Competition Law:

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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 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 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). 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. Block exempted agreements cannot be held invalid by national courts in the context of private litigation.

3. The existing guidelines on vertical restraints, horizontal co-operation agreements and technology transfer agreements 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 and which have as their object or effect the prevention, restriction or distortion of competition.

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.
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 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 (14). 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 (13). 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 (14).

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 (16). 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 (17). 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 (18). In certain circumstances an agreement may be inferred from and imputed to an ongoing commercial relationship between the parties (19). However, the mere fact that a measure adopted by an undertaking falls within the context of on-going business relations is not sufficient (19).
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 (20). 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 (21).

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 (22). 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 restraint 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 (23). 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 (24). 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. 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.

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. 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. 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.

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. 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. Such negative effects must be appreciable. The prohibition rule of Article 81(1) does not apply when the identified anti-competitive effects are insignificant. 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. 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. 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 (35). 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) (36).

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 (37). 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) (38). 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 (39). 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) (40).

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 (41). 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) (42). 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 (43) 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 (44). 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 (45).

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 (46) 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. 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).

38. The remainder of these guidelines will consider each of the four conditions of Article 81(3). Given that these four conditions are cumulative 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. 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.

42. According to settled case law the four conditions of Article 81(3) are cumulative, 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. The four conditions of Article 81(3) are also exhaustive. When they are met the exception is applicable and may not be made dependent 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).

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 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. 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. 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.

44. The assessment of restrictive agreements under Article 81(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 81(3) applies as long as the four conditions are fulfilled and ceases to apply when that is no longer the case. 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 (61). However, severe restrictions of competition are unlikely to fulfil the conditions of Article 81(3). Such restrictions are therefore irrelevant from the point of view of Article 81(3). They neither create objective economic benefits (62) nor do they benefit consumers (63). 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 (64).

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 (65). 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 (66) 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 (67). This means that efficiencies are not assessed from the subjective point of view of the parties (68). 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. 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. 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 (70). In the telecommunications sector, for example, cooperation agreements have been held to create efficiencies by making available more quickly new global services (71). 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) (72).

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 (73).

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 (74).
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 (75). 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 (76). Restrictions that are blacklisted 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 (77).

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 (78). 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 (79) 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 (80). 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 (81). 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 (82). 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 (83). 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 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 (84).

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 (85). 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 (86). 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' (87).
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 (98).

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.

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) (69). 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 (69). 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 (70) (71). 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 (72), 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 (73) 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’ (95). 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 (96). 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 a 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.

(1) In the following the term ‘agreement’ includes concerted practices and decisions of associations of undertakings.
(3) All existing block exemption regulations and Commission notices are available on the DG Competition web-site: http://www.europa.eu.int/comm/dgs/competition
(4) See paragraph 36 below.
(6) The concept of effect on trade between Member States is dealt with in separate guidelines.
(7) In the following the term ‘restriction’ includes the prevention and distortion of competition.
(8) According to Article 81(2) such agreements are automatically void.
(9) 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.
(10) 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.
(11) See note above.
(14) See in this respect e.g. Case 14/68, Walt Wilhelm, [1969] ECR 1, and more recently Case T-203/01, Michelin (II), [2003] ECR II . . ., paragraph 112.


(18) See e.g. Joined Cases 25/84 and 26/84, Ford, [1985] ECR 2725.

(19) See in this respect paragraph 141 of the judgment in Bundesverband der Arzneimittel-Importeure cited in note.


(21) See in this respect e.g. Joined Cases 56/64 and 58/66, Consten and Grundig, [1966] ECR 429.

(22) 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).


(24) 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.

(25) See e.g. paragraph 99 of the judgment in Anic Partecipazioni cited in note 12.

(26) See paragraph 46 below.


(30) See paragraph 77 of the judgment in John Deere cited in note 9.

(31) 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 télévision (M6) cited in note10. 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.


(34) See point 32.


(36) For the reference in the OJ see note 5.

(37) See paragraph 104 of the judgment in Métropole télévision (M6) and others, cited in note 10.

(38) See e.g. Case C-399/93, Luttikhuis, [1995] ECR I-4515, paragraphs 12 to 14.

(39) See in this respect paragraphs 118 et seq. of the Métropole television judgment cited in note 10.

(40) See paragraph 107 of the judgment in Métropole télévision judgement cited in note 10.

(41) See e.g. Commission Decision in Elopak/Metal Box – Odin cited in note 22.


(43) See note 22. The decision was upheld by the Court of First Instance in the judgment in Métropole télévision (M6) cited in note 10.

(44) 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.
See the judgment in Consten and Grundig, cited in note 21.

The fact that an agreement is block exempted does not in itself indicate that the individual agreement is caught by Article 81(1).


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.

See paragraph 42 below.

See the judgment in Société Technique Minière cited in note 20.

See in this respect Case 319/82, Kerpen & Kerpen, [1983] ECR 4 173, paragraphs 11 and 12.

See e.g. Case T-185/00 and others, Métropole télévision SA (M6), [2002] ECR II-3805, paragraphs 26 and 63/82, VBV and VBVB, [1984] ECR 19, paragraph 61.

See Case T-213/00, CMA CGM and others, [2003] ECR II ..., paragraph 226.

See to that effect implicitly paragraph 139 of the Matra judgment 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 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.

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).

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.

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.
As to the former question, which may be relevant in the context of Article 81(1), see paragraph 18 above.

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.

See in this respect paragraphs 392 to 395 of the judgment in Compagnie Générale Maritime cited in note 57.

See for more detail paragraph 116 of the Guidelines on Vertical Restraints cited in note 5.


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.

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.

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.

This term refers to undertakings that constrain the pricing behaviour of other undertakings in the market who might otherwise have tacitly colluded.

The restrictive agreement may even allow the undertakings in question to charge a higher price to customers with a low elasticity of demand.


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.

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.

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).

See paragraph 21 of the judgment in Metro (I) cited in note 54.

See paragraph 97 above.

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) (1)

(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) (2).

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 (3), 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) (4); 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.


(2) 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.

(3) 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.

(4) 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 (1). 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 (2). 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 (3):

(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;

(1) 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.


(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 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).
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 ('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 ('de minimis' rule).

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 oblige 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 or concerted 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 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 (3). 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' (4).

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 (5). 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 (6). 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 (7). 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 (8).

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 (9).

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'.

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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. It is a wider concept, covering all cross-border economic activity including establishment. 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. 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.

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.

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. 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.

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. 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.
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 (20). 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 (21). 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 (23).

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 (23). 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 (25). 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 (27). 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 (28).

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 (29). 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 (30). 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 (31). 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 (32).

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 (33).
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 \(^{(34)}\). 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 \(^{(35)}\).

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 \(^{(34)}\). 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 \(^{(36)}\). 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 \(^{(36)}\).

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) \(^{(37)}\) the Commission has stated that agreements between small and medium-sized undertakings (SMEs) as defined in the Annex to Commission Recommendation 96/280/EC \(^{(38)}\) 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 \(^{(39)}\) 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 (40).

55. In order to apply the market share threshold, it is necessary to determine the relevant market (41). 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 (42). 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 (43).

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 (44). 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.

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.

3.1.2. 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 (45). 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.

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 (46). 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 (47). 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 (48). 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 (49).

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 (50). 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 (51).

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 (52). 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 (53). 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 (54). Once the effective competitive market structure inside the Community risks being further impaired, there is Community law jurisdiction.
3.2. Agreements and abuses covering a single, or only part of a Member State

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 (55). 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.

3.2.1. Cartels covering a single 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.

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 (56).

79. The capacity of such agreements to partition the internal market follows from the fact that undertakings partici-
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 (69). 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 (69).

87. Foreclosure may, for example, occur when suppliers impose exclusive purchasing obligations on buyers (65). In Delimitis (66), 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 (67).

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 (68). 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 (69).
3.2.5. Abuses of dominant positions covering a single Member State

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 a fair 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 (7). 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.

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 (7). In Michelin (7), 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 (7) 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 (7) and where it also operates in other Member States (7). 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 (76). 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 are normally by their very nature an appreciable effect on trade. However, if the abuse is purely local in nature or
3.3.1. General remarks and agreements and practices involving undertakings

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.

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

3.3.2.1. 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 (79). 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 (79), or produce effects inside the Community (79). 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 (81).

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.

104. In the case of imports, this category includes agreements that bring about an isolation of the internal market (82). 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 (89).

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 (84).
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 (10). In Compagnie maritime belge (11), 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 (12).

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 (13). 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.

(6) See paragraphs 142 to 144 of the judgment in Vereniging van Groothandelaren in Bloemkwekerijprodukten cited in the previous footnote.
(8) The concept of appreciability is dealt with in section 2.4 below.
(9) See in this respect Case 85/76, Hoffmann-La Roche, [1979] ECR p. 461, paragraph 126.
(10) Throughout these guidelines the term ‘products’ covers both goods and services.
(13) 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.
(14) See section 3.2 below.
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.


See e.g. Case C-250/92, Gattrup-Klim [1994] ECR II-5641, paragraph 54.


Compare in this respect the judgments in Bagnasco and Wouters cited in footnote 11.


See paragraph 60 of the AEG judgment cited in the previous footnote.


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.

See paragraph 138 of the judgment in BPB Industries and British Gypsum cited in footnote 22.

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.

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.


See e.g. Case T-7/93, Langnese-Iglo, [1995] ECR II-1533, paragraph 120.

See paragraphs 140 and 141 of the judgment in Vereniging van Groothandelaren in Bloemkwekerijprodukten cited in footnote 5.


See paragraph 140 and 141 of the judgment in Vereniging van Groothandelaren in Bloemkwekerijprodukten cited in footnote 5.


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 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).

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).

See the previous footnote.

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).

See also paragraph 14 above.

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 products volumes involved.

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.


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.


See e.g. the Commission Decision in Ford/Volkswagen (OJ L 20, 28.1.1993, p. 14).

See in this respect paragraph 146 of the Compagnie Générale Maritime judgment cited in footnote 23 above.

See in this respect Joined Cases 43/82 and 63/82, VBVB and VBBS, [1984] ECR 19, paragraph 9.


See paragraphs 32 and 33 of the judgment in Commercial Solvents cited in footnote 3.

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.

See for a recent example paragraph 95 of the Wouters judgment cited in footnote 11.

See e.g. Case 246/86, Belasco, [1989] ECR 2117, paragraph 32-38.

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.

Guarantees for current account credit facilities.
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 (1),

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 (2) 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 appli-
cation 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 legis-
lative 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 Regu-
lation 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 manu-
facture of certain products or preparation of certain
services in favour of another party (reciprocal special-
isation) and from agreements whereby the parties

(*) 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 (1), 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.

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
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 (1),

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 (7).

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 (1),

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 (2) 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 cooperation. This also includes scenarios where one party merely finances the research and development activities of another party.

(*) 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.

In order to justify the exemption, 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.

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.

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.

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.

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.

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.

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.

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.
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%.

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.

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 (1), 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.

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.

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.

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;

(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 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 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. 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
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 (*) 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 (2) (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') (2).

(*) 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.


(2) 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 (1) (‘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 (2) (‘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 (3), 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) (4) (‘the Market Definition Notice’). One must take into account, in particular, the uncertainties which arise from the economic environment in which companies operate, the technical know-how which is required to produce or distribute products, the financial and marketing capabilities of the parties, the extent of their sales and the periods during which market entry could take place.

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. (5) 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

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(1) OJ L […] […] p. […].
(2) OJ L […] […] p. […].
(3) 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’.
(5) 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 (1) (the Block Exemption Regulation on Vertical Restraints) and the Guidelines on Vertical Restraints (2). 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 (3). 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 (4).

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 (5).

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.

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(3) 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).
(4) 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.
18. These guidelines replace the Commission guidelines on the applicability of Article 81 of the EC Treaty to horizontal co-operation agreements (1) which were published by the Commission in 2001 and do not apply to the extent that sector specific rules apply as in the case for certain agreements with regard to agriculture (2), transport (3) or insurance (4). 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 (5) (‘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 (6) 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 (7). The balancing of restrictive and pro-competitive effects is conducted exclusively within the framework laid down by Article 101(3) (8). 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...

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(1) 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.


(6) 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, Aeonf-Euiflux, [2006] ECR I-11125, paragraph 50.


(8) 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 (1). In other words, the fact that public authorities encourage a horizontal co-operation agreement does not mean that it is permissible under Article 101 (2). 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 (3). 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 (4). 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 (5) 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) (6). 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 (7).

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 (8). 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 (9), 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.

(1) See judgment of 14 October 2010 in Case C-280/08 P, Deutsche Telekom, ECR 1 not yet reported, paragraph 82 and the case-law cited therein.
(3) 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.
(4) At least until a decision to disapply the national legislation has been adopted and that decision has become definitive (5); see Case C-198/01, CIF, paragraphs 54 et seq.
(5) For the purpose of these guidelines, the term ‘restriction of competition’ includes the prevention and distortion of competition.
(6) See, for example, Case C-209/07, BIDS, [2008] ECR I-8637, paragraph 17.
(7) 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.
(8) See, for example, Joined Cases C-501/06 P and others, GlaxoSmithKline, paragraph 58; Case C-209/07, BIDS, paragraphs 13 et seq.
(9) 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 (1).

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.

(1) 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) (1) ('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 (2). 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 (3). 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 (4), 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 (5).

(2) 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.
(3) As to the calculation of market shares, see also Market Definition Notice, paragraphs 54–55.
(5) 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 (1); 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 (2) and specialisation (including joint production) (3) 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.

(1) More detail on the concept of consumer is provided in paragraph 84 of the General Guidelines.
(2) R&D Block Exemption Regulation.
(3) 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 (1), 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 (2). 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 prejudge 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 (3). 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

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(1) Economic theory on information asymmetries deals with the study of decisions in transactions where one party has more information than the other.

(2) See Case C-7/95 P, John Deere, paragraph 88.

(3) 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 (1).

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 (2). 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 (3). Hence, information exchange can constitute a concerted practice if it reduces strategic uncertainty (4) 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 (5). 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 (6). For example, mere attendance at a meeting (7) 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 (8). 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 (9).

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) (10). 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.

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(1) See Case C-7/95 P, John Deere, paragraph 86.
(2) See Case C-7/95 P, John Deere, paragraph 87.
(3) See Cases 40/73 and others, Suiker Unie, [1975] ECR 1663, paragraph 173 et seq.
(4) 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.
(5) 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’.
(7) 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.’
(10) 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

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.

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.

(1) The use of the term ‘main competition concerns’ means that the ensuing description of competition concerns is neither exclusive nor exhaustive.

(2) 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 (1). 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 (2).

73. Exchanging information on companies' individualised intentions concerning future conduct regarding prices or quantities (3) 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 (4) (5). 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 (6). 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 (7). 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

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(1) See, for example, Joined Cases C-501/06 P and others, GlaxoSmithKline, paragraph 58; Case C-209/07, BIDS, paragraphs 15 et sqq.
(2) See also General Guidelines, paragraph 22.
(3) Information regarding intended future quantities could for instance include intended future sales, market shares, territories, and sales to particular groups of consumers.
(4) 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.
(5) 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).
(6) Case C-7/95 P, John Deere v Commission, paragraph 76.
(7) 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 (1). 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 (2).

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.

(1) Case C-238/05, Asnef-Equifax, paragraph 54.
(2) 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 (1). 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 (2). 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

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(2) 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 uncer-
tainty 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 (1) 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 publi-
cation may allow market participants to make better-informed individual choices in order to adapt

(1) 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 (1). 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 (2). 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 renegotiations 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 renegotiations. 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 renegotiations) 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 renegotiations (3). 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 (4).

Public/non-public information

92. In general, exchanges of genuinely public information are unlikely to constitute an infringement of Article 101 (5). *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

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(1) 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.
(2) 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.
(3) However, infrequent contracts could decrease the likelihood of a sufficiently prompt retaliation.
(4) 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.
(5) 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 (1). 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 (2).

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 (3). 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 customers may be able to constrain
potential restrictive effect on competition (4). 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 (5)

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
consumers 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 rela-
tionship 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 char-
acteristics.

(1) 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.
(2) See Joined Cases T-202/98 and others, Tate & Lyle v Commission, paragraph 60.
(3) 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.
(4) 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.
(5) 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 (1).

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.

(1) 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 (1).

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 (2). 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.

(1) For market definition, see the Market Definition Notice.
(2) 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 (1). 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.

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(1) 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 (1). To fall under the R&D Block Exemption Regulation, that market share may not exceed 25 % (2).

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 (3). 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 (4). However, the benefit of the block exemption may be withdrawn if the agreement eliminated effective competition in innovation (5). After the seven year period, market shares based on sales value can be calculated, and the market share threshold of 25 % applies (6).

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.

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(1) Point (u) of Article 1(1) of the R&D Block Exemption Regulation.
(2) Article 4(2) of the R&D Block Exemption Regulation.
(3) See also Technology Transfer Guidelines, paragraph 23.
(4) Article 4(1) of the R&D Block Exemption Regulation.
(5) See recitals 19, 20 and 21 in the preamble to the R&D Block Exemption Regulation.
(6) 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 (1). 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, if 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.

(1) 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 (1).

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.

(1) This is without prejudice to the analysis of potential efficiency gains, including those that regularly exist in publicly co-funded R&D.
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 (1). 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 (2). 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

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

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

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

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

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

(1) See Article 3(2) of the R&D Block Exemption Regulation.
(2) 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 cooperation, 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).

**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 CO₂. 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 (1) (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’) (2). The spill-over markets are likely to be relevant if the markets are interdependent 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:

(1) OJ C 1, 3.1.1979, p. 2.
(2) 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. Cooperation 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 cooperation 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) (1). 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.

(1) 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).

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### 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).

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### 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 (1).

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.

(1) 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 spillover 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 (1). 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.

(1) 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 (1). 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 (2) 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 (3). 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’) (4). 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 (5). 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 (6). 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 (7), 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

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3. See judgment of 12 May 2010 in Case T-432/05, EMC Development AB v. Commission, not yet reported.
4. Such standard terms might cover only a very small part of the clauses contained in the final contract or a large part thereof.
5. 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.
6. See Chapter 3 on R&D agreements.
7. 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 (1).

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) (2), three main groups of companies with different interests in standard-setting can be distinguished in the abstract (3). 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.

(1) 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.
(2) 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.
(3) In practice, many companies use a mix of these business models.
269. Intellectual property laws and competition laws share the same objectives (1) 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 (2) 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 (3) would fall into this category.

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(1) See Technology Transfer Guidelines, paragraph 7.
(2) 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.
(3) 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 (1).

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 (2), 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 (3) 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.

(1) 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.

(2) See by analogy paragraph 39 et seq. As regards market shares see also paragraph 296.

(3) 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 (1).

284. In the case of a standard involving IPR, a clear and balanced IPR policy (2), 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) (3). 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 (4). 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.

(1) For example effective access should be granted to the specification of the standard.

(2) As specified in paragraphs 285 and 286.

(3) It should be noted that FRAND can also cover royalty-free licensing.

(4) 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 (1). 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 (2).

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 (3). 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 (4). 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.

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(3) 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)’.

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 (1). 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) (2). 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 (3). 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) (4). 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

(1) 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).

(2) 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).

(3) 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

(4) 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) (1). 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 (2). 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.

(1) 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.

(2) 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 (1).

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.

(1) 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 (1).

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 (2).

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 (3) 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 (4). 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.

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(1) 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).

(2) 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’.

(3) 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.

(4) 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.
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 (1). 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.

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(1) 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.

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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.
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.
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(Acts whose publication is obligatory)

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 (1),

Having regard to the opinion of the European Parliament (2),

Having regard to the opinion of the European Economic and Social Committee (3),

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 Com-

(2) In particular, there is a need to rethink the arrangements for applying the exception from the prohi-
bition on agreements, which restrict competition, laid down in Article 81(3) of the Treaty. Under

(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.

(2) OJ C 155, 29.5.2001, p. 73.
(3) 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.
p. 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.

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.

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.

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.

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 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.
Regulations such as 19/65/EEC (1), (EEC) No 2821/71 (2), (EEC) No 3976/87 (3), (EEC) No 1534/91 (4), or (EEC) No 479/92 (5) 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.

For it to ensure that the provisions of the Treaty are applied, the Commission should be able to address decisions to undertakings 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.

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.

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.

(1) 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 (OJL 148, 15.6.1999, p. 1).

(2) 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 148, 15.6.1979, p. 1).

(3) 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 categories of agreements, decisions and concerted practices (OJ L 374, 31.12.1987, p. 46). Regulation as last amended by the Act of Accession of 1994.

(4) 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 and concerted practices in the air transport sector (OJ L 374, 31.12.1987, p. 9).

(5) 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 and concerted practices in the air transport sector (OJ L 143, 7.6.1991, p. 1).

(6) Council Regulation (EEC) No 479/92 of 25 May 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.
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.

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.

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. 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.

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.

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.

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.

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.
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.

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.

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.

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.

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.

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.

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.
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.

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.

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.

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, 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.

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.

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.

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.

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 (*) should therefore be repealed and Regulations (EEC) No 1017/68 (†), (EEC) No 4056/86 (‡) and (EEC) No 3975/87 (§) 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.

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.


(‡) 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.

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 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 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 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 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.

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.
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;
   
   (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 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.

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 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;
(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:

   (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 representatives 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.
Article 32

Exclusions

This Regulation shall not apply to:

(a) international tramp vessel services as defined in Article 1(3)(a) of Regulation (EEC) No 4056/86;
(b) a maritime transport service that takes place exclusively between ports in one and the same Member State as foreseen in Article 1(2) of Regulation (EEC) No 4056/86;
(c) air transport between Community airports and third countries.

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 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.’
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:
   ‘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.

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.
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.

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.

Done at Brussels, 16 December 2002.

For the Council
The President
M. FISCHER BOEL
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 (1),
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:

(1) Regulation No 19/65/EEC empowers the Commission to
apply Article 101(3) of the Treaty on the Functioning of
the European Union (2) 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)
of the Treaty to categories of vertical agreements and
concerted practices (3) 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 Regu-
lation, 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 regu-
lation.

(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 corre-
sponding concerted practices.

(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.

(1) OJ 36, 6.3.1965, p. 533.
(2) 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.

(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 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 (1), 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.

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 fulfills 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
I

(Information)

COMMISSION

COMMISSION NOTICE

Guidelines on Vertical Restraints

(2000/C 291/01)

(Text with EEA relevance)

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1. INTRODUCTION

1. Purpose of the Guidelines

These Guidelines set out the principles for the assessment of vertical agreements under Article 81 of the EC Treaty. What are considered vertical agreements is defined in Article 2(1) of Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (1). These Guidelines are without prejudice to the possible parallel application of Article 82 of the Treaty to vertical agreements. The Guidelines are structured in the following way:

— Section II (paragraphs 8 to 20) describes vertical agreements which generally fall outside Article 81(1);

— Section III (paragraphs 21 to 70) comments on the application of the Block Exemption Regulation;

— Section IV (paragraphs 71 to 87) describes the principles concerning the withdrawal of the block exemption and the disapplication of the Block Exemption Regulation;

— Section V (paragraphs 88 to 99) addresses market definition and market share calculation issues;

— Section VI (paragraphs 100 to 229) describes the general framework of analysis and the enforcement policy of the Commission in individual cases concerning vertical agreements.

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 the text apply to all types of goods and services and to all levels of trade. The term 'products' includes both goods and services. The terms 'supplier' and 'buyer' are used for all levels of trade.

By issuing these Guidelines the Commission aims to help companies to make their own assessment of vertical agreements under the EC competition rules. The standards set forth in these Guidelines must be applied in circumstances specific to each case. This rules out a mechanical application. Each case must be evaluated in the light of its own facts. The Commission will apply the Guidelines reasonably and flexibly.

These Guidelines are without prejudice to the interpretation that may be given by the Court of First Instance and the Court of Justice of the European Communities in relation to the application of Article 81 to vertical agreements.

2. Applicability of Article 81 to vertical agreements

Article 81 of the EC Treaty applies to vertical agreements that may affect trade between Member States and that prevent, restrict or distort competition (hereinafter referred to as 'vertical restraints') (2). For vertical restraints, Article 81 provides an appropriate legal framework for assessment, recognising the distinction between anti-competitive and pro-competitive effects: Article 81(1) prohibits those agreements which appreciably restrict or distort competition, while Article 81(3) allows for exemption of those agreements which confer sufficient benefits to outweigh the anti-competitive effects.

For most vertical restraints, competition concerns can only arise if there is insufficient inter-brand competition, i.e. if there is some degree of market power at the level of the supplier or the buyer or at both levels. If there is insufficient inter-brand competition, the protection of inter- and intra-brand competition becomes important.

The protection of competition is the primary objective of EC competition policy, as this enhances consumer welfare and creates an efficient allocation of resources. In applying the EC competition rules, the Commission will adopt an economic approach which is based on the effects on the market; vertical agreements have to be analysed in their legal and economic context. However, in the case of restrictions by object as listed in Article 4 of the Block Exemption Regulation, the Commission is not required to assess the actual effects on the market. Market integration is an additional goal of EC competition policy. Market integration enhances competition in the Community. Companies should not be allowed to recreate private barriers between Member States where State barriers have been successfully abolished.

II. VERTICAL AGREEMENTS WHICH GENERALLY FALL OUTSIDE ARTICLE 81(1)

1. Agreements of minor importance and SMEs

(8) Agreements which are not capable of appreciably affecting trade between Member States or capable of appreciably restricting competition by object or effect are not caught by Article 81(1). The Block Exemption Regulation applies only to agreements falling within the scope of application of Article 81(1). These Guidelines are without prejudice to the application of the present or any future ‘de minimis’ notice (1).

(9) Subject to the conditions set out in points 11, 18 and 20 of the ‘de minimis’ notice concerning hardcore restrictions and cumulative effect issues, vertical agreements entered into by undertakings whose market share on the relevant market does not exceed 10 % are generally considered to fall outside the scope of Article 81(1). There is no presumption that vertical agreements concluded by undertakings having more than 10 % market share automatically infringe Article 81(1). Agreements between undertakings whose market share exceeds the 10 % threshold may still not have an appreciable effect on trade between Member States or may not constitute an appreciable restriction of competition (2). 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 100 to 229.

