>(4)</sup> OJ C 372, 9.12.1997, p. 5, paragraph 24; see also the Commission's Thirteenth Report on Competition Policy, point 55 and Commission Decision in Case IV/32.009, *Elopak/Metal Box-Odin*, OJ L 209, 8.8.1990, p. 15.

<sup>(5)</sup> See, for example, Case C-73/95, *Viho*, [1996] ECR I-5457, paragraph 51. The exercise of decisive influence by the parent company over the conduct of a subsidiary can be presumed in case of wholly-owned subsidiaries; see, for example, Case 107/82, *AEG*, [1983] ECR-3151, paragraph 50; Case C-286/98 P, *Stora*, [2000] ECR-I 9925, paragraph 29; or Case C-97/08 P, *Akzo*, [2009] ECR I-8237, paragraphs 60 *et seq.*

the Functioning of the European Union to categories of vertical agreements and concerted practices <sup>(1)</sup> (‘the Block Exemption Regulation on Vertical Restraints’) and the Guidelines on Vertical Restraints <sup>(2)</sup>. However, to the extent that vertical agreements, for example, distribution agreements, are concluded between competitors, the effects of the agreement on the market and the possible competition problems can be similar to horizontal agreements. Therefore, vertical agreements between competitors fall under these guidelines <sup>(3)</sup>. Should there be a need to also assess such agreements under the Block Exemption Regulation on Vertical Restraints and the Guidelines on Vertical Restraints, this will be specifically stated in the relevant chapter of these guidelines. In the absence of such a reference, only these guidelines will be applicable to vertical agreements between competitors.

13. Horizontal co-operation agreements may combine different stages of co-operation, for example research and development (‘R&D’) and the production and/or commercialisation of its results. Such agreements are generally also covered by these guidelines. When using these guidelines for the analysis of such integrated co-operation, as a general rule, all the chapters pertaining to the different parts of the co-operation will be relevant. However, where the relevant chapters of these guidelines contain graduated messages, for example with regard to safe harbours or whether certain conduct will normally be considered a restriction of competition by object or by effect, what is set out in the chapter pertaining to that part of an integrated co-operation which can be considered its ‘centre of gravity’ prevails for the entire co-operation <sup>(4)</sup>.
14. Two factors are in particular relevant for the determination of the centre of gravity of integrated co-operation: firstly, the starting point of the co-operation, and, secondly, the degree of integration of the different functions which are combined. For example, the centre of gravity of a horizontal co-operation agreement involving both joint R&D and joint production of the results would thus normally be the joint R&D, as the joint production will only take place if the joint R&D is successful. This implies that the results of the joint R&D are decisive for the subsequent joint production. The assessment of the centre of gravity would change if the parties would have engaged in the joint production in any event, that is to say, irrespective of the joint R&D, or if the agreement provided for a full integration in the area of production and only a partial integration of some R&D activities. In this case, the centre of gravity of the co-operation would be the joint production.
15. Article 101 only applies to those horizontal co-operation agreements which may affect trade between Member States. The principles on the applicability of Article 101 set out in these guidelines are therefore based on the assumption that a horizontal co-operation agreement is capable of affecting trade between Member States to an appreciable extent.
16. The assessment under Article 101 as described in these guidelines is without prejudice to the possible parallel application of Article 102 of the Treaty to horizontal co-operation agreements <sup>(5)</sup>.
17. These guidelines are without prejudice to the interpretation the Court of Justice of the European Union may give to the application of Article 101 to horizontal co-operation agreements.

<sup>(1)</sup> OJ L 102, 23.4.2010, p. 1.

<sup>(2)</sup> OJ C 130, 19.5.2010, p. 1.

<sup>(3)</sup> This does not apply where competitors enter into a non-reciprocal vertical agreement and (i) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level, or (ii) the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services. Such agreements are exclusively assessed under the Block Exemption Regulation and the Guidelines on Vertical Restraints (see Article 2(4) of the Block Exemption Regulation on Vertical Restraints).

<sup>(4)</sup> It should be noted that this test only applies to the relationship between the different chapters of these guidelines, not to the relationship between different block exemption regulations. The scope of a block exemption regulation is defined by its own provisions.

<sup>(5)</sup> See Case T-51/89, *Tetra Pak I*, [1990] ECR-II 309, paragraphs 25 *et seq.* and Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7 (‘Article 102 Guidance Paper’).

18. These guidelines replace the Commission guidelines on the applicability of Article 81 of the EC Treaty to horizontal co-operation agreements<sup>(1)</sup> which were published by the Commission in 2001 and do not apply to the extent that sector specific rules apply as is the case for certain agreements with regard to agriculture<sup>(2)</sup>, transport<sup>(3)</sup> or insurance<sup>(4)</sup>. The Commission will continue to monitor the operation of the R&D and Specialisation Block Exemption Regulations and these guidelines based on market information from stakeholders and national competition authorities and may revise these guidelines in the light of future developments and of evolving insight.
19. The Commission guidelines on the application of Article 81(3) of the Treaty<sup>(5)</sup> ('the General Guidelines') contain general guidance on the interpretation of Article 101. Consequently, these guidelines have to be read in conjunction with the General Guidelines.

### 1.2. Basic principles for the assessment under Article 101

20. The assessment under Article 101 consists of two steps. The first step, under Article 101(1), is to assess whether an agreement between undertakings, which is capable of affecting trade between Member States, has an anti-competitive object or actual or potential<sup>(6)</sup> restrictive effects on competition. The second step, under Article 101(3), which only becomes relevant when an agreement is found to be restrictive of competition within the meaning of Article 101(1), is to determine the pro-competitive benefits produced by that agreement and to assess whether those pro-competitive effects outweigh the restrictive effects on competition<sup>(7)</sup>. The balancing of restrictive and pro-competitive effects is conducted exclusively within the framework laid down by Article 101(3)<sup>(8)</sup>. If the pro-competitive effects do not outweigh a restriction of competition, Article 101(2) stipulates that the agreement shall be automatically void.
21. The analysis of horizontal co-operation agreements has certain common elements with the analysis of horizontal mergers pertaining to the potential restrictive effects, in particular as regards joint ventures. There is often only a fine line between full-function joint ventures that fall under the Merger Regulation and non-full-function joint ventures that are assessed under Article 101. Hence, their effects can be quite similar.
22. In certain cases, companies are encouraged by public authorities to enter into horizontal co-operation agreements in order to attain a public policy objective by way of self-regulation. However, companies remain subject to Article 101 if a national law merely encourages or makes it easier for them to

<sup>(1)</sup> OJ C 3, 6.1.2001, p. 2. These guidelines do not contain a separate chapter on 'environmental agreements' as was the case in the previous guidelines. Standard-setting in the environment sector, which was the main focus of the former chapter on environmental agreements, is more appropriately dealt with in the standardisation chapter of these guidelines. In general, depending on the competition issues 'environmental agreements' give rise to, they are to be assessed under the relevant chapter of these guidelines, be it the chapter on R&D, production, commercialisation or standardisation agreements.

<sup>(2)</sup> Council Regulation (EC) No 1184/2006 of 24 July 2006 applying certain rules of competition to the production of, and trade in, agricultural products, OJ L 214, 4.8.2006, p. 7.

<sup>(3)</sup> Council Regulation (EC) No 169/2009 of 26 February 2009 applying rules of competition to transport by rail, road and inland waterway, OJ L 61, 5.3.2009, p. 1; Council Regulation (EC) No 246/2009 of 26 February 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices between liner shipping companies (consortia), OJ L 79, 25.3.2009, p. 1; Commission Regulation (EC) No 823/2000 of 19 April 2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), OJ L 100, 20.4.2000, p. 24; Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, OJ C 245, 26.9.2008, p. 2.

<sup>(4)</sup> Commission Regulation (EU) No 267/2010 of 24 March 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector, OJ L 83, 31.3.2010, p. 1.

<sup>(5)</sup> OJ C 101, 27.4.2004, p. 97.

<sup>(6)</sup> Article 101(1) prohibits both actual and potential anti-competitive effects; see for example Case C-7/95 P, *John Deere*, [1998] ECR I-3111, paragraph 77; Case C-238/05, *Asnef-Equifax*, [2006] ECR I-11125, paragraph 50.

<sup>(7)</sup> See Joined Cases C-501/06 P and others, *GlaxoSmithKline*, [2009] ECR I-9291, paragraph 95.

<sup>(8)</sup> See Case T-65/98, *Van den Bergh Foods*, [2003] ECR II-4653, paragraph 107; Case T-112/99, *Métropole télévision (M6)* and others, [2001] ECR II-2459, paragraph 74; Case T-328/03, *O2*, [2006] ECR II-1231, paragraphs 69 *et seq.*, where the General Court held that it is only in the precise framework of Article 101(3) that the pro- and anti-competitive aspects of a restriction may be weighed.

engage in autonomous anti-competitive conduct <sup>(1)</sup>. In other words, the fact that public authorities encourage a horizontal co-operation agreement does not mean that it is permissible under Article 101 <sup>(2)</sup>. It is only if anti-competitive conduct is required of companies by national legislation, or if the latter creates a legal framework which precludes all scope for competitive activity on their part, that Article 101 does not apply <sup>(3)</sup>. In such a situation, the restriction of competition is not attributable, as Article 101 implicitly requires, to the autonomous conduct of the companies and they are shielded from all the consequences of an infringement of that article <sup>(4)</sup>. Each case must be assessed on its own facts according to the general principles set out in these guidelines.

#### 1.2.1. Article 101(1)

23. Article 101(1) prohibits agreements the object or effect of which is to restrict <sup>(5)</sup> competition.

##### (i) Restrictions of competition by object

24. Restrictions of competition by *object* are those that by their very nature have the potential to restrict competition within the meaning of Article 101(1) <sup>(6)</sup>. It is not necessary to examine the actual or potential effects of an agreement on the market once its anti-competitive object has been established <sup>(7)</sup>.
25. According to the settled case-law of the Court of Justice of the European Union, in order to assess whether an agreement has an anti-competitive object, regard must be had to the content of the agreement, the objectives it seeks to attain, and the economic and legal context of which it forms part. In addition, although the parties' intention is not a necessary factor in determining whether an agreement has an anti-competitive object, the Commission may nevertheless take this aspect into account in its analysis <sup>(8)</sup>. Further guidance with regard to the notion of restrictions of competition by object can be obtained in the General Guidelines.

##### (ii) Restrictive effects on competition

26. If a horizontal co-operation agreement does not restrict competition by object, it must be examined whether it has appreciable restrictive effects on competition. Account must be taken of both actual and potential effects. In other words, the agreement must at least be likely to have anti-competitive effects.
27. For an agreement to have restrictive effects on competition within the meaning of Article 101(1) it must have, or be likely to have, an appreciable adverse impact on at least one of the parameters of competition on the market, such as price, output, product quality, product variety or innovation. Agreements can have such effects by appreciably reducing competition between the parties to the agreement or between any one of them and third parties. This means that the agreement must reduce the parties' decision-making independence <sup>(9)</sup>, either due to obligations contained in the agreement which regulate the market conduct of at least one of the parties or by influencing the market conduct of at least one of the parties by causing a change in its incentives.

<sup>(1)</sup> See judgment of 14 October 2010 in Case C-280/08 P, *Deutsche Telekom*, ECR I not yet reported, paragraph 82 and the case-law cited therein.

<sup>(2)</sup> See Case C-198/01, *CIF*, [2003] ECR I-8055, paragraphs 56–58; Joined Cases T-217/03 and T-245/03, *French Beef*, [2006] ECR II-4987, paragraph 92; Case T-7/92, *Asia Motor France II*, [1993] ECR II-669, paragraph 71; and Case T-148/89, *Tréfilunion*, [1995] ECR II-1063, paragraph 118.

<sup>(3)</sup> See Case C-280/08 P, *Deutsche Telekom*, paragraph 80–81. This possibility has been narrowly interpreted; see, for example, Joined Cases 209/78 and others, *Van Landewyck*, [1980] ECR 3125, paragraphs 130–134; Joined Cases 240/82 and others, *Stichting Sigarettenindustrie*, [1985] ECR 3831, paragraphs 27–29; and Joined Cases C-359/95 P and C-379/95 P, *Ladbroke Racing*, [1997] ECR I-6265, paragraphs 33 *et seq.*

<sup>(4)</sup> At least until a decision to disapply the national legislation has been adopted and that decision has become definitive; see Case C-198/01, *CIF*, paragraphs 54 *et seq.*

<sup>(5)</sup> For the purpose of these guidelines, the term 'restriction of competition' includes the prevention and distortion of competition.

<sup>(6)</sup> See, for example, Case C-209/07, *BIDS*, [2008] ECR I-8637, paragraph 17.

<sup>(7)</sup> See, for example, Joined Cases C-501/06 P and others, *GlaxoSmithKline*, paragraph 55; Case C-209/07, *BIDS*, paragraph 16; Case C-8/08, *T-Mobile Netherlands*, ECR [2009] I-4529, paragraph 29 *et seq.*; Case C-7/95 P, *John Deere*, paragraph 77.

<sup>(8)</sup> See, for example, Joined Cases C-501/06 P and others, *GlaxoSmithKline*, paragraph 58; Case C-209/07, *BIDS*, paragraphs 15 *et seq.*

<sup>(9)</sup> See Case C-7/95 P, *John Deere*, paragraph 88; Case C-238/05, *Asnef-Equifax*, paragraph 51.



28. Restrictive effects on competition within the relevant market are likely to occur where it can be expected with a reasonable degree of probability that, due to the agreement, the parties would be able to profitably raise prices or reduce output, product quality, product variety or innovation. This will depend on several factors such as the nature and content of the agreement, the extent to which the parties individually or jointly have or obtain some degree of market power, and the extent to which the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power.
29. The assessment of whether a horizontal co-operation agreement has restrictive effects on competition within the meaning of Article 101(1) must be made in comparison to the actual legal and economic context in which competition would occur in the absence of the agreement with all of its alleged restrictions (that is to say, in the absence of the agreement as it stands (if already implemented) or as envisaged (if not yet implemented) at the time of assessment). Hence, in order to prove actual or potential restrictive effects on competition, it is necessary to take into account competition between the parties and competition from third parties, in particular actual or potential competition that would have existed in the absence of the agreement. This comparison does not take into account any potential efficiency gains generated by the agreement as these will only be assessed under Article 101(3).
30. Consequently, horizontal co-operation agreements between competitors that, on the basis of objective factors, would not be able to independently carry out the project or activity covered by the co-operation, for instance, due to the limited technical capabilities of the parties, will normally not give rise to restrictive effects on competition within the meaning of Article 101(1) unless the parties could have carried out the project with less stringent restrictions <sup>(1)</sup>.
31. General guidance with regard to the notion of restrictions of competition by effect can be obtained in the General Guidelines. These guidelines provide additional guidance specific to the competition assessment of horizontal co-operation agreements.

#### ***Nature and content of the agreement***

32. The nature and content of an agreement relates to factors such as the area and objective of the co-operation, the competitive relationship between the parties and the extent to which they combine their activities. Those factors determine which kinds of possible competition concerns can arise from a horizontal co-operation agreement.
33. Horizontal co-operation agreements may limit competition in several ways. The agreement may:
- be exclusive in the sense that it limits the possibility of the parties to compete against each other or third parties as independent economic operators or as parties to other, competing agreements;
  - require the parties to contribute such assets that their decision-making independence is appreciably reduced; or
  - affect the parties' financial interests in such a way that their decision-making independence is appreciably reduced. Both financial interests in the agreement and also financial interests in other parties to the agreement are relevant for the assessment.
34. The potential effect of such agreements may be the loss of competition between the parties to the agreement. Competitors can also benefit from the reduction of competitive pressure that results from the agreement and may therefore find it profitable to increase their prices. The reduction in those competitive constraints may lead to price increases in the relevant market. Factors such as whether the parties to the agreement have high market shares, whether they are close competitors, whether the customers have limited possibilities of switching suppliers, whether competitors are unlikely to increase supply if prices increase, and whether one of the parties to the agreement is an important competitive force, are all relevant for the competitive assessment of the agreement.

<sup>(1)</sup> See also paragraph 18 of the General Guidelines.

35. A horizontal co-operation agreement may also:
- lead to the disclosure of strategic information thereby increasing the likelihood of coordination among the parties within or outside the field of the co-operation;
  - achieve significant commonality of costs (that is to say, the proportion of variable costs which the parties have in common), so the parties may more easily coordinate market prices and output.
36. Significant commonality of costs achieved by a horizontal co-operation agreement can only allow the parties to more easily coordinate market prices and output where the parties have market power, the market characteristics are conducive to such coordination, the area of co-operation accounts for a high proportion of the parties' variable costs in a given market, and the parties combine their activities in the area of co-operation to a significant extent. This could, for instance, be the case, where they jointly manufacture or purchase an important intermediate product or jointly manufacture or distribute a high proportion of their total output of a final product.
37. A horizontal agreement may therefore decrease the parties' decision-making independence and as a result increase the likelihood that they will coordinate their behaviour in order to reach a collusive outcome but it may also make coordination easier, more stable or more effective for parties that were already coordinating before, either by making the coordination more robust or by permitting them to achieve even higher prices.
38. Some horizontal co-operation agreements, for example production and standardisation agreements, may also give rise to anti-competitive foreclosure concerns.

***Market power and other market characteristics***

39. Market power is the ability to profitably maintain prices above competitive levels for a period of time or to profitably maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a period of time.
40. In markets with fixed costs undertakings must price above their variable costs of production in order to ensure a competitive return on their investment. The fact that undertakings price above their variable costs is therefore not in itself a sign that competition in the market is not functioning well and that undertakings have market power that allows them to price above the competitive level. It is when competitive constraints are insufficient to maintain prices, output, product quality, product variety and innovation at competitive levels that undertakings have market power in the context of Article 101(1).
41. The creation, maintenance or strengthening of market power can result from superior skill, foresight or innovation. It can also result from reduced competition between the parties to the agreement or between any one of the parties and third parties, for example, because the agreement leads to anti-competitive foreclosure of competitors by raising competitors' costs and limiting their capacity to compete effectively with the contracting parties.
42. Market power is a question of degree. The degree of market power required for the finding of an infringement under Article 101(1) in the case of agreements that are restrictive of competition by effect is less than the degree of market power required for a finding of dominance under Article 102, where a substantial degree of market power is required.
43. The starting point for the analysis of market power is the position of the parties on the markets affected by the co-operation. To carry out this analysis the relevant market(s) have to be defined by using the methodology of the Commission's Market Definition Notice. Where specific types of markets, such as purchasing or technology markets, are concerned these guidelines will provide additional guidance.



44. If the parties have a low combined market share, the horizontal co-operation agreement is unlikely to give rise to restrictive effects on competition within the meaning of Article 101(1) and, normally, no further analysis will be required. What is considered to be a 'low combined market share' depends on the type of agreement in question and can be inferred from the 'safe harbour' thresholds set out in various chapters of these guidelines and, more generally, from the Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) <sup>(1)</sup> ('the *De Minimis* Notice'). If one of just two parties has only an insignificant market share and if it does not possess important resources, even a high combined market share normally cannot be seen as indicating a likely restrictive effect on competition in the market <sup>(2)</sup>. Given the variety of horizontal co-operation agreements and the different effects they may cause in different market situations, it is not possible to give a general market share threshold above which sufficient market power for causing restrictive effects on competition can be assumed.
45. Depending on the market position of the parties and the concentration in the market, other factors such as the stability of market shares over time, entry barriers and the likelihood of market entry, and the countervailing power of buyers/suppliers also have to be considered.
46. Normally, the Commission uses current market shares in its competitive analysis <sup>(3)</sup>. However, reasonably certain future developments may also be taken into account, for instance in the light of exit, entry or expansion in the relevant market. Historic data may be used if market shares have been volatile, for instance when the market is characterised by large, lumpy orders. Changes in historic market shares may provide useful information about the competitive process and the likely future importance of the various competitors, for instance, by indicating whether undertakings have been gaining or losing market shares. In any event, the Commission interprets market shares in the light of likely market conditions, for instance, if the market is highly dynamic in character and if the market structure is unstable due to innovation or growth.
47. When entering a market is sufficiently easy, a horizontal co-operation agreement will normally not be expected to give rise to restrictive effects on competition. For entry to be considered a sufficient competitive constraint on the parties to a horizontal co-operation agreement, it must be shown to be likely, timely and sufficient to deter or defeat any potential restrictive effects of the agreement. The analysis of entry may be affected by the presence of horizontal co-operation agreements. The likely or possible termination of a horizontal co-operation agreement may influence the likelihood of entry.

#### 1.2.2. Article 101(3)

48. The assessment of restrictions of competition by object or effect under Article 101(1) is only one side of the analysis. The other side, which is reflected in Article 101(3), is the assessment of the pro-competitive effects of restrictive agreements. The general approach when applying Article 101(3) is presented in the General Guidelines. Where in an individual case a restriction of competition within the meaning of Article 101(1) has been proven, Article 101(3) can be invoked as a defence. According to Article 2 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty <sup>(4)</sup>, the burden of proof under Article 101(3) rests on the undertaking(s) invoking the benefit of this provision. Therefore, the factual arguments and the evidence provided by the undertaking(s) must enable the Commission to arrive at the conviction that the agreement in question is sufficiently likely to give rise to pro-competitive effects or that it is not <sup>(5)</sup>.

<sup>(1)</sup> OJ C 368, 22.12.2001, p. 13.

<sup>(2)</sup> If there are more than two parties, then the collective share of all co-operating competitors has to be significantly greater than the share of the largest single participating competitor.

<sup>(3)</sup> As to the calculation of market shares, see also Market Definition Notice, paragraphs 54–55.

<sup>(4)</sup> OJ L 1, 4.1.2003, p. 1.

<sup>(5)</sup> See, for example, Joined Cases C-501/06 P and others, *GlaxoSmithKline*, paragraphs 93–95.

49. The application of the exception rule of Article 101(3) is subject to four cumulative conditions, two positive and two negative:
- the agreement must contribute to improving the production or distribution of products or contribute to promoting technical or economic progress, that is to say, lead to efficiency gains;
  - the restrictions must be indispensable to the attainment of those objectives, that is to say, the efficiency gains;
  - consumers must receive a fair share of the resulting benefits, that is to say, the efficiency gains, including qualitative efficiency gains, attained by the indispensable restrictions must be sufficiently passed on to consumers so that they are at least compensated for the restrictive effects of the agreement; hence, efficiencies only accruing to the parties to the agreement will not suffice; for the purposes of these guidelines, the concept of 'consumers' encompasses the customers, potential and/or actual, of the parties to the agreement <sup>(1)</sup>; and
  - the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.
50. In the area of horizontal co-operation agreements there are block exemption regulations based on Article 101(3) for research and development <sup>(2)</sup> and specialisation (including joint production) <sup>(3)</sup> agreements. Those Block Exemption Regulations are based on the premise that the combination of complementary skills or assets can be the source of substantial efficiencies in research and development and specialisation agreements. This may also be the case for other types of horizontal co-operation agreements. The analysis of the efficiencies of an individual agreement under Article 101(3) is therefore to a large extent a question of identifying the complementary skills and assets that each of the parties brings to the agreement and evaluating whether the resulting efficiencies are such that the conditions of Article 101(3) are fulfilled.
51. Complementarities may arise from horizontal co-operation agreements in various ways. A research and development agreement may bring together different research capabilities that allow the parties to produce better products more cheaply and shorten the time for those products to reach the market. A production agreement may allow the parties to achieve economies of scale or scope that they could not achieve individually.
52. Horizontal co-operation agreements that do not involve the combination of complementary skills or assets are less likely to lead to efficiency gains that benefit consumers. Such agreements may reduce duplication of certain costs, for instance because certain fixed costs can be eliminated. However, fixed cost savings are, in general, less likely to result in benefits to consumers than savings in, for instance, variable or marginal costs.
53. Further guidance regarding the Commission's application of the criteria of Article 101(3) can be obtained in the General Guidelines.

### 1.3. Structure of these guidelines

54. Chapter 2 will first set out some general principles for the assessment of the exchange of information, which are applicable to all types of horizontal co-operation agreements entailing the exchange of information. The subsequent chapters of these guidelines will each address one specific type of horizontal co-operation agreement. Each chapter will apply the analytical framework described in section 1.2 as well as the general principles on the exchange of information to the specific type of co-operation in question.

<sup>(1)</sup> More detail on the concept of consumer is provided in paragraph 84 of the General Guidelines.

<sup>(2)</sup> R&D Block Exemption Regulation.

<sup>(3)</sup> Specialisation Block Exemption Regulation.

## 2. GENERAL PRINCIPLES ON THE COMPETITIVE ASSESSMENT OF INFORMATION EXCHANGE

### 2.1. Definition and scope

55. The purpose of this chapter is to guide the competitive assessment of information exchange. Information exchange can take various forms. Firstly, data can be directly shared between competitors. Secondly, data can be shared indirectly through a common agency (for example, a trade association) or a third party such as a market research organisation or through the companies' suppliers or retailers.
56. Information exchange takes place in different contexts. There are agreements, decisions by associations of undertakings, or concerted practices under which information is exchanged, where the main economic function lies in the exchange of information itself. Moreover, information exchange can be part of another type of horizontal co-operation agreement (for example, the parties to a production agreement share certain information on costs). The assessment of the latter type of information exchanges should be carried out in the context of the assessment of the horizontal co-operation agreement itself.
57. Information exchange is a common feature of many competitive markets and may generate various types of efficiency gains. It may solve problems of information asymmetries <sup>(1)</sup>, thereby making markets more efficient. Moreover, companies may improve their internal efficiency through benchmarking against each other's best practices. Sharing of information may also help companies to save costs by reducing their inventories, enabling quicker delivery of perishable products to consumers, or dealing with unstable demand etc. Furthermore, information exchanges may directly benefit consumers by reducing their search costs and improving choice.
58. However, the exchange of market information may also lead to restrictions of competition in particular in situations where it is liable to enable undertakings to be aware of market strategies of their competitors <sup>(2)</sup>. The competitive outcome of information exchange depends on the characteristics of the market in which it takes place (such as concentration, transparency, stability, symmetry, complexity etc.) as well as on the type of information that is exchanged, which may modify the relevant market environment towards one liable to coordination.
59. Moreover, communication of information among competitors may constitute an agreement, a concerted practice, or a decision by an association of undertakings with the object of fixing, in particular, prices or quantities. Those types of information exchanges will normally be considered and fined as cartels. Information exchange may also facilitate the implementation of a cartel by enabling companies to monitor whether the participants comply with the agreed terms. Those types of exchanges of information will be assessed as part of the cartel.

#### *Concerted practice*

60. Information exchange can only be addressed under Article 101 if it establishes or is part of an agreement, a concerted practice or a decision by an association of undertakings. The existence of an agreement, a concerted practice or decision by an association of undertakings does not prejudice whether the agreement, concerted practice or decision by an association of undertakings gives rise to a restriction of competition within the meaning of Article 101(1). In line with the case-law of the Court of Justice of the European Union, the concept of a concerted practice refers to a form of coordination between undertakings by which, without it having reached the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition <sup>(3)</sup>. The criteria of coordination and cooperation necessary for determining the existence of a concerted practice, far from requiring an actual plan to have been worked out, are

<sup>(1)</sup> Economic theory on information asymmetries deals with the study of decisions in transactions where one party has more information than the other.

<sup>(2)</sup> See Case C-7/95 P, *John Deere*, paragraph 88.

<sup>(3)</sup> See for example Case C-8/08, *T-Mobile Netherlands*, paragraph 26; Joined Cases C-89/85 and others, *Wood Pulp*, [1993] ECR 1307, paragraph 63.

to be understood in the light of the concept inherent in the provisions of the Treaty on competition, according to which each company must determine independently the policy which it intends to adopt on the internal market and the conditions which it intends to offer to its customers <sup>(1)</sup>.

61. This does not deprive companies of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors. It does, however, preclude any direct or indirect contact between competitors, the object or effect of which is to create conditions of competition which do not correspond to the normal competitive conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings, and the volume of the said market <sup>(2)</sup>. This precludes any direct or indirect contact between competitors, the object or effect of which is to influence conduct on the market of an actual or potential competitor, or to disclose to such competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, thereby facilitating a collusive outcome on the market <sup>(3)</sup>. Hence, information exchange can constitute a concerted practice if it reduces strategic uncertainty <sup>(4)</sup> in the market thereby facilitating collusion, that is to say, if the data exchanged is strategic. Consequently, sharing of strategic data between competitors amounts to concertation, because it reduces the independence of competitors' conduct on the market and diminishes their incentives to compete.
62. A situation where only one undertaking discloses strategic information to its competitor(s) who accept(s) it can also constitute a concerted practice <sup>(5)</sup>. Such disclosure could occur, for example, through contacts via mail, emails, phone calls, meetings etc. It is then irrelevant whether only one undertaking unilaterally informs its competitors of its intended market behaviour, or whether all participating undertakings inform each other of the respective deliberations and intentions. When one undertaking alone reveals to its competitors strategic information concerning its future commercial policy, that reduces strategic uncertainty as to the future operation of the market for all the competitors involved and increases the risk of limiting competition and of collusive behaviour <sup>(6)</sup>. For example, mere attendance at a meeting <sup>(7)</sup> where a company discloses its pricing plans to its competitors is likely to be caught by Article 101, even in the absence of an explicit agreement to raise prices <sup>(8)</sup>. When a company receives strategic data from a competitor (be it in a meeting, by mail or electronically), it will be presumed to have accepted the information and adapted its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such data <sup>(9)</sup>.
63. Where a company makes a unilateral announcement that is also genuinely public, for example through a newspaper, this generally does not constitute a concerted practice within the meaning of Article 101(1) <sup>(10)</sup>. However, depending on the facts underlying the case at hand, the possibility of finding a concerted practice cannot be excluded, for example in a situation where such an announcement was followed by public announcements by other competitors, not least because strategic responses of competitors to each other's public announcements (which, to take one instance, might involve readjustments of their own earlier announcements to announcements made by competitors) could prove to be a strategy for reaching a common understanding about the terms of coordination.

<sup>(1)</sup> See Case C-7/95 P, *John Deere*, paragraph 86.

<sup>(2)</sup> Case C-7/95 P, *John Deere*, paragraph 87.

<sup>(3)</sup> See Cases 40/73 and others, *Suiker Unie*, [1975] ECR 1663, paragraph 173 *et seq.*

<sup>(4)</sup> Strategic uncertainty in the market arises as there is a variety of possible collusive outcomes available and because companies cannot perfectly observe past and current actions of their competitors and entrants.

<sup>(5)</sup> See for example Joined Cases T-25/95 and others, *Cimenteries*, [2000] ECR II-491, paragraph 1849: '[...] the concept of concerted practice does in fact imply the existence of reciprocal contacts [...]. That condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it'.

<sup>(6)</sup> See Opinion of Advocate General Kokott, Case C-8/08, *T-Mobile Netherlands*, [2009] ECR I-4529, paragraph 54.

<sup>(7)</sup> See Case C-8/08, *T-Mobile Netherlands*, paragraph 59: 'Depending on the structure of the market, the possibility cannot be ruled out that a meeting on a single occasion between competitors, such as that in question in the main proceedings, may, in principle, constitute a sufficient basis for the participating undertakings to concert their market conduct and thus successfully substitute practical cooperation between them for competition and the risks that that entails.'

<sup>(8)</sup> See Joined Cases T-202/98 and others, *Tate & Lyle v Commission*, [2001] ECR II-2035, paragraph 54.

<sup>(9)</sup> See Case C-199/92 P, *Hüls*, [1999] ECR I-4287, paragraph 162; Case C-49/92 P, *Anic Partecipazioni*, [1999] ECR I-4125, paragraph 121.

<sup>(10)</sup> This would not cover situations where such announcements involve invitations to collude.

## 2.2. Assessment under Article 101(1)

### 2.2.1. Main competition concerns <sup>(1)</sup>

64. Once it has been established that there is an agreement, concerted practice or decision by an association of undertakings, it is necessary to consider the main competition concerns pertaining to information exchanges.

#### *Collusive outcome*

65. By artificially increasing transparency in the market, the exchange of strategic information can facilitate coordination (that is to say, alignment) of companies' competitive behaviour and result in restrictive effects on competition. This can occur through different channels.
66. One way is that through information exchange companies may reach a common understanding on the terms of coordination, which can lead to a collusive outcome on the market. Information exchange can create mutually consistent expectations regarding the uncertainties present in the market. On that basis companies can then reach a common understanding on the terms of coordination of their competitive behaviour, even without an explicit agreement on coordination. Exchange of information about intentions concerning future conduct is the most likely means to enable companies to reach such a common understanding.
67. Another channel through which information exchange can lead to restrictive effects on competition is by increasing the internal stability of a collusive outcome on the market. In particular, it can do so by enabling the companies involved to monitor deviations. Namely, information exchange can make the market sufficiently transparent to allow the colluding companies to monitor to a sufficient degree whether other companies are deviating from the collusive outcome, and thus to know when to retaliate. Both exchanges of present and past data can constitute such a monitoring mechanism. This can either enable companies to achieve a collusive outcome on markets where they would otherwise not have been able to do so, or it can increase the stability of a collusive outcome already present on the market (see Example 3, paragraph 107).
68. A third channel through which information exchange can lead to restrictive effects on competition is by increasing the external stability of a collusive outcome on the market. Information exchanges that make the market sufficiently transparent can allow colluding companies to monitor where and when other companies are attempting to enter the market, thus allowing the colluding companies to target the new entrant. This may also tie into the anti-competitive foreclosure concerns discussed in paragraphs 69 to 71. Both exchanges of present and past data can constitute such a monitoring mechanism.

#### *Anti-competitive foreclosure*

69. Apart from facilitating collusion, an exchange of information can also lead to anti-competitive foreclosure <sup>(2)</sup>.
70. An exclusive exchange of information can lead to anti-competitive foreclosure on the same market where the exchange takes place. This can occur when the exchange of commercially sensitive information places unaffiliated competitors at a significant competitive disadvantage as compared to the companies affiliated within the exchange system. This type of foreclosure is only possible if the information concerned is very strategic for competition and covers a significant part of the relevant market.
71. It cannot be excluded that information exchange may also lead to anti-competitive foreclosure of third parties in a related market. For instance, by gaining enough market power through an information exchange, parties exchanging information in an upstream market, for instance vertically integrated companies, may be able to raise the price of a key component for a market downstream. Thereby, they could raise the costs of their rivals downstream, which could result in anti-competitive foreclosure in the downstream market.

<sup>(1)</sup> The use of the term 'main competition concerns' means that the ensuing description of competition concerns is neither exclusive nor exhaustive.

<sup>(2)</sup> With regard to foreclosure concerns that vertical agreements can give rise to, see paragraphs 100 *et seq.* of the Guidelines on Vertical Restraints.



### 2.2.2. Restriction of competition by object

72. Any information exchange with the objective of restricting competition on the market will be considered as a restriction of competition by object. In assessing whether an information exchange constitutes a restriction of competition by object, the Commission will pay particular attention to the legal and economic context in which the information exchange takes place <sup>(1)</sup>. To this end, the Commission will take into account whether the information exchange, by its very nature, may possibly lead to a restriction of competition <sup>(2)</sup>.
73. Exchanging information on companies' individualised intentions concerning future conduct regarding prices or quantities <sup>(3)</sup> is particularly likely to lead to a collusive outcome. Informing each other about such intentions may allow competitors to arrive at a common higher price level without incurring the risk of losing market share or triggering a price war during the period of adjustment to new prices (see Example 1, paragraph 105). Moreover, it is less likely that information exchanges concerning future intentions are made for pro-competitive reasons than exchanges of actual data.
74. Information exchanges between competitors of individualised data regarding intended future prices or quantities should therefore be considered a restriction of competition by object <sup>(4)</sup> <sup>(5)</sup>. In addition, private exchanges between competitors of their individualised intentions regarding future prices or quantities would normally be considered and fined as cartels because they generally have the object of fixing prices or quantities. Information exchanges that constitute cartels not only infringe Article 101(1), but, in addition, are very unlikely to fulfil the conditions of Article 101(3).

### 2.2.3. Restrictive effects on competition

75. The likely effects of an information exchange on competition must be analysed on a case-by-case basis as the results of the assessment depend on a combination of various case specific factors. The assessment of restrictive effects on competition compares the likely effects of the information exchange with the competitive situation that would prevail in the absence of that specific information exchange <sup>(6)</sup>. For an information exchange to have restrictive effects on competition within the meaning of Article 101(1), it must be likely to have an appreciable adverse impact on one (or several) of the parameters of competition such as price, output, product quality, product variety or innovation. Whether or not an exchange of information will have restrictive effects on competition depends on both the economic conditions on the relevant markets and the characteristics of information exchanged.
76. Certain market conditions may make coordination easier to achieve, sustain internally, or sustain externally <sup>(7)</sup>. Exchanges of information in such markets may have more restrictive effects compared to markets with different conditions. However, even where market conditions are such that coordination

<sup>(1)</sup> See, for example, Joined Cases C-501/06 P and others, *GlaxoSmithKline*, paragraph 58; Case C-209/07, *BIDS*, paragraphs 15 *et seq.*

<sup>(2)</sup> See also General Guidelines, paragraph 22.

<sup>(3)</sup> Information regarding intended future quantities could for instance include intended future sales, market shares, territories, and sales to particular groups of consumers.

<sup>(4)</sup> The notion of 'intended future prices' is illustrated in Example 1. In specific situations where companies are fully committed to sell in the future at the prices that they have previously announced to the public (that is to say, they can not revise them), such public announcements of future individualised prices or quantities would not be considered as intentions, and hence would normally not be found to restrict competition by object. This could occur, for example, because of the repeated interactions and the specific type of relationship companies may have with their customers, for instance since it is essential that the customers know future prices in advance or because they can already take advanced orders at these prices. This is because in these situations the information exchange would be a more costly means for reaching a collusive outcome in the market than exchanging information on future intentions, and would be more likely to be done for pro-competitive reasons. However, this does not imply that in general price commitment towards customers is necessarily pro-competitive. On the contrary, it could limit the possibility of deviating from a collusive outcome and hence render it more stable.

<sup>(5)</sup> This is without prejudice to the fact that public announcements of intended individualised prices may give rise to efficiencies and that the parties to such exchange would have a possibility to rely on Article 101(3).

<sup>(6)</sup> Case C-7/95 P, *John Deere v Commission*, paragraph 76.

<sup>(7)</sup> Information exchange may restrict competition in a similar way to a merger if it leads to more effective, more stable or more likely coordination in the market; see Case C-413/06 P, *Sony*, [2008] ECR I-4951, paragraph 123, where the Court of Justice endorsed the criteria established by the General Court in Case T-342/99, *Airtours*, [2002] ECR II-2585, paragraph 62.

may be difficult to sustain before the exchange, the exchange of information may change the market conditions in such a way that coordination becomes possible after the exchange – for example by increasing transparency in the market, reducing market complexity, buffering instability or compensating for asymmetry. For this reason it is important to assess the restrictive effects of the information exchange in the context of both the initial market conditions, and how the information exchange changes those conditions. This will include an assessment of the specific characteristics of the system concerned, including its purpose, conditions of access to the system and conditions of participation in the system. It will also be necessary to examine the frequency of the information exchanges, the type of information exchanged (for example, whether it is public or confidential, aggregated or detailed, and historical or current), and the importance of the information for the fixing of prices, volumes or conditions of service <sup>(1)</sup>. The following factors are relevant for this assessment.

(i) Market characteristics

77. Companies are more likely to achieve a collusive outcome in markets which are sufficiently transparent, concentrated, non-complex, stable and symmetric. In those types of markets companies can reach a common understanding on the terms of coordination and successfully monitor and punish deviations. However, information exchange can also enable companies to achieve a collusive outcome in other market situations where they would not be able to do so in the absence of the information exchange. Information exchange can thereby facilitate a collusive outcome by increasing transparency in the market, reducing market complexity, buffering instability or compensating for asymmetry. In this context, the competitive outcome of an information exchange depends not only on the initial characteristics of the market in which it takes place (such as concentration, transparency, stability, complexity etc.), but also on how the type of the information exchanged may change those characteristics <sup>(2)</sup>.
78. Collusive outcomes are more likely in transparent markets. Transparency can facilitate collusion by enabling companies to reach a common understanding on the terms of coordination, or/and by increasing internal and external stability of collusion. Information exchange can increase transparency and hence limit uncertainties about the strategic variables of competition (for example, prices, output, demand, costs etc.). The lower the pre-existing level of transparency in the market, the more value an information exchange may have in achieving a collusive outcome. An information exchange that contributes little to the transparency in a market is less likely to have restrictive effects on competition than an information exchange that significantly increases transparency. Therefore it is the combination of both the pre-existing level of transparency and how the information exchange changes that level that will determine how likely it is that the information exchange will have restrictive effects on competition. The pre-existing degree of transparency, inter alia, depends on the number of market participants and the nature of transactions, which can range from public transactions to confidential bilateral negotiations between buyers and sellers. When evaluating the change in the level of transparency in the market, the key element is to identify to what extent the available information can be used by companies to determine the actions of their competitors.
79. Tight oligopolies can facilitate a collusive outcome on the market as it is easier for fewer companies to reach a common understanding on the terms of coordination and to monitor deviations. A collusive outcome is also more likely to be sustainable with fewer companies. With more companies coordinating, the gains from deviating are greater because a larger market share can be gained through undercutting. At the same time, gains from the collusive outcome are smaller because, when there are more companies, the share of the rents from the collusive outcome declines. Exchanges of information in tight oligopolies are more likely to cause restrictive effects on competition than in less tight oligopolies, and are not likely to cause such restrictive effects on competition in very fragmented markets. However, by increasing transparency, or modifying the market environment in another way towards one more liable to coordination, information exchanges may facilitate coordination and monitoring among more companies than would be possible in its absence.

<sup>(1)</sup> Case C-238/05, *Asnef-Equifax*, paragraph 54.

<sup>(2)</sup> It should be noted that the discussion in paragraphs 78 to 85 is not a complete list of relevant market characteristics. There may be other characteristics of the market which are important in the setting of certain information exchanges.

80. Companies may find it difficult to achieve a collusive outcome in a complex market environment. However, to some extent, the use of information exchange may simplify such environments. In a complex market environment more information exchange is normally needed to reach a common understanding on the terms of coordination and to monitor deviations. For example, it is easier to achieve a collusive outcome on a price for a single, homogeneous product, than on numerous prices in a market with many differentiated products. It is nonetheless possible that to circumvent the difficulties involved in achieving a collusive outcome on a large number of prices, companies may exchange information to establish simple pricing rules (for example, pricing points).
81. Collusive outcomes are more likely where the demand and supply conditions are relatively stable<sup>(1)</sup>. In an unstable environment it may be difficult for a company to know whether its lost sales are due to an overall low level of demand or due to a competitor offering particularly low prices, and therefore it is difficult to sustain a collusive outcome. In this context, volatile demand, substantial internal growth by some companies in the market, or frequent entry by new companies, may indicate that the current situation is not sufficiently stable for coordination to be likely<sup>(2)</sup>. Information exchange in certain situations can serve the purpose of increasing stability in the market, and thereby may enable a collusive outcome in the market. Moreover, in markets where innovation is important, coordination may be more difficult since particularly significant innovations may allow one company to gain a major advantage over its rivals. For a collusive outcome to be sustainable, the reactions of outsiders, such as current and future competitors not participating in the coordination, as well as customers, should not be capable of jeopardising the results expected from the collusive outcome. In this context, the existence of barriers to entry makes it more likely that a collusive outcome on the market is feasible and sustainable.
82. A collusive outcome is more likely in symmetric market structures. When companies are homogenous in terms of their costs, demand, market shares, product range, capacities etc., they are more likely to reach a common understanding on the terms of coordination because their incentives are more aligned. However, information exchange may in some situations also allow a collusive outcome to occur in more heterogeneous market structures. Information exchange could make companies aware of their differences and help them to design means to accommodate for their heterogeneity in the context of coordination.
83. The stability of a collusive outcome also depends on the companies' discounting of future profits. The more companies value the current profits that they could gain from undercutting versus all the future ones that they could gain by the collusive outcome, the less likely it is that they will be able to achieve a collusive outcome.
84. By the same token, a collusive outcome is more likely among companies that will continue to operate in the same market for a long time, as in such a scenario they will be more committed to coordinate. If a company knows that it will interact with the others for a long time, it will have a greater incentive to achieve the collusive outcome because the stream of future profits from the collusive outcome will be worth more than the short term profit it could have if it deviated, that is to say, before the other companies detect the deviation and retaliate.
85. Overall, for a collusive outcome to be sustainable, the threat of a sufficiently credible and prompt retaliation must be likely. Collusive outcomes are not sustainable in markets in which the consequences of deviation are not sufficiently severe to convince coordinating companies that it is in their best interest to adhere to the terms of the collusive outcome. For example, in markets characterised by infrequent, lumpy orders, it may be difficult to establish a sufficiently severe deterrence mechanism, since the gain from deviating at the right time may be large, certain and immediate, whereas the losses

<sup>(1)</sup> See Case T-35/92, *John Deere v Commission*, [1994] ECR II-957, paragraph 78.

<sup>(2)</sup> See Commission Decision in Cases IV/31.370 and 31.446, *UK Agricultural Tractor Registration Exchange*, OJ L 68, 13.3.1992, p. 19, paragraph 51 and Case T-35/92, *John Deere v Commission*, paragraph 78. It is not necessary that absolute stability be established or fierce competition excluded.



from being punished small and uncertain, and only materialise after some time. The credibility of the deterrence mechanism also depends on whether the other coordinating companies have an incentive to retaliate, determined by their short-term losses from triggering a price war versus their potential long-term gain in case they induce a return to a collusive outcome. For example, companies' ability to retaliate may be reinforced if they are also interrelated by vertical commercial relationships which they can use as a threat of punishment for deviations.

## (ii) Characteristics of the information exchange

### ***Strategic information***

86. The exchange between competitors of strategic data, that is to say, data that reduces strategic uncertainty in the market, is more likely to be caught by Article 101 than exchanges of other types of information. Sharing of strategic data can give rise to restrictive effects on competition because it reduces the parties' decision-making independence by decreasing their incentives to compete. Strategic information can be related to prices (for example, actual prices, discounts, increases, reductions or rebates), customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, risks, investments, technologies and R&D programmes and their results. Generally, information related to prices and quantities is the most strategic, followed by information about costs and demand. However, if companies compete with regard to R&D it is the technology data that may be the most strategic for competition. The strategic usefulness of data also depends on its aggregation and age, as well as the market context and frequency of the exchange.

### ***Market coverage***

87. For an information exchange to be likely to have restrictive effects on competition, the companies involved in the exchange have to cover a sufficiently large part of the relevant market. Otherwise, the competitors that are not participating in the information exchange could constrain any anti-competitive behaviour of the companies involved. For example, by pricing below the coordinated price level companies unaffiliated within the information exchange system could threaten the external stability of a collusive outcome.
88. What constitutes 'a sufficiently large part of the market' cannot be defined in the abstract and will depend on the specific facts of each case and the type of information exchange in question. Where, however, an information exchange takes place in the context of another type of horizontal co-operation agreement and does not go beyond what is necessary for its implementation, market coverage below the market share thresholds set out in the relevant chapter of these guidelines, the relevant block exemption regulation <sup>(1)</sup> or the *De Minimis* Notice pertaining to the type of agreement in question will usually not be large enough for the information exchange to give rise to restrictive effects on competition.

### ***Aggregated/individualised data***

89. Exchanges of genuinely aggregated data, that is to say, where the recognition of individualised company level information is sufficiently difficult, are much less likely to lead to restrictive effects on competition than exchanges of company level data. Collection and publication of aggregated market data (such as sales data, data on capacities or data on costs of inputs and components) by a trade organisation or market intelligence firm may benefit suppliers and customers alike by allowing them to get a clearer picture of the economic situation of a sector. Such data collection and publication may allow market participants to make better-informed individual choices in order to adapt

<sup>(1)</sup> Exchanges of information in the context of an R&D agreement, if they do not exceed what is necessary for implementation of the agreement, can benefit from the safe harbour of 25 % set out in the R&D Block Exemption Regulation. For the Specialisation Block Exemption Regulation, the relevant safe harbour is 20 %.

efficiently their strategy to the market conditions. More generally, unless it takes place in a tight oligopoly, the exchange of aggregated data is unlikely to give rise to restrictive effects on competition. Conversely, the exchange of individualised data facilitates a common understanding on the market and punishment strategies by allowing the coordinating companies to single out a deviator or entrant. Nevertheless, the possibility cannot be excluded that even the exchange of aggregated data may facilitate a collusive outcome in markets with specific characteristics. Namely, members of a very tight and stable oligopoly exchanging aggregated data who detect a market price below a certain level could automatically assume that someone has deviated from the collusive outcome and take market-wide retaliatory steps. In other words, in order to keep collusion stable, companies may not always need to know who deviated, it may be enough to learn that 'someone' deviated.

### ***Age of data***

90. The exchange of historic data is unlikely to lead to a collusive outcome as it is unlikely to be indicative of the competitors' future conduct or to provide a common understanding on the market <sup>(1)</sup>. Moreover, exchanging historic data is unlikely to facilitate monitoring of deviations because the older the data, the less useful it would be for timely detection of deviations and thus as a credible threat of prompt retaliation <sup>(2)</sup>. There is no predetermined threshold when data becomes historic, that is to say, old enough not to pose risks to competition. Whether data is genuinely historic depends on the specific characteristics of the relevant market and in particular the frequency of price re-negotiations in the industry. For example, data can be considered as historic if it is several times older than the average length of contracts in the industry if the latter are indicative of price re-negotiations. Moreover, the threshold when data becomes historic also depends on the data's nature, aggregation, frequency of the exchange, and the characteristics of the relevant market (for example, its stability and transparency).

### ***Frequency of the information exchange***

91. 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. In more unstable markets, more frequent exchanges of information may be necessary to facilitate a collusive outcome than in stable markets. In markets with long-term contracts (which are indicative of infrequent price re-negotiations) a less frequent exchange of information would normally be sufficient to achieve a collusive outcome. By contrast, infrequent exchanges would not tend to be sufficient to achieve a collusive outcome in markets with short-term contracts indicative of frequent price re-negotiations <sup>(3)</sup>. However, the frequency at which data needs to be exchanged to facilitate a collusive outcome also depends on the nature, age and aggregation of data <sup>(4)</sup>.

### ***Public/non-public information***

92. In general, exchanges of genuinely public information are unlikely to constitute an infringement of Article 101 <sup>(5)</sup>. *Genuinely public information* is information that is generally equally accessible (in terms of costs of access) to all competitors and customers. For information to be genuinely public, obtaining it should not be more costly for customers and companies unaffiliated to the exchange system than for the companies exchanging the information. For this reason, competitors would normally not choose to exchange data that they can collect from the market at equal ease, and hence in practice

<sup>(1)</sup> The collection of historic data can also be used to convey a sector association's input to or analysis of a review of public policy.

<sup>(2)</sup> For example, in past cases the Commission has considered the exchange of individual data which was more than one year old as historic and as not restrictive of competition within the meaning of Article 101(1), whereas information less than one year old has been considered as recent; Commission Decision in Case IV/31.370, *UK Agricultural Tractor Registration Exchange*, paragraph 50; Commission Decision in Case IV/36.069, *Wirtschaftsvereinigung Stahl*, OJ L 1, 3.1.1998, p. 10, paragraph 17.

<sup>(3)</sup> However, infrequent contracts could decrease the likelihood of a sufficiently prompt retaliation.

<sup>(4)</sup> However, depending on the structure of the market and the overall context of the exchange, the possibility cannot be excluded that an isolated exchange may constitute a sufficient basis for the participating undertakings to concert their market conduct and thus successfully substitute practical co-operation between them for competition and the risks that that entails; see Case C-8/08, *T-Mobile Netherlands*, paragraph 59.

<sup>(5)</sup> Joined Cases T-191/98 and others, *Atlantic Container Line (TACA)*, [2003] ECR II-3275, paragraph 1154. This may not be the case if the exchange underpins a cartel.

exchanges of genuinely public data are unlikely. In contrast, even if the data exchanged between competitors is what is often referred to as being 'in the public domain', it is not genuinely public if the costs involved in collecting the data deter other companies and customers from doing so <sup>(1)</sup>. A possibility to gather the information in the market, for example to collect it from customers, does not necessarily mean that such information constitutes market data readily accessible to competitors <sup>(2)</sup>.

93. Even if there is public availability of data (for example, information published by regulators), the existence of an additional information exchange by competitors may give rise to restrictive effects on competition if it further reduces strategic uncertainty in the market. In that case, it is the incremental information that could be critical to tip the market balance towards a collusive outcome.

### ***Public/non-public exchange of information***

94. An *information exchange* is genuinely public if it makes the exchanged data equally accessible (in terms of costs of access) to all competitors and customers <sup>(3)</sup>. The fact that information is exchanged in public may decrease the likelihood of a collusive outcome on the market to the extent that non-coordinating companies, potential competitors, as well as costumers may be able to constrain potential restrictive effect on competition <sup>(4)</sup>. However, the possibility cannot be entirely excluded that even genuinely public exchanges of information may facilitate a collusive outcome in the market.