(10) As regards hardcore restrictions defined in the ‘de minimis’ notice, Article 81(1) may apply below the 10 % 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 Court of First Instance is relevant in this respect (3). Reference is also made to the particular situation of launching a new product or entering a new market which is dealt with in these Guidelines (paragraph 119, point 10).

(11) In addition, the Commission considers that, subject to cumulative effect and hardcore restrictions, agreements between small and medium-sized undertakings as defined in the Annex to Commission Recommendation 96/280/EC (4) are rarely capable of appreciably affecting trade between Member States or of appreciably restricting competition within the meaning of Article 81(1), and therefore generally fall outside the scope of Article 81(1). In cases where such agreements nonetheless meet the conditions for the application of Article 81(1), the Commission will normally refrain from opening proceedings for lack of sufficient Community interest unless those undertakings collectively or individually hold a dominant position in a substantial part of the common market.

2. Agency agreements


Agency agreements cover the situation in which a legal or physical person (the agent) is 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.

(13) In the case of genuine agency agreements, the obligations imposed on the agent as to the contracts negotiated and/or concluded on behalf of the principal do not fall within the scope of application of Article 81(1). The determining factor in assessing whether Article 81(1) is applicable is the financial or commercial risk borne by the agent in relation to the activities for which he has been appointed as an agent by the principal. In this respect it is not material for the assessment whether the agent acts for one or several principals. Non-genuine agency agreements may be caught by Article 81(1), in which case the Block Exemption Regulation and the other sections of these Guidelines will apply.


(14) There are two types of financial or commercial risk that are material to the assessment of the genuine nature of an agency agreement under Article 81(1). First there are the 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, i.e. which are required to enable the agent to conclude and/or negotiate this type of contract. Such investments are usually sunk, if upon leaving that particular field of activity the investment cannot be used for other activities or sold other than at a significant loss.

(15) The agency agreement is considered a genuine agency agreement and consequently falls outside Article 81(1) 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 and in relation to market-specific investments for that field of activity. In such a situation, the selling or purchasing function forms part of the principal’s activities, despite the fact that the agent is a separate undertaking. The principal thus bears the related financial and commercial risks and the agent does not exercise an independent economic activity in relation to the activities for which he has been appointed as an agent by the principal. In the opposite situation the agency agreement is considered a non-genuine agency agreement and may fall under Article 81(1). In that case the agent does bear such risks and will be treated as an independent dealer who must remain free in determining his marketing strategy in order to be able to recover his contract- or market-specific investments. 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 his success as an agent or general investments in for instance premises or personnel, are not material to this assessment.

(16) 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. Nonetheless, the Commission considers that Article 81(1) will generally not be applicable to the obligations imposed on the agent as to the contracts negotiated and/or concluded on behalf of the principal 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:

— 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;

— is not, directly or indirectly, obliged to invest in sales promotion, such as contributions to the advertising budgets of the principal;

— does not maintain at his 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);

— does not create and/or operate an after-sales service, repair service or a warranty service unless it is fully reimbursed by the principal;

— 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;

— does not undertake responsibility towards third parties for damage caused by the product sold (product liability), unless, as agent, he is liable for fault in this respect;

— 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).

(17) This list is not exhaustive. However, where the agent incurs one or more of the above risks or costs, then Article 81(1) may apply as with any other vertical agreement.
If an agency agreement does not fall within the scope of application of Article 81(1), then all obligations imposed on the agent in relation to the contracts concluded and/or negotiated on behalf of the principal fall outside Article 81(1). The following obligations on the agent’s part will generally 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:

(i) Limitations on the territory in which the agent may sell these goods or services;

(ii) Limitations on the customers to whom the agent may sell these goods or services;

(iii) The prices and conditions at which the agent must sell or purchase these goods or services.

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 (non-compete provisions). Exclusive agency provisions concern only intra-brand competition and will in general not lead to anti-competitive effects. Non-compete provisions, including post-term non-compete provisions, concern inter-brand competition and may infringe Article 81(1) if they lead to foreclosure on the relevant market where the contract goods or services are sold or purchased (see Section VI.2.1).

An agency agreement may also fall within the scope of Article 81(1), even if the principal bears all the relevant financial and commercial risks, where it facilitates collusion. This 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.

The Block Exemption Regulation creates a presumption of legality for vertical agreements depending on the market share of the supplier or the buyer. Pursuant to Article 3 of the Block Exemption Regulation, it is in general the market share of the supplier on the market where it sells the contract goods or services which determines the applicability of the block exemption. This market share may not exceed the threshold of 30% in order for the block exemption to apply. Only where the agreement contains an exclusive supply obligation, as defined in Article 1(c) of the Block Exemption Regulation, is it the buyer’s market share on the market where it purchases the contract goods or services which may not exceed the threshold of 30% in order for the block exemption to apply. For market share issues see Section V (paragraphs 88 to 99).

From an economic point of view, a vertical agreement may have effects not only on the market between supplier and buyer but also on markets downstream of the buyer. The simplified approach of the Block Exemption Regulation, which only takes into account the market share of the supplier or the buyer (as the case may be) on the market between these two parties, is justified by the fact that below the threshold of 30% the effects on downstream markets will in general be limited. In addition, only having to consider the market between supplier and buyer makes the application of the Block Exemption Regulation easier and enhances the level of legal certainty, while the instrument of withdrawal (see paragraphs 71 to 87) remains available to remedy possible problems on other related markets.

2. Scope of the Block Exemption Regulation

(i) Definition of vertical agreements

Vertical agreements are defined in Article 2(1) of the Block Exemption Regulation as ‘agreements or concerted practices entered into between two or more undertakings each of which operates, for the purposes of the agreement, 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’.
(24) There are three main elements in this definition:

— the agreement or concerted practice is between two or more undertakings. Vertical agreements with final consumers not operating as an undertaking are not covered; More generally, agreements with final consumers do not fall under Article 81(1), as that article applies only to agreements between undertakings, decisions by associations of undertakings and concerted practices. This is without prejudice to the possible application of Article 82 of the Treaty;

— 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;

— 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. For the application of the Block Exemption Regulation both the goods or services supplied by the supplier and the resulting goods or services are considered to be contract goods or services. 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 1475/95(1). 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 his own goods or services.

(25) 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 being 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, Articles 2(2) to (5) directly or indirectly exclude certain vertical agreements from the application of the Block Exemption Regulation.

(ii) Vertical agreements between competitors

(26) Article 2(4) of the Block Exemption Regulation explicitly excludes from its application ‘vertical agreements entered into between competing undertakings’. Vertical agreements between competitors will be dealt with, as regards possible collusion effects, in the forthcoming Guidelines on the applicability of Article 81 to horizontal cooperation (2). However, the vertical aspects of such agreements need to be assessed under these Guidelines. Article 1(a) of the Block Exemption Regulation defines competing undertakings as ‘actual or potential suppliers in the same product market’, irrespective of whether or not they are competitors on the same geographic market. Competing undertakings are undertakings that are actual or potential suppliers of the contract goods or services or goods or services that are substitutes for the contract goods or services. A potential supplier is an undertaking that does not actually produce a competing product but could and would be likely to do so in the absence of the agreement in response to a small and permanent increase in relative prices. This means that the undertaking would be able and likely to undertake the necessary additional investments and supply the market within 1 year. This assessment has to be based on realistic grounds; the mere theoretical possibility of entering a market is not sufficient (3).

(27) There are three exceptions to the general exclusion of vertical agreements between competitors, all three being set out in Article 2(4) and relating to non-reciprocal agreements. Non-reciprocal means, for instance, that while one manufacturer becomes the distributor of the products of another manufacturer, the latter does not become the distributor of the

products of the first manufacturer. Non-reciprocal agreements between competitors are covered by the Block Exemption Regulation where (1) the buyer has a turnover not exceeding EUR 100 million, or (2) the supplier is a manufacturer and distributor of goods, while the buyer is only a distributor and not also a manufacturer of competing goods, or (3) the supplier is a provider of services operating at several levels of trade, while the buyer does not provide competing services at the level of trade where it purchases the contract services. The second exception covers situations of dual distribution, i.e. the manufacturer of particular goods also acts as a distributor of the goods in competition with independent distributors of his goods. A distributor who 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. The third exception covers similar situations of dual distribution, but in this case for services, when the supplier is also a provider of services at the level of the buyer.

(iii) Associations of retailers

(28) 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 not significantly exceeding the EUR 50 million threshold, this will normally not change the assessment under Article 81.

(29) An association of undertakings may involve both horizontal and vertical agreements. The horizontal agreements have to be assessed according to the principles set out in the forthcoming Guidelines on the applicability of Article 81 to horizontal cooperation. If this 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 have to be assessed first as a horizontal agreement. Only if this assessment is positive does it become relevant to assess the vertical agreements between the association and individual members or between the association and suppliers.

(iv) Vertical agreements containing provisions on intellectual property rights (IPRs)

(30) Article 2(3) of the Block Exemption Regulation includes in its application vertical agreements containing certain provisions relating to the assignment of IPRs or use of IPRs by the buyer and thereby excludes from the Block Exemption Regulation all other vertical agreements containing IPR provisions. The Block Exemption Regulation applies to vertical agreements containing IPR provisions when five conditions are fulfilled:

— The IPR provisions must be part of a vertical agreement, i.e. an agreement with conditions under which the parties may purchase, sell or resell certain goods or services;

— The IPRs must be assigned to, or for use by, the buyer;

— The IPR provisions must not constitute the primary object of the agreement;

— The IPR provisions must be directly related to the use, sale or resale of goods or services by the buyer or his 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;

— The IPR provisions, in relation to the contract goods or services, must not contain restrictions of competition having the same object or effect as vertical restraints which are not exempted under the Block Exemption Regulation.

(31) These 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 transferred 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.
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:

— agreements where a party provides another party with a recipe and licenses the other party to produce a drink with this recipe;

— agreements under which one party provides another party with a mould or master copy and licenses the other party to produce and distribute copies;

— the pure licence of a trade mark or sign for the purposes of merchandising;

— sponsorship contracts concerning the right to advertise oneself as being an official sponsor of an event;

— copyright licensing such as broadcasting contracts concerning the right to record and/or the right to broadcast an event.

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. This means in particular that subcontracting involving the transfer of know-how to a subcontractor (1) does not fall within the scope of application of the Block Exemption Regulation. However, vertical agreements under which the buyer provides only specifications to the supplier which describe the goods or services to be supplied are covered by the Block Exemption Regulation.

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 or distribution of goods or services and the IPR provisions must serve the implementation of the vertical agreement.

The fourth condition requires that the IPR provisions facilitate the use, sale or resale of goods or services by the buyer or his 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. This is for instance the case in a franchise agreement where the franchisor sells to the franchisee goods for resale and in addition licenses the franchisee to use his trade mark and know-how to market the goods. Also covered is the case where the supplier of a concentrated extract licenses the buyer to dilute and bottle the extract before selling it as a drink.

The fifth condition signifies in particular that the IPR provisions should not have the same object or effect 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 (see paragraphs 46 to 61).

Intellectual property rights which may be considered to serve 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.

(32) 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:

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(34) 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 or distribution of goods or services and the IPR provisions must serve the implementation of the vertical agreement.

(35) The fourth condition requires that the IPR provisions facilitate the use, sale or resale of goods or services by the buyer or his 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. This is for instance the case in a franchise agreement where the franchisor sells to the franchisee goods for resale and in addition licenses the franchisee to use his trade mark and know-how to market the goods. Also covered is the case where the supplier of a concentrated extract licenses the buyer to dilute and bottle the extract before selling it as a drink.

(36) The fifth condition signifies in particular that the IPR provisions should not have the same object or effect 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 (see paragraphs 46 to 61).

(37) Intellectual property rights which may be considered to serve 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.

(38) 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.

(39) 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 81(1) at all, are covered by the Block Exemption Regulation.

(40) 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 this form of distribution the licence of the software only takes place between the copyright owner and the user of the software. This may take the form of a 'shrink wrap' licence, i.e. a set of conditions included in the package of the hard copy which the end user is deemed to accept by opening the package.

(1) See Notice on subcontracting, OJ C 1, 3.1.1979, p. 2.
(41) Buyers of hardware incorporating software protected by copyright may be obliged by the copyright holder not to infringe the copyright, for example not to make copies and resell the software or not to make copies and use the software in combination with other hardware. Such use-restrictions, to the extent that they fall within Article 81(1) at all, are covered by the Block Exemption Regulation.

### Know-how

(42) Franchise agreements, with the exception of industrial franchise agreements, are the most obvious example where know-how for marketing purposes is communicated to the buyer. Franchise agreements contain licences of intellectual property rights relating 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.

(43) Licensing contained in franchise agreements is covered by the Block Exemption Regulation if all five conditions listed in point 30 are fulfilled. This is usually the case, 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, such an agreement is not covered by the Block Exemption Regulation, but it will be treated in a way similar to those franchise agreements which are covered by the Block Exemption Regulation.

(44) The following IPR-related obligations are generally considered to be necessary to protect the franchisor's intellectual property rights and are, if these obligations fall under Article 81(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 it, 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.

### Relationship to other block exemption regulations

(45) 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. This means that the Block Exemption Regulation does not apply to vertical agreements covered by Commission Regulation (EC) No 240/96(1) on technology transfer, Commission Regulation (EC) No 1475/95(2) for car distribution or Regulations (EEC) No 417/85(3) and (EEC) No 418/85(4) exempting vertical agreements concluded in connection with horizontal agreements, as last amended by Regulation (EC) No 2236/97(5) or any future regulations of that kind.

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3. **Hardcore restrictions under the Block Exemption Regulation**

(46) The Block Exemption Regulation contains in Article 4 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. This list of hardcore restrictions applies to vertical agreements concerning trade within the Community. In so far as vertical agreements concern exports outside the Community or imports/re-imports from outside the Community see the judgment in Javico v Yves Saint Laurent. Individual exemption of vertical agreements containing such hardcore restrictions is also unlikely.

(47) 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 who 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 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.

(48) 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 an agency agreement falls within Article 81(1) (see paragraphs 12 to 20), an obligation preventing or restricting the agent from sharing his commission, fixed or variable, with the customer would be a hardcore restriction under Article 4(a) of the Block Exemption Regulation. The agent should thus be left free to lower the effective price paid by the customer without reducing the income for the principal.

(49) 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 the buyer, in as far as those restrictions relate to the territory into which or to the customers to whom the buyer may sell the contract goods or services. That hardcore restriction relates to market partitioning by territory or by customer. 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, refusal to supply, reduction of supplied volumes or limitation of supplied volumes to the demand within the allocated territory or customer group, threat of contract termination or profit pass-over obligations. It may further result from the supplier not providing a Community-wide guarantee service, whereby 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. These 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 destination of the supplied goods, e.g. the use of differentiated labels or serial numbers. However, a prohibition imposed on all distributors to sell to certain end users is not classified as a hardcore restriction if there is an objective justification related to the product, such as a general ban on selling dangerous substances to certain customers for reasons of safety or health. It implies that also the supplier himself does not sell to these customers. Nor are obligations on the reseller relating to the display of the supplier’s brand name classified as hardcore.

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(50) There are four exceptions to the hardcore restriction in Article 4(b) of the Block Exemption Regulation. The first exception allows a supplier to restrict active sales by his direct buyers 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 his 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 his territory or to his customer group by the supplier and all the other buyers of the supplier inside the Community. 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. This 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 inside another distributor’s exclusive territory or exclusive customer group by for instance direct mail or visits; or actively approaching a specific customer group or customers in a specific territory allocated exclusively to another distributor through advertisement in media or other promotions specifically targeted at that customer group or targeted at customers in that territory; or establishing a warehouse or distribution outlet in another distributor’s exclusive territory.

- ‘Passive’ sales mean responding to unsolicited requests from individual customers including delivery of goods or services to such customers. General advertising or promotion in media or on the Internet 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 non-exclusive territories or in one’s own territory, are passive sales.

(51) Every distributor must be free to use the Internet to advertise or to sell products. A restriction on the use of the Internet by distributors could only be compatible with the Block Exemption Regulation to the extent that promotion on the Internet or sales over the Internet would lead to active selling into other distributors’ exclusive territories or customer groups. In general, the use of the Internet is not considered a form of active sales into such territories or customer groups, since it is a reasonable way to reach every customer. The fact that it may have effects outside one’s own territory or customer group results from the technology, i.e. the 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 language used on the website or in the communication plays normally no role in that respect. Insofar as a web site is not specifically targeted at customers primarily inside the territory or customer group exclusively allocated to another distributor, for instance with the use of banners or links in pages of providers specifically available to these exclusively allocated customers, the website is not considered a form of active selling. However, unsolicited e-mails sent to individual customers or specific customer groups are considered active selling. The same considerations apply to selling by catalogue. Notwithstanding what has been said before, the supplier may require quality standards for the use of the Internet site to resell his goods, just as the supplier may require quality standards for a shop or for advertising and promotion in general. The latter may be relevant in particular for selective distribution. An outright ban on Internet or catalogue selling is only possible if there is an objective justification. In any case, the supplier cannot reserve to itself sales and/or advertising over the Internet.

(52) There are three other exceptions to the second 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. Thus, it is permissible to restrict a wholesaler from selling to end users, to restrict an appointed distributor in a selective distribution system from selling, at any level of trade, to unauthorised distributors in markets where such a system is operated, and to restrict a buyer of components 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.

(53) The hardcore restriction set out in Article 4(c) of the Block Exemption Regulation concerns the restriction of active or passive sales to end users, whether professional end users or final consumers, by members of a selective distribution network. This means that dealers in a selective distribution system, as defined in Article 1(d) of the Block Exemption Regulation, cannot be restricted in the users or purchasing agents acting on behalf of these users to whom they may sell. For instance, also in a selective distribution system the
dealer should be free to advertise and sell with the help of the Internet. Selective distribution may be combined with exclusive distribution provided that active and passive selling is not restricted anywhere. The supplier may therefore commit itself to supplying only one dealer or a limited number of dealers in a given territory.

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 his own goods. In other words, the original equipment manufacturer may require his own repair and service network to buy the spare parts from it.

4. **Conditions under the Block Exemption Regulation**

(54) In addition, in the case of selective distribution, restrictions can be imposed on the dealer's ability to determine the location of his business premises. Selected dealers may be prevented from running their business from different premises or from opening a new outlet in a different location. If the dealer's outlet is mobile ('shop on wheels'), an area may be defined outside which the mobile outlet cannot be operated.

(55) 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. This means that 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. This means that selective distribution cannot be combined with vertical restraints aimed at forcing distributors to purchase the contract products exclusively from a given source, for instance exclusive purchasing. 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.

(56) 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 these spare parts. An agreement between a manufacturer of spare parts and a buyer who incorporates these parts into his own products (original equipment manufacturer (OEM)), may not, either directly or indirectly, prevent or restrict sales by the manufacturer of these spare parts to end users, independent repairers or service providers. Indirect restrictions may arise in particular 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.

(57) 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.

(58) The first exclusion is provided in Article 5(a) of the Block Exemption Regulation and concerns non-compete obligations. Non-compete obligations are obligations that require the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80 % of the buyer's total purchases during the previous year of the contract goods and services and their substitutes (see the definition in Article 1(b) 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 for the year preceding the conclusion of the contract no relevant purchasing data for the buyer are available, the buyer's best estimate of his annual total requirements may be used. Such non-compete obligations are not covered by the Block Exemption Regulation when their 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. However, non-compete obligations are covered when their duration is limited to five years or less, or when renewal beyond five years requires explicit consent of both parties 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; the repayment needs to be structured in equal or decreasing instalments and should not increase over time. This is without prejudice to the possibility, in the case
for instance of a new distribution outlet, to delay repayment for the first one or two years until sales have reached a certain level. The buyer must have the possibility to repay the remaining debt where there is still an outstanding debt at the end of the non-compete obligation. 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 at the end of the non-compete obligation.

(59) 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(a) 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 his permission. Artificial ownership constructions intended to avoid the five-year limit cannot benefit from this exception.

(60) The second exclusion from the block exemption is provided for in Article 5(b) of the Block Exemption Regulation and concerns post term non-compete obligations. 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. According to the definition in Article 1(f) of the Block Exemption Regulation the know-how needs to be ‘substantial’, meaning ‘that the know-how includes information which is indispensable to the buyer for the use, sale or resale of the contract goods or services’.

(61) The third exclusion from the block exemption is provided for in Article 5(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 his 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 this 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)(1).

5. **No presumption of illegality outside the Block Exemption Regulation**

(62) Vertical agreements falling outside the Block Exemption Regulation will not be presumed to be illegal but may need individual examination. Companies are encouraged to do their own assessment without notification. 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 81(1). When appreciable anti-competitive effects are demonstrated, undertakings may substantiate efficiency claims and explain why a certain distribution system is likely to bring about benefits which are relevant to the conditions for exemption under Article 81(3).

6. **No need for precautionary notification**

(63) Pursuant to Article 4(2) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (2), as last amended by Regulation (EC) No 1216/1999 (3), vertical agreements can benefit from an exemption under Article 81(3) from their date of entry into force, even if notification occurs after that date. This means in practice that no precautionary notification needs to be made. If a dispute arises, an undertaking can still notify, in which case the Commission can exempt the vertical agreement with retroactive effect from the date of entry into force of the agreement if all four conditions of Article 81(3) are fulfilled. A notifying party does not have to explain why the agreement was not notified earlier and will not be denied retroactive exemption simply because it did not notify earlier. Any notification will be reviewed on its merits. This amendment to Article 4(2) of Regulation No 17 should eliminate artificial litigation before national courts and thus strengthen the civil enforceability of contracts. It also takes account of the situation where undertakings have not notified because they assumed the agreement was covered by the Block Exemption Regulation.

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(2) OJ 13, 21.2.1962, p. 204/62.
Since the date of notification no longer limits the possibility of exemption by the Commission, national courts have to assess the likelihood that Article 81(3) will apply in respect of vertical agreements falling within Article 81(1). If such likelihood exists, they should suspend proceedings pending adoption of a position by the Commission. However, national courts may adopt interim measures pending the assessment by the Commission of the applicability of Article 81(3), in the same way as they do when they refer a preliminary question to the Court of Justice under Article 234 of the EC Treaty. No suspension is necessary in respect of injunction proceedings, where national courts themselves are empowered to assess the likelihood of application of Article 81(3).

Unless there is litigation in national courts or complaints, notifications of vertical agreements will not be given priority in the Commission’s enforcement policy. Notifications as such do not provide provisional validity for the execution of agreements. Where undertakings have not notified an agreement because they assumed in good faith that the market share threshold under the Block Exemption Regulation was not exceeded, the Commission will not impose fines.

The Block Exemption Regulation exempts vertical agreements on condition that no hardcore restriction, as set out in Article 4, 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.

The rule of severability does apply, however, to the conditions 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.

Portfolio of products distributed through the same distribution system

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.

In respect of the goods or services which are not covered by the Block Exemption Regulation, the ordinary rules of competition apply, which means:

— there is no block exemption but also no presumption of illegality;

— if there is an infringement of Article 81(1) which is not exemptable, consideration may be given to whether there are appropriate remedies to solve the competition problem within the existing distribution system;

— if there are no such appropriate remedies, the supplier concerned will have to make other distribution arrangements.

This situation can also arise where Article 82 applies in respect of some products but not in respect of others.

The Block Exemption Regulation applies from 1 June 2000. Article 12 of the Block Exemption Regulation provides for a transitional period for vertical agreements already in force before 1 June 2000 which do not satisfy the conditions for exemption provided in the Block Exemption Regulation, but which do satisfy the conditions for exemption under the Block Exemption Regulations which expired on 31 May 2000 (Commissions Regulations (EEC) No 1983/83, (EEC) No 1984/83 and (EEC) No 4087/88). The Commission Notice concerning Regulations (EEC) Nos 1983/83 and 1984/83 also ceases to apply on 31 May 2000. The latter agreements may continue to benefit from these outgoing Regulations until 31 December 2001. Agreements of suppliers with a market share not exceeding 30% who signed with their buyers non-compete agreements with a duration exceeding five years are covered by the Block Exemption Regulation if on 1 January 2002 the non-compete agreements have no more than five years to run.

IV. WITHDRAWAL OF THE BLOCK EXEMPTION AND DISAPPLICATION OF THE BLOCK EXEMPTION REGULATION

1. Withdrawal procedure

(71) The presumption of legality conferred by the Block Exemption Regulation may be withdrawn if 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 81(1) and does not fulfil all the conditions of Article 81(3). This may occur when a supplier, or a buyer in the case of exclusive supply agreements, holding a market share not exceeding 30%, enters into a vertical agreement which does not give rise to objective advantages such as to compensate for the damage which it causes to competition. This may particularly be the case with respect to the distribution of goods to final consumers, who are often in a much weaker position than professional buyers of intermediate goods. In the case of sales to final consumers, the disadvantages caused by a vertical agreement may have a stronger impact than in a case concerning the sale and purchase of intermediate goods. When the conditions of Article 81(3) are not fulfilled, the Commission may withdraw the benefit of the Block Exemption Regulation under Article 6 and establish an infringement of Article 81(1).

(72) Where the withdrawal procedure is applied, the Commission bears the burden of proof that the agreement falls within the scope of Article 81(1) and that the agreement does not fulfil all four conditions of Article 81(3).

(73) The conditions for an exemption under Article 81(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. Similar effects will normally occur when vertical restraints practised by competing suppliers or buyers come within one of the four groups listed in paragraphs 104 to 114. 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. 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 the quantitative limitations imposed on the number of authorised distributors. Other cases in which a withdrawal decision may be taken include situations where the buyer, for example in the context of exclusive supply or exclusive distribution, has significant market power in the relevant downstream market where he resells the goods or provides the services.

(74) 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 81(1)(i) 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 137 to 229.

(75) 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.

(76) Under Article 7 of the Block Exemption Regulation, the competent 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. Where a Member State has not enacted legislation enabling the national competition authority to apply Community competition law or at least to withdraw the benefit of the Block Exemption Regulation, the Member State may ask the Commission to initiate proceedings to this effect.

(77) 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. Often, such cases lend themselves to decentralised enforcement by national competition authorities. However, the Commission reserves the right to take on certain cases displaying a particular Community interest, such as cases raising a new point of law.

(i) Judgment in the Delimitis Case.
National decisions of withdrawal must be taken in accordance with the procedures laid down under national law and will only have effect within the territory of the Member State concerned. Such national decisions must not prejudice the uniform application of the Community competition rules and the full effect of the measures adopted in implementation of those rules. Compliance with this principle implies that national competition authorities must carry out their assessment under Article 81 in the light of the relevant criteria developed by the Court of Justice and the Court of First Instance and in the light of notices and previous decisions adopted by the Commission.

The Commission considers that the consultation mechanisms provided for in the Notice on cooperation between national competition authorities and the Commission should be used to avert the risk of conflicting decisions and duplication of procedures.

### 2. Disapplication of the Block Exemption Regulation

Article 8 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.

Whereas the withdrawal of the benefit of the Block Exemption Regulation under Article 6 implies the adoption of a decision establishing an infringement of Article 81 by an individual company, the effect of a regulation under Article 8 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 81(1) and (3). Following the adoption of a regulation declaring the Block Exemption 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 Court of First Instance and by notices and previous decisions adopted by the Commission will guide 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.

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. Similar effects normally result when the restraints come within one of the four groups listed in paragraphs 104 to 114.

Article 8 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 make use of selection criteria which are not required by the nature of the relevant goods or discriminate against certain forms of distribution capable of selling such goods.

In assessing the need to apply Article 8, 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.

Any regulation adopted under Article 8 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 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.

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(1) Judgment of the Court of Justice in Case 14/68 Walt Wilhelm and Others v Bundeskartellamt [1969] ECR 1, paragraph 4, and judgment in Delimitis.

(2) OJ C 313, 15.10.1997, p. 3, points 49 to 53.
The transitional period of not less than six months that the Commission will have to set under Article 8(2) should allow the undertakings concerned to adapt their agreements to take account of the regulation disapplying the Block Exemption Regulation.

A regulation disapplying the Block Exemption Regulation will not affect the exempted status of the agreements concerned for the period preceding its entry into force.

V. MARKET DEFINITION AND MARKET SHARE CALCULATION ISSUES

1. Commission Notice on definition of the relevant market

The Commission Notice on definition of the relevant market for the purposes of Community competition law 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 the general notice on market definition.

2. The relevant market for calculating the 30% market share threshold under the Block Exemption Regulation

Under Article 3 of the Block Exemption Regulation, it is in general the market share of the supplier that is decisive for the application of the block exemption. In the case of vertical agreements concluded between an association of retailers and individual members, the association is the supplier and needs to take into account its market share as a supplier. Only in the case of exclusive supply as defined in Article 1(c) of the Block Exemption Regulation is it the market share of the buyer, and only that market share, which is decisive for the application of the Block Exemption Regulation.

In order to calculate the market share, it is necessary to determine the relevant market. For this, 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 buyer 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.

For the application of the Block Exemption Regulation, the market share of the supplier is his share on the relevant product and geographic market on which he sells to his buyers. In the example given in paragraph 92, this is market A. The product market depends in the first place 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, what are 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 he 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 the buyers on market A are professional buyers, the geographic market is usually wider than the market where the product is resold to final consumers. Often, this will lead to the definition of national markets or wider geographic markets.

In the case of exclusive supply, the buyer’s market share is his share of all purchases on the relevant purchase market. In the example below, this is also market A.


Where a vertical agreement involves three parties, each operating at a different level of trade, their market shares will have to be below the market share threshold of 30% at both levels in order to benefit from the block exemption. 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 share of both the manufacturer and the wholesaler (or association of retailers) must not exceed 30% in order to benefit from the block exemption.

Where a supplier produces both original equipment and the repair or replacement parts for this 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 (1).

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 he sells the contract goods is decisive for the application of the Block Exemption Regulation. Where a franchisor does not supply goods to be resold but provides a bundle of services combined with IPR provisions which together form the business method being franchised, the franchisor needs to take account of his market share as a provider of a business method. For that purpose, the franchisor needs to calculate his 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 his market share on the value of the goods or services supplied by his 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 his market share on the basis of the relevant sales figures of his franchisees on this market. If the franchisor, in addition to the business method, also supplies certain inputs, such as meat and spices, then the franchisor also needs to calculate his market share on the market where these goods are sold.

The relevant market for individual assessment

For individual assessment of vertical agreements not covered by the Block Exemption Regulation, additional markets may need to be investigated besides the relevant market defined for the application of the Block Exemption Regulation. A vertical agreement may not only have effects on the market between supplier and buyer but may also have effects on downstream markets. For an individual assessment of a vertical agreement the relevant markets at each level of trade affected by restraints contained in the agreement will be examined:

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(i) For 'intermediate goods or services' that are incorporated by the buyer into his own goods or services, vertical restraints generally have effects only on the market between supplier and buyer. A non-compete obligation imposed on the buyer for instance may foreclose other suppliers but will not lead to reduced in-store competition downstream. However, in cases of exclusive supply the position of the buyer on his downstream market is also relevant because the buyer's foreclosing behaviour may only have appreciable negative effects if he has market power on the downstream market.

(ii) For 'final products' an analysis limited to the market between supplier and buyer is less likely to be sufficient since vertical restraints may have negative effects of reduced inter-brand and/or intra-brand competition on the resale market, that is on the market downstream of the buyer. For instance, exclusive distribution may not only lead to foreclosure effects on the market between the supplier and the buyer, but may above all lead to less intra-brand competition in the resale territories of the distributors. The resale market is in particular important if the buyer is a retailer selling to final consumers. A non-compete obligation agreed between a manufacturer and a wholesaler may foreclose this wholesaler to other manufacturers but a loss of in-store competition is not very likely at the wholesale level. The same agreement concluded with a retailer may however cause this added loss of in-store inter-brand competition on the resale market.

(iii) In cases of individual assessment of an 'after-market', the relevant market may be the original equipment market or the after-market depending on the circumstances of the case. In any event, the situation on a separate after-market will be evaluated taking account of the situation on the original equipment market. A less significant position on the original equipment market will normally reduce possible anti-competitive effects on the after-market.

4. Calculation of the market share under the Block Exemption Regulation

(97) The calculation of the market share 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 9(1) of the Block Exemption Regulation).

(98) 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.

(99) However, in the case of dual distribution of final goods, i.e. where a producer of final goods also acts as a distributor on the market, the market definition and market share calculation need to include the goods sold by the producer and competing producers through their integrated distributors and agents (see - Article 9(2)(b) of the Block Exemption Regulation). ‘Integrated distributors’ are connected undertakings within the meaning of Article 11 of the Block Exemption Regulation.

VI. ENFORCEMENT POLICY IN INDIVIDUAL CASES

(100) Vertical restraints are generally less harmful than horizontal restraints. The main reason for treating a vertical restraint more leniently than a horizontal restraint lies in the fact that the latter 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. This means that the exercise of market power by either the upstream or downstream company would 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.

(101) However, this self-restraining character should not 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. However, when it 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.
(102) In the assessment of individual cases, the Commission will adopt an economic approach in the application of Article 81 to vertical restraints. This will limit the scope of application of Article 81 to undertakings holding a certain degree of market power where inter-brand competition may be insufficient. In those cases, the protection of inter-brand and intra-brand competition is important to ensure efficiencies and benefits for consumers.

1. The framework of analysis

1.1. Negative effects of vertical restraints

(103) The negative effects on the market that may result from vertical restraints which EC competition law aims at preventing are the following:

(i) foreclosure of other suppliers or other buyers by raising barriers to entry;

(ii) reduction of inter-brand competition between the companies operating on a market, including facilitation of collusion amongst suppliers or buyers; by collusion is meant both explicit collusion and tacit collusion (conscious parallel behaviour);

(iii) reduction of intra-brand competition between distributors of the same brand;

(iv) the creation of obstacles to market integration, including, above all, limitations on the freedom of consumers to purchase goods or services in any Member State they may choose.

(104) Such negative effects may result from various vertical restraints. Agreements which are different in form may have the same substantive impact on competition. To analyse these possible negative effects, it is appropriate to divide vertical restraints into four groups: a single branding group, a limited distribution group, a resale price maintenance group and a market partitioning group. The vertical restraints within each group have largely similar negative effects on competition.

(105) The classification into four groups is based upon what can be described as the basic components of vertical restraints. In paragraphs 103 to 136, the four different groups are analysed. In 137 to 229, vertical agreements are analysed as they are used in practice because many vertical agreements make use of more than one of these components.

Single branding group

(106) Under the heading of 'single branding' come those agreements which have as their main element that the buyer is induced to concentrate his orders for a particular type of product with one supplier. This component can be found amongst others in non-compete and quantity-forcing on the buyer, where an obligation or incentive scheme agreed between the supplier and the buyer makes the latter purchase his requirements for a particular product and its substitutes only, or mainly, from one supplier. The same component can be found in tying, where the obligation or incentive scheme relates to a product that the buyer is required to purchase as a condition of purchasing another distinct product. The first product is referred to as the 'tied' product and the second is referred to as the 'tying' product.

(107) There are four main negative effects on competition: (1) other suppliers in that market cannot sell to the particular buyers and this may lead to foreclosure of the market or, in the case of tying, to foreclosure of the market for the tied product; (2) it makes market shares more rigid and this may help collusion when applied by several suppliers; (3) as far as the distribution of final goods is concerned, the particular retailers will only sell one brand and there will therefore be no inter-brand competition in their shops (no in-store competition); and (4) in the case of tying, the buyer may pay a higher price for the tied product than he would otherwise do. All these effects may lead to a reduction in inter-brand competition.

(108) The reduction in inter-brand competition may be mitigated by strong initial competition between suppliers to obtain the single branding contracts, but the longer the duration of the non-compete obligation, the more likely it will be that this effect will not be strong enough to compensate for the reduction in inter-brand competition.

Limited distribution group

(109) Under the heading of 'limited distribution' come those agreements which have as their main element that the manufacturer sells to only one or a limited number of buyers. This may be to restrict the number of buyers for a particular territory or group of customers, or to select a particular kind of buyers. This component can be found amongst others in:

— exclusive distribution and exclusive customer allocation, where the supplier limits his sales to only one buyer for a certain territory or class of customers;
— exclusive supply and quantity-forcing on the supplier, where an obligation or incentive scheme agreed between the supplier and the buyer makes the former sell only or mainly to one buyer;

— selective distribution, where the conditions imposed on or agreed with the selected dealers usually limit their number;

— after-market sales restrictions which limit the component supplier’s sales possibilities.

(110) There are three main negative effects on competition: (1) certain buyers within that market can no longer buy from that particular supplier, and this may lead in particular in the case of exclusive supply, to foreclosure of the purchase market, (2) when most or all of the competing suppliers limit the number of retailers, this may facilitate collusion, either at the distributor’s level or at the supplier’s level, and (3) since fewer distributors will offer the product it will also lead to a reduction of intra-brand competition. In the case of wide exclusive territories or exclusive customer allocation the result may be total elimination of intra-brand competition. This reduction of intra-brand competition can in turn lead to a weakening of inter-brand competition.

Market partitioning group

(113) Under the heading of ‘market partitioning’ come agreements whose main element is that the buyer is restricted in where he either sources or resells a particular product. This component can be found in exclusive purchasing, where an obligation or incentive scheme agreed between the supplier and the buyer makes the latter purchase his requirements for a particular product, for instance beer of brand X, exclusively from the designated supplier, but leaving the buyer free to buy and sell competing products, for instance competing brands of beer. It also includes territorial resale restrictions, the allocation of an area of primary responsibility, restrictions on the location of a distributor and customer resale restrictions.

Resale price maintenance group

(111) Under the heading of ‘resale price maintenance’ (RPM) come those agreements whose main element is that the buyer is obliged or induced to resell not below a certain price, at a certain price or not above a certain price. This group comprises minimum, fixed, maximum and recommended resale prices. Maximum and recommended resale prices, which are not hardcore restrictions, may still lead to a restriction of competition by effect.

(112) There are two main negative effects of RPM on competition: (1) a reduction in intra-brand price competition, and (2) increased transparency on prices. In the case of fixed or minimum RPM, distributors can no longer compete on price for that brand, leading to a total elimination of intra-brand price competition. A maximum or recommended price may work as a focal point for resellers, leading to a more or less uniform application of that price level. Increased transparency on price and responsibility for price changes makes horizontal collusion between manufacturers or distributors easier, at least in concentrated markets. The reduction in intra-brand competition may, as it leads to less downward pressure on the price for the particular goods, have as an indirect effect a reduction of inter-brand competition.

1.2. Positive effects of vertical restraints

(114) The main negative effect on competition is a reduction of intra-brand competition that may help the supplier to partition the market and thus hinder market integration. This may facilitate price discrimination. When most or all of the competing suppliers limit the sourcing or resale possibilities of their buyers this may facilitate collusion, either at the distributors’ level or at the suppliers’ level.

(115) It is important to recognise that vertical restraints often 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.
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:

1. To ‘solve a “free-rider” problem’. One distributor may free-ride on the promotion efforts of another distributor. This 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 this situation of free-riding.

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 not on after-sales services. The product will usually need to be relatively new or technically complex as the customer may otherwise very well know what he or she 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 service requirements concerning pre-sales services.

Free-riding between suppliers is also restricted to specific situations, namely in cases where the promotion takes place at the buyer’s premises and is generic, not brand specific.

2. 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 in 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 he 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 in the new market. This is a special case of the free-rider problem described under point (1).

3. The ‘certification free-rider issue’. In some sectors, certain retailers have a reputation for stocking only ‘quality’ products. In such a case, selling through these retailers may be vital for the introduction of a new product. If the manufacturer cannot initially limit his sales to the premium stores, he runs the risk of being de-listed and the product introduction may fail. This means that there may 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.

4. 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 his 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 for instance it can only 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; i.e. one party to
The contract invests more than the other party. When 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.

(5) 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 his 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. This would normally fall outside Article 81(1).

(6) ‘Economies of scale in distribution’. In order to have scale economies exploited and thereby see a lower retail price for his product, the manufacturer may want to concentrate the resale of his products on a limited number of distributors. For this he could use exclusive distribution, quantity forcing in the form of a minimum purchasing requirement, selective distribution containing such a requirement or exclusive purchasing.

(7) ‘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 his 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.

(8) ‘Uniformity and quality standardisation’. A vertical restraint may help to increase sales by creating a brand image and thereby increasing the attractiveness of a product to the final consumer by imposing a certain measure of uniformity and quality standardisation on the distributors. This can for instance be found in selective distribution and franchising.

(117) The eight situations mentioned in paragraph 116 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 his product to the buyer (see in particular the situations described in paragraph 116, points (1), (5), (6) and (8)).

(118) There is a large measure of substitutability between the different vertical restraints. This means that 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 purchasing. This is important as the negative effects on competition may differ between the various vertical restraints. This plays a role when indispensability is discussed under Article 81(3).

1.3. General rules for the evaluation of vertical restraints

(119) In evaluating vertical restraints from a competition policy perspective, some general rules can be formulated:

(1) For most vertical restraints competition concerns can only arise if there is insufficient inter-brand competition, i.e. if there exists a certain degree of market power at the level of the supplier or the buyer or both. Conceptually, market power is the power to raise price above the competitive level and, at least in the short term, to obtain supernormal profits. Companies may have market power below the level of market dominance, which is the threshold for the application of Article 82. Where there are many firms competing in an unconcentrated market, it can be assumed that non-hardcore vertical restraints will not have appreciable negative effects. A market is deemed unconcentrated when the HHI index, i.e. the sum of the squares of the individual market shares of all companies in the relevant market, is below 1 000.
(2) Vertical restraints which reduce inter-brand competition are generally more harmful than vertical restraints that reduce intra-brand competition. For instance, non-compete obligations are likely to have more net negative effects than exclusive distribution. The former, by possibly foreclosing the market to other brands, may prevent those brands from reaching the market. The latter, while limiting intra-brand competition, does not prevent goods from reaching the final consumer.

(3) Vertical restraints from the limited distribution group, in the absence of sufficient inter-brand competition, may significantly restrict the choices available to consumers. They are particularly harmful when more efficient distributors or distributors with a different distribution format are foreclosed. This can reduce innovation in distribution and denies consumers the particular service or price-service combination of these distributors.

(4) Exclusive dealing arrangements are generally worse for competition than non-exclusive arrangements. Exclusive dealing makes, by the express language of the contract or its practical effects, one party fulfil all or practically all its requirements 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.

(5) 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.

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 who often rely more on brand and image. As distributors (retailers, wholesalers) 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.

The undertakings buying intermediate goods or services normally have specialist departments or advisers who monitor developments in the supply market. Because they effect sizeable transactions, search costs are in general not prohibitive. A loss of intra-brand competition is therefore less important at the intermediate level.

(6) In general, a combination of vertical restraints aggravates their negative effects. However, certain combinations of vertical restraints are better for competition than their use in isolation from each other. 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.

(7) Possible negative effects of vertical restraints are reinforced when several suppliers and their buyers organise their trade in a similar way. These so-called cumulative effects may be a problem in a number of sectors.

(8) The more the vertical restraint is linked to the transfer of know-how, the more reason there may be to expect efficiencies to arise and the more a vertical restraint may be necessary to protect the know-how transferred or the investment costs incurred.

(9) The more the vertical restraint is linked to investments which are relationship-specific, the more justification there is for certain vertical restraints. The justified duration will depend on the time necessary to depreciate the investment.

(10) In the case of a new product, or where an existing product is sold for the first time on a different geographic market, it may be difficult for the company to define the market or its market share may be very high. However, this should not be considered a major problem, as vertical restraints linked to opening up new product or geographic markets in general do not restrict competition.
This rule holds, irrespective of the market share of the company, for two years after the first putting on the market of the product. It applies to all non-hardcore vertical restraints and, in the case of a new geographic market, to restrictions on active and passive sales imposed on the direct buyers of the supplier located in other markets to intermediaries in the new market. In the case of genuine testing of a new product in a limited territory or with a limited customer group, the distributors appointed to sell the new product on the test market can be restricted in their active selling outside the test market for a maximum period of 1 year without being caught by Article 81(1).

1.4. **Methodology of analysis**

1. **First**, the undertakings involved need to define the relevant market in order to establish the market share of the supplier or the buyer, depending on the vertical restraint involved (see paragraphs 88 to 99, in particular 89 to 95).

2. If the relevant market share does not exceed the 30 % threshold, the vertical agreement is covered by the Block Exemption Regulation, subject to the hardcore restrictions and conditions set out in that regulation.

3. If the relevant market share is above the 30 % threshold, it is necessary to assess whether the vertical agreement falls within Article 81(1).

4. If the vertical agreement falls within Article 81(1), it is necessary to examine whether it fulfils the conditions for exemption under Article 81(3).

1.4.1. **Relevant factors for the assessment under Article 81(1)**

In assessing cases above the market share threshold of 30 %, the Commission will make a full competition analysis. The following factors are the most important to establish whether a vertical agreement brings about an appreciable restriction of competition under Article 81(1):

(a) market position of the supplier;

(b) market position of competitors;

(c) market position of the buyer;

(d) entry barriers;

(e) maturity of the market;

(f) level of trade;

(g) nature of the product;

(h) 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 supplier is usually a good indicator of market power, but in the case of low entry barriers it may not indicate market power. It is therefore not possible to provide strict rules on the importance of the individual factors. However the following can be said:

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**Market position of the supplier**

The market position of the supplier is established first and foremost by his market share on the relevant product and geographic market. The higher his market share, the greater his market power is likely to be. The market position of the supplier is further strengthened if he has certain cost advantages over his competitors. These competitive advantages may result from a first mover advantage (having the best site, etc.), holding essential patents, having superior technology, being the brand leader or having a superior portfolio.

**Market position of competitors**

The same indicators, that is market share and possible competitive advantages, are used to describe the market position of competitors. The stronger the established competitors are and the greater their number, the less risk there is that the supplier or buyer in question will be able to foreclose the market individually and the less there is a risk of a reduction of inter-brand competition. However, if the number of competitors becomes rather small and their market position (size, costs, R&D potential, etc.) is rather similar, this market structure may increase the risk of collusion. Fluctuating or rapidly changing market shares are in general an indication of intense competition.
Market position of the buyer

(125) Buying power derives from the market position of the buyer. 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 his possible suppliers. Other indicators focus on the market position of the buyer on his resale market including characteristics such as a wide geographic spread of his outlets, own brands of the buyer/distributor and his image amongst final consumers. The effect of buying power on the likelihood of anti-competitive effects is not the same for the different vertical restraints. Buying power may in particular increase the negative effects in case of restraints from the limited distribution and market partitioning groups such as exclusive supply, exclusive distribution and quantitative selective distribution.

Entry barriers

(126) Entry barriers are measured by the extent to which incumbent companies can increase their price above the competitive level, usually above minimum average total cost, and make supra-normal profits without attracting entry. Without any entry barriers, easy and quick entry would eliminate such profits. In as far as effective entry, which would prevent or erode the supra-normal profits, is likely to occur within one or two years, entry barriers can be said to be low.

(127) 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(1), essential facilities, a first mover advantage and brand loyalty of consumers created by strong advertising. 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.

(128) The question whether certain of these factors should be described as entry barriers depends on whether they are related to 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 costs 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.

(129) In general, entry requires sunk costs, sometimes minor and sometimes major. Therefore, actual competition is in general more effective and will weigh more in the assessment of a case than potential competition.

Maturity of the market

(130) 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.

Level of trade

(131) The level of trade is linked to the distinction between intermediate and final goods and services. As indicated earlier, negative effects are in general less likely at the level of intermediate goods and services.

Nature of the product

(132) 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.

**Other factors**

(133) In the assessment of particular restraints other factors may have to be taken into account. Among these factors can be the cumulative effect, i.e. the coverage of the market by similar agreements, the duration of the agreements, 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.

1.4.2. **Relevant factors for the assessment under Article 81(3)**

(134) There are four cumulative conditions for the application of Article 81(3):

- the vertical agreement must contribute to improving production or distribution or to promoting technical or economic progress;

- the vertical agreement must allow consumers a fair share of these benefits;

- the vertical agreement must not impose on the undertakings concerned vertical restraints which are not indispensable to the attainment of these benefits;

- the vertical agreement must not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

(135) The last criterion of elimination of competition for a substantial part of the products in question is related to the question of dominance. Where an undertaking is dominant or becoming dominant as a consequence of the vertical agreement, a vertical restraint that has appreciable anti-competitive effects can in principle not be exempted. The vertical agreement may however fall outside Article 81(1) if there is an objective justification, for instance if it is necessary for the protection of relationship-specific investments or for the transfer of substantial know-how without which the supply or purchase of certain goods or services would not take place.

(136) Where the supplier and the buyer are not dominant, the other three criteria become important. The first, concerning the improvement of production or distribution and the promotion of technical or economic progress, refers to the type of efficiencies described in paragraphs 115 to 118. These efficiencies have to be substantiated and must produce a net positive effect. Speculative claims on avoidance of free-riding or general statements on cost savings will not be accepted. Cost savings that arise from the mere exercise of market power or from anti-competitive conduct cannot be accepted. Secondly, economic benefits have to favour not only the parties to the agreement, but also the consumer. Generally the transmission of the benefits to consumers will depend on the intensity of competition on the relevant market. Competitive pressures will normally ensure that cost-savings are passed on by way of lower prices or that companies have an incentive to bring new products to the market as quickly as possible. Therefore, if sufficient competition which effectively constrains the parties to the agreement is maintained on the market, the competitive process will normally ensure that consumers receive a fair share of the economic benefits. The third criterion will play a role in ensuring that the least anti-competitive restraint is chosen to obtain certain positive effects.

2. **Analysis of specific vertical restraints**

(137) Vertical agreements may contain a combination of two or more of the components of vertical restraints described in paragraphs 103 to 114. The most common vertical restraints and combinations of vertical restraints are analysed below following the methodology of analysis developed in paragraphs 120 to 136.

2.1. **Single branding**

(138) A non-compete arrangement is based on an obligation or incentive scheme which makes the buyer purchase practically all his 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. The possible competition risks are foreclosure of the market to competing suppliers and potential suppliers, 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. All three restrictive effects have a direct impact on inter-brand competition.

(139) Single branding is exempted by the Block Exemption Regulation when the supplier’s market share does not exceed 30 % and subject to a limitation in time of five years for the non-compete obligation. Above the market share threshold or beyond the time limit of five years, the following guidance is provided for the assessment of individual cases.
The ‘market position of the supplier’ is of main importance to assess possible anti-competitive effects of non-compete obligations. In general, this type of obligation is imposed by the supplier and the supplier has similar agreements with other buyers.

It is not only the market position of the supplier that is of importance but also the extent to and the duration for which he applies a non-compete obligation. The higher his tied market share, i.e. the part of his market share sold under a single branding obligation, the more significant foreclosure is likely to be. Similarly, the longer the duration of the non-compete obligations, the more significant foreclosure is likely to be. Non-compete obligations shorter than one year entered into by non-dominant companies are in general not considered to give rise to appreciable anti-competitive effects or net negative effects. Non-compete obligations between one and five years entered into by non-dominant companies usually require a proper balancing of pro- and anti-competitive effects, while non-compete 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. Dominant companies may not impose non-compete obligations on their buyers unless they can objectively justify such commercial practice within the context of Article 82.

In assessing the supplier’s market power, the ‘market position of his competitors’ is important. As long as the competitors are sufficiently numerous and strong, no appreciable anti-competitive effects can be expected. It is only likely that competing suppliers will be foreclosed if they are significantly smaller than the supplier applying the non-compete obligation. 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 non-compete contracts with a significant number of buyers on the relevant market (cumulative effect situation). This is also a situation where non-compete agreements may facilitate collusion between competing suppliers. If individually these 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.

In cases where the market share of the largest supplier is below 30 % and the market share of the five largest suppliers (concentration rate (CR) 5) is below 50 %, there is unlikely to be a single or a cumulative anti-competitive effect situation. If a potential entrant cannot penetrate the market profitably, this is likely to be due to factors other than non-compete obligations, such as consumer preferences. A competition problem is unlikely to arise when, for instance, 50 companies, of which none has an important market share, compete fiercely on a particular market.