## **2.3. Assessment under Article 101(3)**

### ***2.3.1. Efficiency gains <sup>(5)</sup>***

95. Information exchange may lead to efficiency gains. Information about competitors' costs can enable companies to become more efficient if they benchmark their performance against the best practices in the industry and design internal incentive schemes accordingly.
96. Moreover, in certain situations information exchange can help companies allocate production towards high-demand markets (for example, demand information) or low cost companies (for example, cost information). The likelihood of those types of efficiencies depends on market characteristics such as whether companies compete on prices or quantities and the nature of uncertainties on the market. Some forms of information exchanges in this context may allow substantial cost savings where, for example, they reduce unnecessary inventories or enable quicker delivery of perishable products to areas with high demand and their reduction in areas with low demand (see Example 6, paragraph 110).
97. Exchange of consumer data between companies in markets with asymmetric information about consumers can also give rise to efficiencies. For instance, keeping track of the past behaviour of customers in terms of accidents or credit default provides an incentive for consumers to limit their risk exposure. It also makes it possible to detect which consumers carry a lower risk and should benefit from lower prices. In this context, information exchange can also reduce consumer lock-in, thereby inducing stronger competition. This is because information is generally specific to a relationship and consumers would otherwise lose the benefit from that information when switching to another company. Examples of such efficiencies are found in the banking and insurance sectors, which are characterised by frequent exchanges of information about consumer defaults and risk characteristics.

<sup>(1)</sup> Moreover, the fact that the parties to the exchange have previously communicated the data to the public (for example through a daily newspaper or on their websites) does not imply that a subsequent non-public exchange would not infringe Article 101.

<sup>(2)</sup> See Joined Cases T-202/98 and others, *Tate & Lyle v Commission*, paragraph 60.

<sup>(3)</sup> This does not preclude that a database be offered at a lower price to customers which themselves have contributed data to it, as by doing so they normally would have also incurred costs.

<sup>(4)</sup> Assessing barriers to entry and countervailing 'buyer power' in the market would be relevant for determining whether outsiders to the information exchange system would be able to jeopardise the outcomes expected from coordination. However, increased transparency to consumers may either decrease or increase scope for a collusive outcome because with increased transparency to consumers, as price elasticity of demand is higher, pay-offs from deviation are higher but retaliation is also harsher.

<sup>(5)</sup> The discussion of potential efficiency gains from information exchange is neither exclusive nor exhaustive.

98. Exchanging past and present data related to market shares may in some situations provide benefits to both companies and consumers by allowing companies to announce it as a signal of quality of their products to consumers. In situations of imperfect information about product quality, consumers often use indirect means to gain information on the relative qualities of products such as price and market shares (for example, consumers use best-selling lists in order to choose their next book).
99. Information exchange that is genuinely public can also benefit consumers by helping them to make a more informed choice (and reducing their search costs). Consumers are most likely to benefit in this way from public exchanges of current data, which are the most relevant for their purchasing decisions. Similarly, public information exchange about current input prices can lower search costs for companies, which would normally benefit consumers through lower final prices. Those types of direct consumer benefits are less likely to be generated by exchanges of future pricing intentions because companies which announce their pricing intentions are likely to revise them before consumers actually purchase based on that information. Consumers generally cannot rely on companies' future intentions when making their consumption plans. However, to some extent, companies may be disciplined not to change the announced future prices before implementation when, for example, they have repeated interactions with consumers and consumers rely on knowing the prices in advance or, for example, when consumers can make advance orders. In those situations, exchanging information related to the future may improve customers' planning of expenditure.
100. Exchanging present and past data is more likely to generate efficiency gains than exchanging information about future intentions. However, in specific circumstances announcing future intentions could also give rise to efficiency gains. For example, companies knowing early the winner of an R&D race could avoid duplicating costly efforts and wasting resources that cannot be recovered <sup>(1)</sup>.

### 2.3.2. Indispensability

101. Restrictions that go beyond what is necessary to achieve the efficiency gains generated by an information exchange do not fulfil the conditions of Article 101(3). For fulfilling the condition of indispensability, the parties will need to prove that the data's subject matter, aggregation, age, confidentiality and frequency, as well as coverage, of the exchange are of the kind that carries the lowest risks indispensable for creating the claimed efficiency gains. Moreover, the exchange should not involve information beyond the variables that are relevant for the attainment of the efficiency gains. For instance, for the purpose of benchmarking, an exchange of individualised data would generally not be indispensable because information aggregated in for example some form of industry ranking could also generate the claimed efficiency gains while carrying a lower risk of leading to a collusive outcome (see Example 4, paragraph 108). Finally, it is generally unlikely that the sharing of individualised data on future intentions is indispensable, especially if it is related to prices and quantities.
102. Similarly, information exchanges that form part of horizontal co-operation agreements are also more likely to fulfil the conditions of Article 101(3) if they do not go beyond what is indispensable for the implementation of the economic purpose of the agreement (for example, sharing technology necessary for an R&D agreement or cost data in the context of a production agreement).

### 2.3.3. Pass-on to consumers

103. Efficiency gains attained by indispensable restrictions must be passed on to consumers to an extent that outweighs the restrictive effects on competition caused by an information exchange. The lower is the market power of the parties involved in the information exchange, the more likely it is that the efficiency gains would be passed on to consumers to an extent that outweighs the restrictive effects on competition.

<sup>(1)</sup> Such efficiencies need to be weighed against the potential negative effects of, for example, limiting competition for the market which stimulates innovation.

#### 2.3.4. No elimination of competition

104. The criteria of Article 101(3) cannot be met if the companies involved in the information exchange are afforded the possibility of eliminating competition in respect of a substantial part of the products concerned.

#### 2.4. Examples

105. Exchange of intended future prices as a restriction of competition by object

##### Example 1

**Situation:** A trade association of coach companies in country X disseminates individualised information on intended future prices only to the member coach companies. The information contains several elements, such as the intended fare and the route to which the fare applies, the possible restrictions to this fare, such as which consumers can buy it, if advanced payment or minimum stay is required, the period during which tickets can be sold for the given fare (first and last ticket date), and the time during which the ticket with the given fare can be used for travel (first and last travel dates).

**Analysis:** This information exchange, which is triggered by a decision by an association of undertakings, concerns pricing intentions of competitors. This information exchange is a very efficient tool for reaching a collusive outcome and therefore restricts competition by object. This is because the companies are free to change their own intended prices as announced within the association at any time if they learn that their competitors intend to charge higher prices. This allows the companies to reach a common higher price level without incurring the cost of losing market share. For example, coach Company A can announce today a price increase on the route from city 1 to city 2 for travel as of the following month. Since this information is accessible to all other coach companies, Company A can then wait and see the reaction of its competitors to this price announcement. If a competitor on the same route, say, Company B, matched the price increase, then Company A's announcement would be left unchanged and later would likely become effective. However, if Company B did not match the price increase, then Company A could still revise its fare. The adjustment would continue until the companies converged to an increased anti-competitive price level. This information exchange is unlikely to fulfil the conditions of Article 101(3). The information exchange is only confined to competitors, that is to say, customers of the coach companies do not directly benefit from it.

106. Exchange of current prices with sufficient efficiency gains for consumers

##### Example 2

**Situation:** A national tourist office together with the coach companies in small country X agree to disseminate information on current prices of coach tickets through a freely accessible website (in contrast to Example 1, paragraph 105, consumers can already purchase tickets at the prices and conditions which are exchanged, thus they are not intended future prices but present prices of current and future services). The information contains several elements, such as the fare and the route to which the fare is applied, the possible restrictions to this fare, such as which consumers can buy it, if advanced payment or minimum stay is required, and the time during which the ticket with the given fare can be used for travel (first and last travel dates). Coach travel in country X is not in the same relevant market as train and air travel. It is presumed that the relevant market is concentrated, stable and relatively non-complex, and pricing becomes transparent with the information exchange.

**Analysis:** This information exchange does not constitute a restriction of competition by object. The companies are exchanging current prices rather than intended future prices because they are effectively already selling tickets at these prices (unlike in Example 1, paragraph 105). Therefore, this exchange of information is less likely to constitute an efficient mechanism for reaching a focal point for coordination. Nevertheless, given the market structure and strategic nature of the data, this information exchange is likely to constitute an efficient mechanism for monitoring deviations from a collusive outcome, which would be likely to occur in this type of market setting. Therefore, this information exchange could give rise to restrictive effects on competition within the meaning of Article 101(1). However, to the extent that some restrictive effects on competition could result from the possibility to monitor deviations, it is likely that the efficiency gains stemming from the



information exchange would be passed on to consumers to an extent that outweighs the restrictive effects on competition in both their likelihood and magnitude. Unlike in Example 1, paragraph 105, the information exchange is public and consumers can actually purchase tickets at the prices and conditions that are exchanged. Therefore this information exchange is likely to directly benefit consumers by reducing their search costs and improving choice, and thereby also stimulating price competition. Hence, the conditions of Article 101(3) are likely to be met.

#### 107. Current prices deduced from the information exchanged

##### Example 3

**Situation:** The luxury hotels in the capital of country A operate in a tight, non-complex and stable oligopoly, with largely homogenous cost structures, which constitute a separate relevant market from other hotels. They directly exchange individual information about current occupancy rates and revenues. In this case, from the information exchanged the parties can directly deduce their actual current prices.

**Analysis:** Unless it is a disguised means of exchanging information on future intentions, this exchange of information would not constitute a restriction of competition by object because the hotels exchange present data and not information on intended future prices or quantities. However, the information exchange would give rise to restrictive effects on competition within the meaning of Article 101(1) because knowing the competitors' actual current prices would be likely to facilitate coordination (that is to say, alignment) of companies' competitive behaviour. It would be most likely used to monitor deviations from the collusive outcome. The information exchange increases transparency in the market as even though the hotels normally publish their list prices, they also offer various discounts to the list price resulting from negotiations or for early or group bookings, etc. Therefore, the incremental information that is non-publicly exchanged between the hotels is commercially sensitive, that is to say, strategically useful. This exchange is likely to facilitate a collusive outcome on the market because the parties involved constitute a tight, non-complex and stable oligopoly involved in a long-term competitive relationship (repeated interactions). Moreover, the cost structures of the hotels are largely homogeneous. Finally, neither consumers nor market entry can constrain the incumbents' anti-competitive behaviour as consumers have little buyer power and barriers to entry are high. It is unlikely that in this case the parties would be able to demonstrate any efficiency gains stemming from the information exchange that would be passed on to consumers to an extent that would outweigh the restrictive effects on competition. Therefore it is unlikely that the conditions of Article 101(3) can be met.

#### 108. Benchmarking benefits – criteria of Article 101(3) not fulfilled

##### Example 4

**Situation:** Three large companies with a combined market share of 80 % in a stable, non-complex, concentrated market with high barriers to entry, non-publicly and frequently exchange information directly between themselves about a substantial fraction of their individual costs. The companies claim that they do this to benchmark their performance against their competitors and thereby intend to become more efficient.

**Analysis:** This information exchange does not in principle constitute a restriction of competition by object. Consequently, its effects on the market need to be assessed. Because of the market structure, the fact that the information exchanged relates to a large proportion of the companies' variable costs, the individualised form of presentation of the data, and its large coverage of the relevant market, the information exchange is likely to facilitate a collusive outcome and thereby gives rise to restrictive effects on competition within the meaning of Article 101(1). It is unlikely that the criteria of Article 101(3) are fulfilled because there are less restrictive means to achieve the claimed

efficiency gains, for example by way of a third party collecting, anonymising and aggregating the data in some form of industry ranking. Finally, in this case, since the parties form a very tight, non-complex and stable oligopoly, even the exchange of aggregated data could facilitate a collusive outcome in the market. However, this would be very unlikely if this exchange of information happened in a non-transparent, fragmented, unstable, and complex market.

#### 109. Genuinely public information

##### Example 5

**Situation:** The four companies owning all the petrol stations in a large country A exchange current gasoline prices over the telephone. They claim that this information exchange cannot have restrictive effects on competition because the information is public as it is displayed on large display panels at every petrol station.

**Analysis:** The pricing data exchanged over the telephone is not genuinely public, as in order to obtain the same information in a different way it would be necessary to incur substantial time and transport costs. One would have to travel frequently large distances to collect the prices displayed on the boards of petrol stations spread all over the country. The costs for this are potentially high, so that the information could in practice not be obtained but for the information exchange. Moreover, the exchange is systematic and covers the entire relevant market, which is a tight, non-complex, stable oligopoly. Therefore it is likely to create a climate of mutual certainty as to the competitors' pricing policy and thereby it is likely to facilitate a collusive outcome. Consequently, this information exchange is likely to give rise to restrictive effects on competition within the meaning of Article 101(1).

#### 110. Improved meeting of demand as an efficiency gain

##### Example 6

**Situation:** There are five producers of fresh bottled carrot juice in the relevant market. Demand for this product is very unstable and vary from location to location in different points in time. The juice has to be sold and consumed within one day from the date of production. The producers agree to establish an independent market research company that on a daily basis collects current information about unsold juice in each point of sale, which it publishes on its website the following week in a form that is aggregated per point of sale. The published statistics allow producers and retailers to forecast demand and to better position the product. Before the information exchange was put in place, the retailers had reported large quantities of wasted juice and therefore had reduced the quantity of juice purchased from the producers; that is to say, the market was not working efficiently. Consequently, in some periods and areas there were frequent instances of unmet demand. The information exchange system, which allows better forecasting of oversupply and undersupply, has significantly reduced the instances of unmet consumer demand and increased the quantity sold in the market.

**Analysis:** Even though the market is quite concentrated and the data exchanged is recent and strategic, it is not very likely that this exchange would facilitate a collusive outcome because a collusive outcome would be unlikely to occur in such an unstable market. Even if the exchange creates some risk of giving rise to restrictive effects on competition, the efficiency gains stemming from increasing supply to places with high demand and decreasing supply in places with low demand is likely to offset potential restrictive effects. The information is exchanged in a public and aggregated form, which carries lower anti-competitive risks than if it were non-public and individualised. The information exchange therefore does not go beyond what is necessary to correct the market failure. Therefore, it is likely that this information exchange meets the criteria of Article 101(3).

### 3. RESEARCH AND DEVELOPMENT AGREEMENTS

#### 3.1. Definition

111. R&D agreements vary in form and scope. They range from outsourcing certain R&D activities to the joint improvement of existing technologies and co-operation concerning the research, development and marketing of completely new products. They may take the form of a co-operation agreement or of a jointly controlled company. This chapter applies to all forms of R&D agreements, including related agreements concerning the production or commercialisation of the R&D results.

#### 3.2. Relevant markets

112. The key to defining the relevant market when assessing the effects of an R&D agreement is to identify those products, technologies or R&D efforts that will act as the main competitive constraints on the parties. At one end of the spectrum of possible situations, innovation may result in a product (or technology) which competes in an existing product (or technology) market. This is, for example, the case with R&D directed towards slight improvements or variations, such as new models of certain products. Here possible effects concern the market for existing products. At the other end of the spectrum, innovation may result in an entirely new product which creates its own new product market (for example, a new vaccine for a previously incurable disease). However, many cases concern situations in between those two extremes, that is to say, situations in which innovation efforts may create products (or technology) which, over time, replace existing ones (for example, CDs which have replaced records). A careful analysis of those situations may have to cover both existing markets and the impact of the agreement on innovation.

##### *Existing product markets*

113. Where the co-operation concerns R&D for the improvement of existing products, those existing products and their close substitutes form the relevant market concerned by the co-operation <sup>(1)</sup>.
114. If the R&D efforts aim at a significant change of existing products or even at a new product to replace existing ones, substitution with the existing products may be imperfect or long-term. It may be concluded that the old and the potentially emerging new products do not belong to the same relevant market <sup>(2)</sup>. The market for existing products may nevertheless be concerned, if the pooling of R&D efforts is likely to result in the coordination of the parties' behaviour as suppliers of existing products, for instance because of the exchange of competitively sensitive information relating to the market for existing products.
115. If the R&D concerns an important component of a final product, not only the market for that component may be relevant for the assessment, but also the existing market for the final product. For instance, if car manufacturers co-operate in R&D related to a new type of engine, the car market may be affected by that R&D co-operation. The market for final products, however, is only relevant for the assessment if the component at which the R&D is aimed is technically or economically a key element of those final products and if the parties to the R&D agreement have market power with respect to the final products.

##### *Existing technology markets*

116. R&D co-operation may not only concern products but also technology. When intellectual property rights are marketed separately from the products to which they relate, the relevant technology market has to be defined as well. Technology markets consist of the intellectual property that is licensed and its close substitutes, that is to say, other technologies which customers could use as a substitute.

<sup>(1)</sup> For market definition, see the Market Definition Notice.

<sup>(2)</sup> See also Commission Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, OJ C 101, 27.4.2004, p. 2 ('Technology Transfer Guidelines'), paragraph 33.



117. The methodology for defining technology markets follows the same principles as product market definition<sup>(1)</sup>. Starting from the technology which is marketed by the parties, those other technologies to which customers could switch in response to a small but non-transitory increase in relative prices need to be identified. Once those technologies are identified, market shares can be calculated by dividing the licensing income generated by the parties by the total licensing income of all licensors.
118. The parties' position in the market for existing technology is a relevant assessment criterion where the R&D co-operation concerns a significant improvement to an existing technology or a new technology that is likely to replace the existing technology. The parties' market shares can, however, only be taken as a starting point for this analysis. In technology markets, particular emphasis must be placed on potential competition. If companies which do not currently license their technology are potential entrants on the technology market they could constrain the ability of the parties to profitably raise the price for their technology. This aspect of the analysis may also be taken into account directly in the calculation of market shares by basing those on the sales of the products incorporating the licensed technology on downstream product markets (see paragraphs 123 to 126).

#### ***Competition in innovation (R&D efforts)***

119. R&D co-operation may not only affect competition in existing markets, but also competition in innovation and new product markets. This is the case where R&D co-operation concerns the development of new products or technology which either may – if emerging – one day replace existing ones or which are being developed for a new intended use and will therefore not replace existing products but create a completely new demand. The effects on competition in innovation are important in these situations, but can in some cases not be sufficiently assessed by analysing actual or potential competition in existing product/technology markets. In this respect, two scenarios can be distinguished, depending on the nature of the innovative process in a given industry.
120. In the first scenario, which is, for instance, present in the pharmaceutical industry, the process of innovation is structured in such a way that it is possible at an early stage to identify competing R&D poles. Competing R&D poles are R&D efforts directed towards a certain new product or technology, and the substitutes for that R&D, that is to say, R&D aimed at developing substitutable products or technology for those developed by the co-operation and having similar timing. In this case, it can be analysed whether after the agreement there will be a sufficient number of remaining R&D poles. The starting point of the analysis is the R&D of the parties. Then credible competing R&D poles have to be identified. In order to assess the credibility of competing poles, the following aspects have to be taken into account: the nature, scope and size of any other R&D efforts, their access to financial and human resources, know-how/patents, or other specialised assets as well as their timing and their capability to exploit possible results. An R&D pole is not a credible competitor if it cannot be regarded as a close substitute for the parties' R&D effort from the viewpoint of, for instance, access to resources or timing.
121. Besides the direct effect on the innovation itself, the co-operation may also affect a new product market. It will often be difficult to analyse the effects on such a market directly as by its very nature it does not yet exist. The analysis of such markets will therefore often be implicitly incorporated in the analysis of competition in innovation. However, it may be necessary to consider directly the effects on such a market of aspects of the agreement that go beyond the R&D stage. An R&D agreement that includes joint production and commercialisation on the new product market may, for instance, be assessed differently than a pure R&D agreement.
122. In the second scenario, the innovative efforts in an industry are not clearly structured so as to allow the identification of R&D poles. In this situation, in the absence of exceptional circumstances, the Commission would not try to assess the impact of a given R&D co-operation on innovation, but would limit its assessment to existing product and/or technology markets which are related to the R&D co-operation in question.

<sup>(1)</sup> See Market Definition Notice; see also Technology Transfer Guidelines, paragraphs 19 *et seq.*

### ***Calculation of market shares***

123. The calculation of market shares, both for the purposes of the R&D Block Exemption Regulation and of these guidelines, has to reflect the distinction between existing markets and competition in innovation. At the beginning of an R&D co-operation the reference point is the existing market for products capable of being improved, substituted or replaced by the products under development. If the R&D agreement only aims at improving or refining existing products, that market includes the products directly concerned by the R&D. Market shares can thus be calculated on the basis of the sales value of the existing products.
124. If the R&D aims at replacing an existing product, the new product will, if successful, become a substitute for the existing products. To assess the competitive position of the parties, it is again possible to calculate market shares on the basis of the sales value of the existing products. Consequently, the R&D Block Exemption Regulation bases its exemption of those situations on the market share in the relevant market for the products capable of being improved, substituted or replaced by the contract products <sup>(1)</sup>. To fall under the R&D Block Exemption Regulation, that market share may not exceed 25 % <sup>(2)</sup>.
125. For technology markets one way to proceed is to calculate market shares on the basis of each technology's share of total licensing income from royalties, representing a technology's share of the market where competing technologies are licensed. However, this may often be a mere theoretical and not very practical way to proceed because of lack of clear information on royalties, the use of royalty free cross-licensing, etc. An alternative approach is to calculate market shares on the technology market on the basis of sales of products or services incorporating the licensed technology on downstream product markets. Under that approach all sales on the relevant product market are taken into account, irrespective of whether the product incorporates a technology that is being licensed <sup>(3)</sup>. Also for that market the share may not exceed 25 % (irrespective of the calculation method used) for the benefits of the R&D Block Exemption Regulation to apply.
126. If the R&D aims at developing a product which will create a completely new demand, market shares based on sales cannot be calculated. Only an analysis of the effects of the agreement on competition in innovation is possible. Consequently, the R&D Block Exemption Regulation treats those agreements as agreements between non-competitors and exempts them irrespective of market share for the duration of the joint R&D and an additional period of seven years after the product is first put on the market <sup>(4)</sup>. However, the benefit of the block exemption may be withdrawn if the agreement eliminated effective competition in innovation <sup>(5)</sup>. After the seven year period, market shares based on sales value can be calculated, and the market share threshold of 25 % applies <sup>(6)</sup>.

## **3.3. Assessment under Article 101(1)**

### ***3.3.1. Main competition concerns***

127. R&D co-operation can restrict competition in various ways. First, it may reduce or slow down innovation, leading to fewer or worse products coming to the market later than they otherwise would. Secondly, on product or technology markets the R&D co-operation may reduce significantly competition between the parties outside the scope of the agreement or it may make anti-competitive coordination on those markets likely, thereby leading to higher prices. A foreclosure problem may only arise in the context of co-operation involving at least one player with a significant degree of market power (which does not necessarily amount to dominance) for a key technology and the exclusive exploitation of the results.

<sup>(1)</sup> Point (u) of Article 1(1) of the R&D Block Exemption Regulation.

<sup>(2)</sup> Article 4(2) of the R&D Block Exemption Regulation.

<sup>(3)</sup> See also Technology Transfer Guidelines, paragraph 23.

<sup>(4)</sup> Article 4(1) of the R&D Block Exemption Regulation.

<sup>(5)</sup> See recitals 19, 20 and 21 in the preamble to the R&D Block Exemption Regulation.

<sup>(6)</sup> Article 4(3) of the R&D Block Exemption Regulation.

### 3.3.2. Restrictions of competition by object

128. R&D agreements restrict competition by object if they do not truly concern joint R&D, but serve as a tool to engage in a disguised cartel, that is to say, otherwise prohibited price fixing, output limitation or market allocation. However, an R&D agreement which includes the joint exploitation of possible future results is not necessarily restrictive of competition.

### 3.3.3. Restrictive effects on competition

129. Most R&D agreements do not fall under Article 101(1). First, this can be said for many agreements relating to co-operation in R&D at a rather early stage, far removed from the exploitation of possible results.
130. Moreover, R&D co-operation between non-competitors does generally not give rise to restrictive effects on competition<sup>(1)</sup>. The competitive relationship between the parties has to be analysed in the context of affected existing markets and/or innovation. If, on the basis of objective factors, the parties are not able to carry out the necessary R&D independently, for instance, due to the limited technical capabilities of the parties, the R&D agreement will normally not have any restrictive effects on competition. This can apply, for example, to companies bringing together complementary skills, technologies and other resources. The issue of potential competition has to be assessed on a realistic basis. For instance, parties cannot be defined as potential competitors simply because the co-operation enables them to carry out the R&D activities. The decisive question is whether each party independently has the necessary means as regards assets, know-how and other resources.
131. Outsourcing of previously captive R&D is a specific form of R&D co-operation. In such a scenario, the R&D is often carried out by specialised companies, research institutes or academic bodies, which are not active in the exploitation of the results. Normally, such agreements are combined with a transfer of know-how and/or an exclusive supply clause concerning the possible results, which, due to the complementary nature of the co-operating parties in such a scenario, do not give rise to restrictive effects on competition within the meaning of Article 101(1).
132. R&D co-operation which does not include the joint exploitation of possible results by means of licensing, production and/or marketing rarely gives rise to restrictive effects on competition within the meaning of Article 101(1). Those pure R&D agreements can only cause a competition problem if competition with respect to innovation is appreciably reduced, leaving only a limited number of credible competing R&D poles.
133. R&D agreements are only likely to give rise to restrictive effects on competition where the parties to the co-operation have market power on the existing markets and/or competition with respect to innovation is appreciably reduced.
134. There is no absolute threshold above which it can be presumed that an R&D agreement creates or maintains market power and thus is likely to give rise to restrictive effects on competition within the meaning of Article 101(1). However, R&D agreements between competitors are covered by the R&D Block Exemption Regulation provided that their combined market share does not exceed 25 % and that the other conditions for the application of the R&D Block Exemption Regulation are fulfilled.
135. Agreements falling outside the R&D Block Exemption Regulation because the combined market share of the parties exceeds 25 % do not necessarily give rise to restrictive effects on competition. However,

<sup>(1)</sup> R&D co-operation between non-competitors can, however, produce foreclosure effects under Article 101(1) if it relates to an exclusive exploitation of results and if it is concluded between companies, one of which has a significant degree of market power (which does not necessarily amount to dominance) with respect to a key technology.

the stronger the combined position of the parties on existing markets and/or the more competition in innovation is restricted, the more likely it is that the R&D agreement can cause restrictive effects on competition <sup>(1)</sup>.

136. If the R&D is directed at the improvement or refinement of existing products or technologies, possible effects concern the relevant market(s) for those existing products or technologies. Effects on prices, output, product quality, product variety or innovation in existing markets are, however, only likely if the parties together have a strong position, entry is difficult and few other innovation activities are identifiable. Furthermore, if the R&D only concerns a relatively minor input of a final product, effects on competition in those final products are, if any, very limited.
137. In general, a distinction has to be made between pure R&D agreements and agreements providing for more comprehensive co-operation involving different stages of the exploitation of results (that is to say, licensing, production or marketing). As set out in paragraph 132, pure R&D agreements will only rarely give rise to restrictive effects on competition within the meaning of Article 101(1). This is in particular true for R&D directed towards a limited improvement of existing products or technologies. If, in such a scenario, the R&D co-operation includes joint exploitation only by means of licensing to third parties, restrictive effects such as foreclosure problems are unlikely. If, however, joint production and/or marketing of the slightly improved products or technologies are included, the effects on competition of the co-operation have to be examined more closely. Restrictive effects on competition in the form of increased prices or reduced output in existing markets are more likely if strong competitors are involved in such a situation.
138. If the R&D is directed at an entirely new product (or technology) which creates its own new market, price and output effects on existing markets are rather unlikely. The analysis has to focus on possible restrictions of innovation concerning, for instance, the quality and variety of possible future products or technologies or the speed of innovation. Those restrictive effects can arise where two or more of the few companies engaged in the development of such a new product start to co-operate at a stage where they are each independently rather near to the launch of the product. Such effects are typically the direct result of the agreement between the parties. Innovation may be restricted even by a pure R&D agreement. In general, however, R&D co-operation concerning entirely new products is unlikely to give rise to restrictive effects on competition unless only a limited number of credible alternative R&D poles exist. This principle does not change significantly if the joint exploitation of the results, even joint marketing, is involved. In those situations the issue of joint exploitation may only give rise to restrictive effects on competition where foreclosure from key technologies plays a role. Those problems would, however, not arise where the parties grant licences that allow third parties to compete effectively.
139. Many R&D agreements will lie somewhere in between the two situations described in paragraphs 137 and 138. They may therefore have effects on innovation as well as repercussions on existing markets. Consequently, both the existing market and the effect on innovation may be of relevance for the assessment with respect to the parties' combined positions, concentration ratios, number of players or innovators and entry conditions. In some cases there can be restrictive effects on competition in the form of increased prices or reduced output, product quality, product variety or innovation in existing markets and in the form of a negative impact on innovation by means of slowing down the development. For instance, if significant competitors on an existing technology market co-operate to develop a new technology which may one day replace existing products that co-operation may slow down the development of the new technology if the parties have market power on the existing market and also a strong position with respect to R&D. A similar effect can occur if the major player in an existing market co-operates with a much smaller or even potential competitor who is just about to emerge with a new product or technology which may endanger the incumbent's position.

<sup>(1)</sup> This is without prejudice to the analysis of potential efficiency gains, including those that regularly exist in publicly co-funded R&D.

140. Agreements may also fall outside the R&D Block Exemption Regulation irrespective of the parties' market power. This applies for instance to agreements which unduly restrict access of a party to the results of the R&D co-operation<sup>(1)</sup>. The R&D Block Exemption Regulation provides for a specific exception to this general rule in the case of academic bodies, research institutes or specialised companies which provide R&D as a service and which are not active in the industrial exploitation of the results of R&D<sup>(2)</sup>. Nevertheless, agreements falling outside the R&D Block Exemption Regulation and containing exclusive access rights for the purposes of exploitation may, where they fall under Article 101(1), fulfil the criteria of Article 101(3), particularly where exclusive access rights are economically indispensable in view of the market, risks and scale of the investment required to exploit the results of the research and development.

### 3.4. Assessment under Article 101(3)

#### 3.4.1. Efficiency gains

141. Many R&D agreements – with or without joint exploitation of possible results – bring about efficiency gains by combining complementary skills and assets, thus resulting in improved or new products and technologies being developed and marketed more rapidly than would otherwise be the case. R&D agreements may also lead to a wider dissemination of knowledge, which may trigger further innovation. R&D agreements may also give rise to cost reductions.

#### 3.4.2. Indispensability

142. Restrictions that go beyond what is necessary to achieve the efficiency gains generated by an R&D agreement do not fulfil the criteria of Article 101(3). In particular, the restrictions listed in Article 5 of the R&D Block Exemption Regulation may mean it is less likely that the criteria of Article 101(3) will be found to be met, following an individual assessment. It will therefore generally be necessary for the parties to an R&D agreement to show that such restrictions are indispensable to the co-operation.

#### 3.4.3. Pass-on to consumers

143. Efficiency gains attained by indispensable restrictions must be passed on to consumers to an extent that outweighs the restrictive effects on competition caused by the R&D agreement. For example, the introduction of new or improved products on the market must outweigh any price increases or other restrictive effects on competition. In general, it is more likely that an R&D agreement will bring about efficiency gains that benefit consumers if the R&D agreement results in the combination of complementary skills and assets. The parties to an agreement may, for instance, have different research capabilities. If, on the other hand, the parties' skills and assets are very similar, the most important effect of the R&D agreement may be the elimination of part or all of the R&D of one or more of the parties. This would eliminate (fixed) costs for the parties to the agreement but would be unlikely to lead to benefits which would be passed on to consumers. Moreover, the higher the market power of the parties the less likely they are to pass on the efficiency gains to consumers to an extent that would outweigh the restrictive effects on competition.

#### 3.4.4. No elimination of competition

144. The criteria of Article 101(3) cannot be met if the parties are afforded the possibility of eliminating competition in respect of a substantial part of the products (or technologies) in question.

#### 3.4.5. Time of the assessment

145. The assessment of restrictive agreements under Article 101(3) is made within the actual context in which they occur and on the basis of the facts existing at any given point in time. The assessment is sensitive to material changes in the facts. The exception rule of Article 101(3) applies as long as the four conditions of Article 101(3) are fulfilled and ceases to apply when that is no longer the case. When applying Article 101(3) in accordance with those principles it is necessary to take into account the initial sunk investments made by any of the parties and the time needed and the restraints

<sup>(1)</sup> See Article 3(2) of the R&D Block Exemption Regulation.

<sup>(2)</sup> See Article 3(2) of the R&D Block Exemption Regulation.



required to making and recouping an efficiency enhancing investment. Article 101 cannot be applied without taking due account of such *ex ante* investment. The risk facing the parties and the sunk investment that must be made to implement the agreement can thus lead to the agreement falling outside Article 101(1) or fulfilling the conditions of Article 101(3), as the case may be, for the period of time needed to recoup the investment. Should the invention resulting from the investment benefit from any form of exclusivity granted to the parties under rules specific to the protection of intellectual property rights, the recoupment period for such an investment will generally be unlikely to exceed the exclusivity period established under those rules.

146. In some cases the restrictive agreement is an irreversible event. Once the restrictive agreement has been implemented the *ex ante* situation cannot be re-established. In such cases the assessment must be made exclusively on the basis of the facts pertaining at the time of implementation. For instance, in the case of an R&D agreement whereby each party agrees to abandon its respective research project and pool its capabilities with those of another party, it may from an objective point of view be technically and economically impossible to revive a project once it has been abandoned. The assessment of the anti-competitive and pro-competitive effects of the agreement to abandon the individual research projects must therefore be made as of the time of the completion of its implementation. If at that point in time the agreement is compatible with Article 101, for instance because a sufficient number of third parties have competing R&D projects, the parties' agreement to abandon their individual projects remains compatible with Article 101, even if at a later point in time the third party projects fail. However, the prohibition of Article 101 may apply to other parts of the agreement in respect of which the issue of irreversibility does not arise. If, for example, in addition to joint R&D, the agreement provides for joint exploitation, Article 101 may apply to that part of the agreement if, due to subsequent market developments, the agreement gives rise to restrictive effects on competition and does not (any longer) satisfy the conditions of Article 101(3) taking due account of *ex ante* sunk investments.

### 3.5. Examples

147. Impact of joint R&D on innovation markets/new product market

#### Example 1

**Situation:** A and B are the two major companies on the Union-wide market for the manufacture of existing electronic components. Both have a market share of 30 %. They have each made significant investments in the R&D necessary to develop miniaturised electronic components and have developed early prototypes. They now agree to pool those R&D efforts by setting up a joint venture to complete the R&D and produce the components, which will be sold back to the parents, who will commercialise them separately. The remainder of the market consists of small companies without sufficient resources to undertake the necessary investments.

**Analysis:** Miniaturised electronic components, while likely to compete with the existing components in some areas, are essentially a new technology and an analysis must be made of the poles of research destined towards that future market. If the joint venture goes ahead then only one route to the necessary manufacturing technology will exist, whereas it would appear likely that A and B could reach the market individually with separate products. The agreement therefore reduces product variety. The joint production is also likely to directly limit competition between the parties to the agreement and lead them to agree on output levels, quality or other competitively important parameters. This would limit competition even though the parties will commercialise the products independently. The parties could, for instance, limit the output of the joint venture compared to what the parties would have brought to the market if they had decided their output on their own. The joint venture could also charge a high transfer price to the parties, thereby increasing the input costs for the parties which could lead to higher downstream prices. The parties have a large combined market share on the existing downstream market and the remainder of that market is fragmented. This situation is likely to become even more pronounced on the new downstream product market since the smaller competitors cannot invest in the new components. It is therefore quite likely that the joint production will restrict competition.

Furthermore, the market for miniaturised electronic components is in the future likely to develop into a duopoly with a high degree of commonality of costs and possible exchange of commercially sensitive information between the parties. There may therefore also be a serious risk of anti-competitive coordination leading to a collusive outcome in the market. The R&D agreement is therefore likely to give rise to restrictive effects on competition within the meaning of Article 101(1). While the agreement could give rise to efficiency gains in the form of bringing a new technology forward quicker, the parties would face no competition at the R&D level, so their incentives to pursue the new technology at a high pace could be severely reduced. Although some of those concerns could be remedied if the parties committed to license key know-how for manufacturing miniature components to third parties on reasonable terms, it seems unlikely that this could remedy all concerns and fulfil the conditions of Article 101(3).

#### Example 2

**Situation:** A small research company (Company A) which does not have its own marketing organisation has discovered and patented a pharmaceutical substance based on new technology that will revolutionise the treatment of a certain disease. Company A enters into an R&D agreement with a large pharmaceutical producer Company B of products that have so far been used for treating the disease. Company B lacks any similar expertise and R&D programme and would not be able to build such expertise within a relevant timeframe. For the existing products Company B has a market share of around 75 % in all Member States, but the patents will expire over the next five years. There exist two other poles of research with other companies at approximately the same stage of development using the same basic new technology. Company B will provide considerable funding and know-how for product development, as well as future access to the market. Company B is granted a licence for the exclusive production and distribution of the resulting product for the duration of the patent. It is expected that the product could be brought to market in five to seven years.

**Analysis:** The product is likely to belong to a new relevant market. The parties bring complementary resources and skills to the co-operation, and the probability of the product coming to market increases substantially. Although Company B is likely to have considerable market power on the existing market, that market power will be decreasing shortly. The agreement will not lead to a loss in R&D on the part of Company B, as it has no expertise in this area of research, and the existence of other poles of research are likely to eliminate any incentive to reduce R&D efforts. The exploitation rights during the remaining patent period are likely to be necessary for Company B to make the considerable investments needed and Company A has no marketing resources of its own. The agreement is therefore unlikely to give rise to restrictive effects on competition within the meaning of Article 101(1). Even if there were such effects, it is likely that the conditions of Article 101(3) would be fulfilled.

#### 148. Risk of foreclosure

#### Example 3

**Situation:** A small research company (Company A) which does not have its own marketing organisation has discovered and patented a new technology that will revolutionise the market for a certain product for which there is a monopoly producer (Company B) worldwide as no competitors can compete with Company B's current technology. There exist two other poles of research with other companies at approximately the same stage of development using the same

basic new technology. Company B will provide considerable funding and know-how for product development, as well as future access to the market. Company B is granted an exclusive licence for the use of the technology for the duration of the patent and commits to funding only the development of Company A's technology.

**Analysis:** The product is likely to belong to a new relevant market. The parties bring complementary resources and skills to the co-operation, and the probability of the product coming to market increases substantially. However, the fact that Company B commits to Company A's new technology may be likely to lead the two competing poles of research to abandon their projects as it could be difficult to receive continued funding once they have lost the most likely potential customer for their technology. In such a situation no potential competitors would be able to challenge Company B's monopoly position in the future. The foreclosure effect of the agreement would then be likely to be considered to give rise to restrictive effects on competition within the meaning of Article 101(1). In order to benefit from Article 101(3) the parties would have to show that the exclusivity granted would be indispensable to bring the new technology to the market.

#### Example 4

**Situation:** Company A has market power on the market of which its blockbuster medicine forms part. A small company (Company B) which is engaged in pharmaceutical R&D and active pharmaceutical ingredient ('API') production has discovered and filed a patent application for a new process that makes it possible to produce the API of Company A's blockbuster in a more economic fashion and continues to develop the process for industrial production. The compound (API) patent of the blockbuster expires in a little less than three years; thereafter there will remain a number of process patents relating to the medicine. Company B considers that the new process developed by it would not infringe the existing process patents of Company A and would allow the production of a generic version of the blockbuster once the API patent has expired. Company B could either produce the product itself or license the process to interested third parties, for example, generic producers or Company A. Before concluding its research and development in this area, Company B enters into an agreement with Company A, in which Company A makes a financial contribution to the R&D project being carried out by Company B on condition that it acquires an exclusive licence for any of Company B's patents related to the R&D project. There exist two other independent poles of research to develop a non-infringing process for the production of the blockbuster medicine, but it is not yet clear that they will reach industrial production.

**Analysis:** The process covered by Company B's patent application does not allow for the production of a new product. It merely improves an existing production process. Company A has market power on the existing market of which the blockbuster medicine forms part. Whilst that market power would decrease significantly with the actual market entry of generic competitors, the exclusive licence makes the process developed by Company B unavailable to third parties and is thus liable to delay generic entry (not least as the product is still protected by a number of process patents) and, consequently, restricts competition within the meaning of Article 101(1). As Company A and Company B are potential competitors, the R&D Block Exemption Regulation does not apply because Company A's market share on the market of which the blockbuster medicine forms part is above 25 %. The cost savings based on the new production process for Company A are not sufficient to outweigh the restriction of competition. In any event, an exclusive licence is not indispensable to obtain the savings in the production process. Therefore, the agreement is unlikely to fulfil the conditions of Article 101(3).

### 149. Impact of R&D co-operation on dynamic product and technology markets and the environment

#### Example 5

**Situation:** Two engineering companies that produce vehicle components agree to set up a joint venture to combine their R&D efforts to improve the production and performance of an existing



component. The production of that component would also have a positive effect on the environment. Vehicles would consume less fuel and therefore emit less CO<sub>2</sub>. The companies pool their existing technology licensing businesses in the area, but will continue to manufacture and sell the components separately. The two companies have market shares in the Union of 15 % and 20 % on the Original Equipment Manufacturer ('OEM') product market. There are two other major competitors together with several in-house research programmes by large vehicle manufacturers. On the world-wide market for the licensing of technology for those products the parties have shares of 20 % and 25 %, measured in terms of revenue generated, and there are two other major technologies. The product life cycle for the component is typically two to three years. In each of the last five years one of the major companies has introduced a new version or upgrade.

**Analysis:** Since neither company's R&D effort is aimed at a completely new product, the markets to consider are those for the existing components and for the licensing of relevant technology. The parties' combined market share on both the OEM market (35 %) and, in particular, on the technology market (45 %) are quite high. However, the parties will continue to manufacture and sell the components separately. In addition, there are several competing technologies, which are regularly improved. Moreover, the vehicle manufacturers who do not currently license their technology are also potential entrants on the technology market and thus constrain the ability of the parties to profitably raise prices. To the extent that the joint venture has restrictive effects on competition within the meaning of Article 101(1), it is likely that it would fulfil the criteria of Article 101(3). For the assessment under Article 101(3) it would be necessary to take into account that consumers will benefit from a lower consumption of fuel.

#### 4. PRODUCTION AGREEMENTS

##### 4.1. Definition and scope

150. Production agreements vary in form and scope. They can provide that production is carried out by only one party or by two or more parties. Companies can produce jointly by way of a joint venture, that is to say, a jointly controlled company operating one or several production facilities or by looser forms of co-operation in production such as subcontracting agreements where one party (the 'contractor') entrusts to another party (the 'subcontractor') the production of a good.
151. There are different types of subcontracting agreements. Horizontal subcontracting agreements are concluded between companies operating in the same product market irrespective of whether they are actual or potential competitors. Vertical subcontracting agreements are concluded between companies operating at different levels of the market.
152. Horizontal subcontracting agreements comprise unilateral and reciprocal specialisation agreements as well as subcontracting agreements with a view to expanding production. Unilateral specialisation agreements are agreements between two parties which are active on the same product market or markets, by virtue of which one party agrees to fully or partly cease production of certain products or to refrain from producing those products and to purchase them from the other party, which agrees to produce and supply the products. Reciprocal specialisation agreements are agreements between two or more parties which are active on the same products market or markets, by virtue of which two or more parties agree, on a reciprocal basis, to fully or partly cease or refrain from producing certain but different products and to purchase those products from the other parties, which agree to produce and supply them. In the case of subcontracting agreements with a view to expanding production the contractor entrusts the subcontractor with the production of a good, while the contractor does not at the same time cease or limit its own production of the good.
153. These guidelines apply to all forms of joint production agreements and horizontal subcontracting agreements. Subject to certain conditions, joint production agreements as well as unilateral and reciprocal specialisation agreements may benefit from the Specialisation Block Exemption Regulation.

154. Vertical subcontracting agreements are not covered by these guidelines. They fall within the scope of the Guidelines on Vertical Restraints and, subject to certain conditions, may benefit from the Block Exemption Regulation on Vertical Restraints. In addition, they may be covered by the Commission notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article 85(1) of the EEC Treaty <sup>(1)</sup> ('the Subcontracting Notice').

#### 4.2. Relevant markets

155. In order to assess the competitive relationship between the co-operating parties, it is necessary first to define the relevant market or markets directly concerned by the co-operation in production, that is to say, the markets to which the products manufactured under the production agreement belong.
156. A production agreement can also have spill-over effects in markets neighbouring the market directly concerned by the co-operation, for instance upstream or downstream to the agreement (the so-called 'spill-over markets') <sup>(2)</sup>. The spill-over markets are likely to be relevant if the markets are inter-dependent and the parties are in a strong position on the spill-over market.

#### 4.3. Assessment under Article 101(1)

##### 4.3.1. Main competition concerns

157. Production agreements can lead to a direct limitation of competition between the parties. Production agreements, and in particular production joint ventures, may lead the parties to directly align output levels and quality, the price at which the joint venture sells on its products, or other competitively important parameters. This may restrict competition even if the parties market the products independently.
158. Production agreements may also result in the coordination of the parties' competitive behaviour as suppliers leading to higher prices or reduced output, product quality, product variety or innovation, that is to say, a collusive outcome. This can happen, subject to the parties having market power and the existence of market characteristics conducive to such coordination, in particular when the production agreement increases the parties' commonality of costs (that is to say, the proportion of variable costs which the parties have in common) to a degree which enables them to achieve a collusive outcome, or if the agreement involves an exchange of commercially sensitive information that can lead to a collusive outcome.
159. Production agreements may furthermore lead to anti-competitive foreclosure of third parties in a related market (for example, the downstream market relying on inputs from the market in which the production agreement takes place). For instance, by gaining enough market power, parties engaging in joint production in an upstream market may be able to raise the price of a key component for a market downstream. Thereby, they could use the joint production to raise the costs of their rivals downstream and, ultimately, force them off the market. This would, in turn, increase the parties' market power downstream, which could enable them to sustain prices above the competitive level or otherwise harm consumers. Such competition concerns could materialise irrespective of whether the parties to the agreement are competitors on the market in which the co-operation takes place. However, for this kind of foreclosure to have anti-competitive effects, at least one of the parties must have a strong market position in the market where the risks of foreclosure are assessed.

##### 4.3.2. Restrictions of competition by object

160. Generally, agreements which involve price-fixing, limiting output or sharing markets or customers restrict competition by object. However, in the context of production agreements, this does not apply where:

<sup>(1)</sup> OJ C 1, 3.1.1979, p. 2.

<sup>(2)</sup> As also referred to in Article 2(4) of the Merger Regulation.

- the parties agree on the output directly concerned by the production agreement (for example, the capacity and production volume of a joint venture or the agreed amount of outsourced products), provided that the other parameters of competition are not eliminated; or
- a production agreement that also provides for the joint distribution of the jointly manufactured products envisages the joint setting of the sales prices for those products, and only those products, provided that that restriction is necessary for producing jointly, meaning that the parties would not otherwise have an incentive to enter into the production agreement in the first place.

161. In these two cases an assessment is required as to whether the agreement gives rise to likely restrictive effects on competition within the meaning of Article 101(1). In both scenarios the agreement on output or prices will not be assessed separately, but in the light of the overall effects of the entire production agreement on the market.

#### 4.3.3. Restrictive effects on competition

162. Whether the possible competition concerns that production agreements can give rise to are likely to materialise in a given case depends on the characteristics of the market in which the agreement takes place, as well as on the nature and market coverage of the co-operation and the product it concerns. These variables determine the likely effects of a production agreement on competition and thereby the applicability of Article 101(1).
163. Whether a production agreement is likely to give rise to restrictive effects on competition depends on the situation that would prevail in the absence of the agreement with all its alleged restrictions. Consequently, production agreements between companies which compete on markets on which the co-operation occurs are not likely to have restrictive effects on competition if the co-operation gives rise to a new market, that is to say, if the agreement enables the parties to launch a new product or service, which, on the basis of objective factors, the parties would otherwise not have been able to do, for instance, due to the technical capabilities of the parties.
164. In some industries where production is the main economic activity, even a pure production agreement can in itself eliminate key dimensions of competition, thereby directly limiting competition between the parties to the agreements.
165. Alternatively, a production agreement can lead to a collusive outcome or anti-competitive foreclosure by increasing the companies' market power or their commonality of costs or if it involves the exchange of commercially sensitive information. On the other hand, a direct limitation of competition between the parties, a collusive outcome or anti-competitive foreclosure is not likely to occur if the parties to the agreement do not have market power in the market in which the competition concerns are assessed. It is only market power that can enable them to profitably maintain prices above the competitive level, or profitably maintain output, product quality or variety below what would be dictated by competition.
166. In cases where a company with market power in one market co-operates with a potential entrant, for example, with a supplier of the same product in a neighbouring geographic or product market, the agreement can potentially increase the market power of the incumbent. This can lead to restrictive effects on competition if actual competition in the incumbent's market is already weak and the threat of entry is a major source of competitive constraint.
167. Production agreements which also involve commercialisation functions, such as joint distribution or marketing, carry a higher risk of restrictive effects on competition than pure joint production agreements. Joint commercialisation brings the co-operation closer to the consumer and usually involves the joint setting of prices and sales, that is to say, practices that carry the highest risks for competition. However, joint distribution agreements for products which have been jointly produced are generally less likely to restrict competition than stand-alone joint distribution agreements. Also, a joint distribution agreement that is necessary for the joint production agreement to take place in the first place is less likely to restrict competition than if it were not necessary for the joint production.

**Market power**

168. A production agreement is unlikely to lead to restrictive effects on competition if the parties to the agreement do not have market power in the market on which a restriction of competition is assessed. The starting point for the analysis of market power is the market share of the parties. This will normally be followed by the concentration ratio and the number of players in the market as well as by other dynamic factors such as potential entry, and changing market shares.
169. Companies are unlikely to have market power below a certain level of market share. Therefore, unilateral or reciprocal specialisation agreements as well as joint production agreements including certain integrated commercialisation functions such as joint distribution are covered by the Specialisation Block Exemption Regulation if they are concluded between parties with a combined market share not exceeding 20 % in the relevant market or markets, provided that the other conditions for the application of the Specialisation Block Exemption Regulation are fulfilled. Moreover, as regards horizontal subcontracting agreements with a view to expanding production, in most cases it is unlikely that market power exists if the parties to the agreement have a combined market share not exceeding 20 %. In any event, if the parties' combined market share does not exceed 20 % it is likely that the conditions of Article 101(3) are fulfilled.
170. However, if the parties' combined market share exceeds 20 %, the restrictive effects have to be analysed as the agreement does not fall within the scope of the Specialisation Block Exemption Regulation or the safe harbour for horizontal subcontracting agreements with a view to expanding production referred to in sentences 3 and 4 of paragraph 169. A moderately higher market share than allowed for in the Specialisation Block Exemption Regulation or the safe harbour referred to in sentences 3 and 4 of paragraph 169 does not necessarily imply a highly concentrated market, which is an important factor in the assessment. A combined market share of the parties of slightly more than 20 % may occur in a market with a moderate concentration. Generally, a production agreement is more likely to lead to restrictive effects on competition in a concentrated market than in a market which is not concentrated. Similarly, a production agreement in a concentrated market may increase the risk of a collusive outcome even if the parties only have a moderate combined market share.
171. Even if the market shares of the parties to the agreement and the market concentration are high, the risks of restrictive effects on competition may still be low if the market is dynamic, that is to say, a market in which entry occurs and market positions change frequently.
172. In the analysis of whether the parties to a production agreement have market power, the number and intensity of links (for example, other co-operation agreements) between the competitors in the market are relevant to the assessment.
173. Factors such as whether the parties to the agreement have high market shares, whether they are close competitors, whether the customers have limited possibilities of switching suppliers, whether competitors are unlikely to increase supply if prices increase, and whether one of the parties to the agreement is an important competitive force, are all relevant for the competitive assessment of the agreement.

**Direct limitation of competition between the parties**

174. Competition between the parties to a production agreement can be directly limited in various ways. The parties to a production joint venture could, for instance, limit the output of the joint venture compared to what the parties would have brought to the market if each of them had decided their output on their own. If the main product characteristics are determined by the production agreement this could also eliminate the key dimensions of competition between the parties and, ultimately, lead to restrictive effects on competition. Another example would be a joint venture charging a high transfer price to the parties, thereby increasing the input costs for the parties which could lead to higher downstream prices. Competitors may find it profitable to increase their prices as a response, thereby contributing to price increases in the relevant market.