‘Entry barriers’ are important to establish whether there is real foreclosure. Wherever it is relatively easy for competing suppliers to create new buyers or find alternative buyers for the product, foreclosure is unlikely to be a real problem. However, there are often entry barriers, both at the manufacturing and at the distribution level.

‘Countervailing power’ is relevant, as powerful buyers will not easily allow themselves to be cut off from the supply of competing goods or services. Foreclosure which is not based on efficiency and which has harmful effects on ultimate consumers is therefore mainly a risk in the case of dispersed buyers. However, where non-compete agreements are concluded with major buyers this may have a strong foreclosure effect.

Lastly, ‘the level of trade’ is relevant for foreclosure. 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 a serious foreclosure effect may however arise for actual or potential competitors where there is a cumulative effect. A serious cumulative effect is unlikely to arise as long as less than 50 % of the market is tied. When the supplier is dominant, any obligation to buy the products only or mainly from the dominant supplier may easily lead to significant foreclosure effects on the market. The stronger his dominance, the higher the risk of foreclosure of other competitors.

Where the agreement concerns supply of a final product at the wholesale level, the question whether a competition problem is likely to arise below the level of dominance depends in large part on the type of wholesaling and the entry barriers at the wholesale level. There is no real risk of foreclosure if competing manufacturers can easily establish their own wholesaling operation. Whether entry barriers are low depends in part on the type of wholesaling, i.e. 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 food-stuffs). In the latter case, it is not efficient for a manufacturer selling only one product to set up his own wholesaling operation. In that case anti-competitive effects may arise below the level of dominance. In addition, cumulative effect problems may arise if several suppliers tie most of the available wholesalers.

(148) 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 non-compete 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. The stronger its dominance, the higher the risk of foreclosure of other competitors.

(149) At the retail level a cumulative foreclosure effect may also arise. When all companies have market shares below 30% a cumulative foreclosure effect is unlikely if the total tied market share is less than 40% and withdrawal of the block exemption is therefore unlikely. This figure may be higher when other factors like the number of competitors, entry barriers etc. are taken into account. When not all companies have market shares below the threshold of the Block Exemption Regulation but none is dominant, a cumulative foreclosure effect is unlikely if the total tied market share is below 30%.

(150) 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.

(151) 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.

(152) 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 non-competitive obligation, especially when the buyer has to reveal who makes the better offer. In addition, by increasing the transparency of the market it may facilitate collusion between the suppliers. An English clause may also work as quantity-forcing. Quantity-forcing on the buyer is a weaker form of non-competitive obligations, where incentives or obligations agreed between the supplier and the buyer make the latter concentrate his purchases to a large extent with one supplier. Quantity-forcing may for example take the form of minimum purchase requirements or non-linear pricing, such as quantity rebate schemes, loyalty rebate schemes or a two-part tariff (fixed fee plus a price per unit). Quantity-forcing on the buyer will have similar but weaker foreclosure effects than a non-competitive obligation. The assessment of all these different forms will depend on their effect on the market. In addition, Article 82 specifically prevents dominant companies from applying English clauses or fidelity rebate schemes.

(153) Where appreciable anti-competitive effects are established, the question of a possible exemption under Article 81(3) arises as long as the supplier is not dominant. For non-compete obligations, the efficiencies described in paragraph 116, points 1 (free riding between suppliers), 4, 5 (hold-up problems) and 7 (capital market imperfections) may be particularly relevant.

(154) In the case of an efficiency as described in paragraph 116, points 1, 4 and 7, 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 116, point 5 (hold-up problem related to the transfer of know-how).

(155) In the case of a relationship-specific investment made by the supplier (see efficiency 4 in paragraph 116), a non-compete or quantity forcing agreement for the period of depreciation of the investment will in general only be possible if the conditions of Article 81(3). In the case of high relationship-specific investments, a non-competitive 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.

(156) 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 a foreclosure effect on the market. The instances of capital market imperfection, whereby it is more efficient for the supplier of a product than for a bank to provide a loan, will be limited (see efficiency 7 in paragraph 116). Even if the supplier of the product were to be the more efficient provider of capital, a loan could only justify a non-compete obligation if the buyer is not prevented from terminating the non-compete obligation and repaying the outstanding part of the loan at any point in time and without payment of any penalty. This means that the repayment of the loan should be structured in equal or decreasing instalments and should not increase over time and that the buyer should have the possibility to take over the equipment provided by the supplier at its market asset value. This is without prejudice to the possibility, in case for example of a new point of distribution, to delay repayment for the first one or two years until sales have reached a certain level.

(157) The transfer of substantial know-how (efficiency 5 in paragraph 116) usually justifies a non-compete obligation for the whole duration of the supply agreement, as for example in the context of franchising.

(158) Below the level of dominance the combination of non-compete with exclusive distribution may also justify the non-compete obligation lasting the full length of the agreement. In the latter case, the non-compete obligation is likely to improve the distribution efforts of the exclusive distributor in his territory (see paragraphs 161 to 177).

(159) Example of non-compete

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 %. These 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 for exemption are fulfilled.

(160) 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 possibility 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 with market shares below 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. Above the 30% market share threshold, the following guidance is provided for the assessment of exclusive distribution in individual cases.

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 his sales on a limited number of resellers allows him to plan his sales better and to save transport costs. In the light of 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, the quantity forcing of 75% applied by producer X is likely to fulfil the conditions for exemption.

2.2. Exclusive distribution

In an exclusive distribution agreement the supplier agrees to sell his products only to one distributor for resale in a particular territory. At the same time the distributor is usually limited in his active selling into other exclusively allocated territories. The possible competition risks are mainly reduced intra-brand competition and market partitioning, which may in particular facilitate price discrimination. When most or all of the suppliers apply exclusive distribution this may facilitate collusion, both at the suppliers’ and distributors’ level.

Exclusive distribution is exempted by the Block Exemption Regulation when the supplier’s market share does 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. Above the 30% market share threshold, the following guidance is provided for the assessment of exclusive distribution in individual cases.

The market position of the supplier and his 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 be exemptable, the loss of intra-brand competition needs to be balanced with real efficiencies.

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. The loss of intra-brand competition can increase this risk, especially when several suppliers operate similar distribution systems. Multiple exclusive dealerships, i.e. when different suppliers appoint the same exclusive distributor in a given territory, may further increase the risk of collusion. If a dealer is granted the exclusive right to distribute two or more important competing products in the same territory, inter-brand competition is likely to be substantially restricted for those brands. The higher the cumulative market share of the brands distributed by the multiple dealer, the higher the risk of collusion and the more inter-brand competition will be reduced. Such cumulative effect situations may be a reason to withdraw the benefit of the Block Exemption Regulation when the market shares of the suppliers are below the threshold of the Block Exemption Regulation.

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.
Foreclosure of other distributors is not a problem if the supplier which operates the exclusive distribution system appoints a high number of exclusive distributors in the same market and these exclusive distributors are not restricted in selling to other non-appointed distributors. Foreclosure of other distributors may however become a problem 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. Such a case, covered by the Block Exemption Regulation when the market share of each supplier is below 30%, may give reason for withdrawal of the block exemption.

'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.

'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 in a market with growing demand, changing technologies and changing market positions.

'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.

A manufacturer which chooses a wholesaler to be his 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 if the manufacturer is not dominant. 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. Foreclosure of other wholesalers within that territory is not likely as a supplier with a market share above 30% usually has enough bargaining power not to choose a less efficient wholesaler. The possible risks for inter-brand competition of multiple exclusive dealerships are however higher at the wholesale than at the retail level.

The combination of exclusive distribution with single branding may add the problem of foreclosure of the market to other suppliers, especially in case of a dense network of exclusive distributors with small territories or in case of a cumulative effect. This may necessitate application of the principles set out above on single branding. 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 his efforts on the particular brand. Therefore, in the absence of such a foreclosure effect, the combination of exclusive distribution with non-compete is exemptable for the whole duration of the agreement, particularly at the wholesale level.

The combination of exclusive distribution with exclusive purchasing increases the possible competition risks of reduced intra-brand competition and market partitioning which may in particular facilitate price discrimination. 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 purchasing, 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, who are prevented from buying from other distributors in the system. This enhances the possibilities for the supplier to limit intra-brand competition while applying dissimilar conditions of sale. The combination of exclusive distribution and exclusive purchasing is therefore unlikely to be exempted for suppliers with a market share above 30% unless there are very clear and substantial efficiencies leading to lower prices to all final consumers. Lack of such efficiencies may also lead to withdrawal of the block exemption where the market share of the supplier is below 30%.

The 'nature of the product' is not very relevant to assessing the possible anti-competitive effects of exclusive distribution. It is, however, relevant when the issue of possible efficiencies is discussed, that is after an appreciable anti-competitive effect is established.

Exclusive distribution may lead to efficiencies, especially where investments by the distributors are required to protect or build up the brand image.
general, the case for efficiencies is strongest for new products, for complex products, for products whose qualities are difficult to judge before consumption (so-called experience products) or of which the 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.

Example of exclusive distribution at the wholesale level

In 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. These exclusive distributors take care of 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. This includes 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 European 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 above, 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. This makes it likely, if anti-competitive effects exist, that the conditions for exemption are fulfilled.

Example of multiple exclusive dealerships in an oligopolistic market

In a national market for a final product, there are four market leaders, who each have a market share of around 20%. These 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. These 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. This risk is increased through multiple dealings. 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, exemption under Article 81(3) may not be justified and withdrawal of the block exemption may be necessary.
Example of exclusive distribution combined with exclusive purchasing

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 every Member State, it has about seven competitors with much smaller market shares, the largest of these competitors having a market share of 10%. These competitors are present on only one or two national markets. A sells 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. In addition, the retailers are 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. A applies price differences of 10% to 15% between markets and smaller differences within markets. This is translated into smaller price differences at the retail level. The market is relatively stable on the demand and the supply side, and there are no significant technological changes.

In these markets, the loss of intra-brand competition results not only from the territorial exclusivity at the retail level but is aggravated by the exclusive purchasing obligation imposed on the retailers. The exclusive purchase obligation helps to keep markets and territories separate by making arbitrage between the exclusive retailers impossible. The exclusive retailers also cannot sell actively into each other's territory and in practice tend to avoid delivering outside their own territory. This renders price discrimination possible. Arbitrage by consumers or independent traders is limited due to the bulkiness of the product.

The possible efficiency arguments of this system, linked to economies of scale in transport and promotion efforts at the retailers' level, are unlikely to outweigh the negative effect of price discrimination and reduced intra-brand competition. Consequently, it is unlikely that the conditions for exemption are fulfilled.

2.3. Exclusive customer allocation

In an exclusive customer allocation agreement, the supplier agrees to sell his products only to one distributor for resale to a particular class of customers. At the same time, the distributor is usually limited in his active selling to other exclusively allocated classes of customers. The possible competition risks are mainly reduced intra-brand competition and market partitioning, which may in particular facilitate price discrimination. When most or all of the suppliers apply exclusive customer allocation, this may facilitate collusion, both at the suppliers' and the distributors' level.

Exclusive customer allocation is exempted by the Block Exemption Regulation when the supplier'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 purchasing. A combination of exclusive customer allocation and selective distribution is normally hardcore, 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 161 to 177 applies mutatis mutandis to the assessment of exclusive customer allocation, subject to the following specific remarks.

The allocation of customers normally makes arbitrage by the consumers more difficult. In addition, as each appointed distributor has his own class of customers, non-appointed distributors not falling within such a class may find it difficult to obtain the product. This will reduce possible arbitrage by non-appointed distributors. Therefore, above the 30% market share threshold of the Block Exemption Regulation exclusive customer allocation is unlikely to be exemptable unless there are clear and substantial efficiency effects.

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.

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 class 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 any efficiencies and is therefore unlikely to be exempted.
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 23% 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 for exemption are likely to be fulfilled.

Selective distribution

Selective distribution agreements, like exclusive distribution agreements, restrict on the one hand the number of authorised distributors and on the other the possibilities of resale. 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.

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 facilitation of collusion between suppliers or buyers. To assess the possible anti-competitive effects of selective distribution under Article 81(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. 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 81(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 potential resellers and are not applied in a discriminatory manner. Thirdly, the criteria laid down must not go beyond what is necessary. 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.

Qualitative and quantitative selective distribution is exempted by the Block Exemption Regulation up to 30% market share, 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. However, where the nature of the product does not require selective distribution, such a distribution system does not generally bring about sufficient efficiency enhancing effects to counterbalance a significant reduction in intra-brand competition. If appreciable anti-competitive effects

The market position of the supplier and his 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 in the market which is not a dominant undertaking, 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 in a given market.

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 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. This is designed to give selective distribution systems a closed character, making it impossible for non-authorised dealers to obtain supplies. This makes selective distribution particularly well suited to avoid pressure by price discounters on the margins of the manufacturer, as well as on the margins of the authorised dealers.

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 CR3 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 not applying selective distribution, the less likely the foreclosure of other distributors. If all five largest suppliers apply selective distribution, competition concerns may in particular arise with respect to those agreements that apply quantitative selection criteria by directly limiting the number of authorised dealers. The conditions of Article 81(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, 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 total turnover achieved with the type of products in question and it does not go beyond what is necessary for the supplier to recoup his 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.

‘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.

‘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.
Article 5(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. This condition aims specifically at avoiding horizontal collusion to exclude particular brands through the creation of a selective club of brands by the leading suppliers. This kind of obligation is unlikely to be exemptable when the CR5 is equal to or above 50 %, unless none of the suppliers imposing such an obligation belongs to the five largest suppliers in the market.

Foreclosure of other suppliers is normally not a problem as long as other suppliers can use the same distributors, i.e. 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 above 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 when 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 %.

Maturity of the market is important, as loss of intra-brand competition and possible foreclosure of suppliers or dealers may be a serious problem in a mature market but is less relevant in a market with growing demand, changing technologies and changing market positions.

Selective distribution may be efficient when it leads to savings in logistical costs due to economies of scale in transport and this may happen irrespective of the nature of the product (efficiency 6 in paragraph 116). However, this is usually only a marginal efficiency in selective distribution systems. To help solve a free-rider problem between the distributors (efficiency 1 in paragraph 116) or to help create a brand image (efficiency 8 in paragraph 116), the nature of the product is very relevant. In general the case is strongest for new products, for complex products, for products of which the qualities are difficult to judge before consumption (so-called experience products) or of which the qualities are difficult to judge even after consumption (so-called credence products). The combination of selective and exclusive distribution is likely to infringe Article 81 if it is applied by a supplier whose market share exceeds 30 % or in case of cumulative effects, even though active sales between the territories remain free. Such a combination may exceptionally fulfil the conditions of Article 81(3) if it is indispensable to protect substantial and relationship-specific investments made by the authorised dealers (efficiency 4 in paragraph 116).

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.

Example of quantitative selective distribution:

In 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 this 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.
In this 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 for exempting A’s selective distribution network are likely to be fulfilled.

(198) 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: 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 this 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.

In this market, access by general price discounters 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. 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**

(199) 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 his 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.

(200) The coverage by the Block Exemption Regulation of the licensing of IPRs contained in franchise agreements is dealt with in paragraphs 23 to 45. 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 or exclusive distribution, the Block Exemption Regulation applies up to the 30% market share threshold for the
franchisor or the supplier designated by the franchisor. The guidance provided earlier in respect of these types of restraints applies also to franchising, subject to the following specific remarks:

1) In line with general rule 8 (see paragraph 119), the more important the transfer of know-how, the more easily the vertical restraints fulfil the conditions for exemption.

2) A non-compete obligation on the goods or services purchased by the franchisee falls outside Article 81(1) when 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 81(1), as long as it does not exceed the duration of the franchise agreement itself.

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, are only allowed 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.

Most of the obligations contained in the franchise agreements can be assessed as being necessary to protect the intellectual property rights or maintain the common identity and reputation of the franchised network and fall outside Article 81(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 for, at least help to 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 81(3) in as far as the obligations contained therein fall under Article 81(1).

2.6. Exclusive supply

Exclusive supply as defined in Article 1(c) of the Block Exemption Regulation is the extreme form of limited distribution in as far as the limit on the number of buyers is concerned: in the agreement it is specified that there is only one buyer inside the Community to which the supplier may sell a particular final product. For intermediate goods or services, exclusive supply means that there is only one buyer inside the Community or that there is only one buyer inside the Community for the purposes of a specific use. For intermediate goods or services, exclusive supply is often referred to as industrial supply.

(1) See also paragraphs AEG [1983] ECR 3151, paragraph 35; and of the Court of First Instance in Case T-19/91 Vichy v Commission [1992] ECR II-415, paragraph 65. See also paragraphs 89 to 95, in particular paragraph 95.
Foreclosure of competing buyers is not very likely where these competitors have similar buying power and can offer the suppliers similar sales possibilities. In such a case, foreclosure could only occur for potential entrants, who 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.

The main competition risk of exclusive supply is foreclosure of other buyers. 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 can however be expected 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 his downstream market exceeds 30%. In such cases withdrawal of the block exemption may be required. 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.

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, often there are significant entry barriers.

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. The combination with non-compete 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 i.e. reciprocal exclusivity in industrial supply agreements is usually justified below the level of dominance.

Lastly, the level of trade and the nature of the product are relevant for foreclosure. 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 his customers than the wholesaler/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 homogeneous intermediate products, anti-competitive effects are likely to be exemptable below the level of dominance. 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.
Where appreciable anti-competitive effects are established, an exemption under Article 81(3) is possible as long as the company is not dominant. Efficiencies can be expected in the case of a hold-up problem (paragraph 116, points 4 and 5), and this is more likely for intermediate products than for final products. Other efficiencies are less likely. Possible economies of scale in distribution (paragraph 116, point 6) do not seem likely to justify exclusive supply.

In the case of a hold-up problem and even more so in the case of scale economies in distribution, quantity forcing on the supplier, such as minimum supply requirements, could well be a less restrictive alternative.

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 his 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 fulfill the conditions for exemption 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.

Exclusive supply is based on a direct or indirect obligation causing the supplier only to sell to one buyer. Quantity forcing on the supplier is based on incentives agreed between the supplier and the buyer that make the former concentrate his sales mainly with one buyer. Quantity forcing on the supplier may have similar but more mitigated effects than exclusive supply. The assessment of quantity forcing will depend on the degree of foreclosure of other buyers on the upstream market.

2.7. **Tying**

Tying exists when the supplier makes the sale of one product conditional upon the purchase of another distinct product from the supplier or someone designated by the latter. The first product is referred to as the tying product and the second is referred to as the tied product. If the tying is not objectively justified by the nature of the products or commercial usage, such practice may constitute an abuse within the meaning of Article 82(1). Article 81 may apply to horizontal agreements or concerted practices between competing suppliers which make the sale of one product conditional upon the purchase of another distinct product. Tying may also constitute a vertical restraint falling under Article 81 where it results in a single branding type of obligation (see paragraphs 138 to 160) for the tied product. Only the latter situation is dealt with in these Guidelines.

What is to be considered as a distinct product is determined first of all by the demand of the buyers. Two products are distinct if, in the absence of tying, from the buyers' perspective, the products are purchased by them on two different markets. For instance, since customers want to buy shoes with laces, 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. Often combinations have become accepted practice because the nature of the product makes it technically difficult to supply one product without the supply of another product.

The main negative effect of tying on competition is possible foreclosure on the market of the tied product. 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. Tying may also lead to supra-competitive prices, especially in three situations. Firstly, when the tying and tied product are partly substitutable for the buyer. Secondly, when the tying allows price discrimination according to the use the customer

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makes of the tying product, for example the tying of ink cartridges to the sale of photocopiers (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. Lastly, tying may also lead to higher entry barriers both on the market of the tying and on the market of the tied product.

(218) Tying is exempted by Article 2(1) read in conjunction with Article 3 of 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 does not exceed 30%. It may be combined with other non-hardcore vertical restraints such as non-compete or quantity forcing in respect of the tying product, or exclusive purchasing. Above the market share threshold the following guidance is provided for the assessment of tying in individual cases.

(219) The market position of the supplier on the market of the tying product is obviously of main 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) To assess the supplier’s market power, the market position of his competitors on the market of the tying product is important. As long as his 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 of a possible exemption under Article 81(3) arises as long as the company is not dominant. 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 be exemptable, it must, however, be shown that at least part of these cost reductions are passed on to the consumer. Tying is therefore normally not exemptable 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 efficiency 8 in paragraph 116). 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 Article 81(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 Article 81(1), especially where the supplier of the tying product does not derive a direct (financial) benefit from designating the suppliers of the tied product.

(223) The effect of supra-competitive prices is considered anti-competitive in itself. The effect of foreclosure 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 81(1), the analysis for single branding can be applied. Above the 30% market share threshold exemption of tying is unlikely, unless there are clear efficiencies that are transmitted, at least in part, to consumers. Exemption is even less likely when tying is combined with non-compete, either in respect of the tied or in respect of the tying product.

(224) Withdrawal of the block exemption is likely where no efficiencies result from tying or where such efficiencies are not passed on to the consumer (see paragraph 222). Withdrawal is also likely in the case of a cumulative effect where a majority of the suppliers apply similar tying arrangements without the possible efficiencies being transmitted at least in part to consumers.
2.8. **Recommended and maximum resale prices**

(225) The practice of recommending a resale price to a reseller or requiring the reseller to respect a maximum resale price is — subject to the comments in paragraphs 46 to 56 concerning RPM — covered by the Block Exemption Regulation when the market share of the supplier does not exceed the 30% threshold. For cases above the market share threshold and for cases of withdrawal of the block exemption the following guidance is provided.

(226) The possible competition risk of maximum and recommended prices is firstly that the maximum or recommended price will work as a focal point for the resellers and might be followed by most or all of them. A second competition risk is that maximum or recommended prices may facilitate collusion between suppliers.

(227) The most 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. Under such circumstances the practice of imposing a maximum resale price or recommending a resale price may infringe Article 81(1) if it leads to a uniform price level.

(228) The second most important factor for assessing possible anti-competitive effects of the practice of maximum and recommended prices is the market position of competitors. Especially in a narrow oligopoly, the practice of using or publishing maximum or recommended prices may facilitate collusion between the suppliers by exchanging information on the preferred price level and by reducing the likelihood of lower resale prices. The practice of imposing a maximum resale price or recommending resale prices leading to such effects may also infringe Article 81(1).

2.9. **Other vertical restraints**

(229) The vertical restraints and combinations described above are only a selection. There are other restraints and combinations for which no direct guidance is provided here. They will however be treated according to the same principles, with the help of the same general rules and with the same emphasis on the effect on the market.
COMMISION NOTICE

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

(97/C 372/03)

(Text with EEA relevance)

1. 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 (1). 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 (2) 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

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:

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(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.
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 areas.

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 (\(^\ast\)). 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.

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.

\(^{\ast}\) 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.
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 (\(\star\)) 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

\(\star\) 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.

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.

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.

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:

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.

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 (*) 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 withstand rigorous scrutiny for the purposes of establishing patterns of substitution in the past.

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

(*) 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.

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.

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 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 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, where 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.

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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 (*) 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 (**) 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 (***) 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 (****), 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

(**) OJ C 1, 3. 1. 1979, p. 2.
II

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 (5). 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 (6).

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 (7). 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 (8). In general, a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative (9).

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 (10). 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 (11).

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 (1). However, the Commission will interpret market shares in the light of the relevant market conditions, and

(5) See for instance paragraph 82.
(8) 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.
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 (1). 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.

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 (2) or an established distribution and sales network (3). 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 (4), 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 (5). 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

(4) Case 27/76 United Brands v Commission [1978] ECR 207, paragraph 91. 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 (1) 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 (2).

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 (3). 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 pre-empt 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.

(1) For the meaning of the expression 'increase price' see paragraph 11.
(2) 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.

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.

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 (1).

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 likely to be foreclosed by the conduct in question, the Commission will examine economic data relating to cost and sales prices, and in particular whether the dominant undertaking is engaging in below-cost pricing. This will require that sufficiently reliable data be available. Where available, the Commission will use information on the costs of the dominant undertaking itself. If reliable information on those costs is not available, the Commission may decide to use the cost data of competitors or other comparable reliable data.

26. The cost benchmarks that the Commission is likely to use are average avoidable cost (AAC) and long-run average incremental cost (LRAIC) (2). 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 (3).

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.

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(1) Case T-271/03 AKZO Chemic 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.

(2) 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.

(3) 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 (1). A dominant undertaking may 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 (2).

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 (3):

- 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,

- 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 (4). 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


(4) 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.
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 (3). 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.

(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 (4).

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) (5).

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 (6). 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 (7).

(5) In this regard, the assessment of conditional rebates differs from that of predation, which always entails a sacrifice.
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 small. 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.

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. 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. Transaction-related cost advantages are often more likely to be

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(1) 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 to have an anti-competitive foreclosure effect.


(3) 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 (1). 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.

II. 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 (2). ‘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 tied market) and, indirectly, the tying market, the tying market, or both at the same time.

50. The Commission will normally take action under Article 82 where an undertaking is dominant in the tying market (1) 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 (2).

(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 (3). 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 specialising in the manufacture or sale of the tied product without the tying product (4) 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.

(1) See, to that effect, Case T-203/01 Michelin v Commission (Michelin II) [2003] ECR II-4071, paragraphs 56 to 60, 74 and 75.
(2) 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).
(3) 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.
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 (1).

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.

(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 (f).

(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 (g). Pricing below AAC will thus in most cases be predatory.

(1) 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).

(2) 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.

(3) 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 (\(^1\)).

65. However, the concept of sacrifice does not only include pricing below AAC (\(^2\)). 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 (\(^3\)). 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 (\(^4\)), 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 (\(^5\)).

(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 (\(^6\)). 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.

\(^1\) 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 . . . .’

\(^2\) 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.

\(^3\) 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.

\(^4\) See 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/C/18.213/3J Wanadoo Interactive, Commission Decision of 16 July 2003, paragraphs 332 to 367.

\(^5\) This was confirmed in Case T-8/391 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/C/18.213/3J 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 (1). 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 (2) 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 (3), refusal to license intellectual property rights (4), including when the licence is necessary to provide interface information (5), or refusal to grant access to an essential facility or a network (6).

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 (7). 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 (8), 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 (9).

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.

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2. See Judgment of 16 September 2008 in Joined Cases C-468/06 to C-478/06 Sót. Lélòs kai Sia and Others v GlaxoSmithKline, not yet reported.


8. 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.

9. 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.
In general, an input 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 (1). 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 (2). 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 (3). 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 (4).

(b) Elimination of effective competition

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.

(c) Consumer harm

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.

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 (5). 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

(3) 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.
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 (1).  

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 (2). 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.


COMMISSION DECISION
of 20 December 2011
on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest
(notified under document C(2011) 9380)
(Text with EEA relevance)
(2012/21/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 106(3) thereof,

Whereas:

(1) Article 14 of the Treaty requires the Union, without prejudice to Articles 93, 106 and 107 of the Treaty, to use its powers in such a way as to make sure that services of general economic interest operate on the basis of principles and conditions which enable them to fulfil their missions.

(2) For certain services of general economic interest to operate on the basis of principles and under conditions which enable them to fulfil their missions, financial support from the State may prove necessary to cover some or all of the specific costs resulting from the public service obligations. In accordance with Article 345 of the Treaty, as interpreted by the Court of Justice of the European Union, it is irrelevant whether such services of general economic interest are operated by public or private undertakings.

(3) Article 106(2) of the Treaty states in this respect that undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly are subject to the rules contained in the Treaty, in particular to the rules on competition, in so far as the application of these rules does not obstruct, in law or in fact, the performance of the tasks entrusted. This should however not affect the development of trade to such an extent as would be contrary to the interests of the Union.

(4) In its judgment in Altmark (1), the Court of Justice held that public service compensation does not constitute State aid within the meaning of Article 107 of the Treaty provided that four cumulative criteria are met. First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation must not exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit. Finally, where the undertaking that is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs that a typical undertaking, well-run and adequately provided with the relevant means, would have incurred.

(5) Where those criteria are not fulfilled and the general conditions for the applicability of Article 107(1) of the Treaty are met, public service compensation constitutes State aid and is subject to Articles 93, 106, 107 and 108 of the Treaty.

(6) In addition to this Decision, three instruments are relevant for the application of the State aid rules to compensation granted for the provision of services of general economic interest:

(a) a new Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general

(8) Such aid may be deemed compatible only if it is granted in order to ensure the provision of services of general economic interest as referred to in Article 106(2) of the Treaty. It is clear from the case-law that, in the absence of sectoral Union rules governing the matter, Member States have a wide margin of discretion in the definition of services that could be classified as being services of general economic interest. Thus the Commission's task is to ensure that there is no manifest error as regards the definition of services of general economic interest.

(9) Provided a number of conditions are met, limited amounts of compensation granted to undertakings entrusted with the provision of services of general economic interest do not affect the development of trade and competition to such an extent as would be contrary to the interests of the Union. An individual State aid notification should therefore not be required for compensation below a specified annual amount of compensation provided the requirements of this Decision are met.

(7) Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest clarifies the application of Article 107(1); it specifies the meaning and extent of the exception pursuant to Article 106(2) of the Treaty and sets out rules intended to enable effective monitoring of the fulfilment of the criteria set out in that provision. This Decision replaces Decision 2005/842/EC and lays down the conditions under which State aid in the form of compensation for a service of general economic interest is not subject to the prior notification requirement of Article 108(3) of the Treaty as it can be deemed compatible with Article 106(2) of the Treaty.

(10) Given the development of intra-Union trade in the provision of services of general economic interest, demonstrated for instance by the strong development of multi-national providers in a number of sectors which are of great importance for the development of the internal market, it is appropriate to set a lower limit for the amount of compensation which can be exempted from the notification requirement in accordance with this Decision than what was set by Decision 2005/842/EC, while allowing for that amount to be computed as an annual average over the entrustment period.

(11) Hospitals and undertakings in charge of social services, which are entrusted with tasks of general economic interest, have specific characteristics that need to be taken into consideration. In particular, account should be taken of the fact that, in the present economic conditions and at the current stage of development of the internal market, social services may require an amount of aid beyond the threshold in this Decision to compensate for the public service costs. A larger amount of compensation for social services does thus not necessarily produce a greater risk of distortions of competition. Accordingly, undertakings in charge of social services, including the provision of social housing for disadvantaged citizens or socially less advantaged groups, who due to solvency constraints are unable to obtain housing at market conditions, should also benefit from the exemption from notification provided for in this Decision, even if the amount of compensation they receive exceeds the general compensation threshold laid down in this Decision. The same should apply to hospitals providing medical care, including, where applicable, emergency services and ancillary services directly related to their main activities, in particular in the field of research. In order to benefit from the exemption from notification, social services should be clearly identified services, meeting social needs as regards health and long-term care, childcare, access to and reintegration into the labour market, social housing and the care and social inclusion of vulnerable groups.

(12) The extent to which a particular compensation measure affects trade and competition depends not only on the average amount of compensation received per year and the sector concerned, but also on the overall duration of the period of entrustment. Unless a longer period is justified due to the need for a significant investment, for example in the area of social housing, the application of this Decision should therefore be limited to periods of entrustment not exceeding 10 years.
In order for Article 106(2) of the Treaty to apply, the undertaking in question must have been specifically entrusted by the Member State with the operation of a particular service of general economic interest.

In order to ensure that the criteria set out in Article 106(2) of the Treaty are met, it is necessary to lay down more precise conditions that must be fulfilled in respect of the entrustment of the operation of services of general economic interest. The amount of compensation can be properly calculated and checked only if the public service obligations incumbent on the undertakings and any obligations incumbent on the State are clearly set out in one or more acts of the competent public authorities in the Member State concerned. The form of the instrument may vary from one Member State to another but it should specify, at least, the undertakings concerned, the precise content and duration of and, where appropriate, the territory concerned by the public service obligations imposed, the granting of any exclusive or special rights, and describe the compensation mechanism and the parameters for determining the compensation and avoiding and recovering any possible overcompensation. In order to ensure transparency in relation to the application of this Decision, the act of entrustment should also include a reference to it.

In order to avoid unjustified distortions of competition, the compensation should not exceed what is necessary to cover the net costs incurred by the undertaking in operating the service, including a reasonable profit.

Compensation in excess of what is necessary to cover the net costs incurred by the undertaking concerned in operating the service is not necessary for the operation of the service of general economic interest, and consequently constitutes incompatible State aid that should be repaid to the State. Compensation granted for the operation of a service of general economic interest but actually used by the undertaking concerned to operate on another market for purposes other than those specified in the act of entrustment is not necessary for the operation of the service of general economic interest, and may consequently also constitute incompatible State aid that should be repaid.

The net cost to be taken into account should be calculated as the difference between the cost incurred in operating the service of general economic interest and the revenue earned from the service of general economic interest or, alternatively, as the difference between the net cost of operating with the public service obligation and the net cost or profit operating without the public service obligation. In particular, if the public service obligation leads to a reduction of the revenue, for instance due to regulated tariffs, but does not affect the costs, it should be possible to determine the net cost incurred in discharging the public service obligation on the basis of the foregone revenue. In order to avoid unjustified distortions of competition, all revenues earned from the service of general economic interest, that is to say, any revenues that the provider would not have obtained had it not been entrusted with the obligation should be taken into account for the purposes of calculating the amount of compensation. If the undertaking in question holds special or exclusive rights linked to activities, other than the service of general economic interest for which the aid is granted, that generate profits in excess of the reasonable profit, or benefits from other advantages granted by the State, these should be included in its revenue, irrespective of their classification for the purposes of Article 107 of the Treaty.

Reasonable profit should be determined as a rate of return on capital that takes into account the degree of risk, or absence of risk, incurred. The rate of return on capital should be defined as the internal rate of return that the undertaking obtains on its invested capital over the duration of the period of entrustment.

Profit not exceeding the relevant swap rate plus 100 basis points should not be regarded as unreasonable. In this context, the relevant swap rate is viewed as an appropriate rate of return for a risk-free investment. The premium of 100 basis points serves, inter alia, to compensate for liquidity risk related to the provision of capital which is committed for the operation of the service during the period of entrustment.

In cases where the undertaking entrusted with a service of general economic interest does not bear a substantial degree of commercial risk, for instance because the costs it incurs in the operation of the service are compensated in full, profits exceeding the benchmark of the relevant swap rate plus 100 basis points should not be viewed as reasonable.

Where, by reason of specific circumstances, it is not appropriate to use the rate of return on capital, Member States should be able to rely on other profit level indicators to determine what the reasonable profit should be, such as the average return on equity, return on capital employed, return on assets or return on sales.

In determining what constitutes a reasonable profit, the Member States should be able to introduce incentive criteria relating, in particular, to the quality of service provided and gains in productive efficiency. Efficiency gains should not reduce the quality of the service provided. For instance, Member States should be able to define productive efficiency targets in the entrustment act whereby the level of compensation is made
dependent upon the extent to which the targets have been met. The entrustment act may provide that if the undertaking does not meet the objectives, the compensation is to be reduced by applying a calculation method specified in the entrustment act, whereas if the undertaking exceeds the objectives, the compensation may be increased by applying a method specified in the entrustment act. Any rewards linked to productive efficiency gains should be set at a level such as to allow balanced sharing of those gains between the undertaking and the Member State and/or the users.

(23) Article 93 of the Treaty constitutes a lex specialis with regard to Article 106(2) of the Treaty. It lays down the rules applicable to public service compensation in the land transport sector. Article 93 has been interpreted by Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (1), which lays down the rules applicable to the compensation of public service obligations in public passenger traffic. Its application to inland waterway passenger traffic is at the discretion of the Member States. Regulation (EC) No 1370/2007 exempts from notification pursuant to Article 108(3) of the Treaty all compensation in the land transport sector that fulfils the conditions of that Regulation. In accordance with the judgment in Altmark, compensation in the land transport sector that does not comply with the provisions of Article 93 of the Treaty cannot be declared compatible with the Treaty on the basis of Article 106(2) of the Treaty, or on the basis of any other Treaty provision. Consequently, this Decision does not apply to the land transport sector.

(24) Unlike land transport, the maritime and air transport sectors are subject to Article 106(2) of the Treaty. Certain rules applicable to public service compensation in the air and maritime transport sectors are to be found in Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (2) and in Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (3). However, unlike Regulation (EC) No 1370/2007, those Regulations do not refer to the compatibility of the possible State aid elements, nor do they provide for an exemption from the obligation to notify pursuant to Article 108(3) of the Treaty. This Decision should therefore apply to public service compensation in the air and maritime transport sectors provided that, in addition to fulfilling the conditions set out in this Decision, such compensation also complies with the sectoral rules contained in Regulations (EC) No 1008/2008 and (EEC) No 3577/92 where applicable.

(25) In the specific cases of public service compensation for air or maritime links to islands and for airports and ports which constitute services of general economic interest as referred to in Article 106(2) of the Treaty, it is appropriate to provide thresholds based on the average annual number of passengers as this more accurately reflects the economic reality of these activities and their character of services of general economic interest.

(26) Exemption from the requirement of prior notification for certain services of general economic interest does not rule out the possibility for Member States to notify a specific aid project. In the event of such a notification, or if the Commission assesses the compatibility of a specific aid measure following a complaint or ex officio, the Commission will assess whether the conditions of this Decision are met. If that is not the case, the measure will be assessed in accordance with the principles contained in the Commission Communication on a framework for State aid in the form of public service compensation.

(27) This Decision should apply without prejudice to the provisions of Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (4).

(28) This Decision should apply without prejudice to the Union provisions in the field of competition, in particular Articles 101 and 102 of the Treaty.

(29) This Decision should apply without prejudice to the Union provisions in the field of public procurement.

(30) This Decision should apply without prejudice to stricter provisions relating to public service obligations that are contained in sectoral Union legislation.

(31) Transitional provisions should be laid down for individual aid that was granted before the entry into force of this Decision. Aid schemes put into effect in accordance with Decision 2005/842/EC before the entry into force of this Decision should continue to be compatible with the internal market and exempt from the notification requirement for a further period of 2 years. Aid put into effect before the entry into force of this Decision that was not awarded in accordance with Decision 2005/842/EC but fulfils the conditions laid down in this Decision should be compatible with the internal market and exempt from the notification requirement.

(2) OJ L 293, 31.10.2008, p. 3.
The Commission intends to carry out a review of this Decision 5 years after its entry into force.

HAS ADOPTED THIS DECISION:

Article 1

Subject matter

This Decision sets out the conditions under which State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest is compatible with the internal market and exempt from the requirement of notification laid down in Article 108(3) of the Treaty.

Article 2

Scope

1. This Decision applies to State aid in the form of public service compensation, granted to undertakings entrusted with the operation of services of general economic interest as referred to in Article 106(2) of the Treaty, which falls within one of the following categories:

(a) compensation not exceeding an annual amount of EUR 15 million for the provision of services of general economic interest in areas other than transport and transport infrastructure;

where the amount of compensation varies over the duration of the entrustment, the annual amount shall be calculated as average of the annual amounts of compensation expected to be made over the entrustment period;

(b) compensation for the provision of services of general economic interest by hospitals providing medical care, including, where applicable, emergency services; the pursuit of ancillary activities directly related to the main activities, notably in the field of research, does not, however, prevent the application of this paragraph;

(c) compensation for the provision of services of general economic interest meeting social needs as regards health and long term care, childcare, access to and reintegration into the labour market, social housing and the care and social inclusion of vulnerable groups;

(d) compensation for the provision of services of general economic interest as regards air or maritime links to islands on which the average annual traffic during the 2 financial years preceding that in which the service of general economic interest was assigned does not exceed 300 000 passengers;

(e) compensation for the provision of services of general economic interest as regards airports and ports for which

the average annual traffic during the 2 financial years preceding that in which the service of general economic interest was assigned does not exceed 200 000 passengers, in the case of airports, and 300 000 passengers, in the case of ports.

2. This Decision only applies where the period for which the undertaking is entrusted with the operation of the service of general economic interest does not exceed 10 years. Where the period of entrustment exceeds 10 years, this Decision only applies to the extent that a significant investment is required from the service provider that needs to be amortised over a longer period in accordance with generally accepted accounting principles.

3. If during the duration of the entrustment the conditions for the application of this Decision cease to be met, the aid shall be notified in accordance with Article 108(3) of the Treaty.

4. In the field of air and maritime transport, this Decision only applies to State aid in the form of public service compensation, granted to undertakings entrusted with the operation of services of general economic interest as referred to in Article 106(2) of the Treaty, which complies with Regulation (EC) No 1008/2008 and, respectively, Regulation (EEC) No 3577/92 where applicable.

5. This Decision does not apply to State aid in the form of public service compensation granted to undertakings in the field of land transport.

Article 3

Compatibility and exemption from notification

State aid in the form of public service compensation that meets the conditions laid down in this Decision shall be compatible with the internal market and shall be exempt from the prior notification obligation provided for in Article 108(3) of the Treaty provided that it also complies with the requirements flowing from the Treaty or from sectoral Union legislation.

Article 4

Entrustment

Operation of the service of general economic interest shall be entrusted to the undertaking concerned by way of one or more acts, the form of which may be determined by each Member State. The act or acts shall include, in particular:

(a) the content and duration of the public service obligations;

(b) the undertaking and, where applicable, the territory concerned;
(c) the nature of any exclusive or special rights assigned to the undertaking by the granting authority;

(d) a description of the compensation mechanism and the parameters for calculating, controlling and reviewing the compensation;

(e) the arrangements for avoiding and recovering any overcompensation; and

(f) a reference to this Decision.

Article 5

Compensation

1. The amount of compensation shall not exceed what is necessary to cover the net cost incurred in discharging the public service obligations, including a reasonable profit.

2. The net cost may be calculated as the difference between costs as defined in paragraph 3 and revenues as defined in paragraph 4. Alternatively, it may be calculated as the difference between the net cost for the undertaking of operating with the public service obligation and the net cost or profit of the same undertaking operating without the public service obligation.

3. The costs to be taken into consideration shall comprise all the costs incurred in operating the service of general economic interest. They shall be calculated on the basis of generally accepted cost accounting principles, as follows:

(a) where the activities of the undertaking in question are confined to the service of general economic interest, all its costs may be taken into consideration;

(b) where the undertaking also carries out activities falling outside the scope of the service of general economic interest, only the costs related to the service of general economic interest shall be taken into consideration;

(c) the costs allocated to the service of general economic interest may cover all the direct costs incurred in operating the service of general economic interest and an appropriate contribution to costs common to both the service of general economic interest and other activities;

(d) the costs linked with investments, notably concerning infrastructure, may be taken into account when necessary for the operation of the service of general economic interest.

4. The revenue to be taken into consideration shall include at least the entire revenue earned from the service of general economic interest, regardless of whether the revenue is classified as State aid within the meaning of Article 107 of the Treaty. If the undertaking in question holds special or exclusive rights linked to activities, other than the service of general economic interest for which the aid is granted, that generate profits in excess of the reasonable profit, or benefits from other advantages granted by the State, these shall be included in its revenue, irrespective of their classification for the purposes of Article 107 of the Treaty. The Member State concerned may decide that the profits accruing from other activities outside the scope of the service of general economic interest in question are to be assigned in whole or in part to the financing of the service of general economic interest.

5. For the purposes of this Decision, 'reasonable profit' means the rate of return on capital that would be required by a typical undertaking considering whether or not to provide the service of general economic interest for the whole period of entrustment, taking into account the level of risk. The 'rate of return on capital' means the internal rate of return that the undertaking makes on its invested capital over the duration of the period of entrustment. The level of risk depends on the sector concerned, the type of service and the characteristics of the compensation.

6. In determining what constitutes a reasonable profit, Member States may introduce incentive criteria relating, in particular, to the quality of service provided and gains in productive efficiency. Efficiency gains shall not reduce the quality of the service provided. Any rewards linked to productive efficiency gains shall be set at a level such as to allow balanced sharing of those gains between the undertaking and the Member State and/or the users.

7. For the purposes of this Decision, a rate of return on capital that does not exceed the relevant swap rate plus a premium of 100 basis points shall be regarded as reasonable in any event. The relevant swap rate shall be the swap rate the maturity and currency of which correspond to the duration and currency of the entrustment act. Where the provision of the service of general economic interest is not connected with a substantial commercial or contractual risk, in particular when the net cost incurred in providing the service of general economic interest is essentially compensated ex post in full, the reasonable profit may not exceed the relevant swap rate plus a premium of 100 basis points.
8. Where, by reasons of specific circumstances, it is not appropriate to use the rate of return on capital, Member States may rely on profit level indicators other than the rate of return on capital to determine what the reasonable profit should be, such as the average return on equity, return on capital employed, return on assets or return on sales. The ‘return’ means the earnings before interests and taxes in that year. The average return is computed using the discount factor over the life of the contract as specified by the Commission from the Communication on the revision of the method for setting the reference and discount rates (1). Whatever indicator is chosen, the Member State shall be able to provide the Commission upon request with evidence that the profit does not exceed what would be required by a typical undertaking considering whether or not to provide the service, for instance by providing references to returns achieved on similar types of contracts awarded under competitive conditions.

9. Where an undertaking carries out activities falling both inside and outside the scope of the service of general economic interest, the internal accounts shall show separately the costs and receipts associated with the service of general economic interest and those of other services, as well as the parameters for allocating costs and revenues. The costs linked to any activities outside the scope of the service of general economic interest shall cover all the direct costs, an appropriate contribution to the common costs and an adequate return on capital. No compensation shall be granted in respect of those costs.

10. Member States shall require the undertaking concerned to repay any overcompensation received.

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**Article 6**

**Control of overcompensation**

1. Member States shall ensure that the compensation granted for the operation of the service of general economic interest meets the requirements set out in this Decision and in particular that the undertaking does not receive compensation in excess of the amount determined in accordance with Article 5. They shall provide evidence upon request from the Commission. They shall carry out regular checks, or ensure that such checks are carried out, at least every 3 years during the period of entrustment and at the end of that period.

2. Where an undertaking has received compensation in excess of the amount determined in accordance with Article 5, the Member State shall require the undertaking concerned to repay any overcompensation received. The parameters for the calculation of the compensation shall be updated for the future. Where the amount of overcompensation does not exceed 10% of the amount of the average annual compensation, such overcompensation may be carried forward to the next period and deducted from the amount of compensation payable in respect of that period.

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**Article 7**

**Transparency**

For compensation above EUR 15 million granted to an undertaking which also has activities outside the scope of the service of general economic interest, the Member State concerned shall publish the following information on the Internet or by other appropriate means:

(a) the entrustment act or a summary which includes the elements listed in Article 4;

(b) the amounts of aid granted to the undertaking on a yearly basis.

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**Article 8**

**Availability of information**

The Member States shall keep available, during the period of entrustment and for at least 10 years from the end of the period of entrustment, all the information necessary to determine whether the compensation granted is compatible with this Decision.

On written request by the Commission, Member States shall provide the Commission with all the information that the latter considers necessary to determine whether the compensation measures in force are compatible with this Decision.

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**Article 9**

**Reports**

Each Member State shall submit a report on the implementation of this Decision to the Commission every 2 years. The reports shall provide a detailed overview of the application of this Decision for the different categories of services referred to in Article 2(1), including:

(a) a description of the application of this Decision to the services falling within its scope, including in-house activities;

(b) the total amount of aid granted in accordance with this Decision, with a breakdown by the economic sector of the beneficiaries;

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(c) an indication of whether, for a particular type of service, the application of this Decision has given rise to difficulties or complaints by third parties;

and

(d) any other information concerning the application of this Decision required by the Commission and to be specified in due time before the report is to be submitted.

The first report shall be submitted by 30 June 2014.

Article 10

Transitional provisions

This Decision shall apply to individual aid and aid schemes as follows:

(a) any aid scheme put into effect before the entry into force of this Decision that was compatible with the internal market and exempted from the notification requirement in accordance with Decision 2005/842/EC shall continue to be compatible with the internal market and exempt from the notification requirement for a further period of 2 years;

(b) any aid put into effect before the entry into force of this Decision that was not compatible with the internal market nor exempted from the notification requirement in accordance with Decision 2005/842/EC but fulfils the conditions laid down in this Decision shall be compatible with the internal market and exempt from the requirement of prior notification.

Article 11

Repeal

Decision 2005/842/EC is hereby repealed.

Article 12

Entry into force

This Decision shall enter into force on 31 January 2012.

Article 13

Addressees

This Decision is addressed to the Member States.

Done at Brussels, 20 December 2011.

For the Commission
Joaquin ALMUNIA
Vice-President
COMMUNICATION FROM THE COMMISSION

European Union framework for State aid in the form of public service compensation (2011)

(Text with EEA relevance)

(2012/C 8/03)

1. PURPOSE AND SCOPE

1. For certain services of general economic interest (SGEIs) to operate on the basis of principles and under conditions that enable them to fulfil their missions, financial support from the public authorities may prove necessary where revenues accruing from the provision of the service do not allow the costs resulting from the public service obligation to be covered.

2. It follows from the case-law of the Court of Justice of the European Union (1) that public service compensation does not constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union if it fulfils a certain number of conditions (2). Where those conditions are met, Article 108 of the Treaty does not apply.

3. Where public service compensation does not meet those conditions, and to the extent the general criteria for the applicability of Article 107(1) of the Treaty are satisfied, such compensation constitutes State aid and is subject to Articles 106, 107 and 108 of the Treaty.

4. In its Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (3), the Commission has clarified the conditions under which public service compensation is to be regarded as State aid. Furthermore, in its Commission Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest (4), the Commission will set out the conditions under which small amounts of public service compensation should be deemed not to affect trade between Member States and/or not to distort or threaten to distort competition. In those circumstances, compensation is not caught by Article 107(1) of the Treaty and consequently does not fall under the notification procedure provided for in Article 108(3) of the Treaty.

5. Article 106(2) of the Treaty provides the legal basis for assessing the compatibility of State aid for SGEIs. It states that undertakings entrusted with the operation of SGEIs or having the character of a revenue-producing monopoly are subject to the rules contained in the Treaty, in particular to the rules on competition. However, Article 106(2) of the Treaty provides for an exception from the rules contained in the Treaty insofar as the application of the competition rules would obstruct, in law or in fact, the performance of the tasks assigned. This exception only applies where the development of trade is not affected to such an extent as would be contrary to the interests of the Union.

6. Commission Decision 2012/21/EU (5) on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (6) lays down the conditions under which certain types of public service compensation are to be regarded as compatible with the internal market pursuant to Article 106(2) of the Treaty and exempt from the requirement of prior notification under Article 108(3) of the Treaty.

7. The principles set out in this Communication apply to public service compensation only in so far as it constitutes State aid not covered by Decision 2012/21/EU. Such compensation is subject to the prior notification requirement under Article 108(3) of the Treaty. This Communication spells out the conditions under which such State aid can be found compatible with the internal

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(2) In its judgment in Altmark, the Court of Justice held that public service compensation does not constitute State aid if four cumulative criteria are met. First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit. Finally, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with the relevant means, would have incurred.

(3) See page 4 of this Official Journal.


market pursuant to Article 106(2) of the Treaty. It replaces
the Community framework for State aid in the form of
public service compensation (1).

8. The principles set out in this Communication apply to
public service compensation in the field of air and
maritime transport, without prejudice to stricter specific
provisions contained in sectoral Union legislation. They
apply neither to the land transport sector, nor to the
public service broadcasting sector, which is covered by
the Communication from the Commission on the applica-
tion of State aid rules to public service broadcasting (2).

9. Aid for providers of SGEIs in difficulty will be assessed
under the Community guidelines on State aid for
rescuing and restructuring firms in difficulty (3).

10. The principles set out in this Communication apply
without prejudice to:

(a) requirements imposed by Union law in the field of
competition (in particular Articles 101 and 102 of
the Treaty);

(b) requirements imposed by Union law in the field of
public procurement;

(c) the provisions of the Commission Directive
2006/111/EC of 16 November 2006 on the trans-
parency of financial relations between Member States
and public undertakings as well as on financial trans-
parency within certain undertakings (4);

(d) additional requirements flowing from the Treaty or
from sectoral Union legislation.

2. CONDITIONS GOVERNING THE COMPATIBILITY OF
PUBLIC SERVICE COMPENSATION THAT CONSTITUTES
STATE AID

2.1. General provisions

11. At the current stage of development of the internal market,
State aid falling outside the scope of Decision 2012/21/EU
may be declared compatible with Article 106(2) of the
Treaty if it is necessary for the operation of the service
of general economic interest concerned and does not
affect the development of trade to such an extent as to
be contrary to the interests of the Union. The conditions
set out in sections 2.2 to 2.10 must be met in order to
achieve that balance.