***Collusive outcome***

175. The likelihood of a collusive outcome depends on the parties' market power as well as the characteristics of the relevant market. A collusive outcome can result in particular (but not only) from commonality of costs or an exchange of information brought about by the production agreement.
176. A production agreement between parties with market power can have restrictive effects on competition if it increases their commonality of costs (that is to say, the proportion of variable costs which the parties have in common) to a level which enables them to collude. The relevant costs are the variable costs of the product with respect to which the parties to the production agreement compete.
177. A production agreement is more likely to lead to a collusive outcome if prior to the agreement the parties already have a high proportion of variable costs in common, as the additional increment (that is to say, the production costs of the product subject to the agreement) can tip the balance towards a collusive outcome. Conversely, if the increment is large, the risk of a collusive outcome may be high even if the initial level of commonality of costs is low.
178. Commonality of costs increases the risk of a collusive outcome only if production costs constitute a large proportion of the variable costs concerned. This is, for instance, not the case where the co-operation concerns products which require costly commercialisation. An example would be new or heterogeneous products requiring expensive marketing or high transport costs.
179. Another scenario where commonality of costs can lead to a collusive outcome could be where the parties agree on the joint production of an intermediate product which accounts for a large proportion of the variable costs of the final product with respect to which the parties compete downstream. The parties could use the production agreement to increase the price of that common important input for their products in the downstream market. This would weaken competition downstream and would be likely to lead to higher final prices. The profit would be shifted from downstream to upstream to be then shared between the parties through the joint venture.
180. Similarly, commonality of costs increases the anti-competitive risks of a horizontal subcontracting agreement where the input which the contractor purchases from the subcontractor accounts for a large proportion of the variable costs of the final product with which the parties compete.
181. Any negative effects arising from the exchange of information will not be assessed separately but in the light of the overall effects of the agreement. A production agreement can give rise to restrictive effects on competition if it involves an exchange of commercially strategic information that can lead to a collusive outcome or anti-competitive foreclosure. Whether the exchange of information in the context of a production agreement is likely to lead to restrictive effects on competition should be assessed according to the guidance given in Chapter 2.
182. If the information exchange does not exceed the sharing of data necessary for the joint production of the goods subject to the production agreement, then even if the information exchange had restrictive effects on competition within the meaning of Article 101(1), the agreement would be more likely to meet the criteria of Article 101(3) than if the exchange went beyond what was necessary for the joint production. In this case the efficiency gains stemming from producing jointly are likely to outweigh the restrictive effects of the coordination of the parties' conduct. Conversely, in the context of a production agreement the sharing of data which is not necessary for producing jointly, for example the exchange of information related to prices and sales, is less likely to fulfil the conditions of Article 101(3).

**4.4. Assessment under Article 101(3)*****4.4.1. Efficiency gains***

183. Production agreements can be pro-competitive if they provide efficiency gains in the form of cost savings or better production technologies. By producing together companies can save costs that otherwise they would duplicate. They can also produce at lower costs if the co-operation enables them to increase production where marginal costs decline with output, that is to say, by economies of scale. Producing jointly can also help companies to improve product quality if they put together their

complementary skills and know-how. Co-operation can also enable companies to increase product variety, which they could not have afforded, or would not have been able to achieve, otherwise. If joint production allows the parties to increase the number of different types of products, it can also provide cost savings by means of economies of scope.

#### 4.4.2. Indispensability

184. Restrictions that go beyond what is necessary to achieve the efficiency gains generated by a production agreement do not fulfil the criteria of Article 101(3). For instance, restrictions imposed in a production agreement on the parties' competitive conduct with regard to output outside the co-operation will normally not be considered to be indispensable. Similarly, setting prices jointly will not be considered indispensable if the production agreement does not also involve joint commercialisation.

#### 4.4.3. Pass-on to consumers

185. Efficiency gains attained by indispensable restrictions need to be passed on to consumers in the form of lower prices or better product quality or variety to an extent that outweighs the restrictive effects on competition. Efficiency gains that only benefit the parties or cost savings that are caused by output reduction or market allocation are not sufficient to meet the criteria of Article 101(3). If the parties to the production agreement achieve savings in their variable costs they are more likely to pass them on to consumers than if they reduce their fixed costs. Moreover, the higher the market power of the parties, the less likely they will pass on the efficiency gains to consumers to an extent that would outweigh the restrictive effects on competition.

#### 4.4.4. No elimination of competition

186. The criteria of Article 101(3) cannot be met if the parties are afforded the possibility of eliminating competition in respect of a substantial part of the products in question. This has to be analysed in the relevant market to which the products subject to the co-operation belong and in any possible spill-over markets.

### 4.5. Examples

187. Commonality of costs and collusive outcomes

#### Example 1

**Situation:** Companies A and B, two suppliers of a product X decide to close their current old production plants and build a larger, modern and more efficient production plant run by a joint venture, which will have a higher capacity than the total capacity of the old plants of Companies A and B. No other such investments are planned by competitors, which are using their facilities at full capacity. Companies A and B have market shares of 20 % and 25 % respectively. Their products are the closest substitutes in a specific segment of the market, which is concentrated. The market is transparent and rather stagnant, there is no entry and the market shares have been stable over time. Production costs constitute a major part of Company A and Company B's variable costs for product X. Commercialisation is a minor economic activity in terms of costs and strategic importance compared to production: marketing costs are low as product X is homogenous and established and transport is not a key driver of competition.

**Analysis:** If Companies A and B share all or most of their variable costs, this production agreement could lead to a direct limitation of competition between them. It may lead the parties to limit the output of the joint venture compared to what they would have brought to the market if each of them had decided their output on their own. In the light of the capacity constraints of the competitors this reduction output could lead to higher prices.



Even if Companies A and B were not sharing most of their variable costs, but only a significant part thereof, this production agreement could lead to a collusive outcome between Companies A and B, thereby indirectly eliminating competition between the two parties. The likelihood of this depends not only on the issue of commonality of costs (which are high in this case) but also on the characteristics of the relevant market such as, for example, transparency, stability and level of concentration.

In either of the two situations mentioned above, it is likely, in the market configuration of this example, that the production joint venture of Companies A and B would give rise to restrictive effects on competition within the meaning of Article 101(1) on the market of X.

The replacement of two smaller old production plants by the larger, modern and more efficient one may lead the joint venture to increase output at lower prices to the benefits of consumers. However, the production agreement could only meet the criteria of Article 101(3) if the parties provided substantiated evidence that the efficiency gains would be passed on to consumers to such an extent that they would outweigh the restrictive effects on competition.

#### 188. Links between competitors and collusive outcomes

##### Example 2

**Situation:** Two suppliers, Companies A and B, form a production joint venture with respect to product Y. Companies A and B each have a 15 % market share on the market for Y. There are 3 other players on the market: Company C with a market share of 30 %, Company D with 25 % and Company E with 15 %. Company B already has a joint production plant with Company D.

**Analysis:** The market is characterised by very few players and rather symmetric structures. Co-operation between Companies A and B would add an additional link in the market, *de facto* increasing the concentration in the market, as it would also link Company D to Companies A and B. This co-operation is likely to increase the risk of a collusive outcome and thereby likely to give rise to restrictive effects on competition within the meaning of Article 101(1). The criteria of Article 101(3) could only be fulfilled in the presence of significant efficiency gains which are passed on to consumers to such an extent that they would outweigh the restrictive effects on competition.

#### 189. Anti-competitive foreclosure on a downstream market

##### Example 3

**Situation:** Companies A and B set up a production joint venture for the intermediate product X which covers their entire production of X. The production costs of X account for 70 % of the variable costs of the final product Y with respect to which Companies A and B compete downstream. Companies A and B each have a share of 20 % on the market for Y, there is limited entry and the market shares have been stable over time. In addition to covering their own demand for X, both Companies A and B each have a market share of 40 % on the market for X. There are high barriers to entry on the market for X and existing producers are operating near full capacity. On the market for Y, there are two other significant suppliers, each with a 15 % market share, and several smaller competitors. This agreement generates economies of scale.

**Analysis:** By virtue of the production joint venture, Companies A and B would be able to largely control supplies of the essential input X to their competitors in the market for Y. This would give Companies A and B the ability to raise their rivals' costs by artificially increasing the price of X, or by reducing the output. This could foreclose the competitors of Companies A and B in market for Y. Because of the likely anti-competitive foreclosure downstream, this agreement is likely to give rise to restrictive effects on competition within the meaning of Article 101(1). The economies of scale generated by the production joint venture are unlikely to outweigh the restrictive effects on competition and therefore this agreement would most likely not meet the criteria of Article 101(3).

## 190. Specialisation agreement as market allocation

## Example 4

**Situation:** Companies A and B each manufacture both products X and Y. Company A's market share of X is 30 % and of Y 10 %. B's market share of X is 10 % and of Y 30 %. To obtain economies of scale they conclude a reciprocal specialisation agreement under which Company A will only produce X and Company B only Y. They do not cross-supply the products to each other so that Company A only sells X and Company B sells only Y. The parties claim that by specialising in this way they save costs due to the economies of scale and by focusing on only one product will improve their production technologies, which will lead to better quality products.

**Analysis:** With regard to its effects on competition in the market, this specialisation agreement is close to a hardcore cartel where parties allocate the market among themselves. Therefore, this agreement restricts competition by object. Because the claimed efficiencies in the form of economies of scale and improving production technology are only linked to the market allocation, they are unlikely to outweigh the restrictive effects, and therefore the agreement would not meet the criteria of Article 101(3). In any event, if Company A or B believes that it would be more efficient to focus on only one product, it can simply take the unilateral decision to only produce X or Y without at the same time agreeing that the other company will focus on producing the respective other product.

The analysis would be different if Companies A and B supplied each other with the product they focus on so that they both continue to sell X and Y. In such a case Companies A and B could still compete on price on both markets, especially if production costs (which become common through the production agreement) did not constitute a major share of the variable costs of their products. The relevant costs in this context are the commercialisation costs. Hence, the specialisation agreement would be unlikely to restrict competition if X and Y were largely heterogeneous products with a very high proportion of marketing and distribution costs (for example, 65–70 % or more of total costs). In such a scenario the risks of a collusive outcome would not be high and the criteria of Article 101(3) may be fulfilled, provided that the efficiency gains would be passed on to consumers to such an extent that they would outweigh the restrictive effects on competition of the agreement.

## 191. Potential competitors

## Example 5

**Situation:** Company A produces final product X and Company B produces final product Y. X and Y constitute two separate product markets, in which Companies A and B respectively have strong market power. Both companies use Z as an input for their production of X and Y and they both produce Z for captive use only. X is a low added value product for which Z is an essential input (X is quite a simple transformation of Z). Y is a high value added product, for which Z is one of many inputs (Z constitutes a small part of variable costs of Y). Companies A and B agree to jointly produce Z, which generates modest economies of scale.

**Analysis:** Companies A and B are not actual competitors with regard to X, Y or Z. However, since X is a simple transformation of input Z, it is likely that Company B could easily enter the market for X and thus challenge Company A's position on that market. The joint production agreement with regard to Z might reduce Company B's incentives to do so as the joint production might be used for side payments and limit the probability of Company B selling product X (as Company A is likely to have control over the quantity of Z purchased by Company B from the joint venture). However, the probability of Company B entering the market for X in the absence of the agreement depends on the expected profitability of the entry. As X is a low added value product, entry might not be profitable and thus entry by Company B could be unlikely in the absence of the agreement. Given that Companies A and B already have market power, the agreement is likely to give rise to restrictive effects on competition within the meaning of Article 101(1) if the agreement does indeed



decrease the likelihood of entry of Company B into Company A's market, that is to say, the market for X. The efficiency gains in the form of economies of scale generated by the agreement are modest and therefore unlikely to outweigh the restrictive effects on competition.

#### 192. Information exchange in a production agreement

##### Example 6

**Situation:** Companies A and B with high market power decide to produce together to become more efficient. In the context of this agreement they secretly exchange information about their future prices. The agreement does not cover joint distribution.

**Analysis:** This information exchange makes a collusive outcome likely and is therefore likely have as its object the restriction of competition within the meaning of Article 101(1). It would be unlikely to meet the criteria of Article 101(3) because the sharing of information about the parties' future prices is not indispensable for producing jointly and attaining the corresponding cost savings.

#### 193. Swaps and information exchange

##### Example 7

**Situation:** Companies A and B both produce Z, a commodity chemical. Z is a homogenous product which is manufactured according to a European standard which does not allow for any product variations. Production costs are a significant cost factor regarding Z. Company A has a market share of 20 % and Company B of 25 % on the Union-wide market for Z. There are four other manufacturers on the market for Z, with respective market shares of 20 %, 15 %, 10 % and 10 %. The production plant of Company A is located in Member State X in northern Europe whereas the production plant of Company B is located in Member State Y in southern Europe. Even though the majority of Company A's customers are located in northern Europe, Company A also has a number of customers in southern Europe. The majority of Company B's customers are in southern Europe, although it also has a number of customers located in northern Europe. Currently, Company A provides its southern European customers with Z manufactured in its production plant in Member State X and transports it to southern Europe by truck. Similarly, Company B provides its northern European customers with Z manufactured in Member State Y and transports it to northern Europe by truck. Transport costs are quite high, but not so high as to make the deliveries by Company A to southern Europe and Company B to northern Europe unprofitable. Transport costs from Member State X to southern Europe are lower than from Member State Y to northern Europe.

Companies A and B decide that it would be more efficient if Company A stopped transporting Z from Member State X to southern Europe and if Company B stopped transporting the Z from Member State Y to northern Europe although, at the same time, they are keen on retaining their customers. To do so, Companies A and B intend to enter into a swap agreement which allows them to purchase an agreed annual quantity of Z from the other party's plant with a view to selling the purchased Z to those of their customers which are located closer to the other party's plant. In order to calculate a purchase price which does not favour one party over the other and which takes due account of the parties' different production costs and different savings on transport costs, and in order to ensure that both parties can achieve an appropriate margin, they agree to disclose to each other their main costs with regard to Z (that is to say, production costs and transport costs).

**Analysis:** The fact that Companies A and B – who are competitors – swap parts of their production does not in itself give rise to competition concerns. However, the envisaged swap agreement between Companies A and B provides for the exchange of both parties' production and transport costs with regard to Z. Moreover, Companies A and B have a strong combined market position in a fairly concentrated market for a homogenous commodity product. Therefore, due to the extensive information exchange on a key parameter of competition with regard to Z, it is

likely that the swap agreement between Companies A and B will give rise to restrictive effects on competition within the meaning of Article 101(1) as it can lead to a collusive outcome. Even though the agreement will give rise to significant efficiency gains in the form of cost savings for the parties, the restrictions on competition generated by the agreement are not indispensable for their attainment. The parties could achieve similar cost savings by agreeing on a price formula which does not entail the disclosure of their production and transport costs. Consequently, in its current form the swap agreement does not fulfil the criteria of Article 101(3).

## 5. PURCHASING AGREEMENTS

### 5.1. Definition

194. This chapter focuses on agreements concerning the joint purchase of products. Joint purchasing can be carried out by a jointly controlled company, by a company in which many other companies hold non-controlling stakes, by a contractual arrangement or by even looser forms of co-operation (collectively referred to as 'joint purchasing arrangements'). Joint purchasing arrangements usually aim at the creation of buying power which can lead to lower prices or better quality products or services for consumers. However, buying power may, under certain circumstances, also give rise to competition concerns.
195. Joint purchasing arrangements may involve both horizontal and vertical agreements. In these cases a two-step analysis is necessary. First, the horizontal agreements between the companies engaging in joint purchasing have to be assessed according to the principles described in these guidelines. If that assessment leads to the conclusion that the joint purchasing arrangement does not give rise to competition concerns, a further assessment will be necessary to examine the relevant vertical agreements. The latter assessment will follow the rules of the Block Exemption Regulation on Vertical Restraints and the Guidelines on Vertical Restraints.
196. A common form of joint purchasing arrangement is an 'alliance', that is to say an association of undertakings formed by a group of retailers for the joint purchasing of products. Horizontal agreements concluded between the members of the alliance or decisions adopted by the alliance first have to be assessed as a horizontal co-operation agreement according to these guidelines. Only if that assessment does not reveal any competition concerns does it become relevant to assess the relevant vertical agreements between the alliance and an individual member thereof and between the alliance and suppliers. Those agreements are covered – subject to certain conditions – by the Block Exemption Regulation on Vertical Restraints. Vertical agreements not covered by that Block Exemption Regulation are not presumed to be illegal but require individual examination.

### 5.2. Relevant markets

197. There are two markets which may be affected by joint purchasing arrangements. First, the market or markets with which the joint purchasing arrangement is directly concerned, that is to say, the relevant purchasing market or markets. Secondly, the selling market or markets, that is to say, the market or markets downstream where the parties to the joint purchasing arrangement are active as sellers.
198. The definition of relevant purchasing markets follows the principles described in the Market Definition Notice and is based on the concept of substitutability to identify competitive constraints. The only difference from the definition of 'selling markets' is that substitutability has to be defined from the viewpoint of supply and not from the viewpoint of demand. In other words, the suppliers' alternatives are decisive in identifying the competitive constraints on purchasers. Those alternatives could be analysed, for instance, by examining the suppliers' reaction to a small but non-transitory price decrease. Once the market is defined, the market share can be calculated as the percentage of the purchases by the parties out of the total sales of the purchased product or products in the relevant market.
199. If the parties are, in addition, competitors on one or more selling markets, those markets are also relevant for the assessment. The selling markets have to be defined by applying the methodology described in the Market Definition Notice.

### 5.3. Assessment under Article 101(1)

#### 5.3.1. Main competition concerns

200. Joint purchasing arrangements may lead to restrictive effects on competition on the purchasing and/or downstream selling market or markets, such as increased prices, reduced output, product quality or variety, or innovation, market allocation, or anti-competitive foreclosure of other possible purchasers.
201. If downstream competitors purchase a significant part of their products together, their incentives for price competition on the selling market or markets may be considerably reduced. If the parties have a significant degree of market power (which does not necessarily amount to dominance) on the selling market or markets, the lower purchase prices achieved by the joint purchasing arrangement are likely not to be passed on to consumers.
202. If the parties have a significant degree of market power on the purchasing market (buying power) there is a risk that they may force suppliers to reduce the range or quality of products they produce, which may bring about restrictive effects on competition such as quality reductions, lessening of innovation efforts, or ultimately sub-optimal supply.
203. Buying power of the parties to the joint purchasing arrangement could be used to foreclose competing purchasers by limiting their access to efficient suppliers. This is most likely if there are a limited number of suppliers and there are barriers to entry on the supply side of the upstream market.
204. In general, however, joint purchasing arrangements are less likely to give rise to competition concerns when the parties do not have market power on the selling market or markets.

#### 5.3.2. Restrictions of competition by object

205. Joint purchasing arrangements restrict competition by object if they do not truly concern joint purchasing, but serve as a tool to engage in a disguised cartel, that is to say, otherwise prohibited price fixing, output limitation or market allocation.
206. Agreements which involve the fixing of purchase prices can have the object of restricting competition within the meaning of Article 101(1) <sup>(1)</sup>. However, this does not apply where the parties to a joint purchasing arrangement agree on the purchasing prices the joint purchasing arrangement may pay to its suppliers for the products subject to the supply contract. In that case an assessment is required as to whether the agreement is likely to give rise to restrictive effects on competition within the meaning of Article 101(1). In both scenarios the agreement on purchase prices will not be assessed separately, but in the light of the overall effects of the purchasing agreement on the market.

#### 5.3.3. Restrictive effects on competition

207. Joint purchasing arrangements which do not have as their object the restriction of competition must be analysed in their legal and economic context with regard to their actual and likely effects on competition. The analysis of the restrictive effects on competition generated by a joint purchasing arrangement must cover the negative effects on both the purchasing and the selling markets.

### **Market power**

208. There is no absolute threshold above which it can be presumed that the parties to a joint purchasing arrangement have market power so that the joint purchasing arrangement is likely to give rise to restrictive effects on competition within the meaning of Article 101(1). However, in most cases it is unlikely that market power exists if the parties to the joint purchasing arrangement have a combined market share not exceeding 15 % on the purchasing market or markets as well as a combined market share not exceeding 15 % on the selling market or markets. In any event, if the parties' combined market shares do not exceed 15 % on both the purchasing and the selling market or markets, it is likely that the conditions of Article 101(3) are fulfilled.

<sup>(1)</sup> See Article 101(1)(a); Joined Cases T-217/03 and T-245/03, *French Beef*, paragraphs 83 *et seq.*; Case C-8/08, *T-Mobile Netherlands*, paragraph 37.

209. A market share above that threshold in one or both markets does not automatically indicate that the joint purchasing arrangement is likely to give rise to restrictive effects on competition. A joint purchasing arrangement which does not fall within that safe harbour requires a detailed assessment of its effects on the market involving, but not limited to, factors such as market concentration and possible countervailing power of strong suppliers.
210. Buying power may, under certain circumstances, cause restrictive effects on competition. Anti-competitive buying power is likely to arise if a joint purchasing arrangement accounts for a sufficiently large proportion of the total volume of a purchasing market so that access to the market may be foreclosed to competing purchasers. A high degree of buying power may indirectly affect the output, quality and variety of products on the selling market.
211. In the analysis of whether the parties to a joint purchasing arrangement have buying power, the number and intensity of links (for example, other purchasing agreements) between the competitors in the market are relevant.
212. If, however, competing purchasers co-operate who are not active on the same relevant selling market (for example, retailers which are active in different geographic markets and cannot be regarded as potential competitors), the joint purchasing arrangement is unlikely to have restrictive effects on competition unless the parties have a position in the purchasing markets that is likely to be used to harm the competitive position of other players in their respective selling markets.

#### ***Collusive outcome***

213. Joint purchasing arrangements may lead to a collusive outcome if they facilitate the coordination of the parties' behaviour on the selling market. This can be the case if the parties achieve a high degree of commonality of costs through joint purchasing, provided the parties have market power and the market characteristics are conducive to coordination.
214. Restrictive effects on competition are more likely if the parties to the joint purchasing arrangement have a significant proportion of their variable costs in the relevant downstream market in common. This is, for instance, the case if retailers, which are active in the same relevant retail market or markets, jointly purchase a significant amount of the products they offer for resale. It may also be the case if competing manufacturers and sellers of a final product jointly purchase a high proportion of their input together.
215. The implementation of a joint purchasing arrangement may require the exchange of commercially sensitive information such as purchase prices and volumes. The exchange of such information may facilitate coordination with regard to sales prices and output and thus lead to a collusive outcome on the selling markets. Spill-over effects from the exchange of commercially sensitive information can, for example, be minimised where data is collated by a joint purchasing arrangement which does not pass on the information to the parties thereto.
216. Any negative effects arising from the exchange of information will not be assessed separately but in the light of the overall effects of the agreement. Whether the exchange of information in the context of a joint purchasing arrangement is likely to lead to restrictive effects on competition should be assessed according to the guidance given in Chapter 2. If the information exchange does not exceed the sharing of data necessary for the joint purchasing of the products by the parties to the joint purchasing arrangement, then even if the information exchange has restrictive effects on competition within the meaning of Article 101(1), the agreement is more likely to meet the criteria of Article 101(3) than if the exchange goes beyond what was necessary for the joint purchasing.

### **5.4. Assessment under Article 101(3)**

#### ***5.4.1. Efficiency gains***

217. Joint purchasing arrangements can give rise to significant efficiency gains. In particular, they can lead to cost savings such as lower purchase prices or reduced transaction, transportation and storage costs, thereby facilitating economies of scale. Moreover, joint purchasing arrangements may give rise to qualitative efficiency gains by leading suppliers to innovate and introduce new or improved products on the markets.

#### 5.4.2. Indispensability

218. Restrictions that go beyond what is necessary to achieve the efficiency gains generated by a purchasing agreement do not meet the criteria of Article 101(3). An obligation to purchase exclusively through the co-operation may, in certain cases, be indispensable to achieve the necessary volume for the realisation of economies of scale. However, such an obligation has to be assessed in the context of the individual case.

#### 5.4.3. Pass-on to consumers

219. Efficiency gains, such as cost efficiencies or qualitative efficiencies in the form of the introduction of new or improved products on the market, attained by indispensable restrictions must be passed on to consumers to an extent that outweighs the restrictive effects of competition caused by the joint purchasing arrangement. Hence, cost savings or other efficiencies that only benefit the parties to the joint purchasing arrangement will not suffice. Cost savings need to be passed on to consumers, that is to say, the parties' customers. To take a notable example, this pass-on may occur through lower prices on the selling markets. Lower purchasing prices resulting from the mere exercise of buying power are not likely to be passed on to consumers if the purchasers together have market power on the selling markets, and thus do not meet the criteria of Article 101(3). Moreover, the higher the market power of the parties on the selling market or markets the less likely they will pass on the efficiency gains to consumers to an extent that would outweigh the restrictive effects on competition.

#### 5.4.4. No elimination of competition

220. The criteria of Article 101(3) cannot be fulfilled if the parties are afforded the possibility of eliminating competition in respect of a substantial part of the products in question. That assessment has to cover both purchasing and selling markets.

### 5.5. Examples

221. Joint purchasing by small companies with moderate combined market shares

#### Example 1

**Situation:** 150 small retailers conclude an agreement to form a joint purchasing organisation. They are obliged to purchase a minimum volume through the organisation, which accounts for roughly 50 % of each retailer's total costs. The retailers can purchase more than the minimum volume through the organisation, and they may also purchase outside the co-operation. They have a combined market share of 23 % on both the purchasing and the selling markets. Company A and Company B are their two large competitors. Company A has a 25 % share on both the purchasing and selling markets, Company B 35 %. There are no barriers which would prevent the remaining smaller competitors from also forming a purchasing group. The 150 retailers achieve substantial cost savings by virtue of purchasing jointly through the purchasing organisation.

**Analysis:** The retailers have a moderate market position on the purchasing and the selling markets. Furthermore, the co-operation brings about some economies of scale. Even though the retailers achieve a high degree of commonality of costs, they are unlikely to have market power on the selling market due to the market presence of Companies A and B, which are both individually larger than the joint purchasing organisation. Consequently, the retailers are unlikely to coordinate their behaviour and reach a collusive outcome. The formation of the joint purchasing organisation is therefore unlikely to give rise to restrictive effects on competition within the meaning of Article 101(1).

222. Commonality of costs and market power on the selling market

#### Example 2

**Situation:** Two supermarket chains conclude an agreement to jointly purchase products which account for roughly 80 % of their variable costs. On the relevant purchasing markets for the

different categories of products the parties have combined market shares between 25 % and 40 %. On the relevant selling market they have a combined market share of 60 %. There are four other significant retailers each with a 10 % market share. Market entry is not likely.

**Analysis:** It is likely that this purchasing agreement would give the parties the ability to coordinate their behaviour on the selling market, thereby leading to a collusive outcome. The parties have market power on the selling market and the purchasing agreement gives rise to a significant commonality of costs. Moreover, market entry is unlikely. The incentive for the parties to coordinate their behaviour would be reinforced if their cost structures were already similar prior to concluding the agreement. Moreover, similar margins of the parties would further increase the risk of a collusive outcome. This agreement also creates the risk that by the parties' withholding demand and, consequently, as a result of reduced quantity, downstream selling prices would increase. Hence, the purchasing agreement is likely to give rise to restrictive effects on competition within the meaning of Article 101(1). Even though the agreement is very likely to give rise to efficiency gains in the form of cost savings, due to the parties' significant market power on the selling market, these are unlikely to be passed on to consumers to an extent that would outweigh the restrictive effects on competition. Therefore, the purchasing agreement is unlikely to fulfil the criteria of Article 101(3).

#### 223. Parties active in different geographic markets

##### Example 3

**Situation:** Six large retailers, which are each based in a different Member State, form a purchasing group to buy several branded durum wheat flour-based products jointly. The parties are allowed to purchase other similar branded products outside the co-operation. Moreover, five of them also offer similar private label products. The members of the purchasing group have a combined market share of approximately 22 % on the relevant purchasing market, which is Union-wide. In the purchasing market there are three other large players of similar size. Each of the parties to the purchasing group has a market share between 20 % and 30 % on the national selling markets on which they are active. None of them is active in a Member State where another member of the group is active. The parties are not potential entrants to each other's markets.

**Analysis:** The purchasing group will be able to compete with the other existing major players on the purchasing market. The selling markets are much smaller (in turnover and geographic scope) than the Union-wide purchasing market and in those markets some of the members of the group may have market power. Even if the members of the purchasing group have a combined market share of more than 15 % on the purchasing market, the parties are unlikely to coordinate their conduct and collude on the selling markets since they are neither actual nor potential competitors on the downstream markets. Consequently, the purchasing group is not likely to give rise to restrictive effects on competition within the meaning of Article 101(1).

#### 224. Information exchange

##### Example 4

**Situation:** Three competing manufacturers A, B and C entrust an independent joint purchasing organisation with the purchase of product Z, which is an intermediary product used by the three parties for their production of the final product X. The costs of Z are not a significant cost factor for the production of X. The joint purchasing organisation does not compete with the parties on the selling market for X. All information necessary for the purchases (for example quality specifications, quantities, delivery dates, maximum purchase prices) is only disclosed to the joint purchasing organisation, not to the other parties. The joint purchasing organisation agrees the purchasing prices with the suppliers. A, B and C have a combined market share of 30 % on each of the purchasing and selling markets. They have six competitors in the purchasing and selling markets, two of which have a market share of 20 %.



**Analysis:** Since there is no direct information exchange between the parties, the transfer of the information necessary for the purchases to the joint purchasing organisation is unlikely to lead to a collusive outcome. Consequently, the exchange of information is unlikely to give rise to restrictive effects on competition within the meaning of Article 101(1).

## 6. AGREEMENTS ON COMMERCIALISATION

### 6.1. Definition

225. Commercialisation agreements involve co-operation between competitors in the selling, distribution or promotion of their substitute products. This type of agreement can have widely varying scope, depending on the commercialisation functions which are covered by the co-operation. At one end of the spectrum, joint selling agreements may lead to a joint determination of all commercial aspects related to the sale of the product, including price. At the other end, there are more limited agreements that only address one specific commercialisation function, such as distribution, after-sales service, or advertising.
226. An important category of those more limited agreements is distribution agreements. The Block Exemption Regulation on Vertical Restraints and Guidelines on Vertical Restraints generally cover distribution agreements unless the parties to the agreement are actual or potential competitors. If the parties are competitors, the Block Exemption Regulation on Vertical Restraints only covers non-reciprocal vertical agreements between competitors, if (a) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level or, (b) the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and does not provide competing services at the level of trade where it purchases the contract services <sup>(1)</sup>.
227. If competitors agree to distribute their substitute products on a reciprocal basis (in particular if they do so on different geographic markets) there is a possibility in certain cases that the agreements have as their object or effect the partitioning of markets between the parties or that they lead to a collusive outcome. The same can be true for non-reciprocal agreements between competitors. Reciprocal agreements and non-reciprocal agreements between competitors thus have first to be assessed according to the principles set out in this Chapter. If that assessment leads to the conclusion that co-operation between competitors in the area of distribution would in principle be acceptable, a further assessment will be necessary to examine the vertical restraints included in such agreements. That second step of the assessment should be based on the principles set out in the Guidelines on Vertical Restraints.
228. A further distinction should be drawn between agreements where the parties agree only on joint commercialisation and agreements where the commercialisation is related to another type of co-operation upstream, such as joint production or joint purchasing. When analysing commercialisation agreements combining different stages of co-operation it is necessary to determine the centre of gravity of the co-operation in accordance with paragraphs 13 and 14.

### 6.2. Relevant markets

229. To assess the competitive relationship between the parties, the relevant product and geographic market or markets directly concerned by the co-operation (that is to say, the market or markets to which the products subject to the agreement belong) have to be defined. As a commercialisation agreement in one market may also affect the competitive behaviour of the parties in a neighbouring market which is closely related to the market directly concerned by the co-operation, any such neighbouring market also needs to be defined. The neighbouring market may be horizontally or vertically related to the market where the co-operation takes place.

<sup>(1)</sup> Article 2(4) of the Block Exemption Regulation on Vertical Restraints.

### 6.3. Assessment under Article 101(1)

#### 6.3.1. *Main competition concerns*

230. Commercialisation agreements can lead to restrictions of competition in several ways. First, and most obviously, commercialisation agreements may lead to price fixing.
231. Secondly, commercialisation agreements may also facilitate output limitation, because the parties may decide on the volume of products to be put on the market, therefore restricting supply.
232. Thirdly, commercialisation agreements may become a means for the parties to divide the markets or to allocate orders or customers, for example in cases where the parties' production plants are located in different geographic markets or when the agreements are reciprocal.
233. Finally, commercialisation agreements may also lead to an exchange of strategic information relating to aspects within or outside the scope of the co-operation or to commonality of costs – in particular with regard to agreements not encompassing price fixing – which may result in a collusive outcome.

#### 6.3.2. *Restrictions of competition by object*

234. Price fixing is one of the major competition concerns arising from commercialisation agreements between competitors. Agreements limited to joint selling generally have the object of coordinating the pricing policy of competing manufacturers or service providers. Such agreements may not only eliminate price competition between the parties on substitute products but may also restrict the total volume of products to be delivered by the parties within the framework of a system for allocating orders. Such agreements are therefore likely to restrict competition by object.
235. That assessment does not change if the agreement is non-exclusive (that is to say, where the parties are free to sell individually outside the agreement), as long as it can be concluded that the agreement will lead to an overall coordination of the prices charged by the parties.
236. Another specific competition concern related to distribution arrangements between parties which are active in different geographic markets is that they can be an instrument of market partitioning. If the parties use a reciprocal distribution agreement to distribute each other's products in order to eliminate actual or potential competition between them by deliberately allocating markets or customers, the agreement is likely to have as its object a restriction of competition. If the agreement is not reciprocal, the risk of market partitioning is less pronounced. It is necessary, however, to assess whether the non-reciprocal agreement constitutes the basis for a mutual understanding to avoid entering each other's markets.

#### 6.3.3. *Restrictive effects on competition*

237. A commercialisation agreement is normally not likely to give rise to competition concerns if it is objectively necessary to allow one party to enter a market it could not have entered individually or with a more limited number of parties than are effectively taking part in the co-operation, for example, because of the costs involved. A specific application of this principle would be consortia arrangements that allow the companies involved to participate in projects that they would not be able to undertake individually. As the parties to the consortia arrangement are therefore not potential competitors for implementing the project, there is no restriction of competition within the meaning of Article 101(1).
238. Similarly, not all reciprocal distribution agreements have as their object a restriction of competition. Depending on the facts of the case at hand, some reciprocal distribution agreements may, nevertheless, have restrictive effects on competition. The key issue in assessing an agreement of this type is whether the agreement in question is objectively necessary for the parties to enter each other's markets. If it is,



the agreement does not create competition problems of a horizontal nature. However, if the agreement reduces the decision-making independence of one of the parties with regard to entering the other parties' market or markets by limiting its incentives to do so, it is likely to give rise to restrictive effects on competition. The same reasoning applies to non-reciprocal agreements, where the risk of restrictive effects on competition is, however, less pronounced.

239. Moreover, a distribution agreement can have restrictive effects on competition if it contains vertical restraints, such as restrictions on passive sales, resale price maintenance, etc.

#### ***Market power***

240. Commercialisation agreements between competitors can only have restrictive effects on competition if the parties have some degree of market power. In most cases, it is unlikely that market power exists if the parties to the agreement have a combined market share not exceeding 15 %. In any event, if the parties' combined market share does not exceed 15 % it is likely that the conditions of Article 101(3) are fulfilled.
241. If the parties' combined market share is greater than 15 %, their agreement will fall outside the safe harbour of paragraph 240 and thus the likely impact of the joint commercialisation agreement on the market must be assessed.

#### ***Collusive outcome***

242. A joint commercialisation agreement that does not involve price fixing is also likely to give rise to restrictive effects on competition if it increases the parties' commonality of variable costs to a level which is likely to lead to a collusive outcome. This is likely to be the case for a joint commercialisation agreement if prior to the agreement the parties already have a high proportion of their variable costs in common as the additional increment (that is to say, the commercialisation costs of the product subject to the agreement) can tip the balance towards a collusive outcome. Conversely, if the increment is large, the risk of a collusive outcome may be high even if the initial level of commonality of costs is low.
243. The likelihood of a collusive outcome depends on the parties' market power and the characteristics of the relevant market. Commonality of costs can only increase the risk of a collusive outcome if the parties have market power and if the commercialisation costs constitute a large proportion of the variable costs related to the products concerned. This is, for example, not the case for homogeneous products for which the highest cost factor is production. However, commonality of commercialisation costs increases the risk of a collusive outcome if the commercialisation agreement concerns products which entail costly commercialisation, for example, high distribution or marketing costs. Consequently, joint advertising or joint promotion agreements can also give rise to restrictive effects on competition if those costs constitute a significant cost factor.
244. Joint commercialisation generally involves the exchange of sensitive commercial information, particularly on marketing strategy and pricing. In most commercialisation agreements, some degree of information exchange is required in order to implement the agreement. It is therefore necessary to verify whether the information exchange can give rise to a collusive outcome with regard to the parties' activities within and outside the co-operation. Any negative effects arising from the exchange of information will not be assessed separately but in the light of the overall effects of the agreement.
245. For example, where the parties to a joint advertising agreement exchange pricing information, this may lead to a collusive outcome with regard to the sale of the jointly advertised products. In any event, the exchange of such information in the context of a joint advertising agreement goes beyond what would be necessary to implement that agreement. The likely restrictive effects on competition of information exchange in the context of commercialisation agreements will depend on the characteristics of the market and the data shared, and should be assessed in the light of the guidance given in Chapter 2.

#### 6.4. Assessment under Article 101(3)

##### 6.4.1. Efficiency gains

246. Commercialisation agreements can give rise to significant efficiency gains. The efficiencies to be taken into account when assessing whether a commercialisation agreement fulfils the criteria of Article 101(3) will depend on the nature of the activity and the parties to the co-operation. Price fixing can generally not be justified, unless it is indispensable for the integration of other marketing functions, and this integration will generate substantial efficiencies. Joint distribution can generate significant efficiencies, stemming from economies of scale or scope, especially for smaller producers.
247. In addition, the efficiency gains must not be savings which result only from the elimination of costs that are inherently part of competition, but must result from the integration of economic activities. A reduction of transport cost which is only a result of customer allocation without any integration of the logistical system can therefore not be regarded as an efficiency gain within the meaning of Article 101(3).
248. Efficiency gains must be demonstrated by the parties to the agreement. An important element in this respect would be the contribution by the parties of significant capital, technology, or other assets. Cost savings through reduced duplication of resources and facilities can also be accepted. However, if the joint commercialisation represents no more than a sales agency without any investment, it is likely to be a disguised cartel and as such unlikely to fulfil the conditions of Article 101(3).

##### 6.4.2. Indispensability

249. Restrictions that go beyond what is necessary to achieve the efficiency gains generated by a commercialisation agreement do not fulfil the criteria of Article 101(3). The question of indispensability is especially important for those agreements involving price fixing or market allocation, which can only under exceptional circumstances be considered indispensable.

##### 6.4.3. Pass-on to consumers

250. Efficiency gains attained by indispensable restrictions must be passed on to consumers to an extent that outweighs the restrictive effects on competition caused by the commercialisation agreement. This can happen in the form of lower prices or better product quality or variety. The higher the market power of the parties, however, the less likely it is that efficiency gains will be passed on to consumers to an extent that outweighs the restrictive effects on competition. Where the parties have a combined market share of below 15 %, it is likely that any demonstrated efficiency gains generated by the agreement will be sufficiently passed on to consumers.

##### 6.4.4. No elimination of competition

251. The criteria of Article 101(3) cannot be fulfilled if the parties are afforded the possibility of eliminating competition in respect of a substantial part of the products in question. This has to be analysed in the relevant market to which the products subject to the co-operation belong and in possible spill-over markets.

#### 6.5. Examples

252. Joint commercialisation necessary to enter a market

##### Example 1

**Situation:** Four companies providing laundry services in a large city close to the border of another Member State, each with a 3 % market share of the overall laundry market in that city, agree to create a joint marketing arm for the selling of laundry services to institutional customers (that is to say, hotels, hospitals and offices), whilst keeping their independence and freedom to compete for local, individual clients. In view of the new segment of demand (the institutional customers) they develop a common brand name, a common price and common standard terms including, inter alia, a maximum period of 24 hours before deliveries and schedules for delivery. They set up a common

call centre where institutional clients can request their collection and/or delivery service. They hire a receptionist (for the call centre) and several drivers. They further invest in vans for dispatching, and in brand promotion, to increase their visibility. The agreement does not fully reduce their individual infrastructure costs (since they are keeping their own premises and still compete with each other for the individual local clients), but it increases their economies of scale and allows them to offer a more comprehensive service to other types of clients, which includes longer opening hours and dispatching to a wider geographic coverage. In order to ensure the viability of the project, it is indispensable that all four of them enter into the agreement. The market is very fragmented, with no individual competitor having more than 15 % market share.

**Analysis:** Although the joint market share of the parties is below 15 %, the fact that the agreement involves price fixing means that Article 101(1) could apply. However, the parties would not have been in a position to enter the market for providing laundry services to institutional customers, either individually or in co-operation with a fewer number of parties than the four currently taking part in the agreement. As such, the agreement would not create competition concerns, irrespective of the price-fixing restriction, which in this case can be considered as indispensable to the promotion of the common brand and the success of the project.

#### 253. Commercialisation agreement by more parties than necessary to enter a market

##### Example 2

**Situation:** The same facts as in Example 1, paragraph 252, apply with one main difference: in order to ensure the viability of the project, the agreement could have been implemented by only three of the parties (instead of the four actually taking part in the co-operation).

**Analysis:** Although the joint market share of the parties is below 15 %, the fact that the agreement involves price fixing and could have been carried out by fewer than the four parties means that Article 101(1) applies. The agreement thus needs to be assessed under Article 101(3). The agreement gives rise to efficiency gains as the parties are now able to offer improved services for a new category of customers on a larger scale (which they would not otherwise have been able to service individually). In the light of the parties' combined market share of below 15 %, it is likely that they will sufficiently pass-on any efficiency gains to consumers. It is further necessary to consider whether the restrictions imposed by the agreement are indispensable to achieve the efficiencies and whether the agreement eliminates competition. Given that the aim of the agreement is to provide a more comprehensive service (including dispatch, which was not offered before) to an additional category of customers, under a single brand with common standard terms, the price fixing can be considered as indispensable to the promotion of the common brand and, consequently, the success of the project and the resulting efficiencies. Additionally, taking into account the market fragmentation, the agreement will not eliminate competition. The fact that there are four parties to the agreement (instead of the three that would have been strictly necessary) allows for increased capacity and contributes to simultaneously fulfilling the demand of several institutional customers in compliance with the standard terms (that is to say, meeting maximum delivery time terms). As such, the efficiency gains are likely to outweigh the restrictive effects arising from the reduction of competition between the parties and the agreement is likely to fulfil the conditions of Article 101(3).

#### 254. Joint internet platform

##### Example 3

**Situation:** A number of small specialty shops throughout a Member State join an electronic web-based platform for the promotion, sale and delivery of gift fruit baskets. There are a number of competing web-based platforms. By means of a monthly fee, they share the running costs of the platform and jointly invest in brand promotion. Through the webpage, where a wide range of different types of gift baskets are offered, customers order (and pay for) the type of gift basket they

want to be delivered. The order is then allocated to the specialty shop closest to the address of delivery. The shop individually bears the costs of composing the gift basket and delivering it to the client. It reaps 90 % of the final price, which is set by the web-based platform and uniformly applies to all participating specialty shops, whilst the remaining 10 % is used for the common promotion and the running costs of the web-based platform. Apart from the payment of the monthly fee, there are no further restrictions for specialty shops to join the platform, throughout the national territory. Moreover, specialty shops having their own company website are also able to (and in some cases do) sell gift fruit baskets on the internet under their own name and thus can still compete among themselves outside the co-operation. Customers purchasing over the web-based platform are guaranteed same day delivery of the fruit baskets and they can also choose a delivery time convenient to them.

**Analysis:** Although the agreement is of a limited nature, since it only covers the joint selling of a particular type of product through a specific marketing channel (the web-based platform), since it involves price-fixing, it is likely to restrict competition by object. The agreement therefore needs to be assessed under Article 101(3). The agreement gives rise to efficiency gains such as greater choice and higher quality service and the reduction of search costs, which benefit consumers and are likely to outweigh the restrictive effects on competition the agreement brings about. Given that the specialty stores taking part in the co-operation are still able to operate individually and to compete one with another, both through their shops and the internet, the price-fixing restriction could be considered as indispensable for the promotion of the product (since when buying through the web-based platform consumers do not know where they are buying the gift basket from and do not want to deal with a multitude of different prices) and the ensuing efficiency gains. In the absence of other restrictions, the agreement fulfils the criteria of Article 101(3). Moreover, as other competing web-based platforms exist and the parties continue to compete with each other, through their shops or over the internet, competition will not be eliminated.

#### 255. Sales joint venture

##### Example 4

**Situation:** Companies A and B, located in two different Member States, produce bicycle tyres. They have a combined market share of 14 % on the Union-wide market for bicycle tyres. They decide to set up a (non full-function) sales joint venture for marketing the tyres to bicycle producers and agree to sell all their production through the joint venture. The production and transport infrastructure remains separate within each party. The parties claim considerable efficiency gains stem from the agreement. Such gains mainly relate to increased economies of scale, being able to fulfil the demands of their existing and potential new customers and better competing with imported tyres produced in third countries. The joint venture negotiates the prices and allocates orders to the closest production plant, as a way to rationalise transport costs when further delivering to the customer.

**Analysis:** Even though the combined market share of the parties is below 15 %, the agreement falls under Article 101(1). It restricts competition by object since it involves customer allocation and the setting of prices by the joint venture. The claimed efficiencies deriving from the agreement do not result from the integration of economic activities or from common investment. The joint venture would have a very limited scope and would only serve as an interface for allocating orders to the production plants. It is therefore unlikely that any efficiency gains would be passed on to consumers to such an extent that they would outweigh the restrictive effects on competition brought about by the agreement. Thus, the conditions of Article 101(3) would not be fulfilled.

## 256. Non-poaching clause in agreement on outsourcing of services

## Example 5

**Situation:** Companies A and B are competing providers of cleaning services for commercial premises. Both have a market share of 15 %. There are several other competitors with market shares between 10 and 15 %. A has taken the (unilateral) decision to only focus on large customers in the future as servicing large and small customers has proved to require a somewhat different organisation of the work. Consequently, Company A has decided to no longer enter into contracts with new small customers. In addition, Companies A and B enter into an outsourcing agreement whereby Company B would directly provide cleaning services to Company A's existing small customers (which represent 1/3 of its customer base). At the same time, Company A is keen not to lose the customer relationship with those small customers. Hence, Company A will continue to keep its contractual relationships with the small customers but the direct provision of the cleaning services will be done by Company B. In order to implement the outsourcing agreement, Company A will necessarily need to provide Company B with the identities of Company A's small customers which are subject to the agreement. As Company A is afraid that Company B may try to poach those customers by offering cheaper direct services (thereby bypassing Company A), Company A insists that the outsourcing agreement contain a 'non-poaching clause'. According to that clause, Company B may not contact the small customers falling under the outsourcing agreements with a view to providing direct services to them. In addition, Companies A and B agree that Company B may not even provide direct services to those customers if Company B is approached by them. Without the 'non-poaching clause' Company A would not enter into an outsourcing agreement with Company B or any other company.

**Analysis:** The outsourcing agreement removes Company B as an independent supplier of cleaning services for Company A's small customers as they will no longer be able to enter into a direct contractual relationship with Company B. However, those customers only represent 1/3 of Company A's customer base, that is to say, 5 % of the market. They will still be able to turn to Company A and Company B's competitors, which represent 70 % of the market. Hence, the outsourcing agreement will not enable Company A to profitably raise the prices charged to the customers subject to the outsourcing agreement. In addition, the outsourcing agreement is not likely to give rise to a collusive outcome as Companies A and B only have a combined market share of 30 % and they are faced with several competitors that have market shares similar to Company A's and Company B's individual market shares. Moreover, the fact that servicing large and small customers is somewhat different minimises the risk of spill-over effects from the outsourcing agreement to Company A's and Company B's behaviour when competing for large customers. Consequently, the outsourcing agreement is not likely to give rise to restrictive effects on competition within the meaning of Article 101(1).

## 7. STANDARDISATION AGREEMENTS

## 7.1. Definition

*Standardisation agreements*

257. Standardisation agreements have as their primary objective the definition of technical or quality requirements with which current or future products, production processes, services or methods may comply <sup>(1)</sup>. Standardisation agreements can cover various issues, such as standardisation of different grades or sizes of a particular product or technical specifications in product or services markets where compatibility and interoperability with other products or systems is essential. The terms of access to a particular quality mark or for approval by a regulatory body can also be regarded as a standard. Agreements setting out standards on the environmental performance of products or production processes are also covered by this chapter.

<sup>(1)</sup> Standardisation can take different forms, ranging from the adoption of consensus based standards by the recognised European or national standards bodies, through consortia and fora, to agreements between independent companies.

258. The preparation and production of technical standards as part of the execution of public powers are not covered by these guidelines <sup>(1)</sup>. The European standardisation bodies recognised under Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and on rules on Information Society services <sup>(2)</sup> are subject to competition law to the extent that they can be considered to be an undertaking or an association of undertakings within the meaning of Articles 101 and 102 <sup>(3)</sup>. Standards related to the provision of professional services, such as rules of admission to a liberal profession, are not covered by these guidelines.

#### **Standard terms**

259. In certain industries companies use standard terms and conditions of sale or purchase elaborated by a trade association or directly by the competing companies ('standard terms') <sup>(4)</sup>. Such standard terms are covered by these guidelines to the extent that they establish standard conditions of sale or purchase of goods or services between competitors and consumers (and not the conditions of sale or purchase between competitors) for substitute products. When such standard terms are widely used within an industry, the conditions of purchase or sale used in the industry may become *de facto* aligned <sup>(5)</sup>. Examples of industries in which standard terms play an important role are the banking (for example, bank account terms) and insurance sectors.
260. Standard terms elaborated individually by a company solely for its own use when contracting with its suppliers or customers are not horizontal agreements and are therefore not covered by these guidelines.

### **7.2. Relevant markets**

261. Standardisation agreements may produce their effects on four possible markets, which will be defined according to the Market Definition Notice. First, standard-setting may have an impact on the product or service market or markets to which the standard or standards relates. Second, where the standard-setting involves the selection of technology and where the rights to intellectual property are marketed separately from the products to which they relate, the standard can have effects on the relevant technology market <sup>(6)</sup>. Third, the market for standard-setting may be affected if different standard-setting bodies or agreements exist. Fourth, where relevant, a distinct market for testing and certification may be affected by standard-setting.
262. As regards standard terms, the effects are, in general, felt on the downstream market where the companies using the standard terms compete by selling their product to their customers.

### **7.3. Assessment under Article 101(1)**

#### **7.3.1. Main competition concerns**

##### **Standardisation agreements**

263. Standardisation agreements usually produce significant positive economic effects <sup>(7)</sup>, for example by promoting economic interpenetration on the internal market and encouraging the development of new and improved products or markets and improved supply conditions. Standards thus normally

<sup>(1)</sup> See Case C-113/07, *SELEX*, [2009] ECR I-2207, paragraph 92.

<sup>(2)</sup> OJ L 204, 21.7.1998, p. 37.

<sup>(3)</sup> See judgment of 12 May 2010 in Case T-432/05, *EMC Development AB v. Commission*, not yet reported.

<sup>(4)</sup> Such standard terms might cover only a very small part of the clauses contained in the final contract or a large part thereof.

<sup>(5)</sup> This refers to a situation where (legally non-binding) standard terms in practice are used by most of the industry and/or for most aspects of the product/service thus leading to a limitation or even lack of consumer choice.

<sup>(6)</sup> See Chapter 3 on R&D agreements.

<sup>(7)</sup> See also paragraph 308.



increase competition and lower output and sales costs, benefiting economies as a whole. Standards may maintain and enhance quality, provide information and ensure interoperability and compatibility (thus increasing value for consumers).

264. Standard-setting can, however, in specific circumstances, also give rise to restrictive effects on competition by potentially restricting price competition and limiting or controlling production, markets, innovation or technical development. This can occur through three main channels, namely reduction in price competition, foreclosure of innovative technologies and exclusion of, or discrimination against, certain companies by prevention of effective access to the standard.
265. First, if companies were to engage in anti-competitive discussions in the context of standard-setting, this could reduce or eliminate price competition in the markets concerned, thereby facilitating a collusive outcome on the market <sup>(1)</sup>.
266. Second, standards that set detailed technical specifications for a product or service may limit technical development and innovation. While a standard is being developed, alternative technologies can compete for inclusion in the standard. Once one technology has been chosen and the standard has been set, competing technologies and companies may face a barrier to entry and may potentially be excluded from the market. In addition, standards requiring that a particular technology is used exclusively for a standard or preventing the development of other technologies by obliging the members of the standard-setting organisation to exclusively use a particular standard, may lead to the same effect. The risk of limitation of innovation is increased if one or more companies are unjustifiably excluded from the standard-setting process.
267. In the context of standards involving intellectual property rights ('IPR') <sup>(2)</sup>, three main groups of companies with different interests in standard-setting can be distinguished in the abstract <sup>(3)</sup>. First, there are upstream-only companies that solely develop and market technologies. Their only source of income is licensing revenue and their incentive is to maximise their royalties. Secondly, there are downstream-only companies that solely manufacture products or offer services based on technologies developed by others and do not hold relevant IPR. Royalties represent a cost for them, and not a source of revenue, and their incentive is to reduce or avoid royalties. Finally, there are vertically integrated companies that both develop technology and sell products. They have mixed incentives. On the one hand, they can draw licensing revenue from their IPR. On the other hand, they may have to pay royalties to other companies holding IPR essential to the standard. They might therefore cross-license their own essential IPR in exchange for essential IPR held by other companies.
268. Third, standardisation may lead to anti-competitive results by preventing certain companies from obtaining effective access to the results of the standard-setting process (that is to say, the specification and/or the essential IPR for implementing the standard). If a company is either completely prevented from obtaining access to the result of the standard, or is only granted access on prohibitive or discriminatory terms, there is a risk of an anti-competitive effect. A system where potentially relevant IPR is disclosed up-front may increase the likelihood of effective access being granted to the standard since it allows the participants to identify which technologies are covered by IPR and which are not. This enables the participants to both factor in the potential effect on the final price of the result of the standard (for example choosing a technology without IPR is likely to have a positive effect on the final price) and to verify with the IPR holder whether they would be willing to license if their technology is included in the standard.