2.2. Genuine service of general economic interest as
referred to in Article 106 of the Treaty

12. The aid must be granted for a genuine and correctly
defined service of general economic interest as referred to
in Article 106(2) of the Treaty.

13. In its Communication on the application of the European
Union State aid rules to compensation granted for the
provision of services of general economic interest, the
Commission has provided guidance on the requirements
concerning the definition of a service of general
economic interest. In particular, Member States cannot
attach specific public service obligations to services that
are already provided or can be provided satisfactorily and
under conditions, such as price, objective quality char-
acteristics, continuity and access to the service, consistent
with the public interest, as defined by the State, by under-
takings operating under normal market conditions. As for
the question of whether a service can be provided by the
market, the Commission’s assessment is limited to checking
whether the Member State’s definition is vitiated by a
manifest error, unless provisions of Union law provide a
stricter standard.

14. For the scope of application of the principles set out in this
Communication, Member States should show that they
have given proper consideration to the public service
needs supported by way of a public consultation or other
appropriate instruments to take the interests of users and
providers into account. This does not apply where it is
clear that a new consultation will not bring any significant
added value to a recent consultation.

2.3. Need for an entrustment act specifying the public
service obligations and the methods of calculating
compensation

15. Responsibility for the operation of the SGEI must be
entrusted to the undertaking concerned by way of one or
more acts, the form of which may be determined by each
Member State. The term ‘Member State’ covers the central,
regional and local authorities.

16. The act or acts must include, in particular:

(a) the content and duration of the public service obli-
gations;

(b) the undertaking and, where applicable, the territory
concerned;

(c) the nature of any exclusive or special rights assigned to
the undertaking by the granting authority;

(d) the description of the compensation mechanism and
the parameters for calculating, monitoring and
reviewing the compensation; and

(3) OJ C 244, 1.10.2004, p. 2.
(e) the arrangements for avoiding and recovering any over-
compensation.

2.4. Duration of the period of entrustment

17. The duration of the period of entrustment should be justified by reference to objective criteria such as the need to amortise non-transferable fixed assets. In principle, the duration of the period of entrustment should not exceed the period required for the depreciation of the most significant assets required to provide the SGEI.

2.5. Compliance with the Directive 2006/111/EC

18. Aid will be considered compatible with the internal market on the basis of Article 106(2) of the Treaty only where the undertaking complies, where applicable, with Directive 2006/111/EC (1). Aid that does not comply with that Directive is considered to affect the development of trade to an extent that would be contrary to the interest of the Union within the meaning of Article 106(2) of the Treaty.

2.6. Compliance with Union public procurement rules

19. Aid will be considered compatible with the internal market on the basis of Article 106(2) of the Treaty only where the responsible authority, when entrusting the provision of the service to the undertaking in question, has complied or commits to comply with the applicable Union rules in the area of public procurement. This includes any requirements of transparency, equal treatment and non-discrimination resulting directly from the Treaty and, where applicable, secondary Union law. Aid that does not comply with such rules and requirements is considered to affect the development of trade to an extent that would be contrary to the interests of the Union within the meaning of Article 106(2) of the Treaty.

2.7. Absence of discrimination

20. Where an authority assigns the provision of the same SGEI to several undertakings, the compensation should be calculated on the basis of the same method in respect of each undertaking.

2.8. Amount of compensation

21. The amount of compensation must not exceed what is necessary to cover the net cost (2) of discharging the public service obligations, including a reasonable profit.

22. The amount of compensation can be established on the basis of either the expected costs and revenues, or the costs and revenues actually incurred, or a combination of the two, depending on the efficiency incentives that the Member State wishes to provide from the outset, in accordance with paragraphs 40 and 41.

23. Where the compensation is based, in whole or in part, on expected costs and revenues, they must be specified in the entrustment act. They must be based on plausible and observable parameters concerning the economic environment in which the SGEI is being provided. They must rely, where appropriate, on the expertise of sector regulators or of other entities independent from the undertaking. Member States must indicate the sources on which these expectations are based (3). The cost estimation must reflect the expectations of efficiency gains achieved by the SGEI provider over the lifetime of the entrustment.

24. The net cost necessary, or expected to be necessary, to discharge the public service obligations should be calculated using the net avoided cost methodology where this is required by Union or national legislation and in other cases where this is possible.

Net avoided cost methodology

25. Under the net avoided cost methodology, the net cost necessary, or expected to be necessary, to discharge the public service obligations is calculated as the difference between the net cost for the provider of operating with the public service obligation and the net cost or profit for the same provider of operating without that obligation. Due attention must be given to correctly assessing the costs that the service provider is expected to avoid and the revenues it is expected not to receive, in the absence of the public service obligation. The net cost calculation should assess the benefits, including intangible benefits as far as possible, to the SGEI provider.


(1) Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings.

(2) In this context, net cost means net cost as determined in paragraph 25 or costs minus revenues where the net avoided cost methodology cannot be applied.

(3) Public sources of information, cost levels incurred by the SGEI provider in the past, cost levels of competitors, business plans, industry reports, etc.

postal services and the improvement of quality of service (1), contain more detailed guidance on how to apply the net avoided cost methodology.

27. Although the Commission regards the net avoided cost methodology as the most accurate method for determining the cost of a public service obligation, there may be cases where the use of that methodology is not feasible or appropriate. In such cases, where duly justified, the Commission can accept alternative methods for calculating the net cost necessary to discharge the public service obligations, such as the methodology based on cost allocation.

**Methodology based on cost allocation**

28. Under the cost allocation methodology, the net cost necessary to discharge the public service obligations can be calculated as the difference between the costs and the revenues for a designated provider of fulfilling the public service obligations, as specified and estimated in the entrustment act.

29. The costs to be taken into consideration include all the costs necessary to operate the SGEI.

30. Where the activities of the undertaking in question are confined to the SGEI, all its costs may be taken into consideration.

31. Where the undertaking also carries out activities falling outside the scope of the SGEI, the costs to be taken into consideration may cover all the direct costs necessary to discharge the public service obligations and an appropriate contribution to the indirect costs common to both the SGEI and other activities. The costs linked to any activities outside the scope of the SGEI must include all the direct costs and an appropriate contribution to the common costs. To determine the appropriate contribution to the common costs, market prices for the use of the resources, where available, can be taken as a benchmark (2). In the absence of such market prices, the appropriate contribution to the common costs can be determined by reference to the level of reasonable profit (3) the undertaking is expected to make on the activities falling outside the scope of the SGEI or by other methodologies where more appropriate.

**Revenue**

32. The revenue to be taken into account must include at least the entire revenue earned from the SGEI, as specified in the entrustment act, and the excessive profits generated from special or exclusive rights even if linked to other activities as provided in paragraph 45, regardless of whether those excessive profits are classified as State aid within the meaning of Article 107(1) of the Treaty.

**Reasonable profit**

33. Reasonable profit should be taken to mean the rate of return on capital (4) that would be required by a typical company considering whether or not to provide the service of general economic interest for the whole duration of the entrustment act, taking into account the level of risk. The level of risk depends on the sector concerned, the type of service and the characteristics of the compensation mechanism.

34. Where duly justified, profit level indicators other than the rate of return on capital can be used to determine what the reasonable profit should be, such as the average return on equity (5) over the entrustment period, the return on capital employed, the return on assets or the return on sales.

35. Whatever indicator is chosen, the Member State must provide the Commission with evidence that the projected profit does not exceed what would be required by a typical company considering whether or not to provide the service, for instance by providing references to returns achieved on similar types of contracts awarded under competitive conditions.

(2) In Chronopost (Joined Cases C-83/01 P, C-93/01 P and C-94/01 P Chronopost SA [2003] ECR I-6993), the European Court of Justice referred to ‘normal market conditions’: ‘In the absence of any possibility of comparing the situation of La Poste with that of a private group of undertakings not operating in a reserved sector, normal market conditions’, which are necessarily hypothetical, must be assessed by reference to the objective and verifiable elements which are available.

(3) The reasonable profit will be assessed from an ex ante perspective (based on expected profits rather than on realised profits) in order not to remove the incentives for the undertaking to make efficiency gains when operating activities outside the SGEI.

(4) The rate of return on capital is defined here as the Internal Rate of Return (IRR) that the company makes on its invested capital over the lifetime of the project, that is to say the IRR on the cash flows of the contract.

(5) In any given year the accounting measure return on equity (ROE) is defined as the ratio between earnings before interests and taxes (EBIT) and equity capital in that year. The average annual return should be computed over the lifetime of the entrustment by applying as discount factor either the company’s cost of capital or the rate set by the Commission Reference rate Communication, whatever more appropriate.
36. A rate of return on capital that does not exceed the relevant swap rate (1) plus a premium of 100 basis points (2) is regarded as reasonable in any event. The relevant swap rate is the swap rate whose maturity and currency correspond to the duration and currency of the entrustment act.

37. Where the provision of the SGEI is connected with a substantial commercial or contractual risk, for instance because the compensation takes the form of a fixed lump sum payment covering expected net costs and a reasonable profit and the undertaking operates in a competitive environment, the reasonable profit may not exceed the level that corresponds to a rate of return on capital that is commensurate with the level of risk. That rate should be determined where possible by reference to the rate of return on capital that is achieved on similar types of public service contracts awarded under competitive conditions (for example, contracts awarded under a tender). Where it is not possible to apply that method, other methods for establishing a return on capital may also be used, upon justification (3).

38. Where the provision of the SGEI is not connected with a substantial commercial or contractual risk, for instance because the net cost incurred in providing the service of general economic interest is essentially compensated ex post in full, the reasonable profit may not exceed the level that corresponds to the level specified in paragraph 36. Such a compensation mechanism provides no efficiency incentives for the public service provider. Hence its use is strictly limited to cases where the Member State is able to justify that it is not feasible or appropriate to take into account productive efficiency and to have a contract design which gives incentives to achieve efficiency gains.

Efficiency incentives

39. In devising the method of compensation, Member States must introduce incentives for the efficient provision of SGEI of a high standard, unless they can duly justify that it is not feasible or appropriate to do so.

40. Efficiency incentives can be designed in different ways to best suit the specificity of each case or sector. For instance, Member States can define upfront a fixed compensation level which anticipates and incorporates the efficiency gains that the undertaking can be expected to make over the lifetime of the entrustment act.

41. Alternatively, Member States can define productive efficiency targets in the entrustment act whereby the level of compensation is made dependent upon the extent to which the targets have been met. If the undertaking does not meet the objectives, the compensation should be reduced following a calculation method specified in the entrustment act. In contrast, if the undertaking exceeds the objectives, the compensation should be increased following a method specified in the entrustment act. Rewards linked to productive efficiency gains are to be set at a level such as to allow balanced sharing of those gains between the undertaking and the Member State and/or the users.

42. Any such mechanism for incentivising efficiency improvements must be based on objective and measurable criteria set out in the entrustment act and subject to transparent ex post assessment carried out by an entity independent from the SGEI provider.

43. Efficiency gains should be achieved without prejudice to the quality of the service provided and should meet the standards laid down in Union legislation.

Provisions applicable to undertakings also carrying out activities outside the scope of the SGEI or providing several SGEIs

44. Where an undertaking carries out activities falling both inside and outside the scope of the SGEI, the internal accounts must show separately the costs and revenues associated with the SGEI and those of the other services in line with the principles set out in paragraph 31. Where an undertaking is entrusted with the operation of several SGEIs because the granting authority or the nature of the SGEI is different, the undertaking’s internal accounts must make it possible to verify whether there has been any over-compensation at the level of each SGEI.

45. If the undertaking in question holds special or exclusive rights linked to activities, other than the SGEI for which aid is granted, that generate profits in excess of the reasonable profit, or benefits from other advantages granted by the State, these must be taken into consideration, irrespective of their classification for the purposes of Article 107(1) of the Treaty, and added to the undertaking’s revenue. The reasonable profit on the activities for which the undertaking holds special or exclusive rights has to be assessed from an ex ante perspective, in the light of the risk, or the absence...
of risk, incurred by the undertaking in question. That assessment also has to take into account the efficiency incentives that the Member State has introduced in relation to the provision of the services in question.

46. The Member State may decide that the profits accruing from other activities outside the scope of the SGEI, in particular those activities which rely on the infrastructure necessary to provide the SGEI, must be allocated in whole or in part to the financing of the SGEI.

Overcompensation

47. Overcompensation should be understood as compensation that the undertaking receives in excess of the amount of aid as defined in paragraph 21 for the whole duration of the contract. As stated in paragraphs 39 to 42, a surplus that results from higher than expected efficiency gains may be retained by the undertaking as additional reasonable profit as specified in the entrustment act (1).

48. Since overcompensation is not necessary for the operation of the SGEI, it constitutes incompatible State aid.

49. Member States must ensure that the compensation granted for operating the SGEI meets the requirements set out in this Communication and in particular that undertakings are not receiving compensation in excess of the amount determined in accordance with this the requirements set out in this section. They must provide evidence upon request from the Commission. They must carry out regular checks, or ensure that such checks are carried out, at the end of the period of entrustment and, in any event, at intervals of not more than three years. For aid granted by means other than a public procurement procedure with publication (2), checks should normally be made at least every two years.

50. Where the Member State has defined upfront a fixed compensation level which adequately anticipates and incorporates the efficiency gains that the public service provider can be expected to make over the period of entrustment, on the basis of a correct allocation of costs and revenues and of reasonable expectations as described in this section, the overcompensation check is in principle confined to verifying that the level of profit to which the provider is entitled in accordance with the entrustment act is indeed reasonable from an ex ante perspective.

2.9. Additional requirements which may be necessary to ensure that the development of trade is not affected to an extent contrary to the interests of the Union

51. The requirements set out in sections 2.1 to 2.8 are usually sufficient to ensure that aid does not distort competition in a way that is contrary to the interests of the Union.

52. It is conceivable, however, that in some exceptional circumstances, serious competition distortions in the internal market could remain unaddressed and the aid could affect trade to such an extent as would be contrary to the interest of the Union.

53. In such a case, the Commission will examine whether such distortions can be mitigated by requiring conditions or requesting commitments from the Member State.

54. Serious competition distortions such as to be contrary to the interests of the Union are only expected to occur in exceptional circumstances. The Commission will restrict its attention to those distortions where the aid has significant adverse effects on other Member States and the functioning of the internal market, for example, because they deny undertakings in important sectors of the economy the possibility to achieve the scale of operations necessary to operate efficiently.

55. Such distortions may arise, for instance, where the entrustment either has a duration which cannot be justified by reference to objective criteria (such as the need to amortise non-transferable fixed assets) or bundles a series of tasks (typically subject to separate entrustments with no loss of social benefit and no additional costs in terms of efficiency and effectiveness in the provision of the services). In such a case, the Commission would examine whether the same public service could equally well be provided in a less distortive manner, for instance by way of a more limited entrustment in terms of duration or scope or through separate entrustments.

56. Another situation in which a more detailed assessment may be necessary is where the Member State entrusts a public service provider, without a competitive selection procedure, with the task of providing an SGEI in a non-reserved market where very similar services are already being provided or can be expected to be provided in the near future in the absence of the SGEI. Those adverse effects on the development of trade may be more pronounced where the SGEI is to be offered at a tariff below the costs of any actual or potential provider, so as to cause market foreclosure. The Commission, while fully respecting

(1) Similarly, a deficit which results from efficiency gains lower than expected should be partially borne by the undertaking when stipulated in the entrustment act.

(2) Such as aid granted in relation to in-house contracts, concessions with no competitive allocation, public procurement procedures with no prior publication.
the Member State’s wide margin of discretion to define the SGEI, may therefore require amendments, for instance in the allocation of the aid, where it can reasonably show that it would be possible to provide the same SGEI at equivalent conditions for the users, in a less distortive manner and at lower cost for the State.

57. Closer scrutiny is also warranted where the entrustment of the service obligation is connected with special or exclusive rights that seriously restrict competition in the internal market to an extent contrary to the interest of the Union. While the primary route for apprehending such a case remains Article 106(1) of the Treaty, the State aid may not be deemed compatible where the exclusive right provides for advantages that could not be properly assessed, quantified or apprehended according to the methodologies to calculate the net costs of the SGEI described in section 2.8.

58. The Commission will also pay attention to situations where the aid allows the undertaking to finance the creation or use of an infrastructure that is not replicable and enables it to foreclose the market where the SGEI is provided or related relevant markets. Where this is the case, it may be appropriate to require that competitors are given fair and non-discriminatory access to the infrastructure under appropriate conditions.

59. If distortions of competition are a consequence of the entrustment hindering effective implementation or enforcement of Union legislation aimed at safeguarding the proper functioning of the internal market, the Commission will examine whether the public service could equally well be provided in a less distortive manner, for instance by fully implementing the sectoral Union legislation.

2.10. Transparency

60. For each SGEI compensation falling within the scope of this Communication, the Member State concerned must publish the following information on the internet or by other appropriate means:

(a) the results of the public consultation or other appropriate instruments referred to in paragraph 14;

(b) the content and duration of the public service obligations;

(c) the undertaking and, where applicable, the territory concerned;

(d) the amounts of aid granted to the undertaking on a yearly basis.

2.11. Aid which meets the conditions laid down in Article 2(1) of Decision 2012/21/EU

61. The principles set out in paragraphs 14, 19, 20, 24, 39, 51 to 59 and 60(a) do not apply to aid which meets the conditions laid down in Article 2(1) of Decision 2012/21/EU.

3. REPORTING AND EVALUATION

62. Member States shall report to the Commission on the compliance with this Communication every two years. The reports must provide an overview of the application of this Communication to the different sectors of service providers, including:

(a) a description of the application of the principles set out in this Communication to the services falling within its scope, including in-house activities;

(b) the total amount of aid granted to undertakings falling within the scope of this Communication with a breakdown by the economic sector of the beneficiaries;

(c) an indication of whether, for a particular type of service, the application of the principles set out in this Communication has given rise to difficulties or complaints by third parties; and

(d) any other information concerning the application of the principles set out in this Communication required by the Commission and to be specified in due time before the report is to be submitted.

The first report shall be submitted by 30 June 2014.


64. The reports will be published on the internet site of the Commission.

65. The Commission intends to carry out a review of this Communication by 31 January 2017.

4. CONDITIONS AND OBLIGATIONS ATTACHED TO COMMISSION DECISIONS

66. Pursuant to Article 7(4) of Regulation (EC) No 659/1999, the Commission may attach to a positive decision conditions subject to which aid may be considered compatible with the internal market, and lay down obligations to enable compliance with the decision to be monitored. In the field of SGEI, conditions and obligations may be necessary in particular to ensure that aid granted to the undertakings concerned does not lead to undue distortions of competition and trade in the internal

market. In this context, periodic reports or other obligations may be necessary, in the light of the specific situation of each service of general economic interest.

5. APPLICATION

67. The Commission will apply the provisions of this Communication from 31 January 2012.

68. The Commission will apply the principles set out in this Communication to all aid projects notified to it and will take a decision on those projects in accordance with those principles, even if the projects were notified prior to 31 January 2012.

69. The Commission will apply the principles set out in this Communication to unlawful aid on which it takes a decision after 31 January 2012 even if the aid was granted before this date. However, where the aid was granted before 31 January 2012, the principles set out in paragraphs 14, 19, 20, 24, 39 and 60 do not apply.

6. APPROPRIATE MEASURES

70. The Commission proposes as appropriate measures for the purposes of Article 108(1) of the Treaty that Member States publish the list of existing aid schemes regarding public service compensation which have to be brought into line with this Communication by 31 January 2013, and that they bring those aid schemes into line with this Communication by 31 January 2014.

71. Member States should confirm to the Commission by 29 February 2012 that they agree to the appropriate measures proposed. In the absence of any reply, the Commission will take it that the Member State concerned does not agree.
Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest

(Text with EEA relevance)

(2012/C 8/02)

1. PURPOSE AND SCOPE OF THE COMMUNICATION

1. Services of general economic interest (SGEIs) are not only rooted in the shared values of the Union but also play a central role in promoting social and territorial cohesion. The Union and the Member States, each within their respective powers, must take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions.

2. Certain SGEIs can be provided by public or private undertakings (1) without specific financial support from Member States' authorities. Other services can only be provided if the authority concerned offers financial compensation to the provider. In the absence of specific Union rules, Member States are generally free to determine how their SGEIs should be organised and financed.

3. The purpose of this Communication is to clarify the key concepts underlying the application of the State aid rules to public service compensation (2). It will therefore focus on those State aid requirements that are most relevant for public service compensation.

4. In parallel with this Communication, the Commission envisages adopting an SGEI-specific de minimis Regulation clarifying that certain compensation measures do not constitute State aid within the meaning of Article 107 of the Treaty (3), and is issuing a Decision (4), which declares certain types of SGEI compensation constituting State aid to be compatible with the Treaty pursuant to Article 106(2) of the Treaty and exempts them from the notification obligation under Article 108(3) of the Treaty, and a Framework (5), which sets out the conditions under which State aid for SGEIs not covered by the Decision can be declared compatible under Article 106(2) of the Treaty.

5. This Communication is without prejudice to the application of other provisions of Union law, in particular those relating to public procurement and requirements flowing from the Treaty and from sectoral Union legislation. Where a public authority chooses to entrust a third party with the provision of a service, it is required to comply with Union law governing public procurement, stemming from Articles 49 to 56 of the Treaty, the Union Directives on public procurement (Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (6) and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (7)) and sectoral rules (8). Also in cases where the Directives on public procurement are wholly or partially inapplicable (for example, for service concessions and service contracts listed in Annex IIB to Directive 2004/18/EC, including different types of social services), the award may nevertheless have to meet Treaty requirements of transparency, equality of treatment, proportionality and mutual recognition (9).

6. In addition to the issues addressed in this Communication, the Decision 2012/21/EU and the Communication from the Commission on EU Framework for State aid in the field of public service compensation (2011), the Commission will answer individual questions that arise in the context of the application of the State aid rules to SGEIs. It will do so inter alia through its Interactive Information Service on Services of General Interest, which is accessible on the Commission's website (10).

(1) In accordance with Article 345 of the Treaty, the Treaties in no way prejudice the rules in Member States governing the system of property ownership. Consequently, the competition rules do not discriminate against companies based on whether they are in public or private ownership.

(2) Further guidance is contained in the Guide to the application of the European Union rules on State aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest, SEC(2010) 1545 final, 7 December 2010.

(3) See page 23 of this Official Journal.


(5) See page 15 of this Official Journal.


(9) Case C-324/98 Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG [2000] ECR I-10745, paragraph 60 and Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (OJ C 179, 1.8.2006, p. 2).

(10) http://ec.europa.eu/services_general_interest/registration/form_en.html
7. This Communication is without prejudice to the relevant case-law of the Court of Justice of the European Union.

2. GENERAL PROVISIONS RELATING TO THE CONCEPT OF STATE AID

2.1. Concepts of undertaking and economic activity

8. Based on Article 107(1) of the Treaty, the State aid rules generally only apply where the recipient is an 'undertaking'. Whether or not the provider of a service of general interest is to be regarded as an undertaking is therefore fundamental for the application of the State aid rules.

2.1.1. General principles

9. The Court of Justice has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed (1). The classification of a particular entity as an undertaking thus depends entirely on the nature of its activities. This general principle has three important consequences:

First, the status of the entity under national law is not decisive. For example, an entity that is classified as an association or a sports club under national law may nevertheless have to be regarded as an undertaking within the meaning of Article 107(1) of the Treaty. The only relevant criterion in this respect is whether it carries out an economic activity.

Second, the application of the State aid rules as such does not depend on whether the entity is set up to generate profits. Based on the case-law of the Court of Justice and the General Court, non-profit entities can offer goods and services on a market too (2). Where this is not the case, non-profit providers remain of course entirely outside of State aid control.

Third, the classification of an entity as an undertaking is always relative to a specific activity. An entity that carries out both economic and non-economic activities is to be regarded as an undertaking only with regard to the former.

10. Two separate legal entities may be considered to form one economic unit for the purposes of the application of State aid rules. That economic unit is then considered to be the relevant undertaking. In this respect, the Court of Justice looks at the existence of a controlling share or functional, economic and organic links (3). On the other hand, an entity that in itself does not provide goods or services on a market is not an undertaking for the simple fact of holding shares, even a majority shareholding, when the shareholding gives rise only to the exercise of the rights attached to the status of shareholder or member as well as, if appropriate, the receipt of dividends, which are merely the fruits of the ownership of an asset (4).

11. To clarify the distinction between economic and non-economic activities, the Court of Justice has consistently held that any activity consisting in offering goods and services on a market is an economic activity (5).

12. The question whether a market exists for certain services may depend on the way those services are organised in the Member State concerned (6). The State aid rules only apply where a certain activity is provided in a market environment. The economic nature of certain services can therefore differ from one Member State to another. Moreover, due to political choice or economic developments, the classification of a given service can change over time. What is not a market activity today may turn into one in the future, and vice versa.

13. The decision of an authority not to allow third parties to provide a certain service (for example, because it wishes to provide the service in-house) does not rule out the existence of an economic activity. In spite of such market closure, an economic activity can exist where other

operators would be willing and able to provide the service in the market concerned. More generally, the fact that a particular service is provided in-house (1) has no relevance for the economic nature of the activity (2).

14. Since the distinction between economic and non-economic services depends on political and economic specificities in a given Member State, it is not possible to draw up an exhaustive list of activities that a priori would never be economic. Such a list would not provide genuine legal certainty and would thus be of little use. The following paragraphs instead seek to clarify the distinction with respect to a number of important areas.

15. In the absence of a definition of economic activity in the Treaties, the case-law appears to offer different criteria for the application of internal market rules and for the application of competition law (3).