<sup>(1)</sup> Depending on the circle of participants in the standard-setting process, restrictions can occur either on the supplier or on the purchaser side of the market for the standardised product.

<sup>(2)</sup> In the context of this chapter IPR in particular refers to patent(s) (excluding non-published patent applications). However, in case any other type of IPR in practice gives the IPR holder control over the use of the standard the same principles should be applied.

<sup>(3)</sup> In practice, many companies use a mix of these business models.

269. Intellectual property laws and competition laws share the same objectives <sup>(1)</sup> of promoting innovation and enhancing consumer welfare. IPR promote dynamic competition by encouraging undertakings to invest in developing new or improved products and processes. IPR are therefore in general pro-competitive. However, by virtue of its IPR, a participant holding IPR essential for implementing the standard, could, in the specific context of standard-setting, also acquire control over the use of a standard. When the standard constitutes a barrier to entry, the company could thereby control the product or service market to which the standard relates. This in turn could allow companies to behave in anti-competitive ways, for example by 'holding-up' users after the adoption of the standard either by refusing to license the necessary IPR or by extracting excess rents by way of excessive <sup>(2)</sup> royalty fees thereby preventing effective access to the standard. However, even if the establishment of a standard can create or increase the market power of IPR holders possessing IPR essential to the standard, there is no presumption that holding or exercising IPR essential to a standard equates to the possession or exercise of market power. The question of market power can only be assessed on a case by case basis.

### **Standard terms**

270. Standard terms can give rise to restrictive effects on competition by limiting product choice and innovation. If a large part of an industry adopts the standard terms and chooses not to deviate from them in individual cases (or only deviates from them in exceptional cases of strong buyer-power), customers might have no option other than to accept the conditions in the standard terms. However, the risk of limiting choice and innovation is only likely in cases where the standard terms define the scope of the end-product. As regards classical consumer goods, standard terms of sale generally do not limit innovation of the actual product or product quality and variety.
271. In addition, depending on their content, standard terms might risk affecting the commercial conditions of the final product. In particular, there is a serious risk that standard terms relating to price would restrict price competition.
272. Moreover, if the standard terms become industry practice, access to them might be vital for entry into the market. In such cases, refusing access to the standard terms could risk causing anti-competitive foreclosure. As long as the standard terms remain effectively open for use for anyone that wishes to have access to them, they are unlikely to give rise to anti-competitive foreclosure.

### **7.3.2. Restrictions of competition by object**

#### **Standardisation agreements**

273. Agreements that use a standard as part of a broader restrictive agreement aimed at excluding actual or potential competitors restrict competition by object. For instance, 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 or where the producers of the incumbent product collude to exclude new technology from an already existing standard <sup>(3)</sup> would fall into this category.

<sup>(1)</sup> See Technology Transfer Guidelines, paragraph 7.

<sup>(2)</sup> High royalty fees can only be qualified as excessive if the conditions for an abuse of a dominant position as set out in Article 102 of the Treaty and the case-law of the Court of Justice of the European Union are fulfilled. See for example Case 27/76, *United Brands*, [1978] ECR 207.

<sup>(3)</sup> See for example Commission Decision in Case IV/35.691, *Pre-insulated pipes*, OJ L 24, 30.1.1999, p. 1, where part of the infringement of Article 101 consisted in 'using norms and standards in order to prevent or delay the introduction of new technology which would result in price reductions' (paragraph 147).



274. Any agreements to reduce competition by using the disclosure of most restrictive licensing terms prior to the adoption of a standard as a cover to jointly fix prices either of downstream products or of substitute IPR or technology will constitute restrictions of competition by object <sup>(1)</sup>.

#### **Standard terms**

275. Agreements that use standard terms as part of a broader restrictive agreement aimed at excluding actual or potential competitors also restrict competition by object. An example would be where a trade association does not allow a new entrant access to its standards terms, the use of which is vital to ensure entry to the market.
276. Any standard terms containing provisions which directly influence the prices charged to customers (that is to say, recommended prices, rebates, etc.) would constitute a restriction of competition by object.

#### *7.3.3. Restrictive effects on competition*

##### **Standardisation agreements**

##### **Agreements normally not restrictive of competition**

277. Standardisation agreements which do not restrict competition by object must be analysed in their legal and economic context with regard to their actual and likely effect on competition. In the absence of market power <sup>(2)</sup>, a standardisation agreement is not capable of producing restrictive effects on competition. Therefore, restrictive effects are most unlikely in a situation where there is effective competition between a number of voluntary standards.
278. For those standard-setting agreements which risk creating market power, paragraphs 280 to 286 set out the conditions under which such agreements would normally fall outside the scope of Article 101(1).
279. The non-fulfilment of any or all of the principles set out in this section will not lead to any presumption of a restriction of competition within Article 101(1). However, it will necessitate a self-assessment to establish whether the agreement falls under Article 101(1) and, if so, if the conditions of Article 101(3) are fulfilled. In this context, it is recognised that there exist different models for standard-setting and that competition within and between those models is a positive aspect of a market economy. Therefore, standard-setting organisations remain entirely free to put in place rules and procedures that do not violate competition rules whilst being different to those described in paragraphs 280 to 286.
280. Where participation in standard-setting is **unrestricted** and the procedure for adopting the standard in question is **transparent**, standardisation agreements which contain **no obligation to comply** <sup>(3)</sup> with the standard and provide **access to the standard on fair, reasonable and non-discriminatory terms** will normally not restrict competition within the meaning of Article 101(1).
281. In particular, to ensure **unrestricted participation** the rules of the standard-setting organisation would need to guarantee that all competitors in the market or markets affected by the standard can participate in the process leading to the selection of the standard. The standard-setting organisations would also need to have objective and non-discriminatory procedures for allocating voting rights as well as, if relevant, objective criteria for selecting the technology to be included in the standard.

<sup>(1)</sup> This paragraph should not prevent unilateral ex ante disclosures of most restrictive licensing terms as described in paragraph 299. It also does not prevent patent pools created in accordance with the principles set out in the Technology Transfer Guidelines or the decision to license IPR essential to a standard on royalty-free terms as set out in this Chapter.

<sup>(2)</sup> See by analogy paragraph 39 *et seq.* As regards market shares see also paragraph 296.

<sup>(3)</sup> See also paragraph 293 in this regard.

282. With respect to **transparency**, the relevant standard-setting organisation would need to have procedures which allow stakeholders to effectively inform themselves of upcoming, on-going and finalised standardisation work in good time at each stage of the development of the standard.
283. Furthermore, the standard-setting organisation's rules would need to ensure effective **access to the standard on fair, reasonable and non discriminatory terms** <sup>(1)</sup>.
284. In the case of a standard involving IPR, **a clear and balanced IPR policy** <sup>(2)</sup>, **adapted to the particular industry** and the needs of the standard-setting organisation in question, increases the likelihood that the implementers of the standard will be granted effective access to the standards elaborated by that standard-setting organisation.
285. In order to ensure effective access to the standard, the IPR policy would need to require participants wishing to have their IPR included in the standard to provide an irrevocable commitment in writing to offer to license their essential IPR to all third parties on fair, reasonable and non-discriminatory terms ('**FRAND commitment**') <sup>(3)</sup>. That commitment should be given prior to the adoption of the standard. At the same time, the IPR policy should allow IPR holders to exclude specified technology from the standard-setting process and thereby from the commitment to offer to license, providing that exclusion takes place at an early stage in the development of the standard. To ensure the effectiveness of the FRAND commitment, there would also need to be a requirement on all participating IPR holders who provide such a commitment to ensure that any company to which the IPR owner transfers its IPR (including the right to license that IPR) is bound by that commitment, for example through a contractual clause between buyer and seller.
286. Moreover, the IPR policy would need to require **good faith disclosure**, by participants, of their IPR that might be essential for the implementation of the standard under development. This would enable the industry to make an informed choice of technology and thereby assist in achieving the goal of effective access to the standard. Such a disclosure obligation could be based on ongoing disclosure as the standard develops and on reasonable endeavours to identify IPR reading on the potential standard <sup>(4)</sup>. It is also sufficient if the participant declares that it is likely to have IPR claims over a particular technology (without identifying specific IPR claims or applications for IPR). Since the risks with regard to effective access are not the same in the case of a standard-setting organisation with a royalty-free standards policy, IPR disclosure would not be relevant in that context.

#### **FRAND Commitments**

287. FRAND commitments are designed to ensure that essential IPR protected technology incorporated in a standard is accessible to the users of that standard on fair, reasonable and non-discriminatory terms and conditions. In particular, FRAND commitments can prevent IPR holders from making the implementation of a standard difficult by refusing to license or by requesting unfair or unreasonable fees (in other words excessive fees) after the industry has been locked-in to the standard or by charging discriminatory royalty fees.
288. Compliance with Article 101 by the standard-setting organisation does not require the standard-setting organisation to verify whether licensing terms of participants fulfil the FRAND commitment. Participants will have to assess for themselves whether the licensing terms and in particular the fees they charge fulfil the FRAND commitment. Therefore, when deciding whether to commit to FRAND for a particular IPR, participants will need to anticipate the implications of the FRAND commitment, notably on their ability to freely set the level of their fees.

<sup>(1)</sup> For example effective access should be granted to the specification of the standard.

<sup>(2)</sup> As specified in paragraphs 285 and 286.

<sup>(3)</sup> It should be noted that FRAND can also cover royalty-free licensing.

<sup>(4)</sup> To obtain the sought after result a good faith disclosure does not need to go as far as to require participants to compare their IPR against the potential standard and issue a statement positively concluding that they have no IPR reading on the potential standard.

289. In case of a dispute, the assessment of whether fees charged for access to IPR in the standard-setting context are unfair or unreasonable should be based on whether the fees bear a reasonable relationship to the economic value of the IPR <sup>(1)</sup>. In general, there are various methods available to make this assessment. In principle, cost-based methods are not well adapted to this context because of the difficulty in assessing the costs attributable to the development of a particular patent or groups of patents. Instead, it may be possible to compare the licensing fees charged by the company in question for the relevant patents in a competitive environment before the industry has been locked into the standard (*ex ante*) with those charged after the industry has been locked in (*ex post*). This assumes that the comparison can be made in a consistent and reliable manner <sup>(2)</sup>.
290. Another method could be to obtain an independent expert assessment of the objective centrality and essentiality to the standard at issue of the relevant IPR portfolio. In an appropriate case, it may also be possible to refer to *ex ante* disclosures of licensing terms in the context of a specific standard-setting process. This also assumes that the comparison can be made in a consistent and reliable manner. The royalty rates charged for the same IPR in other comparable standards may also provide an indication for FRAND royalty rates. These guidelines do not seek to provide an exhaustive list of appropriate methods to assess whether the royalty fees are excessive.
291. However, it should be emphasised that nothing in these Guidelines prejudices the possibility for parties to resolve their disputes about the level of FRAND royalty rates by having recourse to the competent civil or commercial courts.

#### ***Effects based assessment for standardisation agreements***

292. The assessment of each standardisation agreement must take into account the likely effects of the standard on the markets concerned. The following considerations apply to all standardisation agreements that depart from the principles as set out in paragraphs 280 to 286.
293. Whether standardisation agreements may give rise to restrictive effects on competition may depend on whether the members of a standard-setting organisation remain **free to develop alternative standards or products** that do not comply with the agreed standard <sup>(3)</sup>. For example, if the standard-setting agreement binds the members to only produce products in compliance with the standard, the risk of a likely negative effect on competition is significantly increased and could in certain circumstances give rise to a restriction of competition by object <sup>(4)</sup>. In the same vein, standards only covering minor aspects or parts of the end-product are less likely to lead to competition concerns than more comprehensive standards.
294. The assessment whether the agreement restricts competition will also focus on **access to the standard**. Where the result of a standard (that is to say, the specification of how to comply with the standard and, if relevant, the essential IPR for implementing the standard) is not at all accessible, or only accessible on discriminatory terms, for members or third parties (that is to say, non-members of the relevant standard-setting organisation) this may discriminate or foreclose or segment markets according to their geographic scope of application and thereby is likely to restrict competition. However, in the case of several competing standards or in the case of effective competition between the standardised solution and non-standardised solution, a limitation of access may not produce restrictive effects on competition.

<sup>(1)</sup> See Case 27/76, *United Brands*, paragraph 250; see also Case C-385/07 P, *Der Grüne Punkt – Duales System Deutschland GmbH*, [2009] ECR I-6155, paragraph 142.

<sup>(2)</sup> See Case 395/87, *Ministère public v Jean-Louis Tournier*, [1989] ECR 2521, paragraph 38; Joined Cases 110/88, 241/88 and 242/88, *Francois Lucazeau v SACEM*, [1989] ECR 2811, paragraph 33.

<sup>(3)</sup> See Commission Decision in Case IV/29/151, *Philips/VCR*, OJ L 47, 18.2.1978, p. 42, paragraph 23: 'As these standards were for the manufacture of VCR equipment, the parties were obliged to manufacture and distribute only cassettes and recorders conforming to the VCR system licensed by Philips. They were prohibited from changing to manufacturing and distributing other video cassette systems ... This constituted a restriction of competition under Article 85(1)(b)'.

<sup>(4)</sup> See Commission Decision in Case IV/29/151, *Philips/VCR*, paragraph 23.

295. If **participation in the standard-setting process** is open in the sense that it allows all competitors (and/or stakeholders) in the market affected by the standard to take part in choosing and elaborating the standard, this will lower the risks of a likely restrictive effect on competition by not excluding certain companies from the ability to influence the choice and elaboration of the standard <sup>(1)</sup>. The greater the likely market impact of the standard and the wider its potential fields of application, the more important it is to allow equal access to the standard-setting process. However, if the facts at hand show that there is competition between several such standards and standard-setting organisations (and it is not necessary that the whole industry applies the same standards) there may be no restrictive effects on competition. Also, if in the absence of a limitation on the number of participants it would not have been possible to adopt the standard, the agreement would not be likely to lead to any restrictive effect on competition under Article 101(1) <sup>(2)</sup>. In certain situations the potential negative effects of restricted participation may be removed or at least lessened by ensuring that stakeholders are **kept informed and consulted** on the work in progress <sup>(3)</sup>. The more transparent the procedure for adopting the standard, the more likely it is that the adopted standard will take into account the interests of all stakeholders.
296. To assess the effects of a standard-setting agreement, the **market shares of the goods or services based on the standard** should be taken into account. It might not always be possible to assess with any certainty at an early stage whether the standard will in practice be adopted by a large part of the industry or whether it will only be a standard used by a marginal part of the relevant industry. In many cases the relevant market shares of the companies having participated in developing the standard could be used as a proxy for estimating the likely market share of the standard (since the companies participating in setting the standard would in most cases have an interest in implementing the standard) <sup>(4)</sup>. However, as the effectiveness of standardisation agreements is often proportional to the share of the industry involved in setting and/or applying the standard, high market shares held by the parties in the market or markets affected by the standard will not necessarily lead to the conclusion that the standard is likely to give rise to restrictive effects on competition.
297. Any standard-setting agreement which clearly **discriminates** against any of the participating or potential members could lead to a restriction of competition. For example, if a standard-setting organisation explicitly excludes upstream only companies (that is to say, companies not active on the downstream production market), this could lead to an exclusion of potentially better technologies.
298. As regards standard-setting agreements with **different types of IPR disclosure models** from the ones described in paragraph 286, it would have to be assessed on a case by case basis whether the disclosure model in question (for example a disclosure model not requiring but only encouraging IPR disclosure) guarantees effective access to the standard. In other words, it needs to be assessed whether, in the specific context, an informed choice between technologies and associated IPR is in practice not prevented by the IPR disclosure model.
299. Finally, standard-setting agreements providing for **ex ante disclosures of most restrictive licensing terms**, will not, in principle, restrict competition within the meaning of Article 101(1). In that regard, it is important that parties involved in the selection of a standard be fully informed not only as to the available technical options and the associated IPR, but also as to the likely cost of that IPR. Therefore, should a standard-setting organisation's IPR policy choose to provide for IPR holders to individually

<sup>(1)</sup> In Commission Decision in Case IV/31.458, *X/Open Group*, OJ L 35, 6.2.1987, p. 36, the Commission considered that even if the standards adopted were made public, the restricted membership policy had the effect of preventing non-members from influencing the results of the work of the group and from getting the know-how and technical understanding relating to the standards which the members were likely to acquire. In addition, non-members could not, in contrast to the members, implement the standard before it was adopted (see paragraph 32). The agreement was therefore in these circumstances seen to constitute a restriction under Article 101(1).

<sup>(2)</sup> Or if the adoption of the standard would have been heavily delayed by an inefficient process, any initial restriction could be outweighed by efficiencies to be considered under Article 101(3).

<sup>(3)</sup> See Commission Decision of 14 October 2009 in Case 39.416, *Ship Classification*. The Decision can be found at: [http://ec.europa.eu/competition/antitrust/cases/index/by\\_nr\\_78.html#i39\\_416](http://ec.europa.eu/competition/antitrust/cases/index/by_nr_78.html#i39_416)

<sup>(4)</sup> See paragraph 261.

disclose their most restrictive licensing terms, including the maximum royalty rates they would charge, prior to the adoption of the standard, this will normally not lead to a restriction of competition within the meaning of Article 101(1) <sup>(1)</sup>. Such unilateral ex ante disclosures of most restrictive licensing terms would be one way to enable the standard-setting organisation to take an informed decision based on the disadvantages and advantages of different alternative technologies, not only from a technical perspective but also from a pricing perspective.

### **Standard terms**

300. The establishment and use of standard terms must be assessed in the appropriate economic context and in the light of the situation on the relevant market in order to determine whether the standard terms at issue are likely to give rise to restrictive effects on competition.
301. As long as participation in the actual establishment of standard terms is **unrestricted** for the competitors in the relevant market (either by participation in the trade association or directly), and the established standard terms are **non-binding** and **effectively accessible** for anyone, such agreements are not likely to give rise to restrictive effects on competition (subject to the caveats set out in paragraphs 303, 304, 305 and 307).
302. Effectively accessible and non-binding standard terms for the sale of consumer goods or services (on the presumption that they have no effect on price) thus generally do not have any restrictive effect on competition since they are unlikely to lead to any negative effect on product quality, product variety or innovation. There are, however, two general exceptions where a more in-depth assessment would be required.
303. Firstly, standard terms for the sale of consumer goods or services where the standard terms define the scope of the product sold to the customer, and where therefore the risk of limiting product choice is more significant, could give rise to restrictive effects on competition within the meaning of Article 101(1) where their common application is likely to result in a *de facto* alignment. This could be the case when the widespread use of the standard terms *de facto* leads to a limitation of innovation and product variety. For instance, this may arise where standard terms in insurance contracts limit the customer's practical choice of key elements of the contract, such as the standard risks covered. Even if the use of the standard terms is not compulsory, they might undermine the incentives of the competitors to compete on product diversification.
304. When assessing whether there is a risk that the standard terms are likely to have restrictive effects by way of a limitation of product choice, factors such as existing competition on the market should be taken into account. For example if there is a large number of smaller competitors, the risk of a limitation of product choice would seem to be less than if there are only a few bigger competitors <sup>(2)</sup>. The market shares of the companies participating in the establishment of the standard terms might also give a certain indication of the likelihood of uptake of the standard terms or of the likelihood that the standard terms will be used by a large part of the market. However, in this respect, it is not only relevant to analyse whether the standard terms elaborated are likely to be used by a large part of the market, but also whether the standard terms only cover part of the product or the whole product (the less extensive the standard terms, the less likely that they will lead, overall, to a limitation of product choice). Moreover, in cases where in the absence of the establishment of the standard terms it would not have been possible to offer a certain product, there would not be likely to be any restrictive effect on competition within the meaning of Article 101(1). In that scenario, product choice is increased rather than decreased by the establishment of the standard terms.

<sup>(1)</sup> Any unilateral ex ante disclosures of most restrictive licensing terms should not serve as a cover to jointly fix prices either of downstream products or of substitute IPR/technologies which is, as outlined in paragraph 274, a restriction of competition by object.

<sup>(2)</sup> If previous experience with standard terms on the relevant market shows that the standard terms did not lead to lessened competition on product differentiation, this might also be an indication that the same type of standard terms elaborated for a neighbouring product will not lead to a restrictive effect on competition.



305. Secondly, even if the standard terms do not define the actual scope of the end-product they might be a decisive part of the transaction with the customer for other reasons. An example would be online shopping where customer confidence is essential (for example, in the use of safe payment systems, a proper description of the products, clear and transparent pricing rules, flexibility of the return policy, etc). As it is difficult for customers to make a clear assessment of all those elements, they tend to favour widespread practices and standard terms regarding those elements could therefore become a *de facto* standard with which companies would need to comply to sell in the market. Even though non-binding, those standard terms would become a *de facto* standard, the effects of which are very close to a binding standard and need to be analysed accordingly.
306. If the use of standard terms is binding, there is a need to assess their impact on product quality, product variety and innovation (in particular if the standard terms are binding on the entire market).
307. Moreover, should the standard terms (binding or non-binding) contain any terms which are likely to have a negative effect on competition relating to prices (for example terms defining the type of rebates to be given), they would be likely to give rise to restrictive effects on competition within the meaning of Article 101(1).

#### 7.4. Assessment under Article 101(3)

##### 7.4.1. Efficiency gains

##### **Standardisation agreements**

308. Standardisation agreements frequently give rise to significant efficiency gains. For example, Union wide standards may facilitate market integration and allow companies to market their goods and services in all Member States, leading to increased consumer choice and decreasing prices. Standards which establish technical interoperability and compatibility often encourage competition on the merits between technologies from different companies and help prevent lock-in to one particular supplier. Furthermore, standards may reduce transaction costs for sellers and buyers. Standards on, for instance, quality, safety and environmental aspects of a product may also facilitate consumer choice and can lead to increased product quality. Standards also play an important role for innovation. They can reduce the time it takes to bring a new technology to the market and facilitate innovation by allowing companies to build on top of agreed solutions.
309. To achieve those efficiency gains in the case of standardisation agreements, the information necessary to apply the standard must be effectively available to those wishing to enter the market <sup>(1)</sup>.
310. Dissemination of a standard can be enhanced by marks or logos certifying compliance thereby providing certainty to customers. Agreements for testing and certification go beyond the primary objective of defining the standard and would normally constitute a distinct agreement and market.
311. While the effects on innovation must be analysed on a case-by-case basis, standards creating compatibility on a horizontal level between different technology platforms are considered to be likely to give rise to efficiency gains.

##### **Standard terms**

312. The use of standard terms can entail economic benefits such as making it easier for customers to compare the conditions offered and thus facilitate switching between companies. Standard terms might also lead to efficiency gains in the form of savings in transaction costs and, in certain sectors (in particular where the contracts are of a complex legal structure), facilitate entry. Standard terms may also increase legal certainty for the contract parties.
313. The higher the number of competitors on the market, the greater the efficiency gain of facilitating the comparison of conditions offered.

<sup>(1)</sup> See Commission Decision in Case IV/31.458, *X/Open Group*, paragraph 42: 'The Commission considers that the willingness of the Group to make available the results as quickly as possible is an essential element in its decision to grant an exemption'.

#### 7.4.2. Indispensability

314. Restrictions that go beyond what is necessary to achieve the efficiency gains that can be generated by a standardisation agreement or standard terms do not fulfil the criteria of Article 101(3).

#### **Standardisation agreements**

315. The assessment of each standardisation agreement must take into account its likely effect on the markets concerned, on the one hand, and the scope of restrictions that possibly go beyond the objective of achieving efficiencies, on the other <sup>(1)</sup>.
316. Participation in standard-setting should normally be open to all competitors in the market or markets affected by the standard unless the parties demonstrate significant inefficiencies of such participation or recognised procedures are foreseen for the collective representation of interests <sup>(2)</sup>.
317. As a general rule standardisation agreements should cover no more than what is necessary to ensure their aims, whether this is technical interoperability and compatibility or a certain level of quality. In cases where having only one technological solution would benefit consumers or the economy at large that standard should, be set on a non-discriminatory basis. Technology neutral standards can, in certain circumstances, lead to larger efficiency gains. Including substitute IPR <sup>(3)</sup> as essential parts of a standard while at the same time forcing the users of the standard to pay for more IPR than technically necessary would go beyond what is necessary to achieve any identified efficiency gains. In the same vein, including substitute IPR as essential parts of a standard and limiting the use of that technology to that particular standard (that is to say, exclusive use) could limit inter-technology competition and would not be necessary to achieve the efficiencies identified.
318. Restrictions in a standardisation agreement making a standard binding and obligatory for the industry are in principle not indispensable.
319. In a similar vein, standardisation agreements that entrust certain bodies with the exclusive right to test compliance with the standard go beyond the primary objective of defining the standard and may also restrict competition. The exclusivity can, however, be justified for a certain period of time, for example by the need to recoup significant start-up costs <sup>(4)</sup>. The standardisation agreement should in that case include adequate safeguards to mitigate possible risks to competition resulting from exclusivity. This concerns, inter alia, the certification fee which needs to be reasonable and proportionate to the cost of the compliance testing.

<sup>(1)</sup> In Case IV/29/151, *Philips/VCR*, compliance with the VCR standards led to the exclusion of other, perhaps better systems. Such exclusion was particularly serious in view of the pre-eminent market position enjoyed by Philips '... [R]estrictions were imposed upon the parties which were not indispensable to the attainment of these improvements. The compatibility of VCR video cassettes with the machines made by other manufacturers would have been ensured even if the latter had to accept no more than an obligation to observe the VCR standards when manufacturing VCR equipment' (paragraph 31).

<sup>(2)</sup> See Commission Decision in Case IV/31.458, *X/Open Group*, paragraph 45: '[T]he aims of the Group could not be achieved if any company willing to commit itself to the Group objectives had a right to become a member. This would create practical and logistical difficulties for the management of the work and possibly prevent appropriate proposals being passed.' See also Commission Decision of 14 October 2009 in Case 39.416, *Ship Classification*, paragraph 36: 'the Commitments strike an appropriate balance between maintaining demanding criteria for membership of IACS on the one hand, and removing unnecessary barriers to membership of IACS on the other hand. The new criteria will ensure that only technically competent CSs are eligible to become member of IACS, thus preventing that the efficiency and quality of IACS' work is unduly impaired by too lenient requirements for participation in IACS. At the same time, the new criteria will not hinder CSs, who are technically competent and willing to do so from joining IACS'.

<sup>(3)</sup> Technology which is regarded by users or licensees as interchangeable with or substitutable for another technology, by reason of the characteristics and intended use of the technologies.

<sup>(4)</sup> In this context see Commission Decision in Cases IV/34.179, 34.202, 216, *Dutch Cranes (SCK and FNK)*, OJ L 312, 23.12.1995, p. 79, paragraph 23: 'The ban on calling on firms not certified by SCK as sub-contractors restricts the freedom of action of certified firms. Whether a ban can be regarded as preventing, restricting or distorting competition within the meaning of Article 85(1) must be judged in the legal and economic context. If such a ban is associated with a certification system which is completely open, independent and transparent and provides for the acceptance of equivalent guarantees from other systems, it may be argued that it has no restrictive effects on competition but is simply aimed at fully guaranteeing the quality of the certified goods or services'.

**Standard terms**

320. It is generally not justified to make standard terms binding and obligatory for the industry or the members of the trade association that established them. The possibility cannot, however, be ruled out that making standard terms binding may, in a specific case, be indispensable to the attainment of the efficiency gains generated by them.

7.4.3. *Pass-on to consumers***Standardisation agreements**

321. Efficiency gains attained by indispensable restrictions must be passed on to consumers to an extent that outweighs the restrictive effects on competition caused by a standardisation agreement or by standard terms. A relevant part of the analysis of likely pass-on to consumers is which procedures are used to guarantee that the interests of the users of standards and end consumers are protected. Where standards facilitate technical interoperability and compatibility or competition between new and already existing products, services and processes, it can be presumed that the standard will benefit consumers.

**Standard terms**

322. Both the risk of restrictive effects on competition and the likelihood of efficiency gains increase with the companies' market shares and the extent to which the standard terms are used. Hence, it is not possible to provide any general 'safe harbour' within which there is no risk of restrictive effects on competition or which would allow the presumption that efficiency gains will be passed on to consumers to an extent that outweighs the restrictive effects on competition.
323. However, certain efficiency gains generated by standard terms, such as increased comparability of the offers on the market, facilitated switching between providers, and legal certainty of the clauses set out in the standard terms, are necessarily beneficial for the consumers. As regards other possible efficiency gains, such as lower transaction costs, it is necessary to make an assessment on a case-by-case basis and in the relevant economic context whether these are likely to be passed on to consumers.

7.4.4. *No elimination of competition*

324. Whether a standardisation agreement affords the parties the possibility of eliminating competition depends on the various sources of competition in the market, the level of competitive constraint that they impose on the parties and the impact of the agreement on that competitive constraint. While market shares are relevant for that analysis, the magnitude of remaining sources of actual competition cannot be assessed exclusively on the basis of market share except in cases where a standard becomes a *de facto* industry standard<sup>(1)</sup>. In the latter case competition may be eliminated if third parties are foreclosed from effective access to the standard. Standard terms used by a majority of the industry might create a *de facto* industry standard and thus raise the same concerns. However, if the standard or the standard terms only concern a limited part of the product or service, competition is not likely to be eliminated.

**7.5. Examples**

325. Setting standards competitors cannot satisfy

**Example 1**

**Situation:** A standard-setting organisation sets and publishes safety standards that are widely used by the relevant industry. Most competitors of the industry take part in the setting of the standard. Prior to the adoption of the standard, a new entrant has developed a product which is technically equivalent in terms of the performance and functional requirements and which is recognised by the technical committee of the standard-setting organisation. However, the technical specifications of the safety standard are, without any objective justification, drawn up in such a way as to not allow for this or other new products to comply with the standard.

<sup>(1)</sup> *De facto* standardisation refers to a situation where a (legally non-binding) standard, is, in practice, used by most of the industry.



**Analysis:** This standardisation agreement is likely to give rise to restrictive effects on competition within the meaning of Article 101(1) and is unlikely to meet the criteria of Article 101(3). The members of the standards development organisation have, without any objective justification, set the standard in such a way that products of their competitors which are based on other technological solutions cannot satisfy it, even though they have equivalent performance. Hence, this standard, which has not been set on a non-discriminatory basis, will reduce or prevent innovation and product variety. It is unlikely that the way the standard is drafted will lead to greater efficiency gains than a neutral one.

### 326. Non-binding and transparent standard covering a large part of the market

#### Example 2

**Situation:** A number of consumer electronics manufacturers with substantial market shares agree to develop a new standard for a product to follow up the DVD.

**Analysis:** Provided that (a) the manufacturers remain free to produce other new products which do not conform to the new standard, (b) participation in the standard-setting is unrestricted and transparent, and (c) the standardisation agreement does not otherwise restrict competition, Article 101(1) is not likely to be infringed. If the parties agreed to only manufacture products which conform to the new standard, the agreement would limit technical development, reduce innovation and prevent the parties from selling different products, thereby creating restrictive effects on competition within the meaning of Article 101(1).

### 327. Standardisation agreement without IPR disclosure

#### Example 3

**Situation:** A private standard-setting organisation active in standardisation in the ICT (information and communication technology) sector has an IPR policy which neither requires nor encourages disclosures of IPR which could be essential for the future standard. The standard-setting organisation took the conscious decision not to include such an obligation in particular considering that in general all technologies potentially relevant for the future standard are covered by many IPR. Therefore the standard-setting organisation considered that an IPR disclosure obligation would, on the one hand, not lead to the benefit of enabling the participants to choose a solution with no or little IPR and, on the other, would lead to additional costs in analysing whether the IPR would be potentially essential for the future standard. However, the IPR policy of the standard-setting organisation requires all participants to make a commitment to license any IPR that might read on the future standard on FRAND terms. The IPR policy allows for opt-outs if there is specific IPR that an IPR holder wishes to put outside the blanket licensing commitment. In this particular industry there are several competing private standard-setting organisations. Participation in the standard-setting organisation is open to anyone active in the industry.

**Analysis:** In many cases an IPR disclosure obligation would be pro-competitive by increasing competition between technologies ex ante. In general, such an obligation allows the members of a standard-setting organisation to factor in the amount of IPR reading on a particular technology when deciding between competing technologies (or even to, if possible, choose a technology which is not covered by IPR). The amount of IPR reading on a technology will often have a direct impact on the cost of access to the standard. However, in this particular context, all available technologies seem to be covered by IPR, and even many IPR. Therefore, any IPR disclosure would not have the positive effect of enabling the members to factor in the amount of IPR when choosing technology since regardless of what technology is chosen, it can be presumed that there is IPR reading on that

technology. IPR disclosure would be unlikely to contribute to guaranteeing effective access to the standard which in this scenario is sufficiently guaranteed by the blanket commitment to license any IPR that might read on the future standard on FRAND terms. On the contrary, an IPR disclosure obligation might in this context lead to additional costs for the participants. The absence of IPR disclosure might also, in those circumstances, lead to a quicker adoption of the standard which might be important if there are several competing standard-setting organisations. It follows that the agreement is unlikely to give rise to any negative effects on competition within the meaning of Article 101(1).

### 328. Standards in the insurance sector

#### Example 4

**Situation:** A group of insurance companies comes together to agree non-binding standards for the installation of certain security devices (that is to say, components and equipment designed for loss prevention and reduction and systems formed from such elements). The non-binding standards set by the insurance companies (a) are agreed in order to address a specific need and to assist insurers to manage risk and offer risk-appropriate premiums; (b) are discussed with the installers (or their representatives) and their views are taken on board prior to finalisation of the standards; (c) are published by the relevant insurance association on a dedicated section of its website so that any installer or other interested party can access them easily.

**Analysis:** The process for setting these standards is transparent and allows for the participation of interested parties. In addition, the result is easily accessible on a reasonable and non-discriminatory basis for anyone that wishes to have access to it. Provided that the standard does not have negative effects on the downstream market (for example by excluding certain installers through very specific and unjustified requirements for installations) it is not likely to lead to restrictive effects on competition. However, even if the standards led to restrictive effects on competition, the conditions set out in Article 101(3) would seem to be fulfilled. The standards would assist insurers in analysing to what extent such installation systems reduce relevant risk and prevent losses so that they can manage risks and offer risk-appropriate premiums. Subject to the caveat regarding the downstream market, they would also be more efficient for installers, allowing them to comply with one set of standards for all insurance companies rather than be tested by every insurance company separately. They could also make it easier for consumers to switch between insurers. In addition, they could be beneficial for smaller insurers who may not have the capacity to test separately. As regards the other conditions of Article 101(3), it seems that the non-binding standards do not go beyond what is necessary to achieve the efficiencies in question, that benefits would be passed on to the consumers (some would even be directly beneficial for the consumers) and that the restrictions would not lead to an elimination of competition.

### 329. Environmental standards

#### Example 5

**Situation:** Almost all producers of washing machines agree, with the encouragement of a public body, to no longer manufacture products which do not comply with certain environmental criteria (for example, energy efficiency). Together, the parties hold 90 % of the market. The products which will be thus phased out of the market account for a significant proportion of total sales. They will be replaced by more environmentally friendly, but also more expensive products. Furthermore, the agreement indirectly reduces the output of third parties (for example, electric utilities and suppliers of components incorporated in the products phased out). Without the agreement, the parties would not have shifted their production and marketing efforts to the more environmentally friendly products.

**Analysis:** The agreement grants the parties control of individual production and concerns an appreciable proportion of their sales and total output, whilst also reducing third parties' output. Product variety, which is partly focused on the environmental characteristics of the product, is reduced and prices will probably rise. Therefore, the agreement is likely to give rise to restrictive effects on competition within the meaning of Article 101(1). The involvement of the public

authority is irrelevant for that assessment. However, newer, more environmentally friendly products are more technically advanced, offering qualitative efficiencies in the form of more washing machine programmes which can be used by consumers. Furthermore, there are cost efficiencies for the purchasers of the washing machines resulting from lower running costs in the form of reduced consumption of water, electricity and soap. Those cost efficiencies are realised on markets which are different from the relevant market of the agreement. Nevertheless, those efficiencies may be taken into account as the markets on which the restrictive effects on competition and the efficiency gains arise are related and the group of consumers affected by the restriction and the efficiency gains is substantially the same. The efficiency gains outweigh the restrictive effects on competition in the form of increased costs. Other alternatives to the agreement are shown to be less certain and less cost-effective in delivering the same net benefits. Various technical means are economically available to the parties in order to manufacture washing machines which do comply with the environmental characteristics agreed upon and competition will still take place for other product characteristics. Therefore, the criteria of Article 101(3) would appear to be fulfilled.

### 330. Government encouraged standardisation

#### Example 6

**Situation:** In response to the findings of research into the recommended levels of fat in certain processed food conducted by a government-funded think tank in one Member State, several major manufacturers of the processed foods in the same Member State agree, through formal discussions at an industry trade association, to set recommended fat levels for the products. Together, the parties represent 70 % of sales of the products within the Member State. The parties' initiative will be supported by a national advertising campaign funded by the think tank highlighting the dangers of a high fat content in processed foods.

**Analysis:** Although the fat levels are recommendations and therefore voluntary, as a result of the wide publicity resulting from the national advertising campaign, the recommended fat levels are likely to be implemented by all manufacturers of the processed foods in the Member State. It is therefore likely to become a *de facto* maximum fat level in the processed foods. Consumer choice across the product markets could therefore be reduced. However, the parties will be able to continue to compete with regard to a number of other characteristics of the products, such as price, product size, quality, taste, other nutritional and salt content, balance of ingredients, and branding. Moreover, competition regarding the fat levels in the product offering may increase where parties seek to offer products with the lowest levels. The agreement is therefore unlikely to give rise to restrictive effects on competition within the meaning of Article 101(1).

### 331. Open standardisation of product packaging

#### Example 7

**Situation:** The major manufacturers of a fast-moving consumer product in a competitive market in a Member State – as well as manufacturers and distributors in other Member States who sell the product into the Member State ('importers') – agree with the major packaging suppliers to develop and implement a voluntary initiative to standardise the size and shape of the packaging of the product sold in that Member State. There is currently a wide variation in packaging sizes and materials within and across the Member States. This reflects the fact that the packaging does not represent a high proportion of total production costs and that switching costs for packaging producers are not significant. There is no actual or pending European standard for the packaging. The agreement has been entered into by the parties voluntarily in response to pressure from the Member State's government to meet environmental targets. Together, the manufacturers and importers represent 85 % of sales of the product within the Member State. The voluntary initiative will give rise to a uniform-sized product for sale within the Member State that uses less packaging material, occupies less shelf space, has lower transport and packaging costs, and is more environmentally friendly through reduced packaging waste. It also reduces the recycling costs of producers.

The standard does not specify that particular types of packaging materials must be used. The specifications of the standard have been agreed between manufacturers and importers in an open and transparent manner, with the draft specifications having been published for open consultation on an industry website in a timely manner prior to adoption. The final specifications adopted are also published on an industry trade association website that is freely accessible to any potential entrants, even if they are not members of the trade association.

**Analysis:** Although the agreement is voluntary, the standard is likely to become a *de facto* industry practice because the parties together represent a high proportion of the market for the product in the Member State and retailers are also being encouraged by the government to reduce packaging waste. As such, the agreement could in theory create barriers to entry and give rise to potential anti-competitive foreclosure effects in the Member State market. This would in particular be a risk for importers of the product in question who may need to repackage the product to meet the *de facto* standard in order to sell in the Member State if the pack size used in other Member States does not meet the standard. However, significant barriers to entry and foreclosure are unlikely to occur in practice because (a) the agreement is voluntary, (b) the standard has been agreed with major importers in an open and transparent manner, (c) switching costs are low, and (d) the technical details of the standard are accessible to new entrants, importers and all packaging suppliers. In particular, importers will have been aware of potential changes to packaging at an early stage of development and will have had the opportunity through the open consultation on the draft standards to put forward their views before the standard was eventually adopted. The agreement therefore may not give rise to restrictive effects on competition within the meaning of Article 101(1).

In any event, it is likely that the conditions of Article 101(3) will be fulfilled in this case: (i) the agreement will give rise to quantitative efficiencies through lower transport and packaging costs, (ii) the prevailing conditions of competition on the market are such that these costs reductions are likely to be passed on to consumers, (iii) the agreement includes only the minimum restrictions necessary to achieve the packaging standard and is unlikely to result in significant foreclosure effects and (iv) competition will not be eliminated in a substantial part of the products in question.

### 332. Closed standardisation of product packaging

#### Example 8

**Situation:** The situation is the same as in Example 7, paragraph 331, except the standard is agreed only between manufacturers of the fast-moving consumer product located within the Member State (who represent 65 % of the sales of the product in the Member State), there was no open consultation on the specifications adopted (which include detailed standards on the type of packaging material that must be used) and the specifications of the voluntary standard are not published. This resulted in higher switching costs for producers in other Member States than for domestic producers.

**Analysis:** Similar to Example 7, paragraph 331, although the agreement is voluntary, it is very likely to become *de facto* standard industry practice since retailers are also being encouraged by the government to reduce packaging waste and the domestic manufacturers account for 65 % of sales of the product within the Member State. The fact that relevant producers in other Member States were not consulted resulted in the adoption of a standard which imposes higher switching costs on them compared to domestic producers. The agreement may therefore create barriers to entry and give rise to potential anti-competitive foreclosure effects on packaging suppliers, new entrants and importers – all of whom were not involved in the standard-setting process – as they may need to repackage the product to meet the *de facto* standard in order to sell in the Member State if the pack size used in other Member States does not meet the standard.

Unlike in Example 7, paragraph 331, the standardisation process has not been carried out in an open and transparent manner. In particular, new entrants, importers and packaging suppliers have not been given the opportunity to comment on the proposed standard and may not even be aware of it until a late stage, creating the possibility that they may not be able to change their production methods or switch suppliers quickly and effectively. Moreover, new entrants, importers and

packaging suppliers may not be able to compete if the standard is unknown or difficult to comply with. Of particular relevance here is the fact that the standard includes detailed specifications on the packaging materials to be used which, because of the closed nature of the consultation and the standard, importers and new entrants will struggle to comply with. The agreement may therefore restrict competition within the meaning of Article 101(1). This conclusion is not affected by the fact the agreement has been entered into in order to meet underlying environmental targets agreed with the Member State's government.

It is unlikely that the conditions of Article 101(3) will be fulfilled in this case. Although the agreement will give rise to similar quantitative efficiencies as arise under Example 7, paragraph 331, the closed and private nature of the standardisation agreement and the non-published detailed standard on the type of packaging material that must be used are unlikely to be indispensable to achieving the efficiencies under the agreement.

### 333. Non-binding and open standard terms used for contracts with end-users

#### Example 9

**Situation:** A trade association for electricity distributors establishes non-binding standard terms for the supply of electricity to end-users. The establishment of the standard terms is made in a transparent and non-discriminatory manner. The standard terms cover issues such as the specification of the point of consumption, the location of the connection point and the connection voltage, provisions on service reliability as well as the procedure for settling the accounts between the parties to the contract (for example, what happens if the customer does not provide the supplier with the readings of the measurement devices). The standard terms do not cover any issues relating to prices, that is to say, they contain no recommended prices or other clauses related to price. Any company active within the sector is free to use the standard terms as it sees fit. About 80 % of the contracts concluded with end-users in the relevant market are based on these standard terms.

**Analysis:** These standard terms are not likely to give rise to restrictive effects on competition within the meaning of Article 101(1). Even if they have become industry practice, they do not seem to have any appreciable negative impact on prices, product quality or variety.

### 334. Standard terms used for contracts between companies

#### Example 10

**Situation:** Construction companies in a certain Member State come together to establish non-binding and open standard terms and conditions for use by a contractor when submitting a quotation for construction work to a client. A form of quotation is included together with terms and conditions suitable for building or construction. Together, the documents create the construction contract. Clauses cover such matters as contract formation, general obligations of the contractor and the client and non-price related payment conditions (for example, a provision specifying the contractor's right to give notice to suspend the work for non-payment), insurance, duration, handover and defects, limitation of liability, termination, etc. In contrast to Example 9, paragraph 333, these standard terms would often be used between companies, one active upstream and one active downstream.

**Analysis:** These standard terms are not likely to have restrictive effects on competition within the meaning of Article 101(1). There would normally not be any significant limitation in the customer's choice of the end-product, namely the construction work. Other restrictive effects on competition do not seem likely. Indeed, several of the clauses above (handover and defects, termination, etc.) would often be regulated by law.

## 335. Standard terms facilitating the comparison of different companies' products

## Example 11

**Situation:** A national association for the insurance sector distributes non-binding standard policy conditions for house insurance contracts. The conditions give no indication of the level of insurance premiums, the amount of the cover or the excesses payable by the insured. They do not impose comprehensive cover including risks to which a significant number of policyholders are not simultaneously exposed and do not require the policyholders to obtain cover from the same insurer for different risks. While the majority of insurance companies use standard policy conditions, not all their contracts contain the same conditions as they are adapted to each client's individual needs and therefore there is no *de facto* standardisation of insurance products offered to consumers. The standard policy conditions enable consumers and consumer organisations to compare the policies offered by the different insurers. A consumer association is involved in the process of laying down the standard policy conditions. They are also available for use by new entrants, on a non-discriminatory basis.

**Analysis:** These standard policy conditions relate to the composition of the final insurance product. If the market conditions and other factors would show that there might be a risk of limitation in product variety as a result of insurance companies using such standard policy conditions, it is likely that such possible limitation would be outweighed by efficiencies such as facilitation of comparison by consumers of conditions offered by insurance companies. Those comparisons in turn facilitate switching between insurance companies and thus enhance competition. Furthermore the switching of providers, as well as market entry by competitors, constitutes an advantage for consumers. The fact that the consumer association has participated in the process could, in certain instances, increase the likelihood of those efficiencies which do not automatically benefit the consumers being passed on. The standard policy conditions are also likely to reduce transaction costs and facilitate entry for insurers on a different geographic and/or product markets. Moreover, the restrictions do not seem to go beyond what is necessary to achieve the identified efficiencies and competition would not be eliminated. Consequently, the criteria of Article 101(3) are likely to be fulfilled.

### **E.3 LICENSING AGREEMENTS FOR THE TRANSFER OF TECHNOLOGY**





**COMMISSION REGULATION (EC) No 772/2004**  
**of 27 April 2004**  
**on the application of Article 81(3) of the Treaty to categories of technology transfer agreements**  
**(Text with EEA relevance)**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 19/65/EEC of 2 March 1965 on application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices <sup>(1)</sup>, and in particular Article 1 thereof,

Having published a draft of this Regulation <sup>(2)</sup>,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

- (1) Regulation No 19/65/EEC empowers the Commission to apply Article 81(3) of the Treaty by Regulation to certain categories of technology transfer agreements and corresponding concerted practices to which only two undertakings are party which fall within Article 81(1).
- (2) Pursuant to Regulation No 19/65/EEC, the Commission has, in particular, adopted Regulation (EC) No 240/96 of 31 January 1996 on the application of Article 85(3) of the Treaty to certain categories of technology transfer agreements <sup>(3)</sup>.
- (3) On 20 December 2001 the Commission published an evaluation report on the transfer of technology block exemption Regulation (EC) No 240/96 <sup>(4)</sup>. This generated a public debate on the application of Regulation (EC) No 240/96 and on the application in general of Article 81(1) and (3) of the Treaty to technology transfer agreements. The response to the evaluation report from Member States and third parties has been generally in favour of reform of Community competition policy on technology transfer agreements. It is therefore appropriate to repeal Regulation (EC) No 240/96.

- (4) This Regulation should meet the two requirements of ensuring effective competition and providing adequate legal security for undertakings. The pursuit of these objectives should take account of the need to simplify the regulatory framework and its application. It is appropriate to move away from the approach of listing exempted clauses and to place greater emphasis on defining the categories of agreements which are exempted up to a certain level of market power and on specifying the restrictions or clauses which are not to be contained in such agreements. This is consistent with an economics-based approach which assesses the impact of agreements on the relevant market. It is also consistent with such an approach to make a distinction between agreements between competitors and agreements between non-competitors.

- (5) Technology transfer agreements concern the licensing of technology. Such agreements will usually improve economic efficiency and be pro-competitive as they can reduce duplication of research and development, strengthen the incentive for the initial research and development, spur incremental innovation, facilitate diffusion and generate product market competition.

- (6) The likelihood that such efficiency-enhancing and pro-competitive effects will outweigh any anti-competitive effects due to restrictions contained in technology transfer agreements depends on the degree of market power of the undertakings concerned and, therefore, on the extent to which those undertakings face competition from undertakings owning substitute technologies or undertakings producing substitute products.

- (7) This Regulation should only deal with agreements where the licensor permits the licensee to exploit the licensed technology, possibly after further research and development by the licensee, for the production of goods or services. It should not deal with licensing agreements for the purpose of subcontracting research and development. It should also not deal with licensing agreements to set up technology pools, that is to say, agreements for the pooling of technologies with the purpose of licensing the created package of intellectual property rights to third parties.

<sup>(1)</sup> OJ 36, 6.3.1965, p. 533/65. Regulation as last amended by Regulation (EC) No 1/2003 (OJ L 1, 4.1.2003, p. 1).

<sup>(2)</sup> OJ C 235, 1.10.2003, p. 10.

<sup>(3)</sup> OJ L 31, 9.2.1996, p. 2. Regulation as amended by the 2003 Act of Accession.

<sup>(4)</sup> COM(2001) 786 final.

- (8) For the application of Article 81(3) by regulation, it is not necessary to define those technology transfer agreements that are capable of falling within Article 81(1). In the individual assessment of agreements pursuant to Article 81(1), account has to be taken of several factors, and in particular the structure and the dynamics of the relevant technology and product markets.
- (9) The benefit of the block exemption established by this Regulation should be limited to those agreements which can be assumed with sufficient certainty to satisfy the conditions of Article 81(3). In order to attain the benefits and objectives of technology transfer, the benefit of this Regulation should also apply to provisions contained in technology transfer agreements that do not constitute the primary object of such agreements, but are directly related to the application of the licensed technology.
- (10) For technology transfer agreements between competitors it can be presumed that, where the combined share of the relevant markets accounted for by the parties does not exceed 20 % and the agreements do not contain certain severely anti-competitive restraints, they generally lead to an improvement in production or distribution and allow consumers a fair share of the resulting benefits.
- (11) For technology transfer agreements between non-competitors it can be presumed that, where the individual share of the relevant markets accounted for by each of the parties does not exceed 30 % and the agreements do not contain certain severely anti-competitive restraints, they generally lead to an improvement in production or distribution and allow consumers a fair share of the resulting benefits.
- (12) There can be no presumption that above these market-share thresholds technology transfer agreements do fall within the scope of Article 81(1). For instance, an exclusive licensing agreement between non-competing undertakings does often not fall within the scope of Article 81(1). There can also be no presumption that, above these market-share thresholds, technology transfer agreements falling within the scope of Article 81(1) will not satisfy the conditions for exemption. However, it can also not be presumed that they will usually give rise to objective advantages of such a character and size as to compensate for the disadvantages which they create for competition.
- (13) This Regulation should not exempt technology transfer agreements containing restrictions which are not indispensable to the improvement of production or distribution. In particular, technology transfer agreements containing certain severely anti-competitive restraints such as the fixing of prices charged to third parties should be excluded from the benefit of the block exemption established by this Regulation irrespective of the market shares of the undertakings concerned. In the case of such hardcore restrictions the whole agreement should be excluded from the benefit of the block exemption.
- (14) In order to protect incentives to innovate and the appropriate application of intellectual property rights, certain restrictions should be excluded from the block exemption. In particular exclusive grant back obligations for severable improvements should be excluded. Where such a restriction is included in a licence agreement only the restriction in question should be excluded from the benefit of the block exemption.
- (15) The market-share thresholds, the non-exemption of technology transfer agreements containing severely anti-competitive restraints and the excluded restrictions provided for in this Regulation will normally ensure that the agreements to which the block exemption applies do not enable the participating undertakings to eliminate competition in respect of a substantial part of the products in question.
- (16) In particular cases in which the agreements falling under this Regulation nevertheless have effects incompatible with Article 81(3), the Commission should be able to withdraw the benefit of the block exemption. This may occur in particular where the incentives to innovate are reduced or where access to markets is hindered.
- (17) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty <sup>(1)</sup> empowers the competent authorities of Member States to withdraw the benefit of the block exemption in respect of technology transfer agreements having effects incompatible with Article 81(3), where such effects are felt in their respective territory, or in a part thereof, and where such territory has the characteristics of a distinct geographic market. Member States must ensure that the exercise of this power of withdrawal does not prejudice the uniform application throughout the common market of the Community competition rules or the full effect of the measures adopted in implementation of those rules.
- (18) In order to strengthen supervision of parallel networks of technology transfer agreements which have similar restrictive effects and which cover more than 50 % of a given market, the Commission should be able to declare this Regulation inapplicable to technology transfer agreements containing specific restraints relating to the market concerned, thereby restoring the full application of Article 81 to such agreements.

<sup>(1)</sup> OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).

(19) This Regulation should cover only technology transfer agreements between a licensor and a licensee. It should cover such agreements even if conditions are stipulated for more than one level of trade, by, for instance, requiring the licensee to set up a particular distribution system and specifying the obligations the licensee must or may impose on resellers of the products produced under the licence. However, such conditions and obligations should comply with the competition rules applicable to supply and distribution agreements. Supply and distribution agreements concluded between a licensee and its buyers should not be exempted by this Regulation.

(20) This Regulation is without prejudice to the application of Article 82 of the Treaty,

HAS ADOPTED THIS REGULATION:

#### Article 1

#### Definitions

1. For the purposes of this Regulation, the following definitions shall apply:

- (a) 'agreement' means an agreement, a decision of an association of undertakings or a concerted practice;
- (b) 'technology transfer agreement' means a patent licensing agreement, a know-how licensing agreement, a software copyright licensing agreement or a mixed patent, know-how or software copyright licensing agreement, including any such agreement containing provisions which relate to the sale and purchase of products or which relate to the licensing of other intellectual property rights or the assignment of intellectual property rights, provided that those provisions do not constitute the primary object of the agreement and are directly related to the production of the contract products; assignments of patents, know-how, software copyright or a combination thereof where part of the risk associated with the exploitation of the technology remains with the assignor, in particular where the sum payable in consideration of the assignment is dependent on the turnover obtained by the assignee in respect of products produced with the assigned technology, the quantity of such products produced or the number of operations carried out employing the technology, shall also be deemed to be technology transfer agreements;
- (c) 'reciprocal agreement' means a technology transfer agreement where two undertakings grant each other, in the same or separate contracts, a patent licence, a know-how

licence, a software copyright licence or a mixed patent, know-how or software copyright licence and where these licences concern competing technologies or can be used for the production of competing products;

- (d) 'non-reciprocal agreement' means a technology transfer agreement where one undertaking grants another undertaking a patent licence, a know-how licence, a software copyright licence or a mixed patent, know-how or software copyright licence, or where two undertakings grant each other such a licence but where these licences do not concern competing technologies and cannot be used for the production of competing products;
- (e) 'product' means a good or a service, including both intermediary goods and services and final goods and services;
- (f) 'contract products' means products produced with the licensed technology;
- (g) 'intellectual property rights' includes industrial property rights, know-how, copyright and neighbouring rights;
- (h) 'patents' means patents, patent applications, utility models, applications for registration of utility models, designs, topographies of semiconductor products, supplementary protection certificates for medicinal products or other products for which such supplementary protection certificates may be obtained and plant breeder's certificates;
- (i) 'know-how' means a package of non-patented practical information, resulting from experience and testing, which is:
  - (i) secret, that is to say, not generally known or easily accessible,
  - (ii) substantial, that is to say, significant and useful for the production of the contract products, and
  - (iii) identified, that is to say, described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;
- (j) 'competing undertakings' means undertakings which compete on the relevant technology market and/or the relevant product market, that is to say:
  - (i) competing undertakings on the relevant technology market, being undertakings which license out competing technologies without infringing each others' intellectual property rights (actual competitors on the technology market); the relevant technology market includes technologies which are regarded by the licensee as interchangeable with or substitutable for the licensed technology, by reason of the technologies' characteristics, their royalties and their intended use,

- (ii) competing undertakings on the relevant product market, being undertakings which, in the absence of the technology transfer agreement, are both active on the relevant product and geographic market(s) on which the contract products are sold without infringing each others' intellectual property rights (actual competitors on the product market) or would, on realistic grounds, undertake the necessary additional investments or other necessary switching costs so that they could timely enter, without infringing each others' intellectual property rights, the(se) relevant product and geographic market(s) in response to a small and permanent increase in relative prices (potential competitors on the product market); the relevant product market comprises products which are regarded by the buyers as interchangeable with or substitutable for the contract products, by reason of the products' characteristics, their prices and their intended use;
  - (k) 'selective distribution system' means a distribution system where the licensor undertakes to license the production of the contract products only to licensees selected on the basis of specified criteria and where these licensees undertake not to sell the contract products to unauthorised distributors;
  - (l) 'exclusive territory' means a territory in which only one undertaking is allowed to produce the contract products with the licensed technology, without prejudice to the possibility of allowing within that territory another licensee to produce the contract products only for a particular customer where this second licence was granted in order to create an alternative source of supply for that customer;
  - (m) 'exclusive customer group' means a group of customers to which only one undertaking is allowed actively to sell the contract products produced with the licensed technology;
  - (n) 'severable improvement' means an improvement that can be exploited without infringing the licensed technology.
2. The terms 'undertaking', 'licensor' and 'licensee' shall include their respective connected undertakings.
- 'Connected undertakings' means:
- (a) undertakings in which a party to the agreement, directly or indirectly:
    - (i) has the power to exercise more than half the voting rights, or
    - (ii) has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or
    - (iii) has the right to manage the undertaking's affairs;
  - (b) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in (a);
  - (c) undertakings in which an undertaking referred to in (b) has, directly or indirectly, the rights or powers listed in (a);
  - (d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in (a);
  - (e) undertakings in which the rights or the powers listed in (a) are jointly held by:
    - (i) parties to the agreement or their respective connected undertakings referred to in (a) to (d), or
    - (ii) one or more of the parties to the agreement or one or more of their connected undertakings referred to in (a) to (d) and one or more third parties.

#### Article 2

### Exemption

Pursuant to Article 81(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 81(1) of the Treaty shall not apply to technology transfer agreements entered into between two undertakings permitting the production of contract products.

This exemption shall apply to the extent that such agreements contain restrictions of competition falling within the scope of Article 81(1). The exemption shall apply for as long as the intellectual property right in the licensed technology has not expired, lapsed or been declared invalid or, in the case of know-how, for as long as the know-how remains secret, except in the event where the know-how becomes publicly known as a result of action by the licensee, in which case the exemption shall apply for the duration of the agreement.

#### Article 3

### Market-share thresholds

1. Where the undertakings party to the agreement are competing undertakings, the exemption provided for in Article 2 shall apply on condition that the combined market share of the parties does not exceed 20 % on the affected relevant technology and product market.

2. Where the undertakings party to the agreement are not competing undertakings, the exemption provided for in Article 2 shall apply on condition that the market share of each of the parties does not exceed 30 % on the affected relevant technology and product market.

3. For the purposes of paragraphs 1 and 2, the market share of a party on the relevant technology market(s) is defined in terms of the presence of the licensed technology on the relevant product market(s). A licensor's market share on the relevant technology market shall be the combined market share on the relevant product market of the contract products produced by the licensor and its licensees.



## Article 4

**Hardcore restrictions**

1. Where the undertakings party to the agreement are competing undertakings, the exemption provided for in Article 2 shall not apply to agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

- (a) the restriction of a party's ability to determine its prices when selling products to third parties;
- (b) the limitation of output, except limitations on the output of contract products imposed on the licensee in a non-reciprocal agreement or imposed on only one of the licensees in a reciprocal agreement;
- (c) the allocation of markets or customers except:
  - (i) the obligation on the licensee(s) to produce with the licensed technology only within one or more technical fields of use or one or more product markets,
  - (ii) the obligation on the licensor and/or the licensee, in a non-reciprocal agreement, not to produce with the licensed technology within one or more technical fields of use or one or more product markets or one or more exclusive territories reserved for the other party,
  - (iii) the obligation on the licensor not to license the technology to another licensee in a particular territory,
  - (iv) the restriction, in a non-reciprocal agreement, of active and/or passive sales by the licensee and/or the licensor into the exclusive territory or to the exclusive customer group reserved for the other party,
  - (v) the restriction, in a non-reciprocal agreement, of active sales by the licensee into the exclusive territory or to the exclusive customer group allocated by the licensor to another licensee provided the latter was not a competing undertaking of the licensor at the time of the conclusion of its own licence,
  - (vi) the obligation on the licensee to produce the contract products only for its own use provided that the licensee is not restricted in selling the contract products actively and passively as spare parts for its own products,
  - (vii) the obligation on the licensee, in a non-reciprocal agreement, to produce the contract products only for a particular customer, where the licence was granted in order to create an alternative source of supply for that customer;

(d) the restriction of the licensee's ability to exploit its own technology or the restriction of the ability of any of the parties to the agreement to carry out research and development, unless such latter restriction is indispensable to prevent the disclosure of the licensed know-how to third parties.

2. Where the undertakings party to the agreement are not competing undertakings, the exemption provided for in Article 2 shall not apply to agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

- (a) the restriction of a party's ability to determine its prices when selling products to third parties, without prejudice to the possibility of imposing a maximum sale price or recommending a sale price, provided that it does not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;
- (b) the restriction of the territory into which, or of the customers to whom, the licensee may passively sell the contract products, except:
  - (i) the restriction of passive sales into an exclusive territory or to an exclusive customer group reserved for the licensor,
  - (ii) the restriction of passive sales into an exclusive territory or to an exclusive customer group allocated by the licensor to another licensee during the first two years that this other licensee is selling the contract products in that territory or to that customer group,
  - (iii) the obligation to produce the contract products only for its own use provided that the licensee is not restricted in selling the contract products actively and passively as spare parts for its own products,
  - (iv) the obligation to produce the contract products only for a particular customer, where the licence was granted in order to create an alternative source of supply for that customer,
  - (v) the restriction of sales to end-users by a licensee operating at the wholesale level of trade,
  - (vi) the restriction of sales to unauthorised distributors by the members of a selective distribution system;
- (c) the restriction of active or passive sales to end-users by a licensee which is a member of a selective distribution system and which operates at the retail level, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment.

3. Where the undertakings party to the agreement are not competing undertakings at the time of the conclusion of the agreement but become competing undertakings afterwards, paragraph 2 and not paragraph 1 shall apply for the full life of the agreement unless the agreement is subsequently amended in any material respect.

*Article 5***Excluded restrictions**

1. The exemption provided for in Article 2 shall not apply to any of the following obligations contained in technology transfer agreements:

- (a) any direct or indirect obligation on the licensee to grant an exclusive licence to the licensor or to a third party designated by the licensor in respect of its own severable improvements to or its own new applications of the licensed technology;
- (b) any direct or indirect obligation on the licensee to assign, in whole or in part, to the licensor or to a third party designated by the licensor, rights to its own severable improvements to or its own new applications of the licensed technology;
- (c) any direct or indirect obligation on the licensee not to challenge the validity of intellectual property rights which the licensor holds in the common market, without prejudice to the possibility of providing for termination of the technology transfer agreement in the event that the licensee challenges the validity of one or more of the licensed intellectual property rights.

2. Where the undertakings party to the agreement are not competing undertakings, the exemption provided for in Article 2 shall not apply to any direct or indirect obligation limiting the licensee's ability to exploit its own technology or limiting the ability of any of the parties to the agreement to carry out research and development, unless such latter restriction is indispensable to prevent the disclosure of the licensed know-how to third parties.

*Article 6***Withdrawal in individual cases**

1. The Commission may withdraw the benefit of this Regulation, pursuant to Article 29(1) of Regulation (EC) No 1/2003, where it finds in any particular case that a technology transfer agreement to which the exemption provided for in Article 2 applies nevertheless has effects which are incompatible with Article 81(3) of the Treaty, and in particular where:

- (a) access of third parties' technologies to the market is restricted, for instance by the cumulative effect of parallel networks of similar restrictive agreements prohibiting licensees from using third parties' technologies;
- (b) access of potential licensees to the market is restricted, for instance by the cumulative effect of parallel networks of similar restrictive agreements prohibiting licensors from licensing to other licensees;
- (c) without any objectively valid reason, the parties do not exploit the licensed technology.

2. Where, in any particular case, a technology transfer agreement to which the exemption provided for in Article 2 applies has effects which are incompatible with Article 81(3) of the

Treaty in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct geographic market, the competition authority of that Member State may withdraw the benefit of this Regulation, pursuant to Article 29(2) of Regulation (EC) No 1/2003, in respect of that territory, under the same circumstances as those set out in paragraph 1 of this Article.

*Article 7***Non-application of this Regulation**

1. Pursuant to Article 1a of Regulation No 19/65/EEC, the Commission may by regulation declare that, where parallel networks of similar technology transfer agreements cover more than 50 % of a relevant market, this Regulation is not to apply to technology transfer agreements containing specific restraints relating to that market.

2. A regulation pursuant to paragraph 1 shall not become applicable earlier than six months following its adoption.

*Article 8***Application of the market-share thresholds**

1. For the purposes of applying the market-share thresholds provided for in Article 3 the rules set out in this paragraph shall apply.

The market share shall be calculated on the basis of market sales value data. If market sales value data are not available, estimates based on other reliable market information, including market sales volumes, may be used to establish the market share of the undertaking concerned.

The market share shall be calculated on the basis of data relating to the preceding calendar year.

The market share held by the undertakings referred to in point (e) of the second subparagraph of Article 1(2) shall be apportioned equally to each undertaking having the rights or the powers listed in point (a) of the second subparagraph of Article 1(2).

2. If the market share referred to in Article 3(1) or (2) is initially not more than 20 % respectively 30 % but subsequently rises above those levels, the exemption provided for in Article 2 shall continue to apply for a period of two consecutive calendar years following the year in which the 20 % threshold or 30 % threshold was first exceeded.

*Article 9***Repeal**

Regulation (EC) No 240/96 is repealed.

References to the repealed Regulation shall be construed as references to this Regulation.

*Article 10***Transitional period**

The prohibition laid down in Article 81(1) of the Treaty shall not apply during the period from 1 May 2004 to 31 March 2006 in respect of agreements already in force on 30 April 2004 which do not satisfy the conditions for exemption provided for in this Regulation but which, on 30 April 2004, satisfied the conditions for exemption provided for in Regulation (EC) No 240/96.

*Article 11***Period of validity**

This Regulation shall enter into force on 1 May 2004.

It shall expire on 30 April 2014.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 27 April 2004.

*For the Commission*

Mario MONTI

*Member of the Commission*

## COMMISSION NOTICE

## Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements

(2004/C 101/02)

(Text with EEA relevance)

## I. INTRODUCTION

1. These guidelines set out the principles for the assessment of technology transfer agreements under Article 81 of the Treaty. Technology transfer agreements concern the licensing of technology where the licensor permits the licensee to exploit the licensed technology for the production of goods or services, as defined in Article 1(1)(b) of Commission Regulation (EC) No 773/2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements (the TTBER) <sup>(1)</sup>.

2. The purpose of the guidelines is to provide guidance on the application of the TTBER as well as on the application of Article 81 to technology transfer agreements that fall outside the scope of the TTBER. The TTBER and the guidelines are without prejudice to the possible parallel application of Article 82 of the Treaty to licensing agreements <sup>(2)</sup>.

3. The standards set forth in these guidelines must be applied in light of the circumstances specific to each case. This excludes a mechanical application. Each case must be assessed on its own facts and the guidelines must be applied reasonably and flexibly. Examples given serve as illustrations only and are not intended to be exhaustive. The Commission will keep under review the functioning of the TTBER and the guidelines in the new enforcement system created by Regulation 1/2003 <sup>(3)</sup> to consider whether changes need to be made.

4. The present guidelines are without prejudice to the interpretation of Article 81 and the TTBER that may be given by the Court of Justice and the Court of First Instance.

## II. GENERAL PRINCIPLES

## 1. Article 81 and intellectual property rights

5. The aim of Article 81 as a whole is to protect competition on the market with a view to promoting consumer welfare and an efficient allocation of resources. Article 81(1) prohibits all agreements and concerted practices between undertakings and decisions by associations of undertakings <sup>(4)</sup> which may affect trade between Member States <sup>(5)</sup> and which have as their object or effect the prevention, restriction or distortion of competition <sup>(6)</sup>. As an exception to this rule Article 81(3) provides that the prohibition contained in Article

81(1) may be declared inapplicable in the case of agreements between undertakings which contribute to improving the production or distribution of products or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits and which do not impose restrictions which are not indispensable to the attainment of these objectives and do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products concerned.

6. Intellectual property laws confer exclusive rights on holders of patents, copyright, design rights, trademarks and other legally protected rights. The owner of intellectual property is entitled under intellectual property laws to prevent unauthorised use of his intellectual property and to exploit it, *inter alia*, by licensing it to third parties. Once a product incorporating an intellectual property right has been put on the market inside the EEA by the holder or with his consent, the intellectual property right is exhausted in the sense that the holder can no longer use it to control the sale of the product <sup>(7)</sup> (principle of Community exhaustion). The right holder has no right under intellectual property laws to prevent sales by licensees or buyers of such products incorporating the licensed technology <sup>(8)</sup>. The principle of Community exhaustion is in line with the essential function of intellectual property rights, which is to grant the holder the right to exclude others from exploiting his intellectual property without his consent.

7. The fact that intellectual property laws grant exclusive rights of exploitation does not imply that intellectual property rights are immune from competition law intervention. Articles 81 and 82 are in particular applicable to agreements whereby the holder licenses another undertaking to exploit his intellectual property rights <sup>(9)</sup>. Nor does it imply that there is an inherent conflict between intellectual property rights and the Community competition rules. Indeed, both bodies of law share the same basic objective of promoting consumer welfare and an efficient allocation of resources. Innovation constitutes an essential and dynamic component of an open and competitive market economy. Intellectual property rights promote dynamic competition by encouraging undertakings to invest in developing new or improved products and processes. So does competition by putting pressure on undertakings to innovate. Therefore, both intellectual property rights and competition are necessary to promote innovation and ensure a competitive exploitation thereof.



8. In the assessment of licence agreements under Article 81 it must be kept in mind that the creation of intellectual property rights often entails substantial investment and that it is often a risky endeavour. In order not to reduce dynamic competition and to maintain the incentive to innovate, the innovator must not be unduly restricted in the exploitation of intellectual property rights that turn out to be valuable. For these reasons the innovator should normally be free to seek compensation for successful projects that is sufficient to maintain investment incentives, taking failed projects into account. Technology licensing may also require the licensee to make significant sunk investments in the licensed technology and production assets necessary to exploit it. Article 81 cannot be applied without considering such *ex ante* investments made by the parties and the risks relating thereto. The risk facing the parties and the sunk investment that must be committed may thus lead to the agreement falling outside Article 81(1) or fulfilling the conditions of Article 81(3), as the case may be, for the period of time required to recoup the investment.
  9. In assessing licensing agreements under Article 81, the existing analytical framework is sufficiently flexible to take due account of the dynamic aspects of technology licensing. There is no presumption that intellectual property rights and licence agreements as such give rise to competition concerns. Most licence agreements do not restrict competition and create pro-competitive efficiencies. Indeed, licensing as such is pro-competitive as it leads to dissemination of technology and promotes innovation. In addition, even licence agreements that do restrict competition may often give rise to pro-competitive efficiencies, which must be considered under Article 81(3) and balanced against the negative effects on competition <sup>(10)</sup>. The great majority of licence agreements are therefore compatible with Article 81.
- 2. The general framework for applying Article 81**
10. Article 81(1) prohibits agreements which have as their object or effect the restriction of competition. Article 81(1) applies both to restrictions of competition between the parties to an agreement and to restrictions of competition between any of the parties and third parties.
  11. The assessment of whether a licence agreement restricts competition must be made within the actual context in which competition would occur in the absence of the agreement with its alleged restrictions <sup>(11)</sup>. In making this assessment it is necessary to take account of the likely impact of the agreement on inter-technology competition (i.e. competition between undertakings using competing technologies) and on intra-technology competition (i.e. competition between undertakings using the same technology) <sup>(12)</sup>. Article 81(1) prohibits restrictions of both inter-technology competition and intra-technology competition. It is therefore necessary to assess to what extent the agreement affects or is likely to affect these two aspects of competition on the market.
  12. The following two questions provide a useful framework for making this assessment. The first question relates to the impact of the agreement on inter-technology competition while the second question relates to the impact of the agreement on intra-technology competition. As restraints may be capable of affecting both inter-technology competition and intra-technology competition at the same time, it may be necessary to analyse a restraint in the light of both questions before it can be concluded whether or not competition within the meaning of Article 81(1) is restricted:
    - (a) Does the licence agreement restrict actual or potential competition that would have existed without the contemplated agreement? If so, the agreement may be caught by Article 81(1). In making this assessment it is necessary to take into account competition between the parties and competition from third parties. For instance, where two undertakings established in different Member States cross licence competing technologies and undertake not to sell products in each other's home markets, (potential) competition that existed prior to the agreement is restricted. Similarly, where a licensor imposes obligations on his licensees not to use competing technologies and these obligations foreclose third party technologies, actual or potential competition that would have existed in the absence of the agreement is restricted.
    - (b) Does the agreement restrict actual or potential competition that would have existed in the absence of the contractual restraint(s)? If so, the agreement may be caught by Article 81(1). For instance, where a licensor restricts its licensees from competing with each other, (potential) competition that could have existed between the licensees absent the restraints is restricted. Such restrictions include vertical price fixing and territorial or customer sales restrictions between licensees. However, certain restraints may in certain cases not be caught by Article 81(1) when the restraint is objectively necessary for the existence of an agreement of that type or that nature <sup>(13)</sup>. Such exclusion of the application of Article 81(1) can only be made on the basis of objective factors external to the parties themselves and not the subjective views and characteristics of the parties. The question is not whether the parties in their particular situation would not have accepted to conclude a less restrictive agreement, but whether, given the nature of the agreement and the characteristics of the market, a less restrictive agreement would not have been concluded by undertakings in a similar setting. For instance, territorial restraints in an agreement between non-competitors may fall outside Article 81(1) for a certain duration if the restraints are objectively necessary for a licensee to penetrate a new market. Similarly, a prohibition imposed on all licensees not to sell to certain categories of end users may not be restrictive of competition if such a restraint is objectively necessary for reasons of safety or health related to the dangerous nature of the product in question.

Claims that in the absence of a restraint the supplier would have resorted to vertical integration are not sufficient. Decisions on whether or not to vertically integrate depend on a broad range of complex economic factors, a number of which are internal to the undertaking concerned.

13. In the application of the analytical framework set out in the previous paragraph it must be taken into account that Article 81(1) distinguishes between those agreements that have a restriction of competition as their object and those agreements that have a restriction of competition as their effect. An agreement or contractual restraint is only prohibited by Article 81(1) if its object or effect is to restrict inter-technology competition and/or intra-technology competition.
14. Restrictions of competition by object are those that by their very nature restrict competition. These are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential for negative effects on competition that it is not necessary for the purposes of applying Article 81(1) to demonstrate any actual effects on the market<sup>(14)</sup>. Moreover, the conditions of Article 81(3) are unlikely to be fulfilled in the case of restrictions by object. The assessment of whether or not an agreement has as its object a restriction of competition is based on a number of factors. These factors include, in particular, the content of the agreement and the objective aims pursued by it. It may also be necessary to consider the context in which it is (to be) applied or the actual conduct and behaviour of the parties on the market<sup>(15)</sup>. In other words, an examination of the facts underlying the agreement and the specific circumstances in which it operates may be required before it can be concluded whether a particular restriction constitutes a hardcore restriction of competition. The way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement does not contain an express provision to that effect. Evidence of subjective intent on the part of the parties to restrict competition is a relevant factor but not a necessary condition. For licence agreements, the Commission considers that the restrictions covered by the list of hardcore restrictions of competition contained in Article 4 of the TTBER are restrictive by their very object.
15. If an agreement is not restrictive of competition by object it is necessary to examine whether it has restrictive effects on competition. Account must be taken of both actual and potential effects<sup>(16)</sup>. In other words the agreement must have likely anti-competitive effects. For licence agreements to be restrictive of competition by effect they must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability. The likely negative effects on competition must be appreciable<sup>(17)</sup>. Appreciable anti-competitive effects are likely to occur when at least one of the parties has or obtains some degree of market power and the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power. Market power is the ability to maintain prices above competitive levels or to maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a not insignificant period of time. The degree of market power normally required for a finding of an infringement under Article 81(1) is less than the degree of market power required for a finding of dominance under Article 82.
16. For the purposes of analysing restrictions of competition by effect it is normally necessary to define the relevant market and to examine and assess, *inter alia*, the nature of the products and technologies concerned, the market position of the parties, the market position of competitors, the market position of buyers, the existence of potential competitors and the level of entry barriers. In some cases, however, it may be possible to show anti-competitive effects directly by analysing the conduct of the parties to the agreement on the market. It may for example be possible to ascertain that an agreement has led to price increases.
17. Licence agreements, however, also have substantial pro-competitive potential. Indeed, the vast majority of licence agreements are pro-competitive. Licence agreements may promote innovation by allowing innovators to earn returns to cover at least part of their research and development costs. Licence agreements also lead to a dissemination of technologies, which may create value by reducing the production costs of the licensee or by enabling him to produce new or improved products. Efficiencies at the level of the licensee often stem from a combination of the licensor's technology with the assets and technologies of the licensee. Such integration of complementary assets and technologies may lead to a cost/output configuration that would not otherwise be possible. For instance, the combination of an improved technology of the licensor with more efficient production or distribution assets of the licensee may reduce production costs or lead to the production of a higher quality product. Licensing may also serve the pro-competitive purpose of removing obstacles to the development and exploitation of the licensee's own technology. In particular in sectors where large numbers of patents are prevalent licensing often occurs in order to create design freedom by removing the risk of infringement claims by the licensor. When the licensor agrees not to invoke his intellectual property rights to prevent the sale of the licensee's products, the agreement removes an obstacle to the sale of the licensee's product and thus generally promotes competition.

18. In cases where a licence agreement is caught by Article 81(1) the pro-competitive effects of the agreement must be balanced against its restrictive effects in the context of Article 81(3). When all four conditions of Article 81(3) are satisfied, the restrictive licence agreement in question is valid and enforceable, no prior decision to that effect being required<sup>(18)</sup>. Hardcore restrictions of competition only fulfil the conditions of Article 81(3) in exceptional circumstances. Such agreements generally fail (at least) one of the first two conditions of Article 81(3). They generally do not create objective economic benefits or benefits for consumers. Moreover, these types of agreements generally also fail the indispensability test under the third condition. For example, if the parties fix the price at which the products produced under the licence must be sold, this will generally lead to a lower output and a misallocation of resources and higher prices for consumers. The price restriction is also not indispensable to achieve the possible efficiencies resulting from the availability to both competitors of the two technologies.

### 3. Market definition

19. The Commission's approach to defining the relevant market is laid down in its market definition guidelines<sup>(19)</sup>. The present guidelines only address aspects of market definition that are of particular importance in the field of technology licensing.

20. Technology is an input, which is integrated either into a product or a production process. Technology licensing can therefore affect competition both in input markets and in output markets. For instance, an agreement between two parties which sell competing products and which cross license technologies relating to the production of these products may restrict competition on the product market concerned. It may also restrict competition on the market for technology and possibly also on other input markets. For the purposes of assessing the competitive effects of licence agreements it may therefore be necessary to define relevant goods and service markets (product markets) as well as technology markets<sup>(20)</sup>. The term 'product market' used in Article 3 of the TTBER refers to relevant goods and service markets in both their geographic and product dimension. As is clear from Article 1(1)(j) of the TTBER, the term is used merely to distinguish relevant goods and service markets from relevant technology markets.

21. The TTBER and these guidelines are concerned with effects both on product markets for final products and on product markets for intermediate products. The relevant product market includes products which are regarded by the buyers as interchangeable with or substitutable for the contract products incorporating the

licensed technology, by reason of the products' characteristics, their prices and their intended use.

22. Technology markets consist of the licensed technology and its substitutes, i.e. other technologies which are regarded by the licensees as interchangeable with or substitutable for the licensed technology, by reason of the technologies' characteristics, their royalties and their intended use. The methodology for defining technology markets follows the same principles as the definition of product markets. Starting from the technology which is marketed by the licensor, one needs to identify those other technologies to which licensees could switch in response to a small but permanent increase in relative prices, i.e. the royalties. An alternative approach is to look at the market for products incorporating the licensed technology (cf. paragraph below).

23. Once relevant markets have been defined, market shares can be assigned to the various sources of competition in the market and used as an indication of the relative strength of market players. In the case of technology markets one way to proceed is to calculate market shares on the basis of each technology's share of total licensing income from royalties, representing a technology's share of the market where competing technologies are licensed. However, this may often be a mere theoretical and not a practical way to proceed because of lack of clear information on royalties etc. An alternative approach, which is the one used in Article 3(3) of the TTBER, is to calculate market shares on the technology market on the basis of sales of products incorporating the licensed technology on downstream product markets (see paragraph 70 below). Under this approach all sales on the relevant product market are taken into account, irrespective of whether the product incorporates a technology that is being licensed. In the case of technology markets the approach of Article 3(3) to take into account technologies that are (only) being used in-house, is justified. Indeed, this approach is in general a good indicator of the strength of the technology. First, it captures any potential competition from undertakings that are producing with their own technology and that are likely to start licensing in the event of a small but permanent increase in the price for licenses. Secondly, even where it is unlikely that other technology owners would start licensing, the licensor does not necessarily have market power on the technology market even if he has a high share of licensing income. If the downstream product market is competitive, competition at this level may effectively constrain the licensor. An increase in royalties upstream affects the costs of the licensee, making him less competitive, causing him to lose sales. A technology's market share on the product market also captures this element and is thus normally a good indicator of licensor market power. In individual cases outside the safe harbour of the TTBER it may be necessary, where practically possible, to apply both of the described approaches in order to assess more accurately the market strength of the licensor.

24. Moreover, outside the safe harbour of the TTBER it must also be taken into account that market share may not always be a good indication of the relative strength of available technologies. The Commission will therefore, *inter alia*, also have regard to the number of independently controlled technologies available in addition to the technologies controlled by the parties to the agreement that may be substitutable for the licensed technology at a comparable cost to the user (see paragraph 131 below).
25. Some licence agreements may affect innovation markets. In analysing such effects, however, the Commission will normally confine itself to examining the impact of the agreement on competition within existing product and technology markets<sup>(21)</sup>. Competition on such markets may be affected by agreements that delay the introduction of improved products or new products that over time will replace existing products. In such cases innovation is a source of potential competition which must be taken into account when assessing the impact of the agreement on product markets and technology markets. In a limited number of cases, however, it may be useful and necessary to also define innovation markets. This is particularly the case where the agreement affects innovation aiming at creating new products and where it is possible at an early stage to identify research and development poles<sup>(22)</sup>. In such cases it can be analysed whether after the agreement there will be a sufficient number of competing research and development poles left for effective competition in innovation to be maintained.
- 4. The distinction between competitors and non-competitors**
26. In general, agreements between competitors pose a greater risk to competition than agreements between non-competitors. However, competition between undertakings that use the same technology (intra-technology competition between licensees) constitutes an important complement to competition between undertakings that use competing technologies (inter-technology competition). For instance, intra-technology competition may lead to lower prices for the products incorporating the technology in question, which may not only produce direct and immediate benefits for consumers of these products, but also spur further competition between undertakings that use competing technologies. In the context of licensing it must also be taken into account that licensees are selling their own product. They are not re-selling a product supplied by another undertaking. There may thus be greater scope for product differentiation and quality-based competition between licensees than in the case of vertical agreements for the resale of products.
27. In order to determine the competitive relationship between the parties it is necessary to examine whether the parties would have been actual or potential competitors in the absence of the agreement. If without the agreement the parties would not have been actual or potential competitors in any relevant market affected by the agreement they are deemed to be non-competitors.
28. Where the licensor and the licensee are both active on the same product market or the same technology market without one or both parties infringing the intellectual property rights of the other party, they are actual competitors on the market concerned. The parties are deemed to be actual competitors on the technology market if the licensee is already licensing out his technology and the licensor enters the technology market by granting a license for a competing technology to the licensee.
29. The parties are considered to be potential competitors on the product market if in the absence of the agreement and without infringing the intellectual property rights of the other party it is likely that they would have undertaken the necessary additional investment to enter the relevant market in response to a small but permanent increase in product prices. In order to constitute a realistic competitive constraint entry has to be likely to occur within a short period. Normally a period of one to two years is appropriate. However, in individual cases longer periods can be taken into account. The period of time needed for undertakings already on the market to adjust their capacities can be used as a yardstick to determine this period. For instance, the parties are likely to be considered potential competitors on the product market where the licensee produces on the basis of its own technology in one geographic market and starts producing in another geographic market on the basis of a licensed competing technology. In such circumstances, it is likely that the licensee would have been able to enter the second geographic market on the basis of its own technology, unless such entry is precluded by objective factors, including the existence of blocking patents (see paragraph 32 below).
30. The parties are considered to be potential competitors on the technology market where they own substitutable technologies if in the specific case the licensee is not licensing his own technology, provided that he would be likely to do so in the event of a small but permanent increase in technology prices. However, for the application of the TTBER potential competition on the technology market is not taken into account (see paragraph 66 below).

31. In some cases the parties may become competitors subsequent to the conclusion of the agreement because the licensee develops and starts exploiting a competing technology. In such cases it must be taken into account that the parties were non-competitors at the time of conclusion of the agreement and that the agreement was concluded in that context. The Commission will therefore mainly focus on the impact of the agreement on the licensee's ability to exploit his own (competing) technology. In particular, the list of hardcore restrictions applying to agreements between competitors will not be applied to such agreements unless the agreement is subsequently amended in any material respect after the parties have become competitors (cf. Article 4(3) of the TTBER). The undertakings party to an agreement may also become competitors subsequent to the conclusion of the agreement where the licensee was already active on the product market prior to the licence and where the licensor subsequently enters the product market either on the basis of the licensed technology or a new technology. Also in this case the hardcore list relevant for agreements between non-competitors will continue to apply to the agreement unless the agreement is subsequently amended in any material respect (cf. article 4(3) of the TTBER).

32. If the parties own technologies that are in a one-way or two-way blocking position, the parties are considered to be non-competitors on the technology market. A one-way blocking position exists when a technology cannot be exploited without infringing upon another technology. This is for instance the case where one patent covers an improvement of a technology covered by another patent. In that case the exploitation of the improvement patent pre-supposes that the holder obtains a licence to the basic patent. A two-way blocking position exists where neither technology can be exploited without infringing upon the other technology and where the holders thus need to obtain a licence or a waiver from each other. In assessing whether a blocking position exists the Commission will rely on objective factors as opposed to the subjective views of the parties. Particularly convincing evidence of the existence of a blocking position is required where the parties may have a common interest in claiming the existence of a blocking position in order to be qualified as non-competitors, for instance where the claimed two-way blocking position concerns technologies that are technological substitutes. Relevant evidence includes court decisions including injunctions and opinions of independent experts. In the latter case the Commission will, in particular, closely examine how the expert has been selected. However, also other convincing evidence, including expert evidence from the parties that they have or had good and valid reasons to believe that a blocking position exists or existed, can be relevant to substantiate the existence of a blocking position.

33. In some cases it may also be possible to conclude that while the licensor and the licensee produce competing products, they are non-competitors on the relevant

product market and the relevant technology market because the licensed technology represents such a drastic innovation that the technology of the licensee has become obsolete or uncompetitive. In such cases the licensor's technology either creates a new market or excludes the licensee's technology from the market. Often, however, it is not possible to come to this conclusion at the time the agreement is concluded. It is usually only when the technology or the products incorporating it have been available to consumers for some time that it becomes apparent that the older technology has become obsolete or uncompetitive. For instance, when CD technology was developed and players and discs were put on the market, it was not obvious that this new technology would replace LP technology. This only became apparent some years later. The parties will therefore be considered to be competitors if at the time of the conclusion of the agreement it is not obvious that the licensee's technology is obsolete or uncompetitive. However, given that both Articles 81(1) and Article 81(3) must be applied in light of the actual context in which the agreement occurs, the assessment is sensitive to material changes in the facts. The classification of the relationship between the parties will therefore change into a relationship of non-competitors, if at a later point in time the licensee's technology becomes obsolete or uncompetitive on the market.

### III. APPLICATION OF THE BLOCK EXEMPTION REGULATION

#### 1. The effects of the Block Exemption Regulation

34. Technology transfer agreements that fulfil the conditions set out in the TTBER are block exempted from the prohibition rule contained in Article 81(1). Block exempted agreements are legally valid and enforceable. Such agreements can only be prohibited for the future and only upon withdrawal of the block exemption by the Commission or a Member State competition authority. Block exempted agreements cannot be prohibited under Article 81 by national courts in the context of private litigation.

35. Block exemption of categories of technology transfer agreements is based on the presumption that such agreements — to the extent that they are caught by Article 81(1) — fulfil the four conditions laid down in Article 81(3). It is thus presumed that the agreements give rise to economic efficiencies, that the restrictions contained in the agreements are indispensable to the attainment of these efficiencies, that consumers within the affected markets receive a fair share of the efficiency gains and that the agreements do not afford the undertakings concerned the possibility of eliminating

competition in respect of a substantial part of the products in question. The market share thresholds (Article 3), the hardcore list (Article 4) and the excluded restrictions (Article 5) set out in the TTBER aim at ensuring that only restrictive agreements that can reasonably be presumed to fulfil the four conditions of Article 81(3) are block exempted.

36. As set out in section IV below, many licence agreements fall outside Article 81(1), either because they do not restrict competition at all or because the restriction of competition is not appreciable<sup>(23)</sup>. To the extent that such agreements would anyhow fall within the scope of the TTBER, there is no need to determine whether they are caught by Article 81(1)<sup>(24)</sup>.

37. Outside the scope of the block exemption it is relevant to examine whether in the individual case the agreement is caught by Article 81(1) and if so whether the conditions of Article 81(3) are satisfied. There is no presumption that technology transfer agreements falling outside the block exemption are caught by Article 81(1) or fail to satisfy the conditions of Article 81(3). In particular, the mere fact that the market shares of the parties exceed the market share thresholds set out in Article 3 of the TTBER is not a sufficient basis for finding that the agreement is caught by Article 81(1). Individual assessment of the likely effects of the agreement is required. It is only when agreements contain hardcore restrictions of competition that it can normally be presumed that they are prohibited by Article 81.

## 2. Scope and duration of the Block Exemption Regulation

### 2.1. Agreements between two parties

38. According to Article 2(1) of the TTBER, the Regulation covers technology transfer agreements 'between two undertakings'. Technology transfer agreements between more than two undertakings are not covered by the TTBER<sup>(25)</sup>. The decisive factor in terms of distinguishing between agreements between two undertakings and multiparty agreements is whether the agreement in question is concluded between more than two undertakings.

39. Agreements concluded by two undertakings fall within the scope of the TTBER even if the agreement stipulates conditions for more than one level of trade. For instance, the TTBER applies to a licence agreement concerning not only the production stage but also the distribution stage, stipulating the obligations that the licensee must or may impose on resellers of the products produced under the licence<sup>(26)</sup>.

40. Licence agreements concluded between more than two undertakings often give rise to the same issues as licence agreements of the same nature concluded between two undertakings. In its individual assessment of licence agreements which are of the same nature as those covered by the block exemption but which are concluded between more than two undertakings, the Commission will apply by analogy the principles set out in the TTBER.

### 2.2. Agreements for the production of contract products

41. It follows from Article 2 that for licence agreements to be covered by the TTBER they must concern 'the production of contract products', i.e. products incorporating or produced with the licensed technology. In other words, to be covered by the TTBER the licence must permit the licensee to exploit the licensed technology for production of goods or services (see recital 7 of the TTBER). The TTBER does not cover technology pools. The notion of technology pools covers agreements whereby two or more parties agree to pool their respective technologies and license them as a package. The notion of technology pools also covers arrangements whereby two or more undertakings agree to license a third party and authorise him to license on the package of technologies. Technology pools are dealt with in section IV.4 below.

42. The TTBER applies to licence agreements for the production of contract products whereby the licensee is also permitted to sublicense the licensed technology to third parties provided, however, that the production of contract products constitutes the primary object of the agreement. Conversely, the TTBER does not apply to agreements that have sublicensing as their primary object. However, the Commission will apply by analogy the principles set out in the TTBER and these guidelines to such 'master licensing' agreements between licensor and licensee. Agreements between the licensee and sub-licensees are covered by the TTBER.

43. The term 'contract products' encompasses goods and services produced with the licensed technology. This is the case both where the licensed technology is used in the production process and where it is incorporated into the product itself. In these guidelines the term 'products incorporating the licensed technology' covers both situations. The TTBER applies in all cases where technology is licensed for the purposes of producing goods and services. It is sufficient in this respect that the licensor undertakes not to exercise his intellectual property rights against the licensee. Indeed, the essence of a pure patent licence is the right to operate inside the scope of the exclusive right of the patent. It follows that the TTBER also covers so-called non-assertion agreements and settlement agreements whereby the licensor permits the licensee to produce within the scope of the patent.

44. The TTBER covers 'subcontracting' whereby the licensor licenses technology to the licensee who undertakes to produce certain products on the basis thereof exclusively for the licensor. Subcontracting may also involve the supply of equipment by the licensor to be used in the production of the goods and services covered by the agreement. For the latter type of subcontracting to be covered by the TTBER, the licensed technology and not the supplied equipment must constitute the primary object of the agreement. Subcontracting is also covered by the Commission's Notice concerning the assessment of certain subcontracting agreements in relation to Article 81(1) of the Treaty <sup>(27)</sup>. According to this notice, which remains applicable, subcontracting agreements whereby the subcontractor undertakes to produce certain products exclusively for the contractor generally fall outside Article 81(1). However, other restrictions imposed on the subcontractor such as the obligation not to conduct or exploit his own research and development may be caught by Article 81 <sup>(28)</sup>.
45. The TTBER also applies to agreements whereby the licensee must carry out development work before obtaining a product or a process that is ready for commercial exploitation, provided that a contract product has been identified. Even if such further work and investment is required, the object of the agreement is the production of an identified contract product. On the other hand, the TTBER and the guidelines do not cover agreements whereby a technology is licensed for the purpose of enabling the licensee to carry out further research and development in various fields. For instance, the TTBER and the guidelines do not cover the licensing of a technological research tool used in the process of further research activity. The framework of the TTBER and the guidelines is based on the premise that there is a direct link between the licensed technology and an identified contract product. In cases where no such link exists the main object of the agreement is research and development as opposed to bringing a particular product to the market; in that case the analytical framework of the TTBER and the guidelines may not be appropriate. For the same reasons the TTBER and the guidelines do not cover research and development sub-contracting whereby the licensee undertakes to carry out research and development in the field of the licensed technology and to hand back the improved technology package to the licensor. The main object of such agreements is the provision of research and development services aimed at improving the technology as opposed to the production of goods and services on the basis of the licensed technology.
46. The TTBER and these guidelines cover agreements for the transfer of technology. According to Article 1(1)(b) and (h) of the TTBER the concept of 'technology' covers patents and patent applications, utility models and applications for utility models, design rights, plant breeders rights, topographies of semiconductor products, supplementary protection certificates for medicinal products or other products for which such supplementary protection certificates may be obtained, software copyright, and know-how. The licensed technology should allow the licensee with or without other inputs to produce the contract products.
47. Know-how is defined in Article 1(1)(i) as a package of non-patented practical information, resulting from experience and testing, which is secret, substantial and identified. 'Secret' means that the know-how is not generally known or easily accessible. 'Substantial' means that the know-how includes information which is significant and useful for the production of the products covered by the licence agreement or the application of the process covered by the licence agreement. In other words, the information must significantly contribute to or facilitate the production of the contract products. In cases where the licensed know-how relates to a product as opposed to a process, this condition implies that the know-how is useful for the production of the contract product. This condition is not satisfied where the contract product can be produced on the basis of freely available technology. However, the condition does not require that the contract product is of higher value than products produced with freely available technology. In the case of process technologies, this condition implies that the know-how is useful in the sense that it can reasonably be expected at the date of conclusion of the agreement to be capable of significantly improving the competitive position of the licensee, for instance by reducing his production costs. 'Identified' means that it is possible to verify that the licensed know-how fulfils the criteria of secrecy and substantiality. This condition is satisfied where the licensed know-how is described in manuals or other written form. However, in some cases this may not be reasonably possible. The licensed know-how may consist of practical knowledge possessed by the licensor's employees. For instance, the licensor's employees may possess secret and substantial knowledge about a certain production process which is passed on to the licensee in the form of training of the licensee's employees. In such cases it is sufficient to describe in the agreement the general nature of the know-how and to list the employees that will be or have been involved in passing it on to the licensee.
48. The concept of 'transfer' implies that technology must flow from one undertaking to another. Such transfers normally take the form of licensing whereby the licensor grants the licensee the right to use his technology against payment of royalties. It can also take the form of sub-licensing, whereby a licensee, having been authorised to do so by the licensor, grants licenses to third parties (sub-licensees) for the exploitation of the technology.

### 2.3. The concept of technology transfer agreements

49. The TTBER only applies to agreements that have as their primary object the transfer of technology as defined in that Regulation as opposed to the purchase of goods and services or the licensing of other types of intellectual property. Agreements containing provisions relating to the purchase and sale of products are only covered by the TTBER to the extent that those provisions do not constitute the primary object of the agreement and are directly related to the application of the licensed technology. This is likely to be the case where the tied products take the form of equipment or process input which is specifically tailored to efficiently exploit the licensed technology. If, on the other hand, the product is simply another input into the final product, it must be carefully examined whether the licensed technology constitutes the primary object of the agreement. For instance, in cases where the licensee is already manufacturing a final product on the basis of another technology, the licence must lead to a significant improvement of the licensee's production process, exceeding the value of the product purchased from the licensor. The requirement that the tied products must be related to the licensing of technology implies that the TTBER does not cover the purchase of products that have no relation with the products incorporating the licensed technology. This is for example the case where the tied product is not intended to be used with the licensed product, but relates to an activity on a separate product market.
50. The TTBER only covers the licensing of other types of intellectual property such as trademarks and copyright, other than software copyright, to the extent that they are directly related to the exploitation of the licensed technology and do not constitute the primary object of the agreement. This condition ensures that agreements covering other types of intellectual property rights are only block exempted to the extent that these other intellectual property rights serve to enable the licensee to better exploit the licensed technology. The licensor may for instance authorise the licensee to use his trademark on the products incorporating the licensed technology. The trademark licence may allow the licensee to better exploit the licensed technology by allowing consumers to make an immediate link between the product and the characteristics imputed to it by the licensed technology. An obligation on the licensee to use the licensor's trademark may also promote the dissemination of technology by allowing the licensor to identify himself as the source of the underlying technology. However, where the value of the licensed technology to the licensee is limited because he already employs an identical or very similar technology and the main object of the agreement is the trademark, the TTBER does not apply <sup>(29)</sup>.
51. The licensing of copyright for the purpose of reproduction and distribution of the protected work, i.e. the production of copies for resale, is considered to be similar to technology licensing. Since such licence agreements relate to the production and sale of products on the basis of an intellectual property right, they are considered to be of a similar nature as technology transfer agreements and normally raise comparable issues. Although the TTBER does not cover copyright other than software copyright, the Commission will as a general rule apply the principles set out in the TTBER and these guidelines when assessing such licensing of copyright under Article 81.
52. On the other hand, the licensing of rights in performances and other rights related to copyright is considered to raise particular issues and it may not be warranted to assess such licensing on the basis of the principles developed in these guidelines. In the case of the various rights related to performances value is created not by the reproduction and sale of copies of a product but by each individual performance of the protected work. Such exploitation can take various forms including the performance, showing or the renting of protected material such as films, music or sporting events. In the application of Article 81 the specificities of the work and the way in which it is exploited must be taken into account <sup>(30)</sup>. For instance, resale restrictions may give rise to less competition concerns whereas particular concerns may arise where licensors impose on their licensees to extend to each of the licensors more favourable conditions obtained by one of them. The Commission will therefore not apply the TTBER and the present guidelines by way of analogy to the licensing of these other rights.
53. The Commission will also not extend the principles developed in the TTBER and these guidelines to trademark licensing. Trademark licensing often occurs in the context of distribution and resale of goods and services and is generally more akin to distribution agreements than technology licensing. Where a trademark licence is directly related to the use, sale or resale of goods and services and does not constitute the primary object of the agreement, the licence agreement is covered by Commission Regulation (EC) No 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices <sup>(31)</sup>.
- 2.4. Duration**
54. Subject to the duration of the TTBER, the block exemption applies for as long as the licensed property right has not lapsed, expired or been declared invalid. In the case of know-how the block exemption applies as long as the licensed know-how remains secret, except where the know-how becomes publicly known as a result of action by the licensee, in which case the exemption shall apply for the duration of the agreement (cf. Article 2 of the TTBER).



55. The block exemption applies to each licensed property right covered by the agreement and ceases to apply on the date of expiry, invalidity or the coming into the public domain of the last intellectual property right which constitutes 'technology' within the meaning of the TTBER (cf. paragraph above).

## 2.5. Relationship with other block exemption regulations

56. The TTBER covers agreements between two undertakings concerning the licensing of technology for the purpose of the production of contract products. However, technology can also be an element of other types of agreements. In addition, the products incorporating the licensed technology are subsequently sold on the market. It is therefore necessary to address the interface between the TTBER and Commission Regulation (EC) No 2658/2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements<sup>(32)</sup>, Commission Regulation 2659/2000 on the application of Article 81(3) to categories of research and development agreements<sup>(33)</sup> and Commission Regulation (EC) No 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices<sup>(34)</sup>.

### 2.5.1. The Block Exemption Regulations on specialisation and R&D agreements

57. According to Article 1(1)(c) of Regulation 2658/2000 on specialisation agreements, that Regulation covers, *inter alia*, joint production agreements by virtue of which two or more undertakings agree to produce certain products jointly. The Regulation extends to provisions concerning the assignment or use of intellectual property rights, provided that they do not constitute the primary object of the agreement, but are directly related to and necessary for its implementation.

58. Where undertakings establish a production joint venture and license the joint venture to exploit technology, which is used in the production of the products produced by the joint venture, such licensing is subject to Regulation 2658/2000 and not the TTBER. Accordingly, licensing in the context of a production joint venture normally falls to be considered under Regulation 2658/2000. However, where the joint venture engages in licensing of the technology to third parties, the activity is not linked to production by the joint venture and therefore not covered by that Regulation. Such licensing arrangements, which bring together the technologies of the parties, constitute technology pools, which are dealt with in section IV.4 below.

59. Regulation 2659/2000 on research and development agreements covers agreements whereby two or more undertakings agree to jointly carry out research and development and to jointly exploit the results thereof. According to Article 2(11), research and development and the exploitation of the results are carried out jointly where the work involved is carried out by a

joint team, organisation or undertakings, jointly entrusted to a third party or allocated between the parties by way of specialisation in research, development, production and distribution, including licensing.

60. It follows that Regulation 2659/2000 covers licensing between the parties and by the parties to a joint entity in the context of a research and development agreement. In the context of such agreements the parties can also determine the conditions for licensing the fruits of the research and development agreement to third parties. However, since third party licensees are not party to the research and development agreement, the individual licence agreement concluded with third parties is not covered by Regulation 2659/2000. Such licence agreements are block exempted by the TTBER where they fulfil the conditions of that Regulation.

### 2.5.2. The Block Exemption Regulation on vertical agreements

61. Commission Regulation (EC) No 2790/1999 on vertical agreements covers agreements entered into between two or more undertakings each operating, for the purposes of the agreement, at different levels of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services. It thus covers supply and distribution agreements<sup>(35)</sup>.

62. Given that the TTBER only covers agreements between two parties and that a licensee, selling products incorporating the licensed technology, is a supplier for the purposes of Regulation 2790/1999, these two block exemption regulations are closely related. The agreement between licensor and licensee is subject to the TTBER whereas agreements concluded between a licensee and buyers are subject to Regulation 2790/1999 and the Guidelines on Vertical Restraints<sup>(36)</sup>.

63. The TTBER also block exempts agreements between the licensor and the licensee where the agreement imposes obligations on the licensee as to the way in which he must sell the products incorporating the licensed technology. In particular, the licensee can be obliged to establish a certain type of distribution system such as exclusive distribution or selective distribution. However, the distribution agreements concluded for the purposes of implementing such obligations must, in order to be

block exempted, comply with Regulation 2790/1999. For instance, the licensor can oblige the licensee to establish a system based on exclusive distribution in accordance with specified rules. However, it follows from Article 4(b) of Regulation 2790/1999 that distributors must be free to make passive sales into the territories of other exclusive distributors.