2.1.2. Exercise of public powers

16. It follows from the Court of Justice case-law that Article 107 of the Treaty does not apply where the State acts ‘by exercising public power’ (4) or where authorities emanating from the State act ‘in their capacity as public authorities’ (5). An entity may be deemed to act by exercising public powers where the activity in question is a task that forms part of the essential functions of the State or is connected with those functions by its nature, its aim and the rules to which it is subject (6). Generally speaking, unless the Member State concerned has decided to introduce market mechanisms, activities that intrinsically form part of the prerogatives of official authority and are performed by the State do not constitute economic activities. Examples are activities related to:

(a) the army or the police;

(b) air navigation safety and control (7);

(c) maritime traffic control and safety (8);

(d) anti-pollution surveillance (9); and

(e) the organisation, financing and enforcement of prison sentences (10).

2.1.3. Social security

17. Whether schemes in the area of social security are to be classified as involving an economic activity depends on the way they are set up and structured. In essence, the Court of Justice and the General Court distinguish between schemes based on the principle of solidarity and economic schemes.

18. The Court of Justice and the General Court use a range of criteria to determine whether a social security scheme is solidarity-based and therefore does not involve an economic activity. A bundle of factors can be relevant in this respect:

(a) whether affiliation with the scheme is compulsory (11);

(b) whether the scheme pursues an exclusively social purpose (12);

(c) whether the scheme is non-profit (13);


(2) Neither has it any relevance for the question whether the service can be defined as SGEI; see section 3.2.


(4) Case C-118/85 Commission v Italy, paragraphs 7 and 8.


whether the benefits are independent of the contributions made (1);

whether the benefits paid are not necessarily proportionate to the earnings of the person insured (2); and

whether the scheme is supervised by the State (3).

Such solidarity-based schemes must be distinguished from economic schemes (4). In contrast with solidarity-based schemes, economic schemes are regularly characterised by:

(a) optional membership (5);

(b) the principle of capitalisation (dependency of entitlements on the contributions paid and the financial results of the scheme) (6);

c) their profit-making nature (7); and

d) the provision of entitlements which are supplementary to those under a basic scheme (8).

Some schemes combine features of both categories. In such cases, the classification of the scheme depends on an analysis of different elements and their respective importance (9).

2.1.4. **Health care**

In the Union, the health care systems differ significantly between Member States. The degree to which different health care providers compete with each other in a market environment largely depends on these national specificities.

22. In some Member States, public hospitals are an integral part of a national health service and are almost entirely based on the principle of solidarity (10). Such hospitals are directly funded from social security contributions and other State resources and provide their services free of charge to affiliated persons on the basis of universal coverage (11). The Court of Justice and the General Court have confirmed that, where such a structure exists, the relevant organisations do not act as undertakings (12).

23. Where that structure exists, even activities that in themselves could be of an economic nature, but are carried out merely for the purpose of providing another non-economic service, are not of an economic nature. An organisation that purchases goods — even in large quantities — for the purpose of offering a non-economic service does not act as an undertaking simply because it is a purchaser in a given market (13).

24. In many other Member States, hospitals and other health care providers offer their services for remuneration, be it directly from patients or from their insurance (14). In such systems, there is a certain degree of competition between hospitals concerning the provision of health care services. Where this is the case, the fact that a health service is provided by a public hospital is not sufficient for the activity to be classified as non-economic.

25. The Court of Justice and the General Court have also clarified that health care services which independent doctors and other private practitioners provide for remuneration at their own risk are to be regarded as an economic activity (15). The same principles would apply as regards independent pharmacies.

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(1) Joined Cases C-159/91 and C-160/91 Poucet and Pistre, paragraphs 17 to 18.
(2) Joined Cases C-218/00 Cisal and INAIL, paragraph 40.
(3) Joined Cases C-159/91 and C-160/91 Poucet and Pistre, paragraphs 14; Case C-218/00 Cisal and INAIL, paragraphs 43 to 48; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 AOK Bundesverband, paragraphs 51 to 55.
(4) See, in particular, Case C-244/94 FFSA and Others, paragraph 19.
(6) Case C-244/94 FFSA and Others, paragraphs 9 and 17 to 20; Case C-67/96 Albany, paragraphs 81 to 85; see also Joined Cases C-115/97 to C-117/97 Brentjens [1999] ECR I-6025, paragraphs 81 to 85, Case C-219/97 Drijvende Bokken [1999] ECR I-6121, paragraphs 71 to 75, and Joined Cases C-180/98 to C-184/98 Pavlov and Others, paragraphs 114 and 115.
(7) Joined Cases C-115/97 to C-117/97 Brentjens.
(8) Joined Cases C-180/98 to C-184/98 Pavlov and Others.
(10) Based on the case-law of the European Courts, a prominent example is the Spanish National Health System (see Case T-319/99 FENIN [2003] ECR II-357).
(11) Depending on the overall characteristics of the system, charges which only cover a small fraction of the true cost of the service may not affect its classification as non-economic.
(13) Case T-319/99 FENIN, paragraph 40.
(14) See, for example, Case C-244/94 FFSA, Case C-67/96 Albany, Joined Cases C-115/97, C-116/97 and C-117/97 Brentjens, and Case C-219/97 Drijvende Bokken.
(15) See Joined Cases C-180 to C-184/98 Pavlov and Others, paragraphs 75 and 77.
2.1.5. Education

26. Case-law of the Union has established that public education organised within the national educational system funded and supervised by the State may be considered as a non-economic activity. In this regard, the Court of Justice has indicated that the State:

‘by establishing and maintaining such a system of public education and financed entirely or mainly by public funds and not by pupils or their parents ... does not intend to become involved in activities for remuneration, but carries out its task towards its population in the social, cultural and educational areas’ (1).

27. According to the same case-law, the non-economic nature of public education is in principle not affected by the fact that pupils or their parents sometimes have to pay tuition or enrolment fees which contribute to the operating expenses of the system. Such financial contributions often only cover a fraction of the true costs of the service and can thus not be considered as remuneration for the service provided. They therefore do not alter the non-economic nature of a general education service predominantly funded by the public purse (2). These principles can cover public educational services such as vocational training (3), private and public primary schools (4) and kindergartens (5), secondary teaching activities in universities (6) and the provision of education in universities (7).

28. Such public provision of educational services must be distinguished from services financed predominantly by parents or pupils or commercial revenues. For example, commercial enterprises offering higher education financed entirely by students clearly fall within the latter category. In certain Member States public institutions can also offer educational services which, due to their nature, financing structure and the existence of competing private organisations, are to be regarded as economic.

29. In the Community Framework for State aid for research and development and innovation (8), the Commission has clarified that certain activities of universities and research organisations fall outside the ambit of the State aid rules. This concerns the primary activities of research organisations, namely:

(a) education for more and better skilled human resources;

(b) the conduct of independent research and development for more knowledge and better understanding, including collaborative research and development; and

(c) the dissemination of research results.

30. The Commission has also clarified that technology transfer activities (licensing, spin-off creation or other forms of management of knowledge created by the research organisation) are non-economic where those activities are of an internal nature (9) and all income is reinvested in the primary activities of the research organisations concerned (10).

2.2. State resources

31. Only advantages granted directly or indirectly through State resources can constitute State aid within the meaning of Article 107 of the Treaty (11). Advantages financed from private resources may have the effect of strengthening the position of certain undertakings but do not fall within the scope of Article 107 of the Treaty.

32. This transfer of State resources may take many forms such as direct grants, tax credits and benefits in kind. In particular, the fact that the State does not charge market prices for certain services constitutes a waiver of State


(3) See, among others, Case C-318/05 Commission v Germany [2007] ECR I-6957, paragraph 68. See also Decision of the Commission of 25 April 2001, N 118/00 Subvention publiques aux clubs sportifs professionnels and decision of the EFTA Surveillance Authority in Case 68123 Norway Nasjonal digital laeringsarena, 12.10.2011, p. 9.


(9) See paragraphs 3.1.1 and 3.1.2 of the Community Framework for State aid for research and development and innovation.

(10) See footnote 25 of the Community Framework for State aid for research and development and innovation, ‘internal nature’ means a situation where the management of the knowledge of the research organisation is conducted either by a department or a subsidiary of the research organisation or jointly with other research organisations. Contracting the provision of specific services to third parties by way of open tenders does not jeopardise the internal nature of such activities.

resources. In its judgment in Case C-482/99 France v Commission (1), the Court of Justice also confirmed that the resources of a public undertaking constitute State resources within the meaning of Article 107 of the Treaty because the public authorities are capable of controlling these resources. In cases where an undertaking entrusted with the operation of an SGEI is financed by resources provided by a public undertaking and this financing is imputable to the State, such financing is thus capable of constituting State aid.

33. The granting, without tendering, of licences to occupy or use public domain, or of other special or exclusive rights having an economic value, may imply a waiver of State resources and create an advantage for the beneficiaries (2).

34. Member States may, in some instances, finance an SGEI from charges or contributions paid by certain undertakings or users, the revenue from which is transferred to the undertakings entrusted with the operation of that SGEI. This type of financing arrangement has been examined by the Court of Justice, in particular in its judgment in Case 173/73 Italy v Commission (3), in which it held that:

‘As the funds in question are financed through compulsory contributions imposed by State legislation and as, as this case shows, they are managed and apportioned in accordance with the provisions of that legislation, they must be regarded as State resources within the meaning of Article 107 of the Treaty, even if they are administered by institutions distinct from the public authorities.’

35. Similarly, in its judgment in Joined Cases C-78/90 to C-83/90 Compagnie Commerciale de l'Ouest (4), the Court of Justice confirmed that measures financed through parafiscal charges constitute measures financed through State resources.

36. Accordingly, compensatory payments for the operation of SGEIs which are financed through parafiscal charges or compulsory contributions imposed by the State and managed and apportioned in accordance with the provisions of the legislation are compensatory payments made through State resources.

2.3. Effect on trade

37. In order to be caught by Article 107 of the Treaty, public service compensation must affect or threaten to affect trade between Member States. Such an effect generally presupposes the existence of a market open to competition. Therefore, where markets have been opened up to competition either by Union or national legislation or de facto by economic development, State aid rules apply. In such situations Member States retain their discretion as to how to define, organise and finance SGEIs, subject to State aid control where compensation is granted to the SGEI provider, be it private or public (including in-house). Where the market has been reserved for a single undertaking (including an in-house provider), the compensation granted to that undertaking is equally subject to State aid control. In fact, where economic activity has been opened up to competition, the decision to provide the SGEI by methods other than through a public procurement procedure that ensures the least cost to the community may lead to distortions in the form of preventing entry by competitors or making easier the expansion of the beneficiary in other markets. Distortions may also occur in the input markets. Aid granted to an undertaking operating on a non-liberalised market may affect trade if the recipient undertaking is also active on liberalised markets (5).

38. Aid measures can also have an effect on trade where the recipient undertaking does not itself participate in cross-border activities. In such cases, domestic supply may be maintained or increased, with the consequence that the opportunities for undertakings established in other Member States to offer their services in that Member State are reduced (6).

39. According to the case-law of the Court of Justice, there is no threshold or percentage below which trade between Member States can be regarded as not having been affected (7). The relatively small amount of aid or the relatively small size of the recipient undertaking does not a priori mean that trade between Member States may not be affected.


40. On the other hand, the Commission has in several cases concluded that activities had a purely local character and did not affect trade between Member States. Examples are:

(a) swimming pools to be used predominantly by the local population (\(^1\));

(b) local hospitals aimed exclusively at the local population (\(^2\));

(c) local museums unlikely to attract cross-border visitors (\(^3\)); and

(d) local cultural events, whose potential audience is restricted locally (\(^4\)).

41. Finally, the Commission does not have to examine all financial support granted by Member States. Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid (\(^5\)) stipulates that aid amounting to less than EUR 200 000 per undertaking over any period of three years is not caught by Article 107(1) of the Treaty. Specific de minimis thresholds apply in the transport, fisheries and agricultural sectors (\(^6\)) and the Commission envisions adopting a Regulation with a specific de minimis threshold for local services of general economic interest.

3. CONDITIONS UNDER WHICH PUBLIC SERVICE COMPENSATION DOES NOT CONSTITUTE STATE AID

3.1. The criteria established by the Court of Justice

42. The Court of Justice, in its Altmark judgment (\(^7\)), provided further clarification regarding the conditions under which public service compensation does not constitute State aid owing to the absence of any advantage.

43. According to the Court of Justice,

‘Where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article (107(1) of the Treaty). However, for such compensation to escape qualification as State aid in a particular case, a number of conditions must be satisfied.

— … First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. …

— … Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings. … Payment by a Member State of compensation for the loss incurred by an undertaking without the parameters of such compensation having been established beforehand, where it turns out after the event that the operation of certain services in connection with the discharge of public service obligations was not economically viable, therefore constitutes a financial measure which falls within the concept of State aid within the meaning of Article (107(1) of the Treaty).

— … Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit …

— … Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations’ (\(^8\)).


\(^3\) Commission Decision in Case N 630/03 — Italy — Local museums Sardinia, OJ C 275, 8.12.2005, p. 3.


\(^7\) Case C-280/00 Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, paragraphs 87 to 93.

\(^8\) Case C-280/00 Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, paragraphs 87 to 93.
44. Sections 3.2 to 3.6 will address the different requirements established in the Altmark case-law, namely the concept of a service of general economic interest for the purposes of Article 106 of the Treaty (1), the need for an entrustment act (2), the obligation to define the parameters of compensation (3), the principles concerning the avoidance of over-compensation (4) and the principles concerning the selection of the provider (5).

45. The concept of service of general economic interest is an evolving notion that depends, among other things, on the needs of citizens, technological and market developments and social and political preferences in the Member State concerned. The Court of Justice has established that SGEIs are services that exhibit special characteristics as compared with those of other economic activities (6).

46. In the absence of specific Union rules defining the scope for the existence of an SGEI, Member States have a wide margin of discretion in defining a given service as an SGEI and in granting compensation to the service provider. The Commission’s competence in this respect is limited to checking whether the Member State has made a manifest error when defining the service as an SGEI (7) and to assessing any State aid involved in the compensation. Where specific Union rules exist, the Member States’ discretion is further bound by those rules, without prejudice to the Commission’s duty to carry out an assessment of whether the SGEI has been correctly defined for the purpose of State aid control.

47. The first Altmark criterion requires the definition of an SGEI task. This requirement coincides with that of Article 106(2) of the Treaty (8). It transpires from Article 106(2) of the Treaty that undertakings entrusted with the operation of SGEIs are undertakings entrusted with ‘a particular task’ (9). Generally speaking, the entrustment of a ‘particular public service task’ implies the supply of services which, if it were considering its own commercial interest, an undertaking would not assume or would not assume to the same extent or under the same conditions (10). Applying a general interest criterion, Member States or the Union may attach specific obligations to such services.

48. The Commission thus considers that it would not be appropriate to attach specific public service obligations to an activity which is already provided or can be provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State, by undertakings operating under normal market conditions (11). As for the question of whether a service can be provided by the market, the Commission’s assessment is limited to checking whether the Member State has made a manifest error.

49. An important example of this principle is the broadband sector, for which the Commission has already given clear indications as to the types of activities that can be regarded as SGEIs. Most importantly, the Commission considers that in areas where private investors have already invested in broadband network infrastructure (or are in the process of expanding further their network infrastructure) and are already providing competitive broadband services with adequate coverage, setting up parallel broadband infrastructure should not be considered as an SGEI. In contrast, where investors are not in a position to provide adequate broadband coverage, SGEI compensation may be granted under certain conditions (12).

50. The Commission also considers that the services to be classified as SGEIs must be addressed to citizens or be in the interest of society as a whole.

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(1) See section 3.2.
(2) See section 3.3.
(3) See section 3.4.
(4) See section 3.5.
(5) See section 3.6.
(8) Case T-289/03 British United Provident Association Ltd (BUPA) v Commission [2008], ECR II-81, paragraphs. 171 and 224.
(9) See, in particular, Case C-127/73 BRT v SABAM [1974] ECR-313.
3.3. Entrustment act

51. For Article 106(2) of the Treaty to apply, the operation of an SGEI must be entrusted to one or more undertakings. The undertakings in question must therefore have been entrusted with a special task by the State (1). Also the first Altmark criterion requires that the undertaking has a public service obligation to discharge. Accordingly, in order to comply with the Altmark case-law, a public service assignment is necessary that defines the obligations of the undertakings in question and of the authority.

52. The public service task must be assigned by way of an act that, depending on the legislation in Member States, may take the form of a legislative or regulatory instrument or a contract. It may also be laid down in several acts. Based on the approach taken by the Commission in such cases, the act or series of acts must at least specify:

(a) the content and duration of the public service obligations;

(b) the undertaking and, where applicable, the territory concerned;

(c) the nature of any exclusive or special rights assigned to the undertaking by the authority in question;

(d) the parameters for calculating, controlling and reviewing the compensation; and

(e) the arrangements for avoiding and recovering any over-compensation.

53. The involvement of the service provider in the process by which it is entrusted with a public service task does not mean that that task does not derive from an act of public authority, even if the entrustment is issued at the request of the service provider (2). In some Member States, it is not uncommon for authorities to finance services which were developed and proposed by the provider itself. However, the authority has to decide whether it approves the provider's proposal before it may grant any compensation. It is irrelevant whether the necessary elements of the entrustment act are inserted directly into the decision to accept the provider's proposal or whether a separate legal act, for example, a contract with the provider, is put in place.

3.4. Parameters of compensation

54. The parameters that serve as the basis for calculating compensation must be established in advance in an objective and transparent manner in order to ensure that they do not confer an economic advantage that could favour the recipient undertaking over competing undertakings.

55. The need to establish the compensation parameters in advance does not mean that the compensation has to be calculated on the basis of a specific formula (for example, a certain price per day, per meal, per passenger or per number of users). What matters is only that it is clear from the outset how the compensation is to be determined.

56. Where the authority decides to compensate all cost items of the provider, it must determine at the outset how those costs will be determined and calculated. Only the costs directly associated with the provision of the SGEI can be taken into account in that context. All the revenue accruing to the undertaking from the provision of the SGEI must be deducted.

57. Where the undertaking is offered a reasonable profit as part of its compensation, the entrustment act must also establish the criteria for calculating that profit.

58. Where a review of the amount of compensation during the entrustment period is provided for, the entrustment act must specify the arrangements for the review and any impact it may have on the total amount of compensation.

59. If the SGEI is assigned under a tendering procedure, the method for calculating the compensation must be included in the information provided to all the undertakings wishing to take part in the procedure.

3.5. Avoidance of overcompensation

60. According to the third Altmark criterion, the compensation must not exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit. Therefore any mechanism concerning the selection of the service provider must be decided in such a way that the level of compensation is determined on the basis of these elements.

61. Reasonable profit should be taken to mean the rate of return on capital (4) that would be required by a typical company considering whether or not to provide the service of general economic interest for the whole duration of the period of entrustment, taking into account the level of risk. The level of risk depends on the sector concerned, the type of service and the characteristics of the compensation mechanism. The rate should be determined where possible by reference to the rate of return on capital that is achieved on similar types of public service contracts under competitive conditions (for

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(1) See, in particular, Case C-127/73 BRT v SABAM [1974] ECR-313.
(2) Case T-17/02 Fred Olsen, paragraph 188.
example, contracts awarded under a tender). In sectors where there is no undertaking comparable to the undertaking entrusted with the operation of the service of general economic interest, reference can be made to comparable undertakings situated in other Member States, or if necessary, in other sectors, provided that the particular characteristics of each sector are taken into account. In determining what constitutes a reasonable profit, the Member States may introduce incentive criteria relating, in particular, to the quality of service provided and gains in productive efficiency. Efficiency gains cannot be achieved at the expense of the quality of the service provided.

3.6. Selection of provider

62. In accordance with the fourth Altmark criterion, the compensation offered must either be the result of a public procurement procedure which allows for selection of the tenderer capable of providing those services at the least cost to the community, or the result of a benchmarking exercise with a typical undertaking, well run and adequately provided with the necessary means.

3.6.1. Amount of compensation where the SGEI is assigned under an appropriate tendering procedure

63. The simplest way for public authorities to meet the fourth Altmark criterion is to conduct an open, transparent and non-discriminatory public procurement procedure in line with Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (1) and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (2), as specified below (3). As indicated in paragraph 5, the conduct of such a public procurement procedure is often a mandatory requirement under existing Union rules.

64. Also in cases where it is not a legal requirement, an open, transparent and non-discriminatory public procurement procedure is an appropriate method to compare different potential offers and set the compensation so as to exclude the presence of aid.

65. Based on the case law of the Court of Justice, a public procurement procedure only excludes the existence of State aid where it allows for the selection of the tenderer capable of providing the service at ‘the least cost to the community’.

66. Concerning the characteristics of the tender, an open (4) procedure in line with the requirement of the public procurement rules is certainly acceptable, but also a restricted (5) procedure can satisfy the fourth Altmark criterion, unless interested operators are prevented to tender without valid reasons. On the other hand, a competitive dialogue (6) or a negotiated procedure with prior publication (7) confer a wide discretion upon the adjudicating authority and may restrict the participation of interested operators. Therefore, they can only be deemed sufficient to satisfy the fourth Altmark criterion in exceptional cases. The negotiated procedure without publication of a contract notice (8) cannot ensure that the procedure leads to the selection of the tenderer capable of providing those services at the least cost to the community.

67. As to the award criteria, the ‘lowest price’ (9) obviously satisfies the fourth Altmark criterion. Also the ‘most economically advantageous tender’ (10) is deemed sufficient. Provided that the award criteria, including environmental (11) or social ones, are closely related to the subject-matter of the service provided and allow for the most economically advantageous offer to match the value of the market (12). Where such circumstances occur, a clawback mechanism may be appropriate to minimise the risk of overcompensation ex ante. The awarding authority is not prevented from setting qualitative standards to be met by all economic operators or from taking qualitative aspects related to the different proposals into account in its award decision.

68. Finally, there can be circumstances where a procurement procedure cannot allow for the least cost to the community as it does not give rise to a sufficient open and genuine competition. This could be the case, for example, due to

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3) The Commission intends to amend this Communication once new Union rules on public procurement have been adopted in order to clarify the relevance for State aid purposes of the use of the procedures foreseen in those new rules.
6) Article 29 of Directive 2004/18/EC.
8) Article 31 of Directive 2004/18/EC. See also Article 40(3) of Directive 2004/17/EC.
13) In other words, the criteria should be defined in such a way as to allow for an effective competition that minimises the advantage for the successful bidder.
the particularities of the service in question, existing intellectual property rights or necessary infrastructure owned by a particular service provider. Similarly, in the case of procedures where only one bid is submitted, the tender cannot be deemed sufficient to ensure that the procedure leads to the least cost for the community.

3.6.2. Amount of compensation where the SGEI is not assigned under a tendering procedure

69. Where a generally accepted market remuneration exists for a given service, that market remuneration provides the best benchmark for the compensation in the absence of a tender.

70. Where no such market remuneration exists, the amount of compensation must be determined on the basis of an analysis of the costs that a typical undertaking, well run and adequately provided with material means so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. The aim is to ensure that the high costs of an inefficient undertaking are not taken as the benchmark.

71. As regards the concept of ‘well run undertaking’ and in the absence of any official definition, the Member States should apply objective criteria that are economically recognised as being representative of satisfactory management. The Commission considers that simply generating a profit is not a sufficient criterion for deeming an undertaking to be ‘well run’. Account should also be taken of the fact that the financial results of undertakings, particularly in the sectors most often concerned by SGEIs, may be strongly influenced by their market power or by sectoral rules.

72. The Commission takes the view that the concept of ‘well run undertaking’ entails compliance with the national, Union or international accounting standards in force. The Member States may base their analysis, among other things, on analytical ratios representative of productivity (such as turnover to capital employed, total cost to turnover, turnover per employee, value added per employee or staff costs to value added). Member States can also use analytical ratios relating to the quality of supply as compared with user expectations. An undertaking entrusted with the operation of an SGEI that does not meet the qualitative criteria laid down by the Member State concerned does not constitute a well run undertaking even if its costs are low.

73. Undertakings with such analytical ratios representative of efficient management may be regarded as representative of typical undertakings. However, the analysis and comparison of the cost structures must take into account the size of the undertaking in question and the fact that in certain sectors undertakings with very different cost structures may exist side by side.

74. The reference to the costs of a ‘typical’ undertaking in the sector under consideration implies that there are a sufficient number of undertakings whose costs may be taken into account. Those undertakings may be located in the same Member State or in other Member States. However, the Commission takes the view that reference cannot be made to the costs of an undertaking that enjoys a monopoly position or receives public service compensation granted on conditions that do not comply with Union law, as in both cases the cost level may be higher than normal. The costs to be taken into consideration are all the costs relating to the SGEI, that is to say, the direct costs necessary to discharge the SGEI and an appropriate contribution to the indirect costs common to both the SGEI and other activities.

75. If the Member State can show that the cost structure of the undertaking entrusted with the operation of the SGEI corresponds to the average cost structure of efficient and comparable undertakings in the sector under consideration, the amount of compensation that will allow the undertaking to cover its costs, including a reasonable profit, is deemed to comply with the fourth Altmark criterion.

76. The expression ‘undertaking adequately provided with material means’ should be taken to mean an undertaking which has the resources necessary for it to discharge immediately the public service obligations incumbent on the undertaking to be entrusted with the operation of the SGEI.

77. ‘Reasonable profit’ should be taken to mean the rate of return on capital that would be required by a typical company considering whether or not to provide the service of general economic interest for the whole duration of the period of entrustment, taking into account the level of risk, as provided in section 3.5.

(1) See for example Commission Decision in Case C 49/06 — Italy — State aid scheme implemented by Italy to remunerate Poste Italiane for distributing postal savings certificates (OJ L 189, 21.7.2009, p. 3).

(2) The rate of return on capital means the Internal Rate of Return (IRR) that the undertaking makes on its invested capital over the lifetime of the project, that is to say the IRR over the cash flows of the contract.
COUNCIL REGULATION (EC) No 139/2004
of 20 January 2004
on the control of concentrations between undertakings
(the EC Merger Regulation)
(Text with EEA relevance)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 83 and 308 thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the European Parliament (2),

Having regard to the opinion of the European Economic and Social Committee (3),

Whereas:

(1) Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (4) has been substantially amended. Since further amendments are to be made, it should be recast in the interest of clarity.

(2) For the achievement of the aims of the Treaty, Article 3(1)(g) gives the Community the objective of instituting a system ensuring that competition in the internal market is not distorted. Article 4(1) of the Treaty provides that the activities of the Member States and the Community are to be conducted in accordance with the principle of an open market economy with free competition. These principles are essential for the further development of the internal market.