64. Furthermore, distributors must in principle be free to sell both actively and passively into territories covered by the distribution systems of other licensees producing their own products on the basis of the licensed technology. This is because for the purposes of Regulation 2790/1999 each licensee is a separate supplier. However, the reasons underlying the block exemption contained in that Regulation may also apply where the products incorporating the licensed technology are sold by the licensees under a common brand belonging to the licensor. When the products incorporating the licensed technology are sold under a common brand identity there may be the same efficiency reasons for applying the same types of restraints between licensees' distribution systems as within a single vertical distribution system. In such cases the Commission would be unlikely to challenge restraints where by analogy the requirements of Regulation 2790/1999 are fulfilled. For a common brand identity to exist the products must be sold and marketed under a common brand, which is predominant in terms of conveying quality and other relevant information to the consumer. It does not suffice that in addition to the licensees' brands the product carries the licensor's brand, which identifies him as the source of the licensed technology.

### 3. The safe harbour established by the Block Exemption Regulation

65. According to Article 3 of the TTBER the block exemption of restrictive agreements is subject to market share thresholds, confining the scope of the block exemption to agreements that although they may be restrictive of competition can generally be presumed to fulfil the conditions of Article 81(3). Outside the safe harbour created by the market share thresholds individual assessment is required. The fact that market shares exceed the thresholds does not give rise to any presumption either that the agreement is caught by Article 81(1) or that the agreement does not fulfil the conditions of Article 81(3). In the absence of hardcore restrictions, market analysis is required.
66. The market share threshold to be applied for the purpose of the safe harbour of the TTBER depends on whether the agreement is concluded between competitors or non-competitors. For the purposes of the TTBER undertakings are competitors on the relevant technology market when they license competing technologies. Potential competition on the technology market is not

taken into account for the application of the market share threshold or the hardcore list. Outside the safe harbour of the TTBER potential competition on the technology market is taken into account but does not lead to the application of the hardcore list relating to agreements between competitors (see also paragraph 31 above).

67. Undertakings are competitors on the relevant product market where both undertakings are active on the same product and geographic market(s) on which the products incorporating the licensed technology are sold (actual competitors). They are also considered competitors where they would be likely, on realistic grounds, to undertake the necessary additional investments or other necessary switching costs to enter the relevant product and geographic market(s) within a reasonably short period of time<sup>(37)</sup> in response to a small and permanent increase in relative prices (potential competitors).
68. It follows from paragraphs 66 and 67 that two undertakings are not competitors for the purposes of the TTBER where the licensor is neither an actual nor a potential supplier of products on the relevant market and the licensee, already present on the product market, is not licensing out a competing technology even if he owns a competing technology and produces on the basis of that technology. However, the parties become competitors if at a later point in time the licensee starts licensing out his technology or the licensor becomes an actual or potential supplier of products on the relevant market. In that case the hardcore list relevant for agreements between non-competitors will continue to apply to the agreement unless the agreement is subsequently amended in any material respect, see Article 4(3) of the TTBER and paragraph 31 above.
69. In the case of agreements between competitors the market share threshold is 20 % and in the case of agreements between non-competitors it is 30 % (cf. Article 3(1) and (2) of the TTBER). Where the undertakings party to the licensing agreement are not competitors the agreement is covered if the market share of neither party exceeds 30 % on the affected relevant technology and product markets. Where the undertakings party to the licensing agreement are competitors the agreement is covered if the combined market shares of the parties do not exceed 20 % on the relevant technology and product markets. The market share thresholds apply both to technology markets and markets for products incorporating the licensed technology. If the applicable market share threshold is exceeded on an affected relevant market, the block exemption does not apply to the agreement for that relevant market. For instance, if the licence agreement concerns two separate product markets or two separate geographic markets, the block exemption may apply to one of the markets and not to the other.

70. In the case of technology markets, it follows from Article 3(3) of the TTBER that the licensor's market share is to be calculated on the basis of the sales of the licensor and all his licensees of products incorporating the licensed technology and this for each relevant market separately<sup>(38)</sup>. Where the parties are competitors on the technology market, sales of products incorporating the licensee's own technology must be combined with the sales of the products incorporating the licensed technology. In the case of new technologies that have not yet generated any sales, a zero market share is assigned. When sales commence the technology will start accumulating market share.

71. In the case of product markets, the licensee's market share is to be calculated on the basis of the licensee's sales of products incorporating the licensor's technology and competing products, i.e. the total sales of the licensee on the product market in question. Where the licensor is also a supplier of products on the relevant market, the licensor's sales on the product market in question must also be taken into account. In the calculation of market shares for product markets, however, sales made by other licensees are not taken into account when calculating the licensee's and/or licensor's market share.

72. Market shares should be calculated on the basis of sales value data where such data are available. Such data normally provide a more accurate indication of the strength of a technology than volume data. However, where value based data are not available, estimates based on other reliable market information may be used, including market sales volume data.

73. The principles set out above can be illustrated by the following examples:

#### *Licensing between non-competitors*

##### Example 1

Company A is specialised in developing bio-technological products and techniques and has developed a new product Xeran. It is not active as a producer of Xeran, for which it has neither the production nor the distribution facilities. Company B is one of the producers of competing products, produced with freely available non-proprietary technologies. In year 1, B was selling EUR 25 million worth of products produced with the freely available technologies. In year 2, A gives a licence to B to produce Xeran. In that year B sells EUR 15 million produced with the help of the freely available technologies and EUR 15 million of Xeran. In year 3 and the following years B produces and sells only Xeran worth EUR 40 million annually. In addition in year 2, A is also licensing to C. C was not active on that product market before. C produces and sells only Xeran, EUR 10 million in year 2 and EUR 15 million in year 3 and thereafter. It is established that the total market of Xeran and its substitutes where B and C are active is worth EUR 200 million in each year.

In year 2, the year the licence agreement is concluded, A's market share on the technology market is 0 % as its market share has to be calculated on the basis of the total sales of Xeran in the preceding year. In year 3 A's market share on the technology market is 12,5 %, reflecting the value of Xeran produced by B and C in the preceding year 2. In year 4 and thereafter A's market share on the technology market is 27,5 %, reflecting the value of Xeran produced by B and C in the preceding year.

In year 2 B's market share on the product market is 12,5 %, reflecting B's EUR 25 million sales in year 1. In year 3 B's market share is 15 % because its sales have increased to EUR 30 million in year 2. In year 4 and thereafter B's market share is 20 % as its sales are EUR 40 million annually. C's market share on the product market is 0 % in year 1 and 2, 5 % in year 3 and 7, 5 % thereafter.

As the licence agreements are between non-competitors and the individual market shares of A, B and C are below 30 % each year, the agreements fall within the safe harbour of the TTBER.

**Example 2**

The situation is the same as in example 1, however now B and C are operating in different geographic markets. It is established that the total market of Xeran and its substitutes is worth EUR 100 million annually in each geographic market.

In this case, A's market share on the technology market has to be calculated for each of the two geographic markets. In the market where B is active A's market share depends on the sale of Xeran by B. As in this example the total market is assumed to be EUR 100 million, i.e. half the size of the market in example 1, the market share of A is 0 % in year 2, 15 % in year 3 and 40 % thereafter. B's market share is 25 % in year 2, 30 % in year 3 and 40 % thereafter. In year 2 and 3 both A's and B's market share does not exceed the 30 % threshold. The threshold is however exceeded from year 4 and this means that, in line with Article 8(2) of the TTBER, after year 6 the licence agreement between A and B can no longer benefit from the safe harbour but has to be assessed on an individual basis.

In the market where C is active A's market share depends on the sale of Xeran by C. A's market share on the technology market, based on C's sales in the previous year, is therefore 0 % in year 2, 10 % in year 3 and 15 % thereafter. The market share of C on the product market is the same: 0 % in year 2, 10 % in year 3 and 15 % thereafter. The licence agreement between A and C therefore falls within the safe harbour for the whole period.

*Licensing between competitors***Example 3**

Companies A and B are active on the same relevant product and geographic market for a certain chemical product. They also each own a patent on different technologies used to produce this product. In year 1 A and B sign a cross licence agreement licensing each other to use their respective technologies. In year 1 A and B produce only with their own technology and A sells EUR 15 million of the product and B sells EUR 20 million of the product. From year 2 they both use their own and the other's technology. From that year onward A sells EUR 10 million of the product produced with its own technology and EUR 10 million of the product produced with B's technology. B sells from year 2 EUR 15 million of the product produced with its own technology and EUR 10 million of the product produced with A's technology. It is established that the total market of the product and its substitutes is worth EUR 100 million in each year.

To assess the licence agreement under the TTBER, the market shares of A and B have to be calculated both on the technology market and the product market. The market share of A on the technology market depends on the amount of the product sold in the preceding year that was produced, by both A and B, with A's technology. In year 2 the market share of A on the technology market is therefore 15 %, reflecting its own production and sales of EUR 15 million in year 1. From year 3 A's market share on the technology market is 20 %, reflecting the EUR 20 million sale of the product produced with A's technology and produced and sold by A and B (EUR 10 million each). Similarly, in year 2 B's market share on the technology market is 20 % and thereafter 25 %.

The market shares of A and B on the product market depend on their respective sales of the product in the previous year, irrespective of the technology used. The market share of A on the product market is 15 % in year 2 and 20 % thereafter. The market share of B on the product market is 20 % in year 2 and 25 % thereafter.

As the agreement is between competitors, their combined market share, both on the technology and on the product market, has to be below the 20 % market share threshold in order to benefit from the safe harbour. It is clear that this is not the case here. The combined market share on the technology market and on the product market is 35 % in year 2 and 45 % thereafter. This agreement between competitors will therefore have to be assessed on an individual basis.

**4. Hardcore restrictions of competition under the Block Exemption Regulation****4.1. General principles**

74. Article 4 of the TTBER contains a list of hardcore restrictions of competition. The classification of a restraint as a hardcore restriction of competition is based on the nature of the restriction and experience showing that such restrictions are almost always anti-competitive. In line with the case law of the Community Courts<sup>(39)</sup> such a restriction may result from the clear objective of the agreement or from the circumstances of the individual case (cf. paragraph 14 above).

75. When a technology transfer agreement contains a hardcore restriction of competition, it follows from Article 4(1) and 4(2) of the TTBER that the agreement as a whole falls outside the scope of the block exemption. For the purposes of the TTBER hardcore restrictions cannot be severed from the rest of the agreement. Moreover, the Commission considers that in the context of individual assessment hardcore restrictions of competition will only in exceptional circumstances fulfil the four conditions of Article 81(3) (cf. paragraph 18 above).
76. Article 4 of the TTBER distinguishes between agreements between competitors and agreements between non-competitors.
- #### 4.2. Agreements between competitors
77. Article 4(1) lists the hardcore restrictions for licensing between competitors. According to Article 4(1), the TTBER does not cover agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:
- (a) The restriction of a party's ability to determine its prices when selling products to third parties;
  - (b) The limitation of output, except limitations on the output of contract products imposed on the licensee in a non-reciprocal agreement or imposed on only one of the licensees in a reciprocal agreement;
  - (c) The allocation of markets or customers except
    - (i) the obligation on the licensee(s) to produce with the licensed technology only within one or more technical fields of use or one or more product markets;
    - (ii) the obligation on the licensor and/or the licensee, in a non-reciprocal agreement, not to produce with the licensed technology within one or more technical fields of use or one or more product markets or one or more exclusive territories reserved for the other party;
    - (iii) the obligation on the licensor not to license the technology to another licensee in a particular territory;
    - (iv) the restriction, in a non-reciprocal agreement, of active and/or passive sales by the licensee and/or the licensor into the exclusive territory or to the exclusive customer group reserved for the other party;
  - (v) the restriction, in a non-reciprocal agreement, of active sales by the licensee into the exclusive territory or to the exclusive customer group allocated by the licensor to another licensee provided that the latter was not a competing undertaking of the licensor at the time of the conclusion of its own licence;
  - (vi) the obligation on the licensee to produce the contract products only for its own use provided that the licensee is not restricted in selling the contract products actively and passively as spare parts for its own products;
  - (vii) the obligation on the licensee in a non-reciprocal agreement to produce the contract products only for a particular customer, where the licence was granted in order to create an alternative source of supply for that customer;
  - (d) The restriction of the licensee's ability to exploit its own technology or the restriction of the ability of any of the parties to the agreement to carry out research and development, unless such latter restriction is indispensable to prevent the disclosure of the licensed know-how to third parties.
78. For a number of hardcore restrictions the TTBER makes a distinction between reciprocal and non-reciprocal agreements. The hardcore list is stricter for reciprocal agreements than for non-reciprocal agreements between competitors. Reciprocal agreements are cross-licensing agreements where the licensed technologies are competing technologies or can be used for the production of competing products. A non-reciprocal agreement is an agreement where only one of the parties is licensing its technology to the other party or where in case of cross-licensing the licensed technologies are not competing technologies and cannot be used for the production of competing products. An agreement is not reciprocal merely because the agreement contains a grant back obligation or because the licensee licenses back own improvements of the licensed technology. In case at a later point in time a non-reciprocal agreement becomes a reciprocal agreement due to the conclusion of a second licence between the same parties, they may have to revise the first licence in order to avoid that the agreement contains a hardcore restriction. In the assessment of the individual case the Commission will take into account the time lapsed between the conclusion of the first and the second licence.

79. The hardcore restriction of competition contained in Article 4(1)(a) concerns agreements between competitors that have as their object the fixing of prices for products sold to third parties, including the products incorporating the licensed technology. Price fixing between competitors constitutes a restriction of competition by its very object. Price fixing can for instance take the form of a direct agreement on the exact price to be charged or on a price list with certain allowed maximum rebates. It is immaterial whether the agreement concerns fixed, minimum, maximum or recommended prices. Price fixing can also be implemented indirectly by applying disincentives to deviate from an agreed price level, for example, by providing that the royalty rate will increase if product prices are reduced below a certain level. However, an obligation on the licensee to pay a certain minimum royalty does not in itself amount to price fixing.
80. When royalties are calculated on the basis of individual product sales, the amount of the royalty has a direct impact on the marginal cost of the product and thus a direct impact on product prices<sup>(40)</sup>. Competitors can therefore use cross licensing with reciprocal running royalties as a means of co-ordinating prices on downstream product markets<sup>(41)</sup>. However, the Commission will only treat cross licences with reciprocal running royalties as price fixing where the agreement is devoid of any pro-competitive purpose and therefore does not constitute a bona fide licensing arrangement. In such cases where the agreement does not create any value and therefore has no valid business justification, the arrangement is a sham and amounts to a cartel.
81. The hardcore restriction contained in Article 4(1)(a) also covers agreements whereby royalties are calculated on the basis of all product sales irrespective of whether the licensed technology is being used. Such agreements are also caught by Article 4(1)(d) according to which the licensee must not be restricted in his ability to use his own technology (see paragraph 95 below). In general such agreements restrict competition since the agreement raises the cost of using the licensee's own competing technology and restricts competition that existed in the absence of the agreement<sup>(42)</sup>. This is so both in the case of reciprocal and non-reciprocal arrangements. Exceptionally, however, an agreement whereby royalties are calculated on the basis of all product sales may fulfil the conditions of Article 81(3) in an individual case where on the basis of objective factors it can be concluded that the restriction is indispensable for pro-competitive licensing to occur. This may be the case where in the absence of the restraint it would be impossible or unduly difficult to calculate and monitor the royalty payable by the licensee, for instance because the licensor's technology leaves no visible trace on the final product and practicable alternative monitoring methods are unavailable.
82. The hardcore restriction of competition set out in Article 4(1)(b) concerns reciprocal output restrictions on the parties. An output restriction is a limitation on how much a party may produce and sell. Article 4(1)(b) does not cover output limitations on the licensee in a non-reciprocal agreement or output limitations on one of the licensees in a reciprocal agreement provided that the output limitation only concerns products produced with the licensed technology. Article 4(1)(b) thus identifies as hardcore restrictions reciprocal output restrictions on the parties and output restrictions on the licensor in respect of his own technology. When competitors agree to impose reciprocal output limitations, the object and likely effect of the agreement is to reduce output in the market. The same is true of agreements that reduce the incentive of the parties to expand output, for example by obliging each other to make payments if a certain level of output is exceeded.
83. The more favourable treatment of non-reciprocal quantity limitations is based on the consideration that a one-way restriction does not necessarily lead to a lower output on the market while also the risk that the agreement is not a bona fide licensing arrangement is less when the restriction is non-reciprocal. When a licensee is willing to accept a one-way restriction, it is likely that the agreement leads to a real integration of complementary technologies or an efficiency enhancing integration of the licensor's superior technology with the licensee's productive assets. In a reciprocal agreement an output restriction on one of the licensees is likely to reflect the higher value of the technology licensed by one of the parties and may serve to promote pro-competitive licensing.
84. The hardcore restriction of competition set out in Article 4(1)(c) concerns the allocation of markets and customers. Agreements whereby competitors share markets and customers have as their object the restriction of competition. It is a hardcore restriction where competitors in a reciprocal agreement agree not to produce in certain territories or not to sell actively and/or passively into certain territories or to certain customers reserved for the other party.
85. Article 4(1)(c) applies irrespective of whether the licensee remains free to use his own technology. Once the licensee has tooled up to use the licensor's technology to produce a given product, it may be costly to maintain a separate production line using another technology in order to serve customers covered by the restrictions. Moreover, given the anti-competitive potential of the restraint the licensee may have little incentive to produce under his own technology. Such restrictions are also highly unlikely to be indispensable for pro-competitive licensing to occur.

86. Under Article 4(1)(c)(ii) it is not a hardcore restriction for the licensor in a non-reciprocal agreement to grant the licensee an exclusive licence to produce on the basis of the licensed technology in a particular territory and thus agree not to produce himself the contract products in or provide the contract products from that territory. Such exclusive licences are block exempted irrespective of the scope of the territory. If the licence is world-wide, the exclusivity implies that the licensor abstains from entering or remaining on the market. The block exemption also applies where the licence is limited to one or more technical fields of use or one or more product markets. The purpose of agreements covered by Article 4(1)(c)(ii) may be to give the licensee an incentive to invest in and develop the licensed technology. The object of the agreement is therefore not necessarily to share markets.
87. According to Article 4(1)(c)(iv) and for the same reason, the block exemption also applies to non-reciprocal agreements whereby the parties agree not to sell actively or passively<sup>(43)</sup> into an exclusive territory or to an exclusive customer group reserved for the other party.
88. According to Article 4(1)(c)(iii) it is also not a hardcore restriction if the licensor appoints the licensee as his sole licensee in a particular territory, implying that third parties will not be licensed to produce on the basis of the licensor's technology in the territory in question. In the case of such sole licences the block exemption applies irrespective of whether the agreement is reciprocal or not given that the agreement does not affect the ability of the parties to fully exploit their own technology in the respective territories.
89. Article 4(1)(c)(v) excludes from the hardcore list and thus block exempts up to the market share threshold restrictions in a non-reciprocal agreement on active sales by a licensee into the territory or to the customer group allocated by the licensor to another licensee. It is a condition, however, that the protected licensee was not a competitor of the licensor when the agreement was concluded. It is not warranted to hardcore such restrictions. By allowing the licensor to grant a licensee, who was not already on the market, protection against active sales by licensees which are competitors of the licensor and which for that reason are already established on the market, such restrictions are likely to induce the licensee to exploit the licensed technology more efficiently. On the other hand, if the licensees agree between themselves not to sell actively or passively into certain territories or to certain customer groups, the agreement amounts to a cartel amongst the licensees. Given that such agreements do not involve any transfer of technology they fall outside the scope of the TTBER.
90. According to Article 4(1)(c)(i) restrictions in agreements between competitors that limit the licence to one or more product markets or technical fields of use<sup>(44)</sup> are not hardcore restrictions. Such restrictions are block exempted up to the market share threshold of 20 % irrespective of whether the agreement is reciprocal or not. It is a condition for the application of the block exemption, however, that the field of use restrictions do not go beyond the scope of the licensed technologies. It is also a condition that licensees are not limited in the use of their own technology (see Article 4(1)(d)). Where licensees are limited in the use of their own technology the agreement amounts to market sharing.
91. The block exemption applies irrespective of whether the field of use restriction is symmetrical or asymmetrical. An asymmetrical field of use restriction in a reciprocal licence agreement implies that both parties are allowed to use the respective technologies that they license in only within different fields of use. As long as the parties are unrestricted in the use of their own technologies, it is not assumed that the agreement leads the parties to abandon or refrain from entering the field(s) covered by the licence to the other party. Even if the licensees tool up to use the licensed technology within the licensed field of use, there may be no impact on assets used to produce outside the scope of the licence. It is important in this regard that the restriction relates to distinct product markets or fields of use and not to customers, allocated by territory or by group, who purchase products falling within the same product market or technical field of use. The risk of market sharing is considered substantially greater in the latter case (see paragraph 85 above). In addition, field of use restrictions may be necessary to promote pro-competitive licensing (see paragraph 182 below).
92. Article 4(1)(c)(vi) contains a further exception, namely captive use restrictions, i.e. a requirement whereby the licensee may produce the products incorporating the licensed technology only for his own use. Where the contract product is a component the licensee can thus be obliged to produce that component only for incorporation into his own products and can be obliged not to sell the components to other producers. The licensee must be able, however, to sell the components as spare parts for his own products and must thus be able to supply third parties that perform after sale services on these products. Captive use restrictions as defined may be necessary to encourage the dissemination of technology, particularly between competitors, and are covered by the block exemption. Such restrictions are also dealt with in section IV.2.5 below.

93. Finally, Article 4(1)(c)(vii) excludes from the hardcore list an obligation on the licensee in a non-reciprocal agreement to produce the contract products only for a particular customer with a view to creating an alternative source of supply for that customer. It is thus a condition for the application of Article 4(1)(c)(vii) that the licence is limited to creating an alternative source of supply for that particular customer. It is not a condition, however, that only one such licence is granted. Article 4(1)(c)(vii) also covers situations where more than one undertaking is licensed to supply the same specified customer. The potential of such agreements to share markets is limited where the licence is granted only for the purpose of supplying a particular customer. In particular, in such circumstances it cannot be assumed that the agreement will cause the licensee to cease exploiting his own technology.

94. The hardcore restriction of competition set out in Article 4(1)(d) covers firstly restrictions on any of the parties' ability to carry out research and development. Both parties must be free to carry out independent research and development. This rule applies irrespective of whether the restriction applies to a field covered by the licence or to other fields. However, the mere fact that the parties agree to provide each other with future improvements of their respective technologies does not amount to a restriction on independent research and development. The effect on competition of such agreements must be assessed in light of the circumstances of the individual case. Article 4(1)(d) also does not extend to restrictions on a party to carry out research and development with third parties, where such restriction is necessary to protect the licensor's know-how against disclosure. In order to be covered by the exception, the restrictions imposed to protect the licensor's know-how against disclosure must be necessary and proportionate to ensure such protection. For instance, where the agreement designates particular employees of the licensee to be trained in and responsible for the use of the licensed know-how, it may be sufficient to oblige the licensee not to allow those employees to be involved in research and development with third parties. Other safeguards may be equally appropriate.

95. According to Article 4(1)(d) the licensee must also be unrestricted in the use of his own competing technology provided that in so doing he does not make use of the technology licensed from the licensor. In relation to his own technology the licensee must not be subject to limitations in terms of where he produces or sells, how much he produces or sells and at what price he sells. He must also not be obliged to pay royalties on products produced on the basis of his own technology (cf. paragraph 81 above). Moreover, the licensee must not be restricted in licensing his own technology to third parties. When

restrictions are imposed on the licensee's use of his own technology or to carry out research and development, the competitiveness of the licensee's technology is reduced. The effect of this is to reduce competition on existing product and technology markets and to reduce the licensee's incentive to invest in the development and improvement of his technology.

#### 4.3. Agreements between non-competitors

96. Article 4(2) lists the hardcore restrictions for licensing between non-competitors. According to this provision, the TTBER does not cover agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

- (a) the restriction of a party's ability to determine its prices when selling products to third parties, without prejudice to the possibility to impose a maximum sale price or recommend a sale price, provided that it does not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;
- (b) the restriction of the territory into which, or of the customers to whom, the licensee may passively sell the contract products, except:
  - (i) the restriction of passive sales into an exclusive territory or to an exclusive customer group reserved for the licensor;
  - (ii) the restriction of passive sales into an exclusive territory or to an exclusive customer group allocated by the licensor to another licensee during the first two years that this other licensee is selling the contract products in that territory or to that customer group;
  - (iii) the obligation to produce the contract products only for its own use provided that the licensee is not restricted in selling the contract products actively and passively as spare parts for its own products;
  - (iv) the obligation to produce the contract products only for a particular customer, where the licence was granted in order to create an alternative source of supply for that customer;



(v) the restriction of sales to end users by a licensee operating at the wholesale level of trade;

(vi) the restriction of sales to unauthorised distributors by the members of a selective distribution system;

(c) the restriction of active or passive sales to end users by a licensee which is a member of a selective distribution system and which operates at the retail level, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment.

97. The hardcore restriction of competition set out in Article 4(2)(a) concerns the fixing of prices charged when selling products to third parties. More specifically, this provision covers restrictions which have as their direct or indirect object the establishment of a fixed or a minimum selling price or a fixed or minimum price level to be observed by the licensor or the licensee when selling products to third parties. In the case of agreements that directly establish the selling price, the restriction is clear-cut. However, the fixing of selling prices can also be achieved through indirect means. Examples of the latter are agreements fixing the margin, fixing the maximum level of discounts, linking the sales price to the sales prices of competitors, threats, intimidation, warnings, penalties, or contract terminations in relation to observance of a given price level. Direct or indirect means of achieving price fixing can be made more effective when combined with measures to identify price-cutting, such as the implementation of a price monitoring system, or the obligation on licensees to report price deviations. Similarly, direct or indirect price fixing can be made more effective when combined with measures that reduce the licensee's incentive to lower his selling price, such as the licensor obliging the licensee to apply a most-favoured-customer clause, i.e. an obligation to grant to a customer any more favourable terms granted to any other customer. The same means can be used to make maximum or recommended prices work as fixed or minimum selling prices. However, the provision of a list of recommended prices to or the imposition of a maximum price on the licensee by the licensor is not considered in itself as leading to fixed or minimum selling prices.

98. Article 4(2)(b) identifies as hardcore restrictions of competition agreements or concerted practices that have as their direct or indirect object the restriction of passive sales by licensees of products incorporating the licensed technology<sup>(45)</sup>. Passive sales restrictions on the licensee may be the result of direct obligations, such as the obligation not to sell to certain customers or to customers in certain territories or the obligation to refer orders from these customers to other licensees. It

may also result from indirect measures aimed at inducing the licensee to refrain from making such sales, such as financial incentives and the implementation of a monitoring system aimed at verifying the effective destination of the licensed products. Quantity limitations may be an indirect means to restrict passive sales. The Commission will not assume that quantity limitations as such serve this purpose. However, it will be otherwise where quantity limitations are used to implement an underlying market partitioning agreement. Indications thereof include the adjustment of quantities over time to cover only local demand, the combination of quantity limitations and an obligation to sell minimum quantities in the territory, minimum royalty obligations linked to sales in the territory, differentiated royalty rates depending on the destination of the products and the monitoring of the destination of products sold by individual licensees. The general hardcore restriction covering passive sales by licensees is subject to a number of exceptions, which are dealt with below.

99. Article 4(2)(b) does not cover sales restrictions on the licensor. All sales restrictions on the licensor are block exempted up to the market share threshold of 30 %. The same applies to all restrictions on active sales by the licensee, with the exception of what is said on active selling in paragraphs 105 and 106 below. The block exemption of restrictions on active selling is based on the assumption that such restrictions promote investments, non-price competition and improvements in the quality of services provided by the licensees by solving free rider problems and hold-up problems. In the case of restrictions of active sales between licensees' territories or customer groups, it is not a condition that the protected licensee has been granted an exclusive territory or an exclusive customer group. The block exemption also applies to active sales restrictions where more than one licensee has been appointed for a particular territory or customer group. Efficiency enhancing investment is likely to be promoted where a licensee can be ensured that he will only face active sales competition from a limited number of licensees inside the territory and not also from licensees outside the territory.

100. Restrictions on active and passive sales by licensees into an exclusive territory or to an exclusive customer group reserved for the licensor do not constitute hardcore restrictions of competition (cf. Article 4(2)(b)(i)). Indeed, they are block exempted. It is presumed that up to the market share threshold such restraints, where restrictive of competition, promote pro-competitive dissemination of technology and integration of such technology into the production assets of the licensee. For a territory or customer group to be reserved for the licensor, it is not required that the licensor is actually producing with the licensed technology in the territory or for the customer group in question. A territory or customer group can also be reserved by the licensor for later exploitation.

101. Restrictions on passive sales by licensees into an exclusive territory or customer group allocated to another licensee are block exempted for two years calculated from the date on which the protected licensee first markets the products incorporating the licensed technology inside his exclusive territory or to his exclusive customer group (cf. Article 4(2)(b)(ii)). Licensees often have to commit substantial investments in production assets and promotional activities in order to start up and develop a new territory. The risks facing the new licensee are therefore likely to be substantial, in particular since promotional expenses and investment in assets required to produce on the basis of a particular technology are often sunk, i.e. they cannot be recovered if the licensee exits the market. In such circumstances, it is often the case that licensees would not enter into the licence agreement without protection for a certain period of time against (active and) passive sales into their territory by other licensees. Restrictions on passive sales into the exclusive territory of a licensee by other licensees therefore often fall outside Article 81(1) for a period of up to two years from the date on which the product incorporating the licensed technology was first put on the market in the exclusive territory by the licensee in question. However, to the extent that in individual cases such restrictions are caught by Article 81(1) they are block exempted. After the expiry of this two-year period restrictions on passive sales between licensees constitute hardcore restrictions. Such restrictions are generally caught by Article 81(1) and are unlikely to fulfil the conditions of Article 81(3). In particular, passive sales restrictions are unlikely to be indispensable for the attainment of efficiencies <sup>(46)</sup>.
102. Article 4(2)(b)(iii) brings under the block exemption a restriction whereby the licensee is obliged to produce products incorporating the licensed technology only for his own (captive) use. Where the contract product is a component the licensee can thus be obliged to use that product only for incorporation into his own products and can be obliged not to sell the product to other producers. The licensee must however be able to actively and passively sell the products as spare parts for his own products and must thus be able to supply third parties that perform after sale services on these products. Captive use restrictions are also dealt with in section IV.2.5 below.
103. As in the case of agreements between competitors (cf. paragraph 93 above) the block exemption also applies to agreements whereby the licensee is obliged to produce the contract products only for a particular customer in order to provide that customer with an alternative source of supply (cf. Article 4(2)(b)(iv)). In the case of agreements between non-competitors, such restrictions are unlikely to be caught by Article 81(1).
104. Article 4(2)(b)(v) brings under the block exemption an obligation on the licensee not to sell to end users and thus only to sell to retailers. Such an obligation allows the licensor to assign the wholesale distribution function to the licensee and normally falls outside Article 81(1) <sup>(47)</sup>.
105. Finally Article 4(2)(b)(vi) brings under the block exemption a restriction on the licensee not to sell to unauthorised distributors. This exception allows the licensor to impose on the licensees an obligation to form part of a selective distribution system. In that case, however, the licensees must according to Article 4(2)(c) be permitted to sell both actively and passively to end users, without prejudice to the possibility to restrict the licensee to a wholesale function as foreseen in Article 4(2)(b)(v) (cf. the previous paragraph).
106. It is recalled (cf. paragraph 39 above) that the block exemption covers licence agreements whereby the licensor imposes obligations which the licensee must or may impose on his buyers, including distributors. However, these obligations must comply with the competition rules applicable to supply and distribution agreements. Since the TTBER is limited to agreements between two parties the agreements concluded between the licensee and his buyers implementing such obligations are not covered by the TTBER. Such agreements are only block exempted when they comply with Regulation 2790/1999 (cf. section 2.5.2 above).
- ## 5. Excluded restrictions
107. Article 5 of the TTBER lists four types of restrictions that are not block exempted and which thus require individual assessment of their anti-competitive and pro-competitive effects. It follows from Article 5 that the inclusion in a licence agreement of any of the restrictions contained in these provisions does not prevent the application of the block exemption to the rest of the agreement. It is only the individual restriction in question that is not block exempted, implying that individual assessment is required. Accordingly, the rule of severability applies to the restrictions set out in Article 5.
108. Article 5(1) provides that the block exemption shall not apply to the following three obligations:
- (a) Any direct or indirect obligation on the licensee to grant an exclusive licence to the licensor or to a third party designated by the licensor in respect of its own severable improvements to or its new applications of the licensed technology.

- (b) Any direct or indirect obligation on the licensee to assign to the licensor or to a third party designated by the licensor rights to severable improvements to or new applications of the licensed technology.
- (c) Any direct or indirect obligation on the licensee not to challenge the validity of intellectual property rights held by the licensor in the common market. However, the TTBER does cover the possibility for the licensor to terminate the licence agreement in the event that the licensee challenges the validity of the licensed technology.

The purpose of Article 5(1)(a), (b) and (c) is to avoid block exemption of agreements that may reduce the incentive of licensees to innovate.

109. Article 5(1)(a) and 5(1)(b) concerns exclusive grant backs or assignments to the licensor of severable improvements of the licensed technology. An improvement is severable if it can be exploited without infringing upon the licensed technology. An obligation to grant the licensor an exclusive licence to severable improvements of the licensed technology or to assign such improvements to the licensor is likely to reduce the licensee's incentive to innovate since it hinders the licensee in exploiting his improvements, including by way of licensing to third parties. This is the case both where the severable improvement concerns the same application as the licensed technology and where the licensee develops new applications of the licensed technology. According to Article 5(1)(a) and (b) such obligations are not block exempted. However, the block exemption does cover non-exclusive grant back obligations in respect of severable improvements. This is so even where the grant back obligation is non-reciprocal, i.e. only imposed on the licensee, and where under the agreement the licensor is entitled to feed-on the severable improvements to other licensees. A non-reciprocal grant back obligation may promote innovation and the dissemination of new technology by permitting the licensor to freely determine whether and to what extent to pass on his own improvements to his licensees. A feed-on clause may also promote the dissemination of technology because each licensee knows at the time of contracting that he will be on an equal footing with other licensees in terms of the technology on the basis of which he is producing. Exclusive grant backs and obligations to assign non-severable improvements are not restrictive of competition within the meaning of Article 81(1) since non-severable improvements cannot be exploited by the licensee without the licensor's permission.

110. The application of Article 5(1)(a) and (b) does not depend on whether or not the licensor pays consideration in

return for acquiring the improvement or for obtaining an exclusive licence. However, the existence and level of such consideration may be a relevant factor in the context of an individual assessment under Article 81. When grant backs are made against consideration it is less likely that the obligation creates a disincentive for the licensee to innovate. In the assessment of exclusive grant backs outside the scope of the block exemption the market position of the licensor on the technology market is also a relevant factor. The stronger the position of the licensor, the more likely it is that exclusive grant back obligations will have restrictive effects on competition in innovation. The stronger the position of the licensor's technology the more likely it is that the licensee will be an important source of innovation and future competition. The negative impact of grant back obligations can also be increased in case of parallel networks of licence agreements containing such obligations. When available technologies are controlled by a limited number of licensors that impose exclusive grant back obligations on licensees, the risk of anti-competitive effects is greater than where there are a number of technologies only some of which are licensed on exclusive grant back terms.

111. The risk of negative effects on innovation is higher in the case of cross licensing between competitors where a grant back obligation on both parties is combined with an obligation on both parties to share with the other party improvements of his own technology. The sharing of all improvements between competitors may prevent each competitor from gaining a competitive lead over the other (see also paragraph 208 below). However, the parties are unlikely to be prevented from gaining a competitive lead over each other where the purpose of the licence is to permit them to develop their respective technologies and where the licence does not lead them to use the same technological base in the design of their products. This is the case where the purpose of the licence is to create design freedom rather than to improve the technological base of the licensee.

112. The excluded restriction set out in Article 5(1)(c) concerns non-challenge clauses, i.e. obligations not to challenge the validity of the licensor's intellectual property. The reason for excluding non-challenge clauses from the scope of the block exemption is the fact that licensees are normally in the best position to determine whether or not an intellectual property right is invalid. In the interest of undistorted competition and in conformity with the principles underlying the protection of intellectual property, invalid intellectual property rights should be eliminated. Invalid intellectual property stifles innovation rather than promoting it. Article 81(1) is likely to apply to non-challenge clauses where the licensed technology is valuable and therefore creates a competitive disadvantage for undertakings that are

prevented from using it or are only able to use it against payment of royalties <sup>(48)</sup>. In such cases the conditions of Article 81(3) are unlikely to be fulfilled <sup>(49)</sup>. However, the Commission takes a favourable view of non-challenge clauses relating to know-how where once disclosed it is likely to be impossible or very difficult to recover the licensed know-how. In such cases, an obligation on the licensee not to challenge the licensed know-how promotes dissemination of new technology, in particular by allowing weaker licensors to license stronger licensees without fear of a challenge once the know-how has been absorbed by the licensee.

113. The TTBER covers the possibility for the licensor to terminate the licence agreement in the event of a challenge of the licensed technology. Accordingly, the licensor is not forced to continue dealing with a licensee that challenges the very subject matter of the licence agreement, implying that upon termination any further use by the licensee of the challenged technology is at the challenger's own risk. Article 5(1)(c) ensures, however, that the TTBER does not cover contractual obligations obliging the licensee not to challenge the licensed technology, which would permit the licensor to sue the licensee for breach of contract and thereby create a further disincentive for the licensee to challenge the validity of the licensor's technology. The provision thereby ensures that the licensee is in the same position as third parties.

114. Article 5(2) excludes from the scope of the block exemption, in the case of agreements between non-competitors, any direct or indirect obligation limiting the licensee's ability to exploit his own technology or limiting the ability of the parties to the agreement to carry out research and development, unless such latter restriction is indispensable to prevent the disclosure of licensed know-how to third parties. The content of this condition is the same as that of Article 4(1)(d) of the hardcore list concerning agreements between competitors, which is dealt with in paragraphs 94 and 95 above. However, in the case of agreements between non-competitors it cannot be considered that such restrictions generally have negative effects on competition or that the conditions of Article 81(3) are generally not satisfied <sup>(50)</sup>. Individual assessment is required.

115. In the case of agreements between non-competitors, the licensee normally does not own a competing technology.

However, there may be cases where for the purposes of the block exemption the parties are considered non-competitors in spite of the fact that the licensee does own a competing technology. This is the case where the licensee owns a technology but does not license it and the licensor is not an actual or potential supplier on the product market. For the purposes of the block exemption the parties are in such circumstances neither competitors on the technology market nor competitors on the product market <sup>(51)</sup>. In such cases it is important to ensure that the licensee is not restricted in his ability to exploit his own technology and further develop it. This technology constitutes a competitive constraint in the market, which should be preserved. In such a situation restrictions on the licensee's use of his own technology or on research and development are normally considered to be restrictive of competition and not to satisfy the conditions of Article 81(3). For instance, an obligation on the licensee to pay royalties not only on the basis of products it produces with the licensed technology but also on the basis of products it produces with its own technology will generally limit the ability of the licensee to exploit its own technology and thus be excluded from the scope of the block exemption.

116. In cases where the licensee does not own a competing technology or is not already developing such a technology, a restriction on the ability of the parties to carry out independent research and development may be restrictive of competition where only a few technologies are available. In that case the parties may be an important (potential) source of innovation in the market. This is particularly so where the parties possess the necessary assets and skills to carry out further research and development. In that case the conditions of Article 81(3) are unlikely to be fulfilled. In other cases where several technologies are available and where the parties do not possess special assets or skills, the restriction on research and development is likely to either fall outside Article 81(1) for lack of an appreciable restrictive effect or satisfy the conditions of Article 81(3). The restraint may promote the dissemination of new technology by assuring the licensor that the licence does not create a new competitor and by inducing the licensee to focus on the exploitation and development of the licensed technology. Moreover, Article 81(1) only applies where the agreement reduces the licensee's incentive to improve and exploit his own technology. This is for instance not likely to be the case where the licensor is entitled to terminate the licence agreement once the licensee commences to produce on the basis of his own competing technology. Such a right does not reduce the licensee's incentive to innovate, since the agreement can only be terminated when a commercially viable technology has been developed and products produced on the basis thereof are ready to be put on the market.

## 6. Withdrawal and disapplication of the Block Exemption Regulation

### 6.1. Withdrawal procedure

117. According to Article 6 of the TTBER, the Commission and the competition authorities of the Member States may withdraw the benefit of the block exemption in respect of individual agreements that do not fulfil the conditions of Article 81(3). The power of the competition authorities of the Member States to withdraw the benefit of the block exemption is limited to cases where the relevant geographic market is no wider than the territory of the Member State in question.

118. The four conditions of Article 81(3) are cumulative and must all be fulfilled for the exception rule to be applicable<sup>(52)</sup>. The block exemption can therefore be withdrawn where a particular agreement fails one or more of the four conditions.

119. Where the withdrawal procedure is applied, the withdrawing authority bears the burden of proving that the agreement falls within the scope of Article 81(1) and that the agreement does not satisfy all four conditions of Article 81(3). Given that withdrawal implies that the agreement in question restricts competition within the meaning of Article 81(1) and does not fulfil the conditions of Article 81(3), withdrawal is necessarily accompanied by a negative decision based on Articles 5, 7 or 9 of Regulation 1/2003.

120. According to Article 6, withdrawal may in particular be warranted in the following circumstances:

1. access of third parties' technologies to the market is restricted, for instance by the cumulative effect of parallel networks of similar restrictive agreements prohibiting licensees from using third party technology;
2. access of potential licensees to the market is restricted, for instance by the cumulative effect of parallel networks of similar restrictive agreements preventing licensors from licensing to other licensees;
3. without any objectively valid reason the parties refrain from exploiting the licensed technology.

121. Articles 4 and 5 of the TTBER, containing the list of hardcore restrictions of competition and excluded restrictions, aim at ensuring that block exempted agreements do not reduce the incentive to innovate, do not delay the dissemination of technology, and do not

unduly restrict competition between the licensor and licensee or between licensees. However, the list of hardcore restrictions and the list of excluded restrictions do not take into account all the possible impacts of licence agreements. In particular, the block exemption does not take account of any cumulative effect of similar restrictions contained in networks of licence agreements. Licence agreements may lead to foreclosure of third parties both at the level of the licensor and at the level of the licensee. Foreclosure of other licensors may stem from the cumulative effect of networks of licence agreements prohibiting the licensees from exploiting competing technologies, leading to the exclusion of other (potential) licensors. Foreclosure of licensors is likely to arise in cases where most of the undertakings on the market that could (efficiently) take a competing licence are prevented from doing so as a consequence of restrictive agreements and where potential licensees face relatively high barriers to entry. Foreclosure of other licensees may stem from the cumulative effect of licence agreements prohibiting licensors from licensing other licensees and thereby preventing potential licensees from gaining access to the necessary technology. The issue of foreclosure is examined in more detail in section IV.2.7 below. In addition, the Commission is likely to withdraw the benefit of the block exemption where a significant number of licensors of competing technologies in individual agreements impose on their licensees to extend to them more favourable conditions agreed with other licensors.

122. The Commission is also likely to withdraw the benefit of the block exemption where the parties refrain from exploiting the licensed technology, unless they have an objective justification for doing so. Indeed, when the parties do not exploit the licensed technology, no efficiency enhancing activity takes place, in which case the very rationale of the block exemption disappears. However, exploitation does not need to take the form of an integration of assets. Exploitation also occurs where the licence creates design freedom for the licensee by allowing him to exploit his own technology without facing the risk of infringement claims by the licensor. In the case of licensing between competitors, the fact that the parties do not exploit the licensed technology may be an indication that the arrangement is a disguised cartel. For these reasons the Commission will examine very closely cases of non-exploitation.

### 6.2. Disapplication of the Block Exemption Regulation

123. Article 7 of the TTBER enables the Commission to exclude from the scope of the TTBER, by means of regulation, parallel networks of similar agreements where these cover more than 50 % of a relevant market. Such a measure is not addressed to individual undertakings but concerns all undertakings whose agreements are defined in the regulation disapplying the TTBER.

124. Whereas withdrawal of the benefit of the TTBER by the Commission under Article 6 implies the adoption of a decision under Articles 7 or 9 of Regulation 1/2003, the effect of a Commission disapplication regulation under Article 7 of the TTBER is merely to remove, in respect of the restraints and the markets concerned, the benefit of the TTBER and to restore the full application of Article 81(1) and (3). Following the adoption of a regulation declaring the TTBER inapplicable for a particular market in respect of agreements containing certain restraints, the criteria developed by the relevant case law of the Community Courts and by notices and previous decisions adopted by the Commission will give guidance on the application of Article 81 to individual agreements. Where appropriate, the Commission will take a decision in an individual case, which can provide guidance to all the undertakings operating on the market concerned.
125. For the purpose of calculating the 50 % market coverage ratio, account must be taken of each individual network of licence agreements containing restraints, or combinations of restraints, producing similar effects on the market.
126. Article 7 does not entail an obligation on the part of the Commission to act where the 50 % market-coverage ratio is exceeded. In general, disapplication is appropriate when it is likely that access to the relevant market or competition therein is appreciably restricted. In assessing the need to apply Article 7, the Commission will consider whether individual withdrawal would be a more appropriate remedy. This may depend, in particular, on the number of competing undertakings contributing to a cumulative effect on a market or the number of affected geographic markets within the Community.
127. Any regulation adopted under Article 7 must clearly set out its scope. This means, first, that the Commission must define the relevant product and geographic market(s) and, secondly, that it must identify the type of licensing restraint in respect of which the TTBER will no longer apply. As regards the latter aspect, the Commission may modulate the scope of its regulation according to the competition concern which it intends to address. For instance, while all parallel networks of non-compete arrangements will be taken into account for the purpose of establishing the 50 % market coverage ratio, the Commission may nevertheless restrict the scope of the disapplication regulation only to non-compete obligations exceeding a certain duration. Thus, agreements of a shorter duration or of a less restrictive nature might be left unaffected, due to the lesser degree of foreclosure attributable to such restraints. Where appropriate, the Commission may also provide guidance by specifying the market share level which, in the specific market context, may be regarded as insufficient to bring about a significant contribution by an individual undertaking to the cumulative effect. In general, when the market share of the products incorporating a technology licensed by an individual licensor does not exceed 5 %, the agreement or network of agreements covering that technology is not considered to contribute significantly to a cumulative foreclosure effect <sup>(53)</sup>.
128. The transitional period of not less than six months that the Commission will have to set under Article 7(2) should allow the undertakings concerned to adapt their agreements to take account of the regulation disapplying the TTBER.
129. A regulation disapplying the TTBER will not affect the block exempted status of the agreements concerned for the period preceding its entry into force.

#### IV. APPLICATION OF ARTICLE 81(1) AND 81(3) OUTSIDE THE SCOPE OF THE BLOCK EXEMPTION REGULATION

##### 1. The general framework for analysis

130. Agreements that fall outside the block exemption, for example because the market share thresholds are exceeded or the agreement involves more than two parties, are subject to individual assessment. Agreements that either do not restrict competition within the meaning of Article 81(1) or which fulfil the conditions of Article 81(3) are valid and enforceable. It is recalled that there is no presumption of illegality of agreements that fall outside the scope of the block exemption provided that they do not contain hardcore restrictions of competition. In particular, there is no presumption that Article 81(1) applies merely because the market share thresholds are exceeded. Individual assessment based on the principles described in these guidelines is required.
131. In order to promote predictability beyond the application of the TTBER and to confine detailed analysis to cases that are likely to present real competition concerns, the Commission takes the view that outside the area of hardcore restrictions Article 81 is unlikely to be infringed where there are four or more independently controlled technologies in addition to the technologies controlled by the parties to the agreement that may be substitutable for the licensed technology at a comparable cost to the user. In assessing whether the technologies are sufficiently substitutable the relative commercial strength of the technologies in question must be taken into account. The competitive constraint imposed by a technology is limited if it does not constitute a commercially viable alternative to the licensed technology. For instance, if due to network effects in the market consumers have a strong preference for products incorporating the licensed

technology, other technologies already on the market or likely to come to market within a reasonable period of time may not constitute a real alternative and may therefore impose only a limited competitive constraint. The fact that an agreement falls outside the safe harbour described in this paragraph does not imply that the agreement is caught by Article 81(1) and, if so, that the conditions of Article 81(3) are not satisfied. As for the market share safe harbour of the TTBER, this additional safe harbour merely creates a negative presumption that the agreement is not prohibited by Article 81. Outside the safe harbour individual assessment of the agreement based on the principles developed in these guidelines is required.

### 1.1. The relevant factors

132. In the application of Article 81 to individual cases it is necessary to take due account of the way in which competition operates on the market in question. The following factors are particularly relevant in this respect:

- (a) the nature of the agreement;
- (b) the market position of the parties;
- (c) the market position of competitors;
- (d) the market position of buyers of the licensed products;
- (e) entry barriers;
- (f) maturity of the market; and
- (g) other factors.

The importance of individual factors may vary from case to case and depends on all other factors. For instance, a high market share of the parties is usually a good indicator of market power, but in the case of low entry barriers it may not be indicative of market power. It is therefore not possible to provide firm rules on the importance of the individual factors.

133. Technology transfer agreements can take many shapes and forms. It is therefore important to analyse the nature of the agreement in terms of the competitive relationship between the parties and the restraints that it contains. In the latter regard it is necessary to go beyond the express terms of the agreement. The existence of implicit restraints may be derived from the way in which the agreement has been implemented by the parties and the incentives that they face.

134. The market position of the parties provides an indication of the degree of market power, if any, possessed by the licensor, the licensee or both. The higher their market share the greater their market power is likely to be. This is particularly so where the market share reflects cost advantages or other competitive advantages vis-à-vis competitors. These competitive advantages may for instance result from being a first mover in the market, from holding essential patents or from having superior technology.

135. In analysing the competitive relationship between the parties it is sometimes necessary to go beyond the analysis set out in the above sections II.3 on market definition and II.4 on the distinction between competitors and non-competitors. Even where the licensor is not an actual or potential supplier on the product market and the licensee is not an actual or potential competitor on the technology market, it is relevant to the analysis whether the licensee owns a competing technology, which is not being licensed. If the licensee has a strong position on the product market, an agreement granting him an exclusive licence to a competing technology can restrict competition significantly compared to the situation where the licensor does not grant an exclusive licence or licences other undertakings.

136. Market shares and possible competitive advantages and disadvantages are also used to assess the market position of competitors. The stronger the actual competitors and the greater their number the less risk there is that the parties will be able to individually exercise market power. However, if the number of competitors is rather small and their market position (size, costs, R&D potential, etc.) is rather similar, this market structure may increase the risk of collusion.

137. The market position of buyers provides an indication of whether or not one or more buyers possess buyer power. The first indicator of buying power is the market share of the buyer on the purchase market. This share reflects the importance of his demand for possible suppliers. Other indicators focus on the position of the buyer on his resale market, including characteristics such as a wide geographic spread of his outlets, and his brand image amongst final consumers. In some circumstances buyer power may prevent the licensor and/or the licensee from exercising market power on the market and thereby solve a competition problem that would otherwise have existed. This is particularly so when strong buyers have the capacity and the incentive to bring new sources of supply on to the market in the case of a small but permanent increase in relative prices. Where the strong buyers merely extract favourable terms from the supplier or simply pass on any price increase to their customers, the position of the buyers is not such as to prevent the exercise of market power by the licensee on the product market and therefore not such as to solve the competition problem on that market <sup>(54)</sup>.

138. Entry barriers are measured by the extent to which incumbent companies can increase their price above the competitive level without attracting new entry. In the absence of entry barriers, easy and quick entry would render price increases unprofitable. When effective entry, preventing or eroding the exercise of market power, is likely to occur within one or two years, entry barriers can, as a general rule, be said to be low. Entry barriers may result from a wide variety of factors such as economies of scale and scope, government regulations, especially where they establish exclusive rights, state aid, import tariffs, intellectual property rights, ownership of resources where the supply is limited due to for instance natural limitations, essential facilities, a first mover advantage or brand loyalty of consumers created by strong advertising over a period of time. Restrictive agreements entered into by undertakings may also work as an entry barrier by making access more difficult and foreclosing (potential) competitors. Entry barriers may be present at all stages of the research and development, production and distribution process. The question whether certain of these factors should be described as entry barriers depends particularly on whether they entail sunk costs. Sunk costs are those costs which have to be incurred to enter or be active on a market but which are lost when the market is exited. The more costs are sunk, the more potential entrants have to weigh the risks of entering the market and the more credibly incumbents can threaten that they will match new competition, as sunk costs make it costly for incumbents to leave the market. In general, entry requires sunk costs, sometimes minor and sometimes major. Therefore, actual competition is in general more effective and will weigh more heavily in the assessment of a case than potential competition.

139. A mature market is a market that has existed for some time, where the technology used is well known and widespread and not changing very much and in which demand is relatively stable or declining. In such a market restrictions of competition are more likely to have negative effects than in more dynamic markets.

140. In the assessment of particular restraints other factors may have to be taken into account. Such factors include cumulative effects, i.e. the coverage of the market by similar agreements, the duration of the agreements, the regulatory environment and behaviour that may indicate or facilitate collusion like price leadership, pre-announced price changes and discussions on the 'right' price, price rigidity in response to excess capacity, price discrimination and past collusive behaviour.

## 1.2. Negative effects of restrictive licence agreements

141. The negative effects on competition on the market that may result from restrictive technology transfer agreements include the following:

1. reduction of inter-technology competition between the companies operating on a technology market or on a market for products incorporating the technologies in question, including facilitation of collusion, both explicit and tacit;
2. foreclosure of competitors by raising their costs, restricting their access to essential inputs or otherwise raising barriers to entry; and
3. reduction of intra-technology competition between undertakings that produce products on the basis of the same technology.

142. Technology transfer agreements may reduce inter-technology competition, i.e. competition between undertakings that license or produce on the basis of substitutable technologies. This is particularly so where reciprocal obligations are imposed. For instance, where competitors transfer competing technologies to each other and impose a reciprocal obligation to provide each other with future improvements of their respective technologies and where this agreement prevents either competitor from gaining a technological lead over the other, competition in innovation between the parties is restricted (see also paragraph 208 below).

143. Licensing between competitors may also facilitate collusion. The risk of collusion is particularly high in concentrated markets. Collusion requires that the undertakings concerned have similar views on what is in their common interest and on how the co-ordination mechanisms function. For collusion to work the undertakings must also be able to monitor each other's market behaviour and there must be adequate deterrents to ensure that there is an incentive not to depart from the common policy on the market, while entry barriers must be high enough to limit entry or expansion by outsiders. Agreements can facilitate collusion by increasing transparency in the market, by controlling certain behaviour and by raising barriers to entry. Collusion can also exceptionally be facilitated by licensing agreements that lead to a high degree of commonality of costs, because undertakings that have similar costs are more likely to have similar views on the terms of coordination <sup>(55)</sup>.



144. Licence agreements may also affect inter-technology competition by creating barriers to entry for and expansion by competitors. Such foreclosure effects may stem from restraints that prevent licensees from licensing from third parties or create disincentives for them to do so. For instance, third parties may be foreclosed where incumbent licensors impose non-compete obligations on licensees to such an extent that an insufficient number of licensees are available to third parties and where entry at the level of licensees is difficult. Suppliers of substitutable technologies may also be foreclosed where a licensor with a sufficient degree of market power ties together various parts of a technology and licenses them together as a package while only part of the package is essential to produce a certain product.

145. Licence agreements may also reduce intra-technology competition, i.e. competition between undertakings that produce on the basis of the same technology. An agreement imposing territorial restraints on licensees, preventing them from selling into each other's territory reduces competition between them. Licence agreements may also reduce intra-technology competition by facilitating collusion between licensees. Moreover, licence agreements that reduce intra-technology competition may facilitate collusion between owners of competing technologies or reduce inter-technology competition by raising barriers to entry.

### 1.3. Positive effects of restrictive licence agreements and the framework for analysing such effects

146. Even restrictive licence agreements mostly also produce pro-competitive effects in the form of efficiencies, which may outweigh their anti-competitive effects. This assessment takes place within the framework of Article 81(3), which contains an exception from the prohibition rule of Article 81(1). For this exception to be applicable the licence agreement must produce objective economic benefits, the restrictions on competition must be indispensable to attain the efficiencies, consumers must receive a fair share of the efficiency gains, and the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products concerned.

147. The assessment of restrictive agreements under Article 81(3) is made within the actual context in which they occur<sup>(56)</sup> and on the basis of the facts existing at any given point in time. The assessment is sensitive to material changes in the facts. The exception rule of Article 81(3) applies as long as the four conditions are fulfilled and ceases to apply when that is no longer the case<sup>(57)</sup>. However, when applying Article 81(3) in accordance with these principles it is necessary to take into account the initial sunk investments made by any of the parties and the time needed and the restraints required to commit and recoup an efficiency enhancing investment. Article 81 cannot be applied without considering the *ex ante* investment and the risks relating thereto. The risk facing the parties and the sunk

investment that must be committed to implement the agreement can thus lead to the agreement falling outside Article 81(1) or fulfilling the conditions of Article 81(3), as the case may be, for the period of time required to recoup the investment.

148. The first condition of Article 81(3) requires an assessment of what are the objective benefits in terms of efficiencies produced by the agreement. In this respect, licence agreements have the potential of bringing together complementary technologies and other assets allowing new or improved products to be put on the market or existing products to be produced at lower cost. Outside the context of hardcore cartels, licensing often occurs because it is more efficient for the licensor to licence the technology than to exploit it himself. This may particularly be the case where the licensee already has access to the necessary production assets. The agreement allows the licensee to gain access to a technology that can be combined with these assets, allowing him to exploit new or improved technologies. Another example of potentially efficiency enhancing licensing is where the licensee already has a technology and where the combination of this technology and the licensor's technology gives rise to synergies. When the two technologies are combined the licensee may be able to attain a cost/output configuration that would not otherwise be possible. Licence agreements may also give rise to efficiencies at the distribution stage in the same way as vertical distribution agreements. Such efficiencies can take the form of cost savings or the provision of valuable services to consumers. The positive effects of vertical agreements are described in the Guidelines on Vertical Restraints<sup>(58)</sup>. A further example of possible efficiency gains is agreements whereby technology owners assemble a technology package for licensing to third parties. Such pooling arrangements may in particular reduce transaction costs, as licensees do not have to conclude separate licence agreements with each licensor. Pro-competitive licensing may also occur to ensure design freedom. In sectors where large numbers of intellectual property rights exist and where individual products may infringe upon a number of existing and future property rights, licence agreements whereby the parties agree not to assert their property rights against each other are often pro-competitive because they allow the parties to develop their respective technologies without the risk of subsequent infringement claims.

149. In the application of the indispensability test contained in Article 81(3) the Commission will in particular examine whether individual restrictions make it possible to perform the activity in question more efficiently than would have been the case in the absence of the restriction concerned. In making this assessment the market conditions and the realities facing the parties must be taken into account. Undertakings invoking the benefit of Article 81(3) are not required to consider hypothetical and theoretical alternatives. They must, however, explain and demonstrate why seemingly realistic and significantly less restrictive alternatives

would be significantly less efficient. If the application of what appears to be a commercially realistic and less restrictive alternative would lead to a significant loss of efficiencies, the restriction in question is treated as indispensable. In some cases, it may also be necessary to examine whether the agreement as such is indispensable to achieve the efficiencies. This may for example be so in the case of technology pools that include complementary but non-essential technologies <sup>(59)</sup>, in which case it must be examined to what extent such inclusion gives rise to particular efficiencies or whether, without a significant loss of efficiencies, the pool could be limited to technologies for which there are no substitutes. In the case of simple licensing between two parties it is generally not necessary to go beyond an examination of the indispensability of individual restraints. Normally there is no less restrictive alternative to the licence agreement as such.

150. The condition that consumers must receive a fair share of the benefits implies that consumers of the products produced under the licence must at least be compensated for the negative effects of the agreement <sup>(60)</sup>. This means that the efficiency gains must fully off-set the likely negative impact on prices, output and other relevant factors caused by the agreement. They may do so by changing the cost structure of the undertakings concerned, giving them an incentive to reduce price, or by allowing consumers to gain access to new or improved products, compensating for any likely price increase <sup>(61)</sup>.
151. The last condition of Article 81(3), according to which the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products concerned, presupposes an analysis of remaining competitive pressures on the market and the impact of the agreement on such sources of competition. In the application of the last condition of Article 81(3) the relationship between Article 81(3) and Article 82 must be taken into account. According to settled case law, the application of Article 81(3) cannot prevent the application of Article 82 of the Treaty <sup>(62)</sup>. Moreover, since Articles 81 and 82 both pursue the aim of maintaining effective competition on the market, consistency requires that Article 81(3) be interpreted as precluding any application of the exception rule to restrictive agreements that constitute an abuse of a dominant position <sup>(63)</sup>.
152. The fact that the agreement substantially reduces one dimension of competition does not necessarily mean that competition is eliminated within the meaning of Article 81(3). A technology pool, for instance, can result in an industry standard, leading to a situation in which there is little competition in terms of the technological format. Once the main players in the market adopt a certain format, network effects may make it very difficult for alternative formats to survive. This does not

imply, however, that the creation of a de facto industry standard always eliminates competition within the meaning of the last condition of Article 81(3). Within the standard, suppliers may compete on price, quality and product features. However, in order for the agreement to comply with Article 81(3), it must be ensured that the agreement does not unduly restrict competition and does not unduly restrict future innovation.

## 2. The application of Article 81 to various types of licensing restraints

153. This section deals with various types of restraints that are commonly included in licence agreements. Given their prevalence it is useful to provide guidance as to how they are assessed outside the safe harbour of the TTBER. Restraints that have already been dealt with in the preceding parts of these guidelines, in particular sections III.4 and III.5, are only dealt with briefly in the present section.
154. This section covers both agreements between non-competitors and agreements between competitors. In respect of the latter a distinction is made — where appropriate — between reciprocal and non-reciprocal agreements. No such distinction is required in the case of agreements between non-competitors. When undertakings are neither actual nor potential competitors on a relevant technology market or on a market for products incorporating the licensed technology, a reciprocal licence is for all practical purposes no different from two separate licences. Arrangements whereby the parties assemble a technology package, which is then licensed to third parties, are technology pools, which are dealt with in section 4 below.
155. This section does not deal with obligations in licence agreements that are generally not restrictive of competition within the meaning of Article 81(1). These obligations include but are not limited to:
  - (a) confidentiality obligations;
  - (b) obligations on licensees not to sub-license;
  - (c) obligations not to use the licensed technology after the expiry of the agreement, provided that the licensed technology remains valid and in force;
  - (d) obligations to assist the licensor in enforcing the licensed intellectual property rights;

- (e) obligations to pay minimum royalties or to produce a minimum quantity of products incorporating the licensed technology; and
- (f) obligations to use the licensor's trade mark or indicate the name of the licensor on the product.

## 2.1. Royalty obligations

156. The parties to a licence agreement are normally free to determine the royalty payable by the licensee and its mode of payment without being caught by Article 81(1). This principle applies both to agreements between competitors and agreements between non-competitors. Royalty obligations may for instance take the form of lump sum payments, a percentage of the selling price or a fixed amount for each product incorporating the licensed technology. In cases where the licensed technology relates to an input which is incorporated into a final product it is as a general rule not restrictive of competition that royalties are calculated on the basis of the price of the final product, provided that it incorporates the licensed technology. In the case of software licensing royalties based on the number of users and royalties calculated on a per machine basis are generally compatible with Article 81(1).

157. In the case of licence agreements between competitors it is recalled, see paragraphs and above, that in a limited number of circumstances royalty obligations may amount to price fixing, which is a hardcore restriction (cf. Article 4(1)(a)). It is a hardcore restriction under Article 4(1)(a) if competitors provide for reciprocal running royalties in circumstances where the licence is a sham, in that its purpose is not to allow an integration of complementary technologies or to achieve another pro-competitive aim. It is also a hardcore restriction under Article 4(1)(a) and 4(1)(d) if royalties extend to products produced solely with the licensee's own technology.

158. Other types of royalty arrangements between competitors are block exempted up to the market share threshold of 20 % even if they restrict competition. Outside the safe harbour of the block exemption Article 81(1) may be applicable where competitors cross license and impose running royalties that are clearly disproportionate compared to the market value of the licence and where such royalties have a significant impact on market prices. In assessing whether the royalties are disproportionate it is relevant to have regard to the royalties paid by other licensees on the product market for the same or substitute technologies. In such cases it is unlikely that the conditions of Article 81(3) are satisfied. Article 81(1) may also apply where reciprocal running royalties per unit increase as output increases. If the parties have a significant degree of market power, such royalties may have the effect of limiting output.

159. Notwithstanding the fact that the block exemption only applies as long as the technology is valid and in force, the parties can normally agree to extend royalty obligations beyond the period of validity of the licensed intellectual property rights without falling foul of Article 81(1). Once these rights expire, third parties can legally exploit the technology in question and compete with the parties to the agreement. Such actual and potential competition will normally suffice to ensure that the obligation in question does not have appreciable anti-competitive effects.

160. In the case of agreements between non-competitors the block exemption covers agreements whereby royalties are calculated on the basis of both products produced with the licensed technology and products produced with technologies licensed from third parties. Such arrangements may facilitate the metering of royalties. However, they may also lead to foreclosure by increasing the cost of using third party inputs and may thus have similar effects as a non-compete obligation. If royalties are paid not just on products produced with the licensed technology but also on products produced with third party technology, then the royalties will increase the cost of the latter products and reduce demand for third party technology. Outside the scope of the block exemption it must therefore be examined whether the restriction has foreclosure effects. For that purpose it is appropriate to use the analytical framework set out in section 2.7 below. In the case of appreciable foreclosure effects such agreements are caught by Article 81(1) and unlikely to fulfil the conditions of Article 81(3), unless there is no other practical way of calculating and monitoring royalty payments.

## 2.2. Exclusive licensing and sales restrictions

161. For the present purposes it is useful to distinguish between restrictions as to production within a given territory (exclusive or sole licences) and restrictions on the sale of products incorporating the licensed technology into a given territory and to a given customer group (sales restrictions).

### 2.2.1. Exclusive and sole licences

162. A licence is deemed to be exclusive if the licensee is the only one who is permitted to produce on the basis of the licensed technology within a given territory. The licensor thus undertakes not to produce itself or license others to produce within a given territory. This territory may cover the whole world. Where the licensor undertakes only not to licence third parties to produce within a given territory, the licence is a sole licence. Often exclusive or sole licensing is accompanied by sales restrictions that limit the parties in where they may sell products incorporating the licensed technology.

163. Reciprocal exclusive licensing between competitors falls under Article 4(1)(c), which identifies market sharing between competitors as a hardcore restriction. Reciprocal sole licensing between competitors is block exempted up to the market share threshold of 20 %. Under such an agreement the parties mutually commit not to license their competing technologies to third parties. In cases where the parties have a significant degree of market power such agreements may facilitate collusion by ensuring that the parties are the only sources of output in the market based on the licensed technologies.
164. Non-reciprocal exclusive licensing between competitors is block exempted up to the market share threshold of 20 %. Above the market share threshold it is necessary to analyse what are the likely anti-competitive effects of such exclusive licensing. Where the exclusive licence is world-wide it implies that the licensor leaves the market. In cases where exclusivity is limited to a particular territory such as a Member State the agreement implies that the licensor abstains from producing goods and services inside the territory in question. In the context of Article 81(1) it must in particular be assessed what is the competitive significance of the licensor. If the licensor has a limited market position on the product market or lacks the capacity to effectively exploit the technology in the licensee's territory, the agreement is unlikely to be caught by Article 81(1). A special case is where the licensor and the licensee only compete on the technology market and the licensor, for instance being a research institute or a small research based undertaking, lacks the production and distribution assets to effectively bring to market products incorporating the licensed technology. In such cases Article 81(1) is unlikely to be infringed.
165. Exclusive licensing between non-competitors — to the extent that it is caught by Article 81(1) <sup>(64)</sup> — is likely to fulfil the conditions of Article 81(3). The right to grant an exclusive licence is generally necessary in order to induce the licensee to invest in the licensed technology and to bring the products to market in a timely manner. This is in particular the case where the licensee must make large investments in further developing the licensed technology. To intervene against the exclusivity once the licensee has made a commercial success of the licensed technology would deprive the licensee of the fruits of his success and would be detrimental to competition, the dissemination of technology and innovation. The Commission will therefore only exceptionally intervene against exclusive licensing in agreements between non-competitors, irrespective of the territorial scope of the licence.
166. The main situation in which intervention may be warranted is where a dominant licensee obtains an exclusive licence to one or more competing technologies. Such agreements are likely to be caught by Article 81(1) and unlikely to fulfil the conditions of Article 81(3). It is a condition however that entry into the technology market is difficult and the licensed technology constitutes a real source of competition on the market. In such circumstances an exclusive licence may foreclose third party licensees and allow the licensee to preserve his market power.
167. Arrangements whereby two or more parties cross licence each other and undertake not to licence third parties give rise to particular concerns when the package of technologies resulting from the cross licences creates a de facto industry standard to which third parties must have access in order to compete effectively on the market. In such cases the agreement creates a closed standard reserved for the parties. The Commission will assess such arrangements according to the same principles as those applied to technology pools (see section 4 below). It will normally be required that the technologies which support such a standard be licensed to third parties on fair, reasonable and non-discriminatory terms <sup>(65)</sup>. Where the parties to the arrangement compete with third parties on an existing product market and the arrangement relates to that product market a closed standard is likely to have substantial exclusionary effects. This negative impact on competition can only be avoided by licensing also to third parties.
- ### 2.2.2. Sales restrictions
168. Also as regards sales restrictions there is an important distinction to be made between licensing between competitors and between non-competitors.
169. Restrictions on active and passive sales by one or both parties in a reciprocal agreement between competitors are hardcore restrictions of competition under Article 4(1)(c). Sales restrictions on either party in a reciprocal agreement between competitors are caught by Article 81(1) and are unlikely to fulfil the conditions of Article 81(3). Such restrictions are generally considered market sharing, since they prevent the affected party from selling actively and passively into territories and to customer groups which he actually served or could realistically have served in the absence of the agreement.
170. In the case of non-reciprocal agreements between competitors the block exemption applies to restrictions on active and passive sales by the licensee or the licensor into the exclusive territory or to the exclusive customer group reserved for the other party (cf. Article 4(1)(c)(iv)). Above the market share threshold of 20 % sales restrictions between licensor and licensee are caught by

Article 81(1) when one or both of the parties have a significant degree of market power. Such restrictions, however, may be indispensable for the dissemination of valuable technologies and therefore fulfil the conditions of Article 81(3). This may be the case where the licensor has a relatively weak market position in the territory where he exploits himself the technology. In such circumstances restrictions on active sales in particular may be indispensable to induce the licensor to grant the licence. In the absence thereof the licensor would risk facing active competition in his main area of activity. Similarly, restrictions on active sales by the licensor may be indispensable, in particular, where the licensee has a relatively weak market position in the territory allocated to him and has to make significant investments in order to efficiently exploit the licensed technology.

171. The block exemption also covers restrictions on active sales into the territory or to the customer group allocated to another licensee, who was not a competitor of the licensor at the time when he concluded the licence agreement with the licensor. It is a condition, however, that the agreement between the parties in question is non-reciprocal. Above the market share threshold such active sales restrictions are likely to be caught by Article 81(1) when the parties have a significant degree of market power. However, the restraint is likely to be indispensable within the meaning of Article 81(3) for the period of time required for the protected licensee to penetrate a new market and establish a market presence in the allocated territory or vis-à-vis the allocated customer group. This protection against active sales allows the licensee to overcome the asymmetry, which he faces due to the fact that some of the licensees are competing undertakings of the licensor and thus already established on the market. Restrictions on passive sales by licensees into a territory or to a customer group allocated to another licensee are hardcore restrictions under Article 4(1)(c) of the TTBER.

172. In the case of agreements between non-competitors sales restrictions between the licensor and a licensee are block exempted up to the market share threshold of 30 %. Above the market share threshold restrictions on active and passive sales by licensees to territories or customer groups reserved for the licensor may fall outside Article 81(1) where on the basis of objective factors it can be concluded that in the absence of the sales restrictions licensing would not occur. A technology owner cannot normally be expected to create direct competition with himself on the basis of his own technology. In other cases sales restrictions on the licensee may be caught by Article 81(1) both where the licensor individually has a significant degree of market power and in the case of a cumulative effect of similar agreements concluded by licensors which together hold a strong position on the market.

173. Sales restrictions on the licensor, when caught by Article 81(1), are likely to fulfil the conditions of Article 81(3) unless there are no real alternatives to the licensor's technology on the market or such alternatives are licensed by the licensee from third parties. Such restrictions and in particular restrictions on active sales are likely to be indispensable within the meaning of Article 81(3) in order to induce the licensee to invest in the production, marketing and sale of the products incorporating the licensed technology. It is likely that the licensee's incentive to invest would be significantly reduced if he would face direct competition from the licensor whose production costs are not burdened by royalty payments, possibly leading to sub-optimal levels of investment.

174. As regards restrictions on sales between licensees in agreements between non-competitors, the TTBER block exempts restrictions on active selling between territories or customer groups. Above the market share threshold restrictions on active sales between licensees' territories and customer groups limit intra-technology competition and are likely to be caught by Article 81(1) when the individual licensee has a significant degree of market power. Such restrictions, however, may fulfil the conditions of Article 81(3) where they are necessary to prevent free riding and to induce the licensee to make the investment necessary for efficient exploitation of the licensed technology inside his territory and to promote sales of the licensed product. Restrictions on passive sales are covered by the hardcore list of Article 4(2)(b), cf. paragraph 101 above, when they exceed two years from the date on which the licensee benefiting from the restrictions first put the product incorporating the licensed technology on the market inside his exclusive territory. Passive sales restrictions exceeding this two-year period are unlikely to fulfil the conditions of Article 81(3).

## 2.3. Output restrictions

175. Reciprocal output restrictions in licence agreements between competitors constitute a hardcore restriction covered by Article 4(1)(b) of the TTBER (cf. point 82 above). Article 4(1)(b) does not cover output restrictions imposed on the licensee in a non-reciprocal agreement or on one of the licensees in an reciprocal agreement. Such restrictions are block exempted up to the market share threshold of 20 %. Above the market share threshold, output restrictions on the licensee may restrict competition where the parties have a significant degree of market power. However, Article 81(3) is likely to apply in cases where the licensor's technology is substantially better than the licensee's technology and the output limitation substantially exceeds the output of the licensee prior to the conclusion of the agreement. In

that case the effect of the output limitation is limited even in markets where demand is growing. In the application of Article 81(3) it must also be taken into account that such restrictions may be necessary in order to induce the licensor to disseminate his technology as widely as possible. For instance, a licensor may be reluctant to license his competitors if he cannot limit the licence to a particular production site with a specific capacity (a site licence). Where the licence agreement leads to a real integration of complementary assets, output restrictions on the licensee may therefore fulfil the conditions of Article 81(3). However, this is unlikely to be the case where the parties have substantial market power.

176. Output restrictions in licence agreements between non-competitors are block exempted up to the market share threshold of 30 %. The main anti-competitive risk flowing from output restrictions on licensees in agreements between non-competitors is reduced intra-technology competition between licensees. The significance of such anti-competitive effects depends on the market position of the licensor and the licensees and the extent to which the output limitation prevents the licensee from satisfying demand for the products incorporating the licensed technology.
177. When output restrictions are combined with exclusive territories or exclusive customer groups, the restrictive effects are increased. The combination of the two types of restraints makes it more likely that the agreement serves to partition markets.
178. Output limitations imposed on the licensee in agreements between non-competitors may also have pro-competitive effects by promoting the dissemination of technology. As a supplier of technology, the licensor should normally be free to determine the output produced with the licensed technology by the licensee. If the licensor were not free to determine the output of the licensee, a number of licence agreements might not come into existence in the first place, which would have a negative impact on the dissemination of new technology. This is particularly likely to be the case where the licensor is also a producer, since in that case the output of the licensees may find their way back into the licensor's main area of operation and thus have a direct impact on these activities. On the other hand, it is less likely that output restrictions are necessary in order to ensure dissemination of the licensor's technology when combined with sales restrictions on the licensee prohibiting him from selling into a territory or customer group reserved for the licensor.

## 2.4. Field of use restrictions

179. Under a field of use restriction the licence is either limited to one or more technical fields of application or one or more product markets. There are many cases in which the same technology can be used to make different products or can be incorporated into products belonging to different product markets. A new moulding technology may for instance be used to make plastic bottles and plastic glasses, each product belonging to separate product markets. However, a single product market may encompass several technical fields of use. For instance a new engine technology may be employed in four cylinder engines and six cylinder engines. Similarly, a technology to make chipsets may be used to produce chipsets with up to four CPUs and more than four CPUs. A licence limiting the use of the licensed technology to produce say four cylinder engines and chipsets with up to four CPUs constitutes a technical field of use restriction.
180. Given that field of use restrictions are block exempted and that certain customer restrictions are hardcore restrictions under Articles 4(1)(c) and 4(2)(b) of the TTBER, it is important to distinguish the two categories of restraints. A customer restriction presupposes that specific customer groups are identified and that the parties are restricted in selling to such identified groups. The fact that a technical field of use restriction may correspond to certain groups of customers within a product market does not imply that the restraint is to be classified as a customer restriction. For instance, the fact that certain customers buy predominantly or exclusively chipsets with more than four CPUs does not imply that a licence which is limited to chipsets with up to four CPUs constitutes a customer restriction. However, the field of use must be defined objectively by reference to identified and meaningful technical characteristics of the licensed product.
181. A field of use restriction limits the exploitation of the licensed technology by the licensee to one or more particular fields of use without limiting the licensor's ability to exploit the licensed technology. In addition, as with territories, these fields of use can be allocated to the licensee under an exclusive or sole licence. Field of use restrictions combined with an exclusive or sole licence also restrict the licensor's ability to exploit his own technology, by preventing him from exploiting it himself, including by way of licensing to others. In the case of a sole licence only licensing to third parties is restricted. Field of use restrictions combined with exclusive and sole licences are treated in the same way as the exclusive and sole licenses dealt with in section 2.2.1 above. In particular, for licensing between competitors, this means that reciprocal exclusive licensing is hardcore under Article 4(1)(c).

182. Field of use restrictions may have pro-competitive effects by encouraging the licensor to license his technology for applications that fall outside his main area of focus. If the licensor could not prevent licensees from operating in fields where he exploits the technology himself or in fields where the value of the technology is not yet well established, it would be likely to create a disincentive for the licensor to license or would lead him to charge a higher royalty. It must also be taken into account that in certain sectors licensing often occurs to ensure design freedom by preventing infringement claims. Within the scope of the licence the licensee is able to develop his own technology without fearing infringement claims by the licensor.

183. Field of use restrictions on licensees in agreements between actual or potential competitors are block exempted up to the market share threshold of 20 %. The main competitive concern in the case of such restrictions is the risk that the licensee ceases to be a competitive force outside the licensed field of use. This risk is greater in the case of cross licensing between competitors where the agreement provides for asymmetrical field of use restrictions. A field of use restriction is asymmetrical where one party is permitted to use the licensed technology within one product market or technical field of use and the other party is permitted to use the other licensed technology within another product market or technical field of use. Competition concerns may in particular arise where the licensee's production facility, which is tooled up to use the licensed technology, is also used to produce with his own technology products outside the licensed field of use. If the agreement is likely to lead the licensee to reduce output outside the licensed field of use, the agreement is likely to be caught by Article 81(1). Symmetrical field of use restrictions, i.e. agreements whereby the parties are licensed to use each other's technologies within the same field(s) of use, are unlikely to be caught by Article 81(1). Such agreements are unlikely to restrict competition that existed in the absence of the agreement. Article 81(1) is also unlikely to apply in the case of agreements that merely enable the licensee to develop and exploit his own technology within the scope of the licence without fearing infringement claims by the licensor. In such circumstances field of use restrictions do not in themselves restrict competition that existed in the absence of the agreement. In the absence of the agreement the licensee also risked infringement claims outside the scope of the licensed field of use. However, if the licensee without business justification terminates or scales back his activities in the area outside the licensed field of use this may be an indication of an underlying market sharing arrangement amounting to a hardcore restriction under Article 4(1)(c) of the TTBER.

184. Field of use restrictions on licensee and licensor in agreements between non-competitors are block exempted up to the market share threshold of 30 %. Field of use restrictions in agreements between non-competitors whereby the licensor reserves one or

more product markets or technical fields of use for himself are generally either non-restrictive of competition or efficiency enhancing. They promote dissemination of new technology by giving the licensor an incentive to license for exploitation in fields in which he does not want to exploit the technology himself. If the licensor could not prevent licensees from operating in fields where the licensor exploits the technology himself, it would be likely to create a disincentive for the licensor to licence.

185. In agreements between non-competitors the licensor is normally also entitled to grant sole or exclusive licences to different licensees limited to one or more fields of use. Such restrictions limit intra-technology competition between licensees in the same way as exclusive licensing and are analysed in the same way (cf. section 2.2.1 above).

## 2.5. Captive use restrictions

186. A captive use restriction can be defined as an obligation on the licensee to limit his production of the licensed product to the quantities required for the production of his own products and for the maintenance and repair of his own products. In other words, this type of use restriction takes the form of an obligation on the licensee to use the products incorporating the licensed technology only as an input for incorporation into his own production; it does not cover the sale of the licensed product for incorporation into the products of other producers. Captive use restrictions are block exempted up to the respective market share thresholds of 20 % and 30 %. Outside the scope of the block exemption it is necessary to examine what are the pro-competitive and anti-competitive effects of the restraint. In this respect it is necessary to distinguish agreements between competitors from agreements between non-competitors.

187. In the case of licence agreements between competitors a restriction that imposes on the licensee to produce under the licence only for incorporation into his own products prevents him from being a supplier of components to third party producers. If prior to the conclusion of the agreement, the licensee was not an actual or likely potential supplier of components to other producers, the captive use restriction does not change anything compared to the pre-existing situation. In those circumstances the restriction is assessed in the same way as in the case of agreements between non-competitors. If, on the other hand, the licensee is an actual or likely component supplier, it is necessary to examine what is the impact of the agreement on this activity. If by tooling up to use the licensor's technology the licensee ceases to use his own technology on a stand alone basis and thus to be a component supplier, the agreement restricts competition that existed prior to the agreement. It may result in serious negative market effects when the licensor has a significant degree of market power on the component market.

188. In the case of licence agreements between non-competitors there are two main competitive risks stemming from captive use restrictions: (a) a restriction of intra-technology competition on the market for the supply of inputs and (b) an exclusion of arbitrage between licensees enhancing the possibility for the licensor to impose discriminatory royalties on licensees.
189. Captive use restrictions, however, may also promote pro-competitive licensing. If the licensor is a supplier of components, the restraint may be necessary in order for the dissemination of technology between non-competitors to occur. In the absence of the restraint the licensor may not grant the licence or may do so only against higher royalties, because otherwise he would create direct competition to himself on the component market. In such cases a captive use restriction is normally either not restrictive of competition or covered by Article 81(3). It is a condition, however, that the licensee is not restricted in selling the licensed product as replacement parts for his own products. The licensee must be able to serve the after market for his own products, including independent service organisations that service and repair the products produced by him.
190. Where the licensor is not a component supplier on the relevant market, the above reason for imposing captive use restrictions does not apply. In such cases a captive use restriction may in principle promote the dissemination of technology by ensuring that licensees do not sell to producers that compete with the licensor on other markets. However, a restriction on the licensee not to sell into certain customer groups reserved for the licensor normally constitutes a less restrictive alternative. Consequently, in such cases a captive use restriction is normally not necessary for the dissemination of technology to take place.
- 2.6. Tying and bundling**
191. In the context of technology licensing tying occurs when the licensor makes the licensing of one technology (the tying product) conditional upon the licensee taking a licence for another technology or purchasing a product from the licensor or someone designated by him (the tied product). Bundling occurs where two technologies or a technology and a product are only sold together as a bundle. In both cases, however, it is a condition that the products and technologies involved are distinct in the sense that there is distinct demand for each of the products and technologies forming part of the tie or the bundle. This is normally not the case where the technologies or products are by necessity linked in such a way that the licensed technology cannot be exploited without the tied product or both parts of the bundle cannot be exploited without the other. In the following the term 'tying' refers to both tying and bundling.
192. Article 3 of the TTBER, which limits the application of the block exemption by market share thresholds, ensures that tying and bundling are not block exempted above the market share thresholds of 20 % in the case of agreements between competitors and 30 % in the case of agreements between non-competitors. The market share thresholds apply to any relevant technology or product market affected by the licence agreement, including the market for the tied product. Above the market share thresholds it is necessary to balance the anti-competitive and pro-competitive effects of tying.
193. The main restrictive effect of tying is foreclosure of competing suppliers of the tied product. Tying may also allow the licensor to maintain market power in the market for the tying product by raising barriers to entry since it may force new entrants to enter several markets at the same time. Moreover, tying may allow the licensor to increase royalties, in particular when the tying product and the tied product are partly substitutable and the two products are not used in fixed proportion. Tying prevents the licensee from switching to substitute inputs in the face of increased royalties for the tying product. These competition concerns are independent of whether the parties to the agreement are competitors or not. For tying to produce likely anti-competitive effects the licensor must have a significant degree of market power in the tying product so as to restrict competition in the tied product. In the absence of market power in the tying product the licensor cannot use his technology for the anti-competitive purpose of foreclosing suppliers of the tied product. Furthermore, as in the case of non-compete obligations, the tie must cover a certain proportion of the market for the tied product for appreciable foreclosure effects to occur. In cases where the licensor has market power on the market for the tied product rather than on the market for the tying product, the restraint is analysed as non-compete or quantity forcing, reflecting the fact that any competition problem has its origin on the market for the 'tied' product and not on the market for the 'tying' product <sup>(66)</sup>.
194. Tying can also give rise to efficiency gains. This is for instance the case where the tied product is necessary for a technically satisfactory exploitation of the licensed technology or for ensuring that production under the licence conforms to quality standards respected by the licensor and other licensees. In such cases tying is normally either not restrictive of competition or covered by Article 81(3). Where the licensees use the licensor's trademark or brand name or where it is otherwise obvious to consumers that there is a link between the product incorporating the licensed technology and the licensor, the licensor has a legitimate interest in ensuring that the quality of the products are such that it does not undermine the value of his technology or his reputation as an economic operator. Moreover, where it is known to consumers that the licensees (and the licensor) produce on the basis of the same technology it is unlikely that licensees would be willing to take a licence unless the technology is exploited by all in a technically satisfactory way.



195. Tying is also likely to be pro-competitive where the tied product allows the licensee to exploit the licensed technology significantly more efficiently. For instance, where the licensor licenses a particular process technology the parties can also agree that the licensee buys a catalyst from the licensor which is developed for use with the licensed technology and which allows the technology to be exploited more efficiently than in the case of other catalysts. Where in such cases the restriction is caught by Article 81(1), the conditions of Article 81(3) are likely to be fulfilled even above the market share thresholds.

## 2.7. Non-compete obligations

196. Non-compete obligations in the context of technology licensing take the form of an obligation on the licensee not to use third party technologies which compete with the licensed technology. To the extent that a non-compete obligation covers a product or additional technology supplied by the licensor the obligation is dealt with in the preceding section on tying.

197. The TTBER exempts non-compete obligations both in the case of agreements between competitors and in the case of agreements between non-competitors up to the market share thresholds of 20 % and 30 % respectively.

198. The main competitive risk presented by non-compete obligations is foreclosure of third party technologies. Non-compete obligations may also facilitate collusion between licensors in the case of cumulative use. Foreclosure of competing technologies reduces competitive pressure on royalties charged by the licensor and reduces competition between the incumbent technologies by limiting the possibilities for licensees to substitute between competing technologies. As in both cases the main problem is foreclosure, the analysis can in general be the same in the case of agreements between competitors and agreements between non-competitors. However, in the case of cross licensing between competitors where both agree not to use third party technologies the agreement may facilitate collusion between them on the product market, thereby justifying the lower market share threshold of 20 %.

199. Foreclosure may arise where a substantial part of potential licensees are already tied to one or, in the case of cumulative effects, more sources of technology and are prevented from exploiting competing technologies. Foreclosure effects may result from agreements concluded by a single licensor with a significant degree of market power or by a cumulative effect of agreements concluded by several licensors, even where each individual agreement or network of agreements is covered by the TTBER. In the latter case, however, a serious cumulative effect is unlikely to arise as long as less than 50 % of the market is tied. Above this threshold significant foreclosure is likely to occur when there are relatively high barriers to entry for new licensees. If barriers to entry are low, new licensees are able to enter the market and exploit commercially attractive technologies held by third parties and thus represent a real alternative to incumbent licensees. In order to determine the real possibility for entry and expansion by third parties it is also necessary to take account of the extent to which distributors are tied to licensees by non-compete obligations. Third party technologies only have a real possibility of entry if they have access to the necessary production and distribution assets. In other words, the ease of entry depends not only on the availability of licensees but also the extent to which they have access to distribution. In assessing foreclosure effects at the distribution level the Commission will apply the analytical framework set out in section IV.2.1 of the Guidelines on Vertical Restraints <sup>(67)</sup>.

200. When the licensor has a significant degree of market power, obligations on licensees to obtain the technology only from the licensor can lead to significant foreclosure effects. The stronger the market position of the licensor the higher the risk of foreclosing competing technologies. For appreciable foreclosure effects to occur the non-compete obligations do not necessarily have to cover a substantial part of the market. Even in the absence thereof, appreciable foreclosure effects may occur where non-compete obligations are targeted at undertakings that are the most likely to license competing technologies. The risk of foreclosure is particularly high where there is only a limited number of potential licensees and the licence agreement concerns a technology which is used by the licensees to make an input for their own use. In such cases the entry barriers for a new licensor are likely to be high. Foreclosure may be less likely in cases where the technology is used to make a product that is sold to third parties; although in this case the restriction also ties production capacity for the input in question, it does not tie demand for the product incorporating the input produced with the licensed technology. To enter the market in the latter case licensors only need access to one or more licensee(s) that have suitable production capacity and unless only few undertakings possess or are able to obtain the assets required to take a licence, it is unlikely that by imposing non-compete obligations on its licensees the licensor is able to deny competitors access to efficient licensees.

201. Non-compete obligations may also produce pro-competitive effects. First, such obligations may promote dissemination of technology by reducing the risk of misappropriation of the licensed technology, in particular know-how. If a licensee is entitled to license competing technologies from third parties, there is a risk that particularly licensed know-how would be used in the exploitation of competing technologies and thus benefit competitors. When a licensee also exploits competing technologies, it normally also makes monitoring of royalty payments more difficult, which may act as a disincentive to licensing.
202. Second, non-compete obligations possibly in combination with an exclusive territory may be necessary to ensure that the licensee has an incentive to invest in and exploit the licensed technology effectively. In cases where the agreement is caught by Article 81(1) because of an appreciable foreclosure effect, it may be necessary in order to benefit from Article 81(3) to choose a less restrictive alternative, for instance to impose minimum output or royalty obligations, which normally have less potential to foreclose competing technologies.
203. Third, in cases where the licensor undertakes to make significant client specific investments for instance in training and tailoring of the licensed technology to the licensee's needs, non-compete obligations or alternatively minimum output or minimum royalty obligations may be necessary to induce the licensor to make the investment and to avoid hold-up problems. However, normally the licensor will be able to charge directly for such investments by way of a lump sum payment, implying that less restrictive alternatives are available.
- 3. Settlement and non-assertion agreements**
204. Licensing may serve as a means of settling disputes or avoiding that one party exercises his intellectual property rights to prevent the other party from exploiting his own technology. Licensing including cross licensing in the context of settlement agreements and non-assertion agreements is not as such restrictive of competition since it allows the parties to exploit their technologies post agreement. However, the individual terms and conditions of such agreements may be caught by Article 81(1). Licensing in the context of settlement agreements is treated like other licence agreements. In the case of technologies that from a technical point of view are substitutes, it is therefore necessary to assess to what extent it is likely that the technologies in question are in a one-way or two-way blocking position (cf. paragraph 32 above). If so, the parties are not deemed to be competitors.
205. The block exemption applies provided that the agreement does not contain any hardcore restrictions of competition as set out in Article 4 of the TTBER. The hardcore list of Article 4(1) may in particular apply where it was clear to the parties that no blocking position exists and that consequently they are competitors. In such cases the settlement is merely a means to restrict competition that existed in the absence of the agreement.
206. In cases where it is likely that in the absence of the licence the licensee could be excluded from the market, the agreement is generally pro-competitive. Restrictions that limit intra-technology competition between the licensor and the licensee are often compatible with Article 81, see section 2 above.
207. Agreements whereby the parties cross license each other and impose restrictions on the use of their technologies, including restrictions on the licensing to third parties, may be caught by Article 81(1). Where the parties have a significant degree of market power and the agreement imposes restrictions that clearly go beyond what is required in order to unblock, the agreement is likely to be caught by Article 81(1) even if it is likely that a mutual blocking position exists. Article 81(1) is particularly likely to apply where the parties share markets or fix reciprocal running royalties that have a significant impact on market prices.
208. Where under the agreement the parties are entitled to use each other's technology and the agreement extends to future developments, it is necessary to assess what is the impact of the agreement on the parties' incentive to innovate. In cases where the parties have a significant degree of market power the agreement is likely to be caught by Article 81(1) where the agreement prevents the parties from gaining a competitive lead over each other. Agreements that eliminate or substantially reduce the possibilities of one party to gain a competitive lead over the other reduce the incentive to innovate and thus adversely affect an essential part of the competitive process. Such agreements are also unlikely to satisfy the conditions of Article 81(3). It is particularly unlikely that the restriction can be considered indispensable within the meaning of the third condition of Article 81(3). The achievement of the objective of the agreement, namely to ensure that the parties can continue to exploit their own technology without being blocked by the other party, does not require that the parties agree to share future innovations. However, the parties are unlikely to be prevented from gaining a competitive lead over each other where the purpose of the licence is to allow the parties to develop their respective technologies and where

the licence does not lead them to use the same technological solutions. Such agreements merely create design freedom by preventing future infringement claims by the other party.

209. In the context of a settlement and non-assertion agreement, non-challenge clauses are generally considered to fall outside Article 81(1). It is inherent in such agreements that the parties agree not to challenge *ex post* the intellectual property rights covered by the agreement. Indeed, the very purpose of the agreement is to settle existing disputes and/or to avoid future disputes.

#### 4. Technology pools

210. Technology pools are defined as arrangements whereby two or more parties assemble a package of technology which is licensed not only to contributors to the pool but also to third parties. In terms of their structure technology pools can take the form of simple arrangements between a limited number of parties or elaborate organisational arrangements whereby the organisation of the licensing of the pooled technologies is entrusted to a separate entity. In both cases the pool may allow licensees to operate on the market on the basis of a single licence.

211. There is no inherent link between technology pools and standards, but in some cases the technologies in the pool support (wholly or partly) a *de facto* or *de jure* industry standard. When technology pools do support an industry standard they do not necessarily support a single standard. Different technology pools may support competing standards<sup>(68)</sup>.

212. Agreements establishing technology pools and setting out the terms and conditions for their operation are not — irrespective of the number of parties — covered by the block exemption (cf. section III.2.2 above). Such agreements are addressed only by these guidelines. Pooling arrangements give rise to a number of particular issues regarding the selection of the included technologies and the operation of the pool, which do not arise in the context of other types of licensing. The individual licences granted by the pool to third party licensees, however, are treated like other licence agreements, which are block exempted when the conditions set out in the TTBER are fulfilled, including the requirements of Article 4 of the TTBER containing the list of hardcore restrictions.

213. Technology pools may be restrictive of competition. The creation of a technology pool necessarily implies joint

selling of the pooled technologies, which in the case of pools composed solely or predominantly of substitute technologies amounts to a price fixing cartel. Moreover, in addition to reducing competition between the parties, technology pools may also, in particular when they support an industry standard or establish a *de facto* industry standard, result in a reduction of innovation by foreclosing alternative technologies. The existence of the standard and the related technology pool may make it more difficult for new and improved technologies to enter the market.

214. Technology pools can also produce pro-competitive effects, in particular by reducing transaction costs and by setting a limit on cumulative royalties to avoid double marginalisation. The creation of a pool allows for one-stop licensing of the technologies covered by the pool. This is particularly important in sectors where intellectual property rights are prevalent and where in order to operate on the market licences need to be obtained from a significant number of licensors. In cases where licensees receive on-going services concerning the application of the licensed technology, joint licensing and servicing can lead to further cost reductions.

#### 4.1. The nature of the pooled technologies

215. The competitive risks and the efficiency enhancing potential of technology pools depend to a large extent on the relationship between the pooled technologies and their relationship with technologies outside the pool. Two basic distinctions must be made, namely (a) between technological complements and technological substitutes and (b) between essential and non-essential technologies.

216. Two technologies<sup>(69)</sup> are complements as opposed to substitutes when they are both required to produce the product or carry out the process to which the technologies relate. Conversely, two technologies are substitutes when either technology allows the holder to produce the product or carry out the process to which the technologies relate. A technology is essential as opposed to non-essential if there are no substitutes for that technology inside or outside the pool and the technology in question constitutes a necessary part of the package of technologies for the purposes of producing the product(s) or carrying out the process(es) to which the pool relates. A technology for which there are no substitutes, remains essential as long as the technology is covered by at least one valid intellectual property right. Technologies that are essential are by necessity also complements.

217. When technologies in a pool are substitutes, royalties are likely to be higher than they would otherwise be, because licensees do not benefit from rivalry between the technologies in question. When the technologies in the pool are complements the arrangement reduces transaction costs and may lead to lower overall royalties because the parties are in a position to fix a common royalty for the package as opposed to each fixing a royalty which does not take account of the royalty fixed by others.
218. The distinction between complementary and substitute technologies is not clear-cut in all cases, since technologies may be substitutes in part and complements in part. When due to efficiencies stemming from the integration of two technologies licensees are likely to demand both technologies the technologies are treated as complements even if they are partly substitutable. In such cases it is likely that in the absence of the pool licensees would want to licence both technologies due to the additional economic benefit of employing both technologies as opposed to employing only one of them.
219. The inclusion in the pool of substitute technologies restricts inter-technology competition and amounts to collective bundling. Moreover, where the pool is substantially composed of substitute technologies, the arrangement amounts to price fixing between competitors. As a general rule the Commission considers that the inclusion of substitute technologies in the pool constitutes a violation of Article 81(1). The Commission also considers that it is unlikely that the conditions of Article 81(3) will be fulfilled in the case of pools comprising to a significant extent substitute technologies. Given that the technologies in question are alternatives, no transaction cost savings accrue from including both technologies in the pool. In the absence of the pool licensees would not have demanded both technologies. It is not sufficient that the parties remain free to license independently. In order not to undermine the pool, which allows them to jointly exercise market power, the parties are likely to have little incentive to do so.
220. When a pool is composed only of technologies that are essential and therefore by necessity also complements, the creation of the pool as such generally falls outside Article 81(1) irrespective of the market position of the parties. However, the conditions on which licences are granted may be caught by Article 81(1).
221. Where non-essential but complementary patents are included in the pool there is a risk of foreclosure of third party technologies. Once a technology is included in the pool and is licensed as part of the package, licensees are likely to have little incentive to license a competing technology when the royalty paid for the package already covers a substitute technology. Moreover, the inclusion of technologies which are not necessary for the purposes of producing the product(s) or carrying out the process(es) to which the technology pool relates also forces licensees to pay for technology that they may not need. The inclusion of complementary patents thus amounts to collective bundling. When a pool encompasses non-essential technologies, the agreement is likely to be caught by Article 81(1) where the pool has a significant position on any relevant market.
222. Given that substitute and complementary technologies may be developed after the creation of the pool, the assessment of essentiality is an on-going process. A technology may therefore become non-essential after the creation of the pool due to the emergence of new third party technologies. One way to ensure that such third party technologies are not foreclosed is to exclude from the pool technologies that have become non-essential. However, there may be other ways to ensure that third party technologies are not foreclosed. In the assessment of technology pools comprising non-essential technologies, i.e. technologies for which substitutes exist outside the pool or which are not necessary in order to produce one or more products to which the pool relates, the Commission will in its overall assessment, *inter alia*, take account of the following factors:
- (a) whether there are any pro-competitive reasons for including the non-essential technologies in the pool;
  - (b) whether the licensors remain free to license their respective technologies independently. Where the pool is composed of a limited number of technologies and there are substitute technologies outside the pool, licensees may want to put together their own technological package composed partly of technology forming part of the pool and partly of technology owned by third parties;

(c) whether, in cases where the pooled technologies have different applications some of which do not require use of all of the pooled technologies, the pool offers the technologies only as a single package or whether it offers separate packages for distinct applications. In the latter case it is avoided that technologies which are not essential to a particular product or process are tied to essential technologies;

(d) whether the pooled technologies are available only as a single package or whether licensees have the possibility of obtaining a licence for only part of the package with a corresponding reduction of royalties. The possibility to obtain a licence for only part of the package may reduce the risk of foreclosure of third party technologies outside the pool, in particular where the licensee obtains a corresponding reduction in royalties. This requires that a share of the overall royalty has been assigned to each technology in the pool. Where the licence agreements concluded between the pool and individual licensees are of relatively long duration and the pooled technology supports a *de facto* industry standard, it must also be taken into account that the pool may foreclose access to the market of new substitute technologies. In assessing the risk of foreclosure in such cases it is relevant to take into account whether or not licensees can terminate at reasonable notice part of the licence and obtain a corresponding reduction of royalties.

#### 4.2. Assessment of individual restraints

223. The purpose of this section is to address a certain number of restraints that in one form or another are commonly found in technology pools and which need to be assessed in the overall context of the pool. It is recalled, cf. paragraph 212 above, that the TTBER applies to licence agreements concluded between the pool and third party licensees. This section is therefore limited to addressing the creation of the pool and licensing issues that are particular to licensing in the context of technology pools.

224. In making its assessment the Commission will be guided by the following main principles:

1. The stronger the market position of the pool the greater the risk of anti-competitive effects.
2. Pools that hold a strong position on the market should be open and non-discriminatory.

3. Pools should not unduly foreclose third party technologies or limit the creation of alternative pools.

225. Undertakings setting up a technology pool that is compatible with Article 81, and any industry standard that it may support, are normally free to negotiate and fix royalties for the technology package and each technology's share of the royalties either before or after the standard is set. Such agreement is inherent in the establishment of the standard or pool and cannot in itself be considered restrictive of competition and may in certain circumstances lead to more efficient outcomes. In certain circumstances it may be more efficient if the royalties are agreed before the standard is chosen and not after the standard is decided upon, to avoid that the choice of the standard confers a significant degree of market power on one or more essential technologies. On the other hand, licensees must remain free to determine the price of products produced under the licence. Where the selection of technologies to be included in the pool is carried out by an independent expert this may further competition between available technological solutions.

226. Where the pool has a dominant position on the market, royalties and other licensing terms should be fair and non-discriminatory and licences should be non-exclusive. These requirements are necessary to ensure that the pool is open and does not lead to foreclosure and other anti-competitive effects on downstream markets. These requirements, however, do not preclude different royalties for different uses. It is in general not considered restrictive of competition to apply different royalty rates to different product markets, whereas there should be no discrimination within product markets. In particular, the treatment of licensees should not depend on whether they are licensors or not. The Commission will therefore take into account whether licensors are also subject to royalty obligations.

227. Licensors and licensees must be free to develop competing products and standards and must also be free to grant and obtain licences outside the pool. These requirements are necessary in order to limit the risk of foreclosure of third party technologies and ensure that the pool does not limit innovation and preclude the creation of competing technological solutions. Where a pool supports a (*de facto*) industry standard and where the parties are subject to non-compete obligations, the pool creates a particular risk of preventing the development of new and improved technologies and standards.

228. Grant back obligations should be non-exclusive and be limited to developments that are essential or important to the use of the pooled technology. This allows the pool to feed on and benefit from improvements to the pooled technology. It is legitimate for the parties to ensure that the exploitation of the pooled technology cannot be held up by licensees that hold or obtain essential patents.
229. One of the problems identified with regard to patent pools is the risk that they shield invalid patents. Pooling raises the costs/risks for a successful challenge, because the challenge fails if only one patent in the pool is valid. The shielding of invalid patents in the pool may oblige licensees to pay higher royalties and may also prevent innovation in the field covered by an invalid patent. In order to limit this risk any right to terminate a licence in the case of a challenge must be limited to the technologies owned by the licensor who is the addressee of the challenge and must not extend to the technologies owned by the other licensors in the pool.
- #### 4.3. The institutional framework governing the pool
230. The way in which a technology pool is created, organised and operated can reduce the risk of it having the object or effect of restricting competition and provide assurances to the effect that the arrangement is pro-competitive.
231. When participation in a standard and pool creation process is open to all interested parties representing different interests it is more likely that technologies for inclusion into the pool are selected on the basis of price/quality considerations than when the pool is set up by a limited group of technology owners. Similarly, when the relevant bodies of the pool are composed of persons representing different interests, it is more likely that licensing terms and conditions, including royalties, will be open and non-discriminatory and reflect the value of the licensed technology than when the pool is controlled by licensor representatives.
232. Another relevant factor is the extent to which independent experts are involved in the creation and operation of the pool. For instance, the assessment of whether or not a technology is essential to a standard supported by a pool is often a complex matter that requires special expertise. The involvement in the selection process of independent experts can go a long way in ensuring that a commitment to include only essential technologies is implemented in practice.
233. The Commission will take into account how experts are selected and what are the exact functions that they are to perform. Experts should be independent from the undertakings that have formed the pool. If experts are connected to the licensors or otherwise depend on them, the involvement of the expert will be given less weight. Experts must also have the necessary technical expertise to perform the various functions with which they have been entrusted. The functions of independent experts may include, in particular, an assessment of whether or not technologies put forward for inclusion into the pool are valid and whether or not they are essential.
234. It is also relevant to consider the arrangements for exchanging sensitive information among the parties. In oligopolistic markets exchanges of sensitive information such as pricing and output data may facilitate collusion<sup>(70)</sup>. In such cases the Commission will take into account to what extent safeguards have been put in place, which ensure that sensitive information is not exchanged. An independent expert or licensing body may play an important role in this respect by ensuring that output and sales data, which may be necessary for the purposes of calculating and verifying royalties is not disclosed to undertakings that compete on affected markets.
235. Finally, it is relevant to take account of the dispute resolution mechanism foreseen in the instruments setting up the pool. The more dispute resolution is entrusted to bodies or persons that are independent of the pool and the members thereof, the more likely it is that the dispute resolution will operate in a neutral way.