(3) The completion of the internal market and of economic and monetary union, the enlargement of the European Union and the lowering of international barriers to trade and investment will continue to result in major corporate reorganisations, particularly in the form of concentrations.

(4) Such reorganisations are to be welcomed to the extent that they are in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community.

(5) However, it should be ensured that the process of reorganisation does not result in lasting damage to competition; Community law must therefore include provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it.

(6) A specific legal instrument is therefore necessary to permit effective control of all concentrations in terms of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations. Regulation (EEC) No 4064/89 has allowed a Community policy to develop in this field. In the light of experience, however, that Regulation should now be recast into legislation designed to meet the challenges of a more integrated market and the future enlargement of the European Union. In accordance with the principles of subsidiarity and of proportionality as set out in Article 5 of the Treaty, this Regulation does not go beyond what is necessary in order to achieve the objective of ensuring that competition in the common market is not distorted, in accordance with the principle of an open market economy with free competition.

(7) Articles 81 and 82, while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not sufficient to control all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty. This Regulation should therefore be based not only on Article 83 but, principally, on Article 308 of the Treaty, under which the Community may give itself the additional powers of action necessary for the attainment of its objectives, and also powers of action with regard to concentrations on the markets for agricultural products listed in Annex I to the Treaty.

(2) OJ C 20, 28.1.2003, p. 4.
(8) The provisions to be adopted in this Regulation should apply to significant structural changes, the impact of which on the market goes beyond the national borders of any one Member State. Such concentrations should, as a general rule, be reviewed exclusively at Community level, in application of a ‘one-stop shop’ system and in compliance with the principle of subsidiarity. Concentrations not covered by this Regulation come, in principle, within the jurisdiction of the Member States.

(9) The scope of application of this Regulation should be defined according to the geographical area of activity of the undertakings concerned and be limited by quantitative thresholds in order to cover those concentrations which have a Community dimension. The Commission should report to the Council on the implementation of the applicable thresholds and criteria so that the Council, acting in accordance with Article 202 of the Treaty, is in a position to review them regularly, as well as the rules regarding pre-notification referral, in the light of the experience gained: this requires statistical data to be provided by the Member States to the Commission to enable it to prepare such reports and possible proposals for amendments. The Commission’s reports and proposals should be based on relevant information regularly provided by the Member States.

(10) A concentration with a Community dimension should be deemed to exist where the aggregate turnover of the undertakings concerned exceeds given thresholds; that is the case irrespective of whether or not the undertakings effecting the concentration have their seat or their principal fields of activity in the Community, provided they have substantial operations there.

(11) The rules governing the referral of concentrations from the Commission to Member States and from Member States to the Commission should operate as an effective corrective mechanism in the light of the principle of subsidiarity; these rules protect the competition interests of the Member States in an adequate manner and take due account of legal certainty and the ‘one-stop shop’ principle.

(12) Concentrations may qualify for examination under a number of national merger control systems if they fall below the turnover thresholds referred to in this Regulation. Multiple notification of the same transaction increases legal uncertainty, effort and cost for undertakings and may lead to conflicting assessments. The system whereby concentrations may be referred to the Commission by the Member States concerned should therefore be further developed.

(13) The Commission should act in close and constant liaison with the competent authorities of the Member States from which it obtains comments and information.

(14) The Commission and the competent authorities of the Member States should together form a network of public authorities, applying their respective competences in close cooperation, using efficient arrangements for information-sharing and consultation, with a view to ensuring that a case is dealt with by the most appropriate authority, in the light of the principle of subsidiarity and with a view to ensuring that multiple notifications of a given concentration are avoided to the greatest extent possible. Referrals of concentrations from the Commission to Member States and from Member States to the Commission should be made in an efficient manner avoiding, to the greatest extent possible, situations where a concentration is subject to a referral both before and after its notification.

(15) The Commission should be able to refer to a Member State notified concentrations with a Community dimension which threaten significantly to affect competition in a market within that Member State presenting all the characteristics of a distinct market. Where the concentration affects competition on such a market, which does not constitute a substantial part of the common market, the Commission should be obliged, upon request, to refer the whole or part of the case to the Member State concerned. A Member State should be able to refer to the Commission a concentration which does not have a Community dimension but which affects trade between Member States and threatens to significantly affect competition within its territory. Other Member States which are also competent to review the concentration should be able to join the request. In such a situation, in order to ensure the efficiency and predictability of the system, national time limits should be suspended until a decision has been reached as to the referral of the case. The Commission should have the power to examine and deal with a concentration on behalf of a requesting Member State or requesting Member States.

(16) The undertakings concerned should be granted the possibility of requesting referrals to or from the Commission before a concentration is notified so as to further improve the efficiency of the system for the control of concentrations within the Community. In such situations, the Commission and national competition authorities should decide within short, clearly defined time limits whether a referral to or from the Commission ought to be made, thereby ensuring the efficiency of the system. Upon request by the undertakings concerned, the Commission should be able to refer to a Member State a concentration with a Community dimension which may significantly affect competition in a market within that Member State presenting all the characteristics of a distinct market; the undertakings concerned should not, however, be required to demonstrate that the effects of the concentration would be detrimental to competition. A concentration should not be referred from the Commission to a Member State which has expressed its disagreement to such a referral. Before notification to national authorities, the undertakings concerned should also be able to request that a concentration without a Community dimension which is capable of being reviewed under the national competition laws of at least three Member States be referred to
It is expedient to define the concept of concentration in such a manner as to cover operations bringing about a lasting change in the control of the undertakings concerned and therefore in the structure of the market. It is therefore appropriate to include, within the scope of this Regulation, all joint ventures performing on a lasting basis all the functions of an autonomous economic entity. It is moreover appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time.

This Regulation should also apply where the undertakings concerned accept restrictions directly related to, and necessary for, the implementation of the concentration. Commission decisions declaring concentrations compatible with the common market in application of this Regulation should automatically cover such restrictions, without the Commission having to assess such restrictions in individual cases. At the request of the undertakings concerned, however, the Commission should, in cases presenting novel or unresolved questions giving rise to genuine uncertainty, expressly assess whether or not any restriction is directly related to, and necessary for, the implementation of the concentration. A case presents a novel or unresolved question giving rise to genuine uncertainty if the question is not covered by the relevant Commission notice in force or a published Commission decision.

The arrangements to be introduced for the control of concentrations should, without prejudice to Article 86(2) of the Treaty, respect the principle of non-discrimination between the public and the private sectors. In the public sector, calculation of the turnover of an undertaking concerned in a concentration needs, therefore, to take account of undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them.

It is necessary to establish whether or not concentrations with a Community dimension are compatible with the common market in terms of the need to maintain and develop effective competition in the common market. In so doing, the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty establishing the European Community and Article 2 of the Treaty on European Union.

In order to ensure a system of undistorted competition in the common market, in furtherance of a policy conducted in accordance with the principle of an open market economy with free competition, this Regulation must permit effective control of all concentrations from the point of view of their effect on competition in the Community. Accordingly, Regulation (EEC) No 4064/89 established the principle that a concentration with a Community dimension which creates or strengthens a dominant position as a result of which effective competition in the common market or in a substantial part of it would be significantly impeded should be declared incompatible with the common market.

The Commission should be given exclusive competence to apply this Regulation, subject to review by the Court of Justice.

The Member States should not be permitted to apply their national legislation on competition to concentrations with a Community dimension, unless this Regulation makes provision therefor. The relevant powers of national authorities should be limited to cases where, failing intervention by the Commission, effective competition is likely to be significantly impeded within the territory of a Member State and where the competition interests of that Member State cannot be sufficiently protected otherwise by this Regulation. The Member States concerned must act promptly in such cases; this Regulation cannot, because of the diversity of national law, fix a single time limit for the adoption of final decisions under national law.

Furthermore, the exclusive application of this Regulation to concentrations with a Community dimension is without prejudice to Article 296 of the Treaty, and does not prevent the Member States from taking appropriate measures to protect legitimate interests other than those pursued by this Regulation, provided that such measures are compatible with the general principles and other provisions of Community law.

It is expedient to define the concept of concentration in such a manner that it would be particularly pertinent in situations where the concentration would affect competition beyond the territory of one Member State. Where a concentration capable of being reviewed under the competition laws of three or more Member States is referred to the Commission prior to any national notification, and no Member State competent to review the case expresses its disagreement, the Commission should acquire exclusive competence to review the concentration and such a concentration should be deemed to have a Community dimension. Such pre-notification referrals from Member States to the Commission should not, however, be made where at least one Member State competent to review the case has expressed its disagreement with such a referral.
In view of the consequences that concentrations in oligopolistic market structures may have, it is all the more necessary to maintain effective competition in such markets. Many oligopolistic markets exhibit a healthy degree of competition. However, under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition. The Community courts have, however, not to date expressly interpreted Regulation (EEC) No 4064/89 as requiring concentrations giving rise to such non-coordinated effects to be declared incompatible with the common market. Therefore, in the interests of legal certainty, it should be made clear that this Regulation permits effective control of all such concentrations by providing that any concentration which would significantly impede effective competition, in the common market or in a substantial part of it, should be declared incompatible with the common market. The notion of 'significant impediment to effective competition' in Article 2(2) and (3) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned.

A significant impediment to effective competition generally results from the creation or strengthening of a dominant position. With a view to preserving the guidance that may be drawn from past judgments of the European courts and Commission decisions pursuant to Regulation (EEC) No 4064/89, while at the same time maintaining consistency with the standards of competitive harm which have been applied by the Commission and the Community courts regarding the compatibility of a concentration with the common market, this Regulation should accordingly establish the principle that a concentration with a Community dimension which would significantly impede effective competition, in the common market or in a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position, is to be declared incompatible with the common market.

In addition, the criteria of Article 81(1) and (3) of the Treaty should be applied to joint ventures performing, on a lasting basis, all the functions of autonomous economic entities, to the extent that their creation has as its consequence an appreciable restriction of competition between undertakings that remain independent.

In order to clarify and explain the Commission's appraisal of concentrations under this Regulation, it is appropriate for the Commission to publish guidance which should provide a sound economic framework for the assessment of concentrations with a view to determining whether or not they may be declared compatible with the common market.

In order to determine the impact of a concentration on competition in the common market, it is appropriate to take account of any substantiated and likely efficiencies put forward by the undertakings concerned. It is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers, that it might otherwise have and that, as a consequence, the concentration would not significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position. The Commission should publish guidance on the conditions under which it may take efficiencies into account in the assessment of a concentration.

Where the undertakings concerned modify a notified concentration, in particular by offering commitments with a view to rendering the concentration compatible with the common market, the Commission should be able to declare the concentration, as modified, compatible with the common market. Such commitments should be proportionate to the competition problem and entirely eliminate it. It is also appropriate to accept commitments before the initiation of proceedings where the competition problem is readily identifiable and can easily be remedied. It should be expressly provided that the Commission may attach to its decision conditions and obligations in order to ensure that the undertakings concerned comply with their commitments in a timely and effective manner so as to render the concentration compatible with the common market. Transparency and effective consultation of Member States as well as of interested third parties should be ensured throughout the procedure.

The Commission should have at its disposal appropriate instruments to ensure the enforcement of commitments and to deal with situations where they are not fulfilled. In cases of failure to fulfill a condition attached to the decision declaring a concentration compatible with the common market, the situation rendering the concentration compatible with the common market does not materialise and the concentration, as implemented, is therefore not authorised by the Commission. As a consequence, if the concentration is implemented, it should be treated in the same way as a non-notified concentration implemented without authorisation. Furthermore, where the Commission has already found that, in the absence of the condition, the concentration would be incompatible with the common market, it should have the power to directly order the dissolution of the concentration, so as to restore the situation prevailing prior to the implementation of the concentration. Where an obligation attached to a decision declaring the concentration compatible with the common market is not fulfilled, the Commission should be able to revoke its decision. Moreover, the Commission should be able to impose appropriate financial sanctions where conditions or obligations are not fulfilled.
Concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market. Without prejudice to Articles 81 and 82 of the Treaty, an indication to this effect exists, in particular, where the market share of the undertakings concerned does not exceed 25 % either in the common market or in a substantial part of it.

The Commission should have the task of taking all the decisions necessary to establish whether or not concentrations with a Community dimension are compatible with the common market, as well as decisions designed to restore the situation prevailing prior to the implementation of a concentration which has been declared incompatible with the common market.

To ensure effective control, undertakings should be obliged to give prior notification of concentrations with a Community dimension following the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest. Notification should also be possible where the undertakings concerned satisfy the Commission of their intention to enter into an agreement for a proposed concentration and demonstrate to the Commission that their plan for that proposed concentration is sufficiently concrete, for example on the basis of an agreement in principle, a memorandum of understanding, or a letter of intent signed by all undertakings concerned, or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension. The implementation of concentrations should be suspended until a final decision of the Commission has been taken. However, it should be possible to derogate from this suspension at the request of the undertakings concerned, where appropriate. In deciding whether or not to grant a derogation, the Commission should take account of all pertinent factors, such as the nature and gravity of damage to the undertakings concerned or to third parties, and the threat to competition posed by the concentration. In the interest of legal certainty, the validity of transactions must nevertheless be protected as much as necessary.

A period within which the Commission must initiate proceedings in respect of a notified concentration and a period within which it must take a final decision on the compatibility or incompatibility with the common market of that concentration should be laid down. These periods should be extended whenever the undertakings concerned offer commitments with a view to rendering the concentration compatible with the common market, in order to allow for sufficient time for the analysis and market testing of such commitment offers and for the consultation of Member States as well as interested third parties. A limited extension of the period within which the Commission must take a final decision should also be possible in order to allow sufficient time for the investigation of the case and the verification of the facts and arguments submitted to the Commission.

The Community respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union (1). Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles.

The undertakings concerned must be afforded the right to be heard by the Commission when proceedings have been initiated; the members of the management and supervisory bodies and the recognised representatives of the employees of the undertakings concerned, and interested third parties, must also be given the opportunity to be heard.

In order properly to appraise concentrations, the Commission should have the right to request all necessary information and to conduct all necessary inspections throughout the Community. To that end, and with a view to protecting competition effectively, the Commission's powers of investigation need to be expanded. The Commission should, in particular, have the right 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 have the right to ask for any information relevant to the subject matter and purpose of the inspection; they should also have the right to affix seals during inspections, particularly in circumstances where there are reasonable grounds to suspect that a concentration has been implemented without being notified; that incorrect, incomplete or misleading information has been supplied to the Commission; or that the undertakings or persons concerned have failed to comply with a condition or obligation imposed by decision of the Commission. In any event, seals should only be used in exceptional circumstances, for the period of time strictly necessary for the inspection, normally not for more than 48 hours.

Without prejudice to the case-law of the Court of Justice, it is also useful to set out the scope of the control that the national judicial authority may exercise when it authorises, as provided by national law and as a precautionary measure, assistance from law enforcement authorities in order to overcome possible opposition on the part of the undertaking against an inspection, including the affixing of seals, ordered by Commission decision. It results from the case-law that the national judicial authority may in particular ask of the Commission 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. The competent authorities of the Member States should cooperate actively in the exercise of the Commission's investigative powers.

When complying with decisions of the Commission, the undertakings and persons concerned cannot be forced to admit that they have committed infringements, 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 themselves or against others the existence of such infringements.

For the sake of transparency, all decisions of the Commission which are not of a merely procedural nature should be widely publicised. While ensuring preservation of 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 and with the competent authorities of third countries should likewise be safeguarded.

Compliance with this Regulation should be enforceable, as appropriate, by means of fines and periodic penalty payments. The Court of Justice should be given unlimited jurisdiction in that regard pursuant to Article 229 of the Treaty.

The conditions in which concentrations, involving undertakings having their seat or their principal fields of activity in the Community, are carried out in third countries should be observed, and provision should be made for the possibility of the Council giving the Commission an appropriate mandate for negotiation with a view to obtaining non-discriminatory treatment for such undertakings.

This Regulation in no way detracts from the collective rights of employees, as recognised in the undertakings concerned, notably with regard to any obligation to inform or consult their recognised representatives under Community and national law.

The Commission should be able to lay down detailed rules concerning the implementation of this Regulation in accordance with the procedures for the exercise of implementing powers conferred on the Commission. For the adoption of such implementing provisions, the Commission should be assisted by an Advisory Committee composed of the representatives of the Member States as specified in Article 23,

HAS ADOPTED THIS REGULATION:

Article 1

Scope

1. Without prejudice to Article 4(5) and Article 22, this Regulation shall apply to all concentrations with a Community dimension as defined in this Article.

2. A concentration has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and

(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

3. A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2 500 million;

(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;

(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and

(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

4. On the basis of statistical data that may be regularly provided by the Member States, the Commission shall report to the Council on the operation of the thresholds and criteria set out in paragraphs 2 and 3 by 1 July 2009 and may present proposals pursuant to paragraph 5.

5. Following the report referred to in paragraph 4 and on a proposal from the Commission, the Council, acting by a qualified majority, may revise the thresholds and criteria mentioned in paragraph 3.

Article 2

Appraisal of concentrations

1. Concentrations within the scope of this Regulation shall be appraised in accordance with the objectives of this Regulation and the following provisions with a view to establishing whether or not they are compatible with the common market.

In making this appraisal, the Commission shall take into account:

(a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community;
(b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

2. A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market.

3. A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.

4. To the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 81(1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the common market.

5. In making this appraisal, the Commission shall take into account in particular:

— whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market,

— whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

Article 3

Definition of concentration

1. A concentration shall be deemed to arise where a change of control on a lasting basis results from:

(a) the merger of two or more previously independent undertakings or parts of undertakings, or

(b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

2. Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

(a) ownership or the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

3. Control is acquired by persons or undertakings which:

(a) are holders of the rights or entitled to rights under the contracts concerned; or

(b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.

4. The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b).

5. A concentration shall not be deemed to arise where:

(a) credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those securities and that any such disposal takes place within one year of the date of acquisition; that period may be extended by the Commission on request where such institutions or companies can show that the disposal was not reasonably possible within the period set;

(b) control is acquired by an office-holder according to the law of a Member State relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings;
Prior notification of concentrations and pre-notification referral at the request of the notifying parties

1. Concentrations with a Community dimension defined in this Regulation shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.

Notification may also be made where the undertakings concerned demonstrate to the Commission a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension.

For the purposes of this Regulation, the term ‘notified concentration’ shall also cover intended concentrations notified pursuant to the second subparagraph. For the purposes of paragraphs 4 and 5 of this Article, the term ‘concentration’ includes intended concentrations within the meaning of the second subparagraph.

2. A concentration which consists of a merger within the meaning of Article 3(1)(a) or in the acquisition of joint control within the meaning of Article 3(1)(b) shall be notified jointly by the parties to the merger or by those acquiring joint control as the case may be. In all other cases, the notification shall be effected by the person or undertaking acquiring control of the whole or parts of one or more undertakings.

3. Where the Commission finds that a notified concentration falls within the scope of this Regulation, it shall publish the fact of the notification, at the same time indicating the names of the undertakings concerned, their country of origin, the nature of the concentration and the economic sectors involved. The Commission shall take account of the legitimate interest of undertakings in the protection of their business secrets.

4. Prior to the notification of a concentration within the meaning of paragraph 1, the persons or undertakings referred to in paragraph 2 may inform the Commission, by means of a reasoned submission, that the concentration may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that Member State.

The Commission shall transmit this submission to all Member States without delay. The Member State referred to in the reasoned submission shall, within 15 working days of receiving the submission, express its agreement or disagreement as regards the request to refer the case. Where that Member State takes no such decision within this period, it shall be deemed to have agreed.

Unless that Member State disagrees, the Commission, where it considers that such a distinct market exists, and that competition in that market may be significantly affected by the concentration, may decide to refer the whole or part of the case to the competent authorities of that Member State with a view to the application of that State’s national competition law.

The decision whether or not to refer the case in accordance with the third subparagraph shall be taken within 25 working days starting from the receipt of the reasoned submission by the Commission. The Commission shall inform the other Member States and the persons or undertakings concerned of its decision. If the Commission does not take a decision within this period, it shall be deemed to have adopted a decision to refer the case in accordance with the submission made by the persons or undertakings concerned.

If the Commission decides, or is deemed to have decided, pursuant to the third and fourth subparagraphs, to refer the whole of the case, no notification shall be made pursuant to paragraph 1 and national competition law shall apply. Article 9(6) to (9) shall apply mutatis mutandis.

5. With regard to a concentration as defined in Article 3 which does not have a Community dimension within the meaning of Article 1 and which is capable of being reviewed under the national competition laws of at least three Member States, the persons or undertakings referred to in paragraph 2 may, before any notification to the competent authorities, inform the Commission by means of a reasoned submission that the concentration should be examined by the Commission.

The Commission shall transmit this submission to all Member States without delay.

Any Member State competent to examine the concentration under its national competition law may, within 15 working days of receiving the reasoned submission, express its disagreement as regards the request to refer the case.

Where at least one such Member State has expressed its disagreement in accordance with the third subparagraph within the period of 15 working days, the case shall not be referred. The Commission shall, without delay, inform all Member States and the persons or undertakings concerned of any such expression of disagreement.

Where no Member State has expressed its disagreement in accordance with the third subparagraph within the period of 15 working days, the concentration shall be deemed to have a Community dimension and shall be notified to the Commission in accordance with paragraphs 1 and 2. In such situations, no Member State shall apply its national competition law to the concentration.

6. The Commission shall report to the Council on the operation of paragraphs 4 and 5 by 1 July 2009. Following this report and on a proposal from the Commission, the Council, acting by a qualified majority, may revise paragraphs 4 and 5.

**Article 5**

**Calculation of turnover**

1. Aggregate turnover within the meaning of this Regulation shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover. The aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 4.

Turnover, in the Community or in a Member State, shall comprise products sold and services provided to undertakings or consumers, in the Community or in that Member State as the case may be.

2. By way of derogation from paragraph 1, where the concentration consists of the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts which are the subject of the concentration shall be taken into account with regard to the seller or sellers.

However, two or more transactions within the meaning of the first subparagraph which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction.

3. 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 (1), after deduction of value added tax and other taxes directly related to those items, where appropriate:

- (i) interest income and similar income;

(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), gross premiums received from Community residents and from residents of one Member State respectively shall be taken into account.

4. Without prejudice to paragraph 2, the aggregate turnover of an undertaking concerned within the meaning of this Regulation shall be calculated by adding together the respective turnovers of the following:

(a) the undertaking concerned;

(b) those undertakings in which the undertaking concerned, directly or indirectly:

- (i) owns more than half the capital or business assets, or
- (ii) has the power to exercise more than half the voting rights, or
- (iii) has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or
- (iv) has the right to manage the undertakings' affairs;

(c) those undertakings which have in the undertaking concerned the rights or powers listed in (b);

(d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b);

(e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (b).

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5. Where undertakings concerned by the concentration jointly have the rights or powers listed in paragraph 4(b), in calculating the aggregate turnover of the undertakings concerned for the purposes of this Regulation:

(a) no account shall be taken of the turnover resulting from the sale of products or the provision of services between the joint undertaking and each of the undertakings concerned or any other undertaking connected with any one of them, as set out in paragraph 4(b) to (e);

(b) account shall be taken of the turnover resulting from the sale of products and the provision of services between the joint undertaking and any third undertakings. This turnover shall be apportioned equally amongst the undertakings concerned.

Article 6

Examination of the notification and initiation of proceedings

1. The Commission shall examine the notification as soon as it is received.

(a) Where it concludes that the concentration notified does not fall within the scope of this Regulation, it shall record that finding by means of a decision.

(b) Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market.

A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

(c) Without prejudice to paragraph 2, where the Commission finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the common market, it shall decide to initiate proceedings. Without prejudice to Article 9, such proceedings shall be closed by means of a decision as provided for in Article 8(1) to (4), unless the undertakings concerned have demonstrated to the satisfaction of the Commission that they have abandoned the concentration.

2. Where the Commission finds that, following modification by the undertakings concerned, a notified concentration no longer raises serious doubts within the meaning of paragraph 1(c), it shall declare the concentration compatible with the common market pursuant to paragraph 1(b).

The Commission may attach to its decision under paragraph 1(b) conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

3. The Commission may revoke the decision it took pursuant to paragraph 1(a) or (b) where:

(a) the decision is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit,

or

(b) the undertakings concerned commit a breach of an obligation attached to the decision.

4. In the cases referred to in paragraph 3, the Commission may take a decision under paragraph 1, without being bound by the time limits referred to in Article 10(1).

5. The Commission shall notify its decision to the undertakings concerned and the competent authorities of the Member States without delay.

Article 7

Suspension of concentrations

1. A concentration with a Community dimension as defined in Article 1, or which is to be examined by the Commission pursuant to Article 4(5), shall not be implemented either before its notification or until it has been declared compatible with the common market pursuant to a decision under Articles 6(1)(b), 8(1) or 8(2), or on the basis of a presumption according to Article 10(6).

2. Paragraph 1 shall not prevent the implementation of a public bid or of a series of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, by which control within the meaning of Article 3 is acquired from various sellers, provided that:

(a) the concentration is notified to the Commission pursuant to Article 4 without delay; and

(b) the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on a derogation granted by the Commission under paragraph 3.

3. The Commission may, on request, grant a derogation from the obligations imposed in paragraphs 1 or 2. The request to grant a derogation must be reasoned. In deciding on the request, the Commission shall take into account inter alia the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration. Such a derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. A derogation may be applied for and granted at any time, be it before notification or after the transaction.

4. The validity of any transaction carried out in contravention of paragraph 1 shall be dependent on a decision pursuant to Article 6(1)(b) or Article 8(1), (2) or (3) or on a presumption pursuant to Article 10(6).
This Article shall, however, have no effect on the validity of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, unless the buyer and seller knew or ought to have known that the transaction was carried out in contravention of paragraph 1.

**Article 8**

**Powers of decision of the Commission**

1. Where the Commission finds that a notified concentration fulfils the criterion laid down in Article 2(2) and, in the cases referred to in Article 2(4), the criteria laid down in Article 81(3) of the Treaty, it shall issue a decision declaring the concentration