(1) OJ L 123, 27.4.2004. The TTBER replaces Commission Regulation (EC) No 240/96 of 31 January 1996 on the application of Article 85(3) of the Treaty to certain categories of technology transfer agreements (OJ L 31, 9.2.1996, p. 2).

(2) See Joined Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge*, [2000] ECR I-1365, paragraph 130, and paragraph 106 of the Commission Guidelines on the application of Article 81(3) of the Treaty, not yet published.

(3) Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).

(4) In the following the term 'agreement' includes concerted practices and decisions of associations of undertakings.

(5) See Commission Notice on the concept of effect on trade between Member States contained in Articles 81 and 82 of the Treaty, not yet published.

- (6) In the following the term 'restriction' includes the prevention and distortion of competition.
- (7) This principle of Community exhaustion is for example enshrined in Article 7(1) of Directive 104/89/EEC to approximate the laws of the Member States relating to trade marks (OJ L 40, 11.2.1989, p. 1), which provides that the trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trade mark by the proprietor or with his consent.
- (8) On the other hand, the sale of copies of a protected work does not lead to the exhaustion of performance rights, including rental rights, in the work, see in this respect Case 158/86, *Warner Brothers and Metronome Video*, [1988] ECR 2605, and Case C-61/97, *Foreningen af danske videogramdistributører*, [1998] ECR I-5171.
- (9) See e.g. Joined Cases 56/64 and 58/64, *Consten and Grundig*, [1966] ECR 429.
- (10) The methodology for the application of Article 81(3) is set out in the Commission Guidelines on the application of Article 81(3) of the Treaty cited in note 2.
- (11) See Case 56/65, *Société Technique Minière*, [1966] ECR 337, and Case C-7/95 P, *John Deere*, [1998] ECR I-3111, paragraph 76.
- (12) See in this respect e.g. judgment in *Consten and Grundig* cited in note 9.
- (13) See in this respect the judgment in *Société Technique Minière* cited in note 11 and Case 258/78, *Nungesser*, [1982] ECR 2015.
- (14) See in this respect e.g. Case C-49/92 P, *Anic Partecipazioni*, [1999] ECR I-4125, paragraph 99.
- (15) See Joined Cases 29/83 and 30/83, *CRAM and Rheinzink*, [1984] ECR 1679, paragraph 26, and Joined Cases 96/82 and others, *ANSEAU-NAVEWA*, [1983] ECR 3369, paragraphs 23-25.
- (16) See the judgment in *John Deere*, [1998] cited in note 11.
- (17) Guidance on the issue of appreciability can be found in Commission notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty (OJ C 368, 22.12.2001, p. 13). The notice defines appreciability in a negative way. Agreements, which fall outside the scope of the *de minimis* notice, do not necessarily have appreciable restrictive effects. An individual assessment is required.
- (18) See Article 1(2) of Council Regulation No 1/2003 cited in note 3.
- (19) Commission notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).
- (20) As to these distinctions see also Commission Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (OJ C 3, 6.1.2001, p. 2, paragraphs 44 to 52).
- (21) See to that effect paragraphs 50 to 52 of the Guidelines on horizontal cooperation agreements, cited in the previous note.
- (22) *Idem*, paragraph 51.
- (23) See in this respect the Notice on agreements of minor importance cited in note 17.
- (24) According to Article 3(2) of Regulation 1/2003, agreements which may affect trade between Member States but which are not prohibited by Article 81 cannot be prohibited by national competition law.
- (25) Under Council Regulation 19/65, OJ Special Edition Series I 1965-1966, p. 35, the Commission is not empowered to block exempt technology transfer agreements concluded between more than two undertakings.
- (26) See recital 19 of the TTBER and further section 2.5 below.
- (27) OJ C 1, 3.1.1979, p. 2.
- (28) See paragraph 3 of the subcontracting notice.
- (29) See in this respect Commission Decision in *Moosehead/Whitbread* (OJ L 100, 20.4.1990, p. 32).
- (30) See in this respect Case 262/81, *Coditel (II)*, [1982] ECR 3381.
- (31) OJ L 336, 29.12.1999, p. 21.
- (32) OJ L 304, 5.12.2000, p. 3.
- (33) OJ L 304, 5.12.2000, p. 7.
- (34) See note 31.
- (35) See the guide 'Competition policy in Europe — The competition rules for supply and distribution agreements', 2002.
- (36) OJ C 291, 13.10.2000, p. 1, and note 31.
- (37) See paragraph 29 above.

- <sup>(38)</sup> The reasons for this calculation rule are explained in paragraph 23 above.
- <sup>(39)</sup> See e.g. the case law cited in note 15.
- <sup>(40)</sup> See in this respect paragraph 98 of the Guidelines on the application of Article 81(3) of the Treaty cited in note 2.
- <sup>(41)</sup> This is also the case where one party grants a licence to the other party and accepts to buy a physical input from the licensee. The purchase price can serve the same function as the royalty.
- <sup>(42)</sup> See in this respect Case 193/83, *Windsurfing International*, [1986] ECR 611, paragraph 67.
- <sup>(43)</sup> For a general definition of active and passive sales, reference is made to paragraph 50 of the Guidelines on vertical restraints cited in note 36.
- <sup>(44)</sup> Field of use restrictions are further dealt with in section IV.2.4 below.
- <sup>(45)</sup> This hardcore restriction applies to licence agreements concerning trade within the Community. As regards agreements concerning exports outside the Community or imports/re-imports from outside the Community see Case C-306/96, *Javico*, [1998] ECR I-1983.
- <sup>(46)</sup> See in this respect paragraph 77 of the judgment in *Nungesser* cited in note 13.
- <sup>(47)</sup> See in this respect Case 26/76, *Metro (I)*, [1977] ECR 1875.
- <sup>(48)</sup> If the licensed technology is outdated no restriction of competition arises, see in this respect Case 65/86, *Bayer v Sülthofer*, [1988] ECR 5249.
- <sup>(49)</sup> As to non-challenge clauses in the context of settlement agreements see point 209 below.
- <sup>(50)</sup> See paragraph 14 above.
- <sup>(51)</sup> See paragraphs 66 and 67 above.
- <sup>(52)</sup> See in this respect paragraph 42 of the Guidelines on the application of Article 81(3) of the Treaty, cited in note 2.
- <sup>(53)</sup> See in this respect paragraph 8 of the Commission Notice on agreements of minor importance, cited in note 17.
- <sup>(54)</sup> See in this respect Case T-228/97, *Irish Sugar*, [1999] ECR II-2969, paragraph 101.
- <sup>(55)</sup> See in this respect paragraph 23 of the Guidelines on horizontal cooperation agreements, cited in note 20.
- <sup>(56)</sup> See Joined Cases 25/84 and 26/84, *Ford*, [1985] ECR 2725.
- <sup>(57)</sup> See in this respect for example Commission Decision in *TPS* (OJ L 90, 2.4.1999, p. 6). Similarly, the prohibition of Article 81(1) also only applies as long as the agreement has a restrictive object or restrictive effects.
- <sup>(58)</sup> Cited in note 36. See in particular paragraphs 115 *et seq.*
- <sup>(59)</sup> As to these concepts see section IV.4.1 below.
- <sup>(60)</sup> See paragraph 85 of the Guidelines on the application of Article 81(3) of the Treaty, cited in note 2.
- <sup>(61)</sup> *Idem*, paragraphs 98 and 102.
- <sup>(62)</sup> See paragraph 130 of the judgment cited in note 2. Similarly, the application of Article 81(3) does not prevent the application of the Treaty rules on the free movement of goods, services, persons and capital. These provisions are in certain circumstances applicable to agreements, decisions and concerted practices within the meaning of Article 81(1), see to that effect Case C-309/99, *Wouters*, [2002] ECR I-1577, paragraph 120.
- <sup>(63)</sup> See in this respect Case T-51/89, *Tetra Pak (I)*, [1990] ECR II-309. See also paragraph 106 of the Guidelines on the application of Article 81(3) of the Treaty cited in note 2 above.
- <sup>(64)</sup> See the judgment in *Nungesser* cited in note 13.
- <sup>(65)</sup> See in this respect the Commission's Notice in the Canon/Kodak Case (OJ C 330, 1.11.1997, p. 10) and the IGR Stereo Television Case mentioned in the XI Report on Competition Policy, paragraph 94.
- <sup>(66)</sup> For the applicable analytical framework see section 2.7 below and paragraphs 138 *et seq.* of the Guidelines on Vertical Restraints cited in note 36.
- <sup>(67)</sup> See note 36.
- <sup>(68)</sup> See in this respect the Commission's press release IP/02/1651 concerning the licensing of patents for third generation (3G) mobile services. This case involved five technology pools creating five different technologies, each of which could be used to produce 3G equipment.
- <sup>(69)</sup> The term 'technology' is not limited to patents. It covers also patent applications and intellectual property rights other than patents.
- <sup>(70)</sup> See in this respect the judgment in *John Deere* cited in note 11.



## **F. EEA AGREEMENT**



# **AGREEMENT ON THE EUROPEAN ECONOMIC AREA<sup>1</sup>**

## **PART IV COMPETITION AND OTHER COMMON RULES**

### **CHAPTER 1 RULES APPLICABLE TO UNDERTAKINGS**

#### **Article 53**

1. The following shall be prohibited as incompatible with the functioning of this Agreement: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by this Agreement, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

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<sup>1</sup> See also:

- DECISION OF THE COUNCIL AND THE COMMISSION of 13 December 1993 on the conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation\* (94/1/ECSC, EC); OJ L1/1, 3.1.1994;

\**The present agreement has not been ratified by the Swiss Confederation.*

- COUNCIL REGULATION (EC) No 2894/94 of 28 November 1994 concerning arrangements for implementing the Agreement on the European Economic Area

## **Article 54**

Any abuse by one or more undertakings of a dominant position within the territory covered by this Agreement or in a substantial part of it shall be prohibited as incompatible with the functioning of this Agreement in so far as it may affect trade between Contracting Parties.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

## **Article 55**

1. Without prejudice to the provisions giving effect to Articles 53 and 54 as contained in Protocol 21 and Annex XIV of this Agreement, the EC Commission and the EFTA Surveillance Authority provided for in Article 108(1) shall ensure the application of the principles laid down in Articles 53 and 54.

The competent surveillance authority, as provided for in Article 56, shall investigate cases of suspected infringement of these principles, on its own initiative, or on application by a State within the respective territory or by the other surveillance authority. The competent surveillance authority shall carry out these investigations in cooperation with the competent national authorities in the respective territory and in cooperation with the other surveillance authority, which shall give it its assistance in accordance with its internal rules.

If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

2. If the infringement is not brought to an end, the competent surveillance authority shall record such infringement of the principles in a reasoned decision.

The competent surveillance authority may publish its decision and authorize States within the respective territory to take the measures, the conditions and details of which it shall determine, needed to remedy the situation. It may also request the other surveillance authority to authorize States within the respective territory to take such measures.

## **Article 56**

1. Individual cases falling under Article 53 shall be decided upon by the surveillance authorities in accordance with the following provisions:

- (a) individual cases where only trade between EFTA States is affected shall be decided upon by the EFTA Surveillance Authority;
- (b) without prejudice to subparagraph (c), the EFTA Surveillance Authority decides, as provided for in the provisions set out in Article 58, Protocol 21 and the rules adopted for its implementation, Protocol 23 and Annex XIV, on cases where the turnover of the undertakings concerned in the territory of the EFTA States equals 33% or more of their turnover in the territory covered by this Agreement;

(c) the EC Commission decides on the other cases as well as on cases under (b) where trade between EC Member States is affected, taking into account the provisions set out in Article 58, Protocol 21, Protocol 23 and Annex XIV.

2. Individual cases falling under Article 54 shall be decided upon by the surveillance authority in the territory of which a dominant position is found to exist. The rules set out in paragraph 1(b) and (c) shall apply only if dominance exists within the territories of both surveillance authorities.

3. Individual cases falling under subparagraph (c) of paragraph 1, whose effects on trade between EC Member States or on competition within the Community are not appreciable, shall be decided upon by the EFTA Surveillance Authority.

4. The terms 'undertaking' and 'turnover' are, for the purposes of this Article, defined in Protocol 22.

### **Article 57**

1. Concentrations the control of which is provided for in paragraph 2 and which create or strengthen a dominant position as a result of which effective competition would be significantly impeded within the territory covered by this Agreement or a substantial part of it, shall be declared incompatible with this Agreement.

2. The control of concentrations falling under paragraph 1 shall be carried out by:

(a) the EC Commission in cases falling under Regulation (EEC) No 4064/89 in accordance with that Regulation and in accordance with Protocols 21 and 24 and Annex XIV to this Agreement. The EC Commission shall, subject to the review of the EC Court of Justice, have sole competence to take decisions on these cases;

(b) the EFTA Surveillance Authority in cases not falling under subparagraph (a) where the relevant thresholds set out in Annex XIV are fulfilled in the territory of the EFTA States in accordance with Protocols 21 and 24 and Annex XIV. This is without prejudice to the competence of EC Member States.

### **Article 58**

With a view to developing and maintaining a uniform surveillance throughout the European Economic Area in the field of competition and to promoting a homogeneous implementation, application and interpretation of the provisions of this Agreement to this end, the competent authorities shall cooperate in accordance with the provisions set out in Protocols 23 and 24.

### **Article 59**

1. In the case of public undertakings and undertakings to which EC Member States or EFTA States grant special or exclusive rights, the Contracting Parties shall ensure that there is neither enacted nor maintained in force any measure contrary to the rules contained in this Agreement, in particular to those rules provided for in Articles 4 and 53 to 63.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Agreement, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties.

3. The EC Commission as well as the EFTA Surveillance Authority shall ensure within their respective competence the application of the provisions of this Article and shall,

where necessary, address appropriate measures to the States falling within their respective territory.

### **Article 60**

Annex XIV contains specific provisions giving effect to the principles set out in Articles 53, 54, 57 and 59.

## **CHAPTER 2 STATE AID**

### **Article 61**

1. Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.

2. The following shall be compatible with the functioning of this Agreement:

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

(b) aid to make good the damage caused by natural disasters or exceptional occurrences;

(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division.

3. The following may be considered to be compatible with the functioning of this Agreement:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of an EC Member State or an EFTA State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) such other categories of aid as may be specified by the EEA Joint Committee in accordance with Part VII.

### **Article 62**

1. All existing systems of State aid in the territory of the Contracting Parties, as well as any plans to grant or alter State aid, shall be subject to constant review as to their compatibility with Article 61. This review shall be carried out:

(a) as regards the EC Member States, by the EC Commission according to the rules laid down in Article 93 of the Treaty establishing the European Economic Community;

(b) as regards the EFTA States, by the EFTA Surveillance Authority according to the rules set out in an agreement between the EFTA States establishing the EFTA Surveillance Authority which is entrusted with the powers and functions laid down in Protocol 26.

2. With a view to ensuring a uniform surveillance in the field of State aid throughout the territory covered by this Agreement, the EC Commission and the EFTA Surveillance Authority shall cooperate in accordance with the provisions set out in Protocol 27.

### **Article 63**

Annex XV contains specific provisions on State aid.

### **Article 64**

1. If one of the surveillance authorities considers that the implementation by the other surveillance authority of Articles 61 and 62 of this Agreement and Article 5 of Protocol 14 is not in conformity with the maintenance of equal conditions of competition within the territory covered by this Agreement, exchange of views shall be held within two weeks according to the procedure of Protocol 27, paragraph (f).

If a commonly agreed solution has not been found by the end of this two-week period, the competent authority of the affected Contracting Party may immediately adopt appropriate interim measures in order to remedy the resulting distortion of competition.

Consultations shall then be held in the EEA Joint Committee with a view to finding a commonly acceptable solution.

If within three months the EEA Joint Committee has not been able to find such a solution, and if the practice in question causes, or threatens to cause, distortion of competition affecting trade between the Contracting Parties, the interim measures may be replaced by definitive measures, strictly necessary to offset the effect of such distortion. Priority shall be given to such measures that will least disturb the functioning of the EEA.

2. The provisions of this Article will also apply to State monopolies, which are established after the date of signature of the Agreement.

## **CHAPTER 3 OTHER COMMON RULES**

### **Article 65**

1. Annex XVI contains specific provisions and arrangements concerning procurement which, unless otherwise specified, shall apply to all products and to services as specified.

2. Protocol 28 and Annex XVII contain specific provisions and arrangements concerning intellectual, industrial and commercial property, which, unless otherwise specified, shall apply to all products and services.

# PROTOCOL 21

## ***ON THE IMPLEMENTATION OF COMPETITION RULES APPLICABLE TO UNDERTAKINGS***

### *Article 1*

The EFTA Surveillance Authority shall, in an agreement between the EFTA States, be entrusted with equivalent powers and similar functions to those of the EC Commission, at the time of the signature of the Agreement, for the application of the competition rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community, enabling the EFTA Surveillance Authority to give effect to the principles laid down in Articles 1(2)(e) and 53 to 60 of the Agreement, and in Protocol 25.

The Community shall, where necessary, adopt the provisions giving effect to the principles laid down in Articles 1(2)(e) and 53 to 60 of the Agreement, and in Protocol 25, in order to ensure that the EC Commission has equivalent powers and similar functions under this Agreement to those which it has, at the time of the signature of the Agreement, for the application of the competition rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community.

### *Article 2*

If, following the procedures set out in Part VII of the Agreement, new acts for the implementation of Articles 1(2)(e) and 53 to 60 and of Protocol 25, or on amendments of the acts listed in Article 3 of this Protocol are adopted, corresponding amendments shall be made in the agreement setting up the EFTA Surveillance Authority so as to ensure that the EFTA Surveillance Authority will be entrusted simultaneously with equivalent powers and similar functions to those of the EC Commission.

### *Article 3*

1. In addition to the acts listed in Annex XIV, the following acts reflect the powers and functions of the EC Commission for the application of the competition rules of the Treaty establishing the European Economic Community:

#### *Control of concentrations*

- 1.<sup>{1}</sup> **32004 R 0139:** Article 4(4) and (5) and Articles 6 to 26 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).
- 2.<sup>{2}</sup> **32004 R 0802:** Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ L 133, 30.4.2004, p. 1), as corrected by OJ L 172, 6.5.2004, p. 9, as amended by:
- **32006 R 1792:** Commission Regulation (EC) No 1792/2006 of 23 October 2006 (OJ L 362, 20.12.2006, p. 1),
  - **32008 R 1033:** Commission Regulation (EC) No 1033/2008 of 20 October 2008 (OJ L 279, 22.10.2008, p. 3).

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<sup>{1}</sup> Text of point 1 (Council Regulation (EEC) No 4064/89) replaced by Decision No 78/2004 (OJ No L 219, 19.6.2004, p. 13 and EEA Supplement No 32, 19.6.2004, p. 1), e.i.f. 9.6.2004, and subsequently replaced by Decision No 79/2004 (OJ No L 219, 19.6.2004, p. 24 and EEA Supplement No 32, 19.6.2004, p. 10), e.i.f. 1.7.2005.

<sup>{2}</sup> This point, introduced by Decision No 77/98 (OJ No L 172, 8.7.1999, p. 56 and EEA Supplement No 30, 8.7.1999, p. 153), e.i.f. 1.9.1998, replaces former point 2. See also Decision No 13/97 (OJ No L 182, 10.7.1997, p. 44 and EEA Supplement No 29, 10.7.1997, p. 59), e.i.f. 1.4.1997 and subsequently replaced by Decision No 117/2009 (OJ No L 334, 17.12.2009, p. 20 and EEA Supplement No 68, 17.12.2009, p. 20) e.i.f. 23.10.2009



General procedural rules

- 3.{<sup>3</sup>} **32003 R 0001**: Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1), as amended by:
- {<sup>4</sup>} **32004 R 0411**: Council Regulation (EC) No 411/2004 of 26 February 2004 (OJ L 68, 6.3.2004, p. 1),
- {<sup>5</sup>} **32006 R 1419**: Council Regulation (EC) No 1419/2006 of 25 September 2006 (OJ L 269, 28.9.2006, p. 1).
- 4.{<sup>6</sup>} **32004 R 0773**: Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ L 123, 27.4.2004, p. 18), as amended by:
- {<sup>7</sup>} **32006 R 1792**: Commission Regulation (EC) No 1792/2006 of 23 October 2006 (OJ L 362, 20.12.2006, p. 1),
- {<sup>8</sup>} **32008 R 0622**: Commission Regulation (EC) No 622/2008 of 30 June 2008 (OJ L 171, 1.7.2008, p. 3).

5. [ ] {<sup>9</sup>}

*Transport*

6. [ ] {<sup>10</sup>}

7. [ ] {<sup>11</sup>}

8. [ ] {<sup>12</sup>}

9. [ ] {<sup>13</sup>}

10. **374 R 2988**: Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ No L 319, 29.11.1974, p. 1), as amended by:

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{<sup>3</sup>} Text replaced by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

{<sup>4</sup>} Indent and words “, as amended by:”, added by Decision No 40/2005 (OJ No L 198, 28.7.2005, p. 38 and EEA Supplement No 38, 28.7.2005, p. 22), e.i.f. 19.5.2005.

{<sup>5</sup>} Indent added by Decision No 153/2006 (OJ No L 89, 29.3.2007, p. 25 and EEA Supplement No 15, 29.3.2007, p. 20), e.i.f. 1.8.2007.

{<sup>6</sup>} Text of point 4 (Commission Regulation (EC) No 3385/94) replaced by Decision No 178/2004 (OJ No L 133, 26.5.2005, p. 35 and EEA Supplement No 26, 26.5.2005, p. 25), e.i.f. 1.7.2005.

{<sup>7</sup>} Indent and words “, as amended by:”, added by Decision No 132/2007 (OJ No L 100, 10.4.2008, p. 1 and EEA Supplement No 19, 10.4.2008, p.1), e.i.f. pending.

{<sup>8</sup>} Indent added by Decision No 118/2009 (OJ No L 334, 17.12.2009, p. 22 and EEA Supplement No 68, 17.12.2009, p. 22), e.i.f. 23.10.2009.

{<sup>9</sup>} Text of point 5 (Commission Regulation (EC) No 2842/98) deleted by Decision No 178/2004 (OJ No L 133, 26.5.2005, p. 35 and EEA Supplement No 26, 26.5.2005, p. 25), e.i.f. 1.7.2005.

{<sup>10</sup>} Text of point 6 (Council Regulation (EEC) No 141/62) deleted by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

{<sup>11</sup>} Text of point 7 (Article 6 and articles 10 to 31 of Council Regulation (EEC) No 1017/68) deleted by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

{<sup>12</sup>} Text of point 8 deleted by Decision No 60/1999 (OJ No L 284, 9.11.2000, p. 38 and EEA Supplement No 50, 9.11.2000, p. 118), e.i.f. 1.5.1999.

{<sup>13</sup>} Text of point 9 deleted by Decision No 60/1999 (OJ No L 284, 9.11.2000, p. 38 and EEA Supplement No 50, 9.11.2000, p. 118), e.i.f. 1.5.1999.

- <sup>{14}</sup> **32003 R 0001**: Council Regulation (EC) No 1/2003 of 16 December 2002 (OJ L 1, 4.1.2003, p. 1).
11. <sup>{15}</sup>
12. <sup>{16}</sup>
13. **387 R 3975**: Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector (OJ No L 374, 31.12.1987, p. 1), as amended by:
- **391 R 1284**: Council Regulation (EEC) No 1284/91 of 14 May 1991 (OJ No L 122, 17.5.1991, p. 2),
- <sup>{17}</sup> **392 R 2410**: Council Regulation (EEC) No 2410/92 of 23 July 1992 (OJ No L 240, 24.8.1992, p. 18),
- <sup>{18}</sup> **32003 R 0001**: Council Regulation (EC) No 1/2003 of 16 December 2002 (OJ L 1, 4.1.2003, p. 1),
- <sup>{19}</sup> **32004 R 0411**: Council Regulation (EC) No 411/2004 of 26 February 2004 (OJ L 68, 6.3.2004, p. 1).
- 14.<sup>{20}</sup>
15. <sup>{21}</sup>
16. <sup>{22}</sup>
2. In addition to the acts listed in Annex XIV, the following acts reflect the powers and functions of the EC Commission for the application of the competition rules of the Treaty establishing the European Coal and Steel Community (ECSC):
1. Article (ECSC) 65(2), subparagraphs 3 to 5, (3), (4), subparagraph 2, and (5).
2. Article (ECSC) 66(2), subparagraphs 2 to 4, and (4) to (6).
3. **354 D 7026**: High Authority Decision No 26/54 of 6 May 1954 laying down in implementation of Article 66(4) of the Treaty a regulation concerning information to be furnished (OJ of the European Coal and Steel Community No 9, 11.5.1954, p. 350/54).

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<sup>{14}</sup> Indent and words “, as amended by:”, added by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

<sup>{15}</sup> Text of point 11 (Section II of Council Regulation (EEC) No 4056/86) deleted by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

<sup>{16}</sup> Text of point 12 deleted by Decision No 60/1999 (OJ No L 284, 9.11.2000, p. 38 and EEA Supplement No 50, 9.11.2000, p. 118), e.i.f. 1.5.1999.

<sup>{17}</sup> Indent added by Decision No 3/94 (OJ No L 85, 30.3.1994, p. 65 and EEA Supplement No 1, 30.3.1994, p. 5), e.i.f. 1.7.1994.

<sup>{18}</sup> Indent and words “, as amended by:”, added by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

<sup>{19}</sup> Indent added by Decision No 40/2005 (OJ No L 198, 28.7.2005, p. 38 and EEA Supplement No 38, 28.7.2005, p. 22), e.i.f. 19.5.2005.

<sup>{20}</sup> Text deleted by Decision No 60/1999 (OJ No L 284, 9.11.2000, p. 38 and EEA Supplement No 50, 9.11.2000, p. 118), e.i.f. 1.5.1999.

<sup>{21}</sup> Text of point 15 (Commission Regulation (EC) No 2842/98) deleted by Decision No 178/2004 (OJ No L 133, 26.5.2005, p. 35 and EEA Supplement No 26, 26.5.2005, p. 25), e.i.f. 1.7.2005.

<sup>{22}</sup> Text of point 16 (Commission Regulation (EC) No 2843/98) deleted by Decision No 178/2004 (OJ No L 133, 26.5.2005, p. 35 and EEA Supplement No 26, 26.5.2005, p. 25), e.i.f. 1.7.2005.

4. **378 S 0715:** Commission Decision No 715/78/ECSC of 6 April 1978 concerning limitation periods in proceedings and the enforcement of sanctions under the Treaty establishing the European Coal and Steel Community (OJ No L 94, 8.4.1978, p. 22).
5. **384 S 0379:** Commission Decision No 379/84/ECSC of 15 February 1984 defining the powers of officials and agents of the Commission instructed to carry out the checks provided for in the ECSC Treaty and decisions taken in application thereof (OJ No L 46, 16.2.1984, p. 23).

#### *Article 4 {<sup>23</sup>}*

#### *Article 5 {<sup>24</sup>}*

#### *Article 6 {<sup>25</sup>}*

#### *Article 7 {<sup>26</sup>}*

#### *Article 8 {<sup>27</sup>}*

Applications submitted to the EC Commission prior to the date of entry into force of the Agreement shall be deemed to comply with the provisions on application under the Agreement.

The competent surveillance authority pursuant to Article 56 of the Agreement and Article 10 of Protocol 23 may require a duly completed form as prescribed for the implementation of the Agreement to be submitted to it within such time as it shall appoint. In that event, applications shall be treated as properly made only if the forms are submitted within the prescribed period and in accordance with the provisions of the Agreement.

#### *Article 9 {<sup>28</sup>}*

#### *Article 10*

The Contracting Parties shall ensure that the measures affording the necessary assistance to officials of the EFTA Surveillance Authority and the EC Commission, in order to enable them to make their investigations as foreseen under the Agreement, are taken within six months of the entry into force of the Agreement.

#### *Article 11*

As regards agreements, decisions and concerted practices already in existence at the date of entry into force of the Agreement which fall under Article 53(1), the prohibition in Article 53(1) shall not apply where the agreements, decisions or practices are modified within six months from the date of entry into force of the Agreement so as to fulfil the conditions contained in the block exemptions provided for in Annex XIV.

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{<sup>23</sup>} Text of article 4 deleted by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i f. 19.5.2005.

{<sup>24</sup>} Text of article 5 deleted by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i f. 19.5.2005.

{<sup>25</sup>} Text of article 6 deleted by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i f. 19.5.2005.

{<sup>26</sup>} Text of article 7 deleted by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i f. 19.5.2005.

{<sup>27</sup>} Words “and notifications” deleted by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i f. 19.5.2005.

{<sup>28</sup>} Text of article 9 deleted by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i f. 19.5.2005.

### *Article 12*

As regards agreements, decisions of associations of undertakings and concerted practices already in existence at the date of entry into force of the Agreement which fall under Article 53 (1), the prohibition in Article 53(1) shall not apply, from the date of entry into force of the Agreement, where the agreements, decisions or practices are modified within six months from the date of entry into force of the Agreement so as not to fall under the prohibition of Article 53(1) any more.

### *Article 13*

Agreements, decisions of associations of undertakings and concerted practices which benefit from an individual exemption granted under Article 85(3) of the Treaty establishing the European Economic Community before the entry into force of the Agreement shall continue to be exempted as regards the provisions of the Agreement, until their date of expiry as provided for in the decisions granting these exemptions or until the EC Commission otherwise decides, whichever date is the earlier.

### *Review clause*<sup>{29}</sup>

By the end of 2005 and at the request of one of the Contracting Parties, the Parties shall review the mechanisms for the enforcement of Articles 53 and 54 of the Agreement as well as the co-operation mechanisms of Protocol 23 to the Agreement, with a view to ensuring the homogenous and effective application of those Articles. The Parties shall in particular review the decision of the EEA Joint Committee No 130/2004 of 24 September 2004 in light of the Parties' experiences with the new system of enforcing the competition rules and explore the possibility of mirroring in the EEA the system established in the EU by Council Regulation (EC) No 1/2003 as regards the application of Articles 81 and 82 of the Treaty by national competition authorities, the horizontal co-operation between national competition authorities and the mechanism for ensuring uniform application of the competition rules by national authorities.

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<sup>{29}</sup> Review clause added by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

# **PROTOCOL 22**

## ***CONCERNING THE DEFINITION OF ‘UNDERTAKING’ AND ‘TURNOVER’ (ARTICLE 56)***

### *Article 1*

For the purposes of the attribution of individual cases pursuant to Article 56 of the Agreement, an ‘undertaking’ shall be any entity carrying out activities of a commercial or economic nature.

### *Article 2*

‘Turnover’ within the meaning of Article 56 of the Agreement shall comprise the amounts derived by the undertakings concerned, in the territory covered by the Agreement, in the preceding financial year from the sale of products and the provision of services falling within the undertaking's ordinary scope of activities after deduction of sales rebates and of value-added tax and other taxes directly related to turnover.

### *Article 3<sup>{1}</sup>*

In place of turnover the following shall be used:

- (a) for credit institutions and other financial institutions, the sum of the following income items as defined in Council Directive 86/635/EEC, after deduction of value added tax and other taxes directly related to those items, where appropriate:
  - (i) interest income and similar income;
  - (ii) income from securities:
    - income from shares and other variable yield securities,
    - income from participating interests,
    - income from shares in affiliated undertakings;
  - (iii) commissions receivable;
  - (iv) net profit on financial operations;
  - (v) other operating income.

The turnover of a credit or financial institution in the territory covered by the Agreement shall comprise the income items, as defined above, which are received by the branch or division of that institution established in the territory covered by the Agreement;

- (b) for insurance undertakings, the value of gross premiums written which shall comprise all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurance undertakings, including also outgoing reinsurance premiums, and after deduction of taxes and parafiscal contributions or levies charged by reference to the amounts of individual premiums or the total volume of premiums; as regards Article 1(2)(b) and (3)(b), (c) and (d) and the final part of Article 1(2) and (3) of Council Regulation (EC) No 139/2004, gross premiums received from residents in the territory covered by the Agreement shall be taken into account.

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<sup>{1}</sup> Text of Article 3 replaced by Decision No 78/2004 (OJ No L 219, 16.6.2004, p. 13 and EEA Supplement No 32, 19.6.2004, p. 1), e.i.f. 9.6.2004.

*Article 4*

1. In derogation from the definition of the turnover relevant for the application of Article 56 of the Agreement, as contained in Article 2 of this Protocol, the relevant turnover shall be constituted:
  - (a) as regards agreements, decisions of associations of undertakings and concerted practices related to distribution and supply arrangements between non-competing undertakings, of the amounts derived from the sale of goods or the provision of services which are the subject matter of the agreements, decisions or concerted practices, and from the other goods or services which are considered by users to be equivalent in view of their characteristics, price and intended use;
  - (b) as regards agreements, decisions of associations of undertakings and concerted practices related to arrangements on transfer of technology between non-competing undertakings, of the amounts derived from the sale of goods or the provision of services which result from the technology which is the subject matter of the agreements, decisions or concerted practices, and of the amounts derived from the sale of those goods or the provision of those services which that technology is designed to improve or replace.
2. However, where at the time of the coming into existence of arrangements as described in paragraph 1(a) and (b) turnover as regards the sale of goods or the provision of services is not in evidence, the general provision as contained in Article 2 shall apply.

*Article 5*

1. Where individual cases concern products falling within the scope of application of Protocol 25, the relevant turnover for the attribution of those cases shall be the turnover achieved in these products.
2. Where individual cases concern products falling within the scope of application of Protocol 25 as well as products or services falling within the scope of application of Articles 53 and 54 of the Agreement, the relevant turnover is determined by taking into account all the products and services as provided for in Article 2.

**PROTOCOL 23 <sup>{1}</sup>**  
***CONCERNING THE COOPERATION BETWEEN***  
***THE SURVEILLANCE AUTHORITIES (ARTICLE 58)***

**GENERAL PRINCIPLES**

*Article 1*

1. The EFTA Surveillance Authority and the EC Commission shall exchange information and consult each other on general policy issues at the request of either of the surveillance authorities.
2. The EFTA Surveillance Authority and the EC Commission, in accordance with their internal rules, respecting Article 56 of the Agreement and Protocol 22 and the autonomy of both sides in their decisions, shall cooperate in the handling of individual cases falling under Article 56(1)(b) and (c), (2), second sentence and (3), as provided for in the provisions below.
3. For the purposes of this Protocol, the term 'territory of a surveillance authority' shall mean for the EC Commission the territory of the EC Member States to which the Treaty establishing the European Community applies, upon the terms laid down in that Treaty, and for the EFTA Surveillance Authority the territories of the EFTA States to which the Agreement applies.

<sup>{2}</sup>*Article 1A*

In the interests of homogeneous interpretation by the EFTA Surveillance Authority and the EC Commission of Articles 53 and 54 of the Agreement and of Articles 81 and 82 of the Treaty, the EFTA Surveillance Authority and the competent authorities of the EFTA States may also be allowed to participate in meetings of the network of public authorities referred to in recital 15 of Council Regulation (EC) No 1/2003 for the purposes of discussion of general policy issues only. The EFTA Surveillance Authority, the EC Commission and the competent authorities of the EFTA states and of the EC Member States shall have the power to make available all information necessary for the purpose of such general policy discussion in that network. Information made available in this context shall not be used for enforcement purposes. This participation shall be without prejudice to rights of participation of the EFTA States and the EFTA Surveillance Authority granted under the EEA Agreement.

**THE INITIAL PHASE OF THE PROCEEDINGS**

*Article 2*

1. In cases falling under Article 56(1)(b) and (c), (2), second sentence and (3) of the Agreement, the EFTA Surveillance Authority and the EC Commission shall without undue delay forward to each other complaints to the extent that it is not apparent that these have been addressed to both surveillance authorities. They shall also inform each other when opening *ex officio* procedures.

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<sup>{1}</sup> Text of protocol 23 replaced by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i f. 19.5.2005.

<sup>{2}</sup> Article inserted by Decision No 147/2007 (OJ No L 100, 10.4.2008, p. 99 and EEA Supplement No 19, 10.4.2008, p 96), e.i.f. 27.10.2007.

2. The EFTA Surveillance Authority and the EC Commission shall without undue delay forward to each other information received from the national competition authorities within their respective territories concerning the commencement of the first formal investigative measure in cases falling under Article 56 (1)(b) and (c), (2), second sentence and (3) of the Agreement.
3. The surveillance authority which has received information as provided for in the first paragraph may present its comments thereon within 30 working days of its receipt.

### *Article 3*

1. The competent surveillance authority shall, in cases falling under Article 56(1)(b) and (c), (2), second sentence and (3) of the Agreement, consult the other surveillance authority when:
  - addressing to the undertakings or associations of undertakings concerned its statement of objections,
  - publishing its intention to adopt a decision declaring Article 53 or 54 of the Agreement not applicable, or
  - publishing its intention to adopt a decision making commitments offered by the undertakings binding on the undertakings.
2. The other surveillance authority may deliver its comments within the time limits set out in the abovementioned publication or statement of objections.
3. Observations received from the undertakings concerned or third parties shall be transmitted to the other surveillance authority.

### *Article 4*

In cases falling under Article 56(1)(b) and (c), (2), second sentence and (3) of the Agreement, the competent surveillance authority shall transmit to the other surveillance authority the administrative letters by which a file is closed or a complaint rejected.

### *Article 5*

In cases falling under Article 56(1)(b) and (c), (2), second sentence and (3) of the Agreement, the competent surveillance authority shall invite the other surveillance authority to be represented at hearings of the undertakings concerned. The invitation shall also extend to the States falling within the competence of the other surveillance authority.

## **ADVISORY COMMITTEES**

### *Article 6*

1. In cases falling under Article 56 (1)(b) and (c), (2), second sentence and (3) of the Agreement, the competent surveillance authority shall, in due time, inform the other surveillance authority of the date of the meeting of the Advisory Committee and transmit the relevant documentation.
2. All documents forwarded for that purpose from the other surveillance authority shall be presented to the Advisory Committee of the surveillance authority which is competent to decide on a case in accordance with Article 56 together with the material sent out by that surveillance authority.
3. Each surveillance authority and the States falling within its competence shall be entitled to be present in the Advisory Committees of the other surveillance authority and to express their views therein; they shall not have, however, the right to vote.



4. Consultations may also take place by written procedure. However, if the surveillance authority which is not competent to decide on a case in accordance with Article 56 so requests, the competent surveillance authority shall convene a meeting.

## **REQUEST FOR DOCUMENTS AND THE RIGHT TO MAKE OBSERVATIONS**

### *Article 7*

The surveillance authority which is not competent to decide on a case in accordance with Article 56 of the Agreement may request from the other surveillance authority at all stages of the proceedings copies of the most important documents concerning cases falling under Article 56(1)(b) and (c), (2) second sentence and (3) of the Agreement, and may furthermore, before a final decision is taken, make any observations it considers appropriate.

## **ADMINISTRATIVE ASSISTANCE**

### *Article 8*

1. When the competent surveillance authority, as defined in Article 56 of the Agreement, by simple request or by decision requires an undertaking or association of undertakings located within the territory of the other surveillance authority to supply information, it shall at the same time forward a copy of the request or decision to the other surveillance authority.
2. At the request of the competent surveillance authority, as defined in Article 56 of the Agreement, the other surveillance authority shall, in accordance with its internal rules, undertake inspections within its territory in cases where the competent surveillance authority so requesting considers it to be necessary.
3. The competent surveillance authority is entitled to be represented and take an active part in inspections carried out by the other surveillance authority in respect of paragraph 2.
4. All information obtained during such inspections on request shall be transmitted to the surveillance authority which requested the inspections immediately after their finalization.
5. Where the competent surveillance authority, in cases falling under Article 56(1)(b) and (c), (2), second sentence and (3) of the Agreement, carries out inspections within its territory, it shall inform the other surveillance authority of the fact that such inspections have taken place and, on request, transmit to that authority the relevant results of the inspections.
6. When the competent surveillance authority as defined in Article 56 of the Agreement interviews a consenting natural or legal person in the territory of the other surveillance authority, the latter shall be informed thereof. The surveillance authority which is not competent may be present during such an interview, as well as officials from the competition authority on whose territory the interviews are conducted.

## **EXCHANGE AND USE OF INFORMATION**

### *Article 9*

1. For the purpose of applying Articles 53 and 54 of the Agreement, the EFTA Surveillance Authority and the EC Commission shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.
2. Information acquired or exchanged pursuant to this Protocol shall only be used in evidence for the purpose of procedures under Articles 53 and 54 of the Agreement and in respect of the subject matter for which it was collected.
3. Where the information referred to in Article 2 (1) and (2) concerns a case which has been initiated as a result of an application for leniency, that information cannot be used by the receiving surveillance authority as the basis for starting an inspection on its own behalf. This is without prejudice to any power of the surveillance authority to open an inspection on the basis of information received from other sources.
4. Save as provided under paragraph 5, information voluntarily submitted by a leniency applicant will only be transmitted to the other surveillance authority with the consent of the applicant. Similarly other information that has been obtained during or following an inspection or by means of or following any other fact-finding measures which, in each case, could not have been carried out except as a result of the leniency application will only be transmitted to the other surveillance authority if the applicant has consented to the transmission to that authority of information it has voluntarily submitted in its application for leniency. Once the leniency applicant has given consent to the transmission of information to the other surveillance authority, that consent may not be withdrawn. This paragraph is

without prejudice, however, to the responsibility of each applicant to file leniency applications to whichever authorities it may consider appropriate.

5. Notwithstanding paragraph 4, the consent of the applicant for the transmission of information to the other surveillance authority is not required in any of the following circumstances:
- a) no consent is required where the receiving surveillance authority has also received a leniency application relating to the same infringement from the same applicant as the transmitting surveillance authority, provided that at the time the information is transmitted it is not open to the applicant to withdraw the information which it has submitted to that receiving surveillance authority;
  - b) no consent is required where the receiving surveillance authority has provided a written commitment that neither the information transmitted to it nor any other information it may obtain following the date and time of transmission as noted by the transmitting surveillance authority, will be used by it or by any other authority to which the information is subsequently transmitted to impose sanctions on the leniency applicant or on any other legal or natural person covered by the favourable treatment offered by the transmitting authority as a result of the application made by the applicant under its leniency programme or on any employee or former employee of the leniency applicant or of any of the aforementioned persons. A copy of the receiving authority's written commitment will be provided to the applicant.
  - c) in the case of information collected by a surveillance authority under Article 8(2) at the request of the surveillance authority to whom the leniency application was made, no consent is required for the transmission of such information to, and its use by, the surveillance authority to whom the application was made.

## **PROFESSIONAL SECRECY**

### *Article 10*

1. For the purpose of carrying out the tasks entrusted to it by this Protocol, the EC Commission and the EFTA Surveillance Authority can forward to the States falling within their respective territories all information acquired or exchanged by them pursuant to this Protocol.
2. The EC Commission, the EFTA Surveillance Authority, the competent authorities of the EC Member States and the EFTA States, their officials, servants and other persons working under the supervision of these authorities as well as officials and servants of other authorities of the States shall not disclose information acquired or exchanged by them as a result of the application of this Protocol and of the kind covered by the obligation of professional secrecy.
3. Rules on professional secrecy and restricted use of information provided for in the Agreement or in the legislation of the Contracting Parties shall not prevent exchange of information as set out in this Protocol.

## **ACCESS TO THE FILE<sup>{3}</sup>**

### *Article 10A*

When a surveillance authority grants access to the file to the parties to whom it has addressed a statement of objections, the right of access to the file shall not extend to internal documents of the other surveillance authority or of the competition authorities of the EC Member States and the EFTA States. The right of access to the file shall also not extend to correspondence between the surveillance authorities, between a surveillance authority and the competition authorities of the EC Member States or EFTA States or between the competition authorities of the

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<sup>{3}</sup> Heading and article 10A inserted by Decision No 178/2004 (OJ No L 133, 26.5.2005, p. 35 and EEA Supplement No 26, 26.5.2005, p. 25), c.i.f. 1.7.2005.

EC Member States or EFTA States where such correspondence is contained in the file of the competent surveillance authority.

## COMPLAINTS AND TRANSFERRAL OF CASES

### *Article 11*

1. Complaints may be addressed to either surveillance authority. Complaints addressed to the surveillance authority which, pursuant to Article 56, is not competent to decide on a given case shall be transferred without delay to the competent surveillance authority.
2. If, in the preparation or initiation of ex officio proceedings, it becomes apparent that the other surveillance authority is competent to decide on a case in accordance with Article 56 of the Agreement, this case shall be transferred to the competent surveillance authority.
3. Once a case is transferred to the other surveillance authority as provided for in paragraphs 1 and 2, the case may not be transferred back. A case may not be transferred after
  - the statement of objections has been sent to the undertakings or associations of undertakings concerned,
  - a letter has been sent to the complainant informing him that there are insufficient grounds for pursuing the complaint,
  - the publication of the intention to adopt a decision declaring Article 53 or 54 not applicable, or the publication of the intention to adopt a decision making commitments offered by the undertakings binding on the undertakings.

## LANGUAGES

### *Article 12*

Any natural or legal person shall be entitled to address and be addressed by the EFTA Surveillance Authority and the EC Commission in an official language of an EFTA State or the European Community which they choose as regards complaints. This shall also cover all instances of a proceeding, whether it be opened following a complaint or *ex officio* by the competent surveillance authority.

## **G. INTERNATIONAL COOPERATION**



## Overview of bilateral and multilateral agreements

### Bilateral relations on competition issues

The European Commission has engaged actively in cooperation with competition authorities of many countries outside the EU. Cooperation with some of them is based on bilateral agreements dedicated entirely to competition (the so-called "dedicated agreements"). In other cases, competition provisions are included as part of wider general agreements such as free Trade Agreements, Partnership and Cooperation Agreements, Association Agreements, etc.

The full text of the agreement as published in the Official Journal of the European Union (OJ) is provided where available on the Competition Web site (<http://ec.europa.eu/competition/international/bilateral/index.html>).

### Overview of dedicated agreements:

- Agreement between the Government of the **United States of America** and the Commission of the European Communities regarding the application of their competition laws (1995)
- Agreement between the European Communities and the Government of the **United States of America** on the application of positive comity principles in the enforcement of their competition laws (1998)
- Agreement between the European Communities and the Government of **Canada** regarding the application of their competition laws (1999)
- Agreement between the European Community and the Government of **Japan** concerning cooperation on anti-competitive activities (2003)
- Terms of Reference of the **EU-China Competition Policy Dialogue** (2003)
- Memorandum of Understanding on Cooperation between the Fair Trade Commission of the **Republic of Korea** and the Competition Directorate-General of the European Commission (2004)
- Agreement between the EU and the **Republic of Korea** concerning cooperation on anti-competitive activities (2009)

- Memorandum of Understanding on Cooperation between Ministry of Justice and the heads of the Competition Authorities of **Brazil** and the Competition Directorate-General of the European Commission (2009)

#### Overview of general agreements containing competition provisions:

- Agreement between the European Economic Community and the **Swiss Confederation** (1972)
- Agreement between the European Community and the **Swiss Confederation** on Air Transport (2002)
- Annex to the Framework Agreement for cooperation between the European Economic Community and the Federative Republic of **Brazil** - Exchange of letters between the European Economic Community and the Federative Republic of Brazil on maritime transport (1995)
- Association Agreement with **Turkey** (1995)
- Agreement between the European Coal and Steel Community and the Republic of **Turkey** (1996)
- Agreement between the European Community and the Government of **Denmark** and the Home Government of the **Faroe Islands** (1996)
- Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States and the **United Mexican States** (1997)
- Decision No 2/2000 of the **EC-Mexico Joint Council**- Joint Declarations (2000)
- Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community and the **Palestine Liberation Organisation** (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip (1997)
- Euro-Mediterranean Agreement establishing an association between the EU and **Algeria** (2005), between the EC and the **Arab Republic of Egypt** (2004), between the EC and the **State of Israel** (2005), between the EC and the **Hashemite Kingdom of Jordan** (1997), between the EC and the **Republic of Lebanon** (2006), between the EC and the **Republic of Morocco** (2000), between the EC and the **Republic of Tunisia** (1998)



- Agreement on Trade, Development and Cooperation between the European Community and its Member States and the **Republic of South Africa** (1999)
- Cotonou Agreement (**ACP countries**, 2000)
- Partnership and Cooperation Agreement (with **Armenia** in 2005, with the Republic of **Moldova** in 1998, with the **Russian Federation** in 1997, with **Ukraine** in 1998)
- Stabilisation and Association Agreement (with **Albania** in 2006, with **Croatia** in 2004, with Former Yugoslav **Republic of Macedonia** in 2004, with **Montenegro** in 2007)
- Agreement establishing an association between the European Community and its Member States and the **Republic of Chile** (2002)
- Council Decision no. 1/2004 of the **EU-Morocco Association Council** of 19 April 2004 adopting the necessary rules for the implementation of the competition rules (2004)
- Economic partnership agreement with the **CARIFORUM States** (2008)

### **Multilateral relations on competition policy**

For many years, the Commission has participated actively in the work of international forums dealing with competition policy issues. The main organisations concerned are:

- European Economic Area (EEA)
- International Competition Network (ICN)
- Organisation of Economic Cooperation and Development (OECD). [DG Competition submissions](http://ec.europa.eu/competition/international/multilateral/oecd_submissions.html) to the OECD Round Tables are available on the Competition Web site ([http://ec.europa.eu/competition/international/multilateral/oecd\\_submissions.html](http://ec.europa.eu/competition/international/multilateral/oecd_submissions.html)).
- United Nations Conference on Trade and Development (UNCTAD)
- World Trade Organisation (WTO)



## **H. OTHERS**



**H.1** Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU

**H.2** Best Practices for the submission of economic evidence and data collection in cases concerning the application of articles 101 and 102 TFEU and in merger cases

**H.3** Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU

**available on :**

<http://ec.europa.eu/competition/antitrust/legislation/legislation.html>



## **Antitrust Correspondance**

**In all your correspondence, please specify the name of the case and the case number**

All correspondence relating to a case must be sent to the Registry, even when addressed to a specific Directorate or Unit with DG Competition.

### **Delivery by post:**

European Commission  
Directorate-General for Competition  
For the attention of the Antitrust Registry  
1049 Bruxelles/Brussel  
BELGIQUE/BELGIË  
Fax: +32 2 295.01.28

### **Delivery by hand:**

European Commission  
DG Competition  
For the attention of the Antitrust Registry  
Avenue du Bourget/ Bourgetlaan 1  
1140 Evere  
Bruxelles/Brussel

- In its efforts “towards the e-Commission”, the European Commission encourages use of electronic information.
- Precaution : Emails should not exceed 8 MB
- Secure email can be sent encrypted using "Qualified PKI Certificates". If you don't have such certificate you can obtain them via certificates providers or any national certification authority.
- If, nevertheless, you want to send paper documents, please respect following rules :
  - No bound documents, stapled documents, no cardboard dividers, no double-sided pages
  - Format: only A4 weighing less than 120 gr/m2

The Registry reserves the right to request electronic copies for voluminous paper documents.

To inform the Commission about suspected infringements of the competition rules.

## Complaints

The Commission encourages citizens and firms to inform about suspected infringements of competition rules. There are two ways to do this.

If you are directly affected by the practice which you suspect restricts competition and are able to provide specific information, you may want to lodge a formal complaint, which must fulfil certain requirements. The complaint form ("Form C") is available on the Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty. Official Journal L 123, 27.04.2004, p.18-24 (see the form on the last page "Annex").

Information on how the Commission handles complaints is available on the Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (Official Journal C 101 , 27/04/2004 p. 65-77).

The other way is the provision of market information that does not have to comply with the same requirements. You can report your concerns by e-mail to [comp-market-information@ec.europa.eu](mailto:comp-market-information@ec.europa.eu). Please indicate your name and address, identify the firms and products concerned and describe the practice you have observed. This will help the Commission to detect problems in the market and be the starting point for an investigation. We invite you to read our e-services privacy policy before contacting us. You can also send your complaint by post: European Commission, Competition DG, B - 1049 Brussels.

If the situation you have encountered is specific and limited to the country or the area in which you live, or involves no more than three member States you may want to contact a national competition authority. The competition authorities of all EU Member States now apply the same competition rules as the European Commission and very often they are well placed to deal with your problem. If you think that a larger number of Member States are concerned, you may primarily chose to contact the European Commission. If you are not sure about the scope of the problem, do not hesitate to contact either the European Commission or the national competition authority because the authorities cooperate among them and will allocate the case as appropriate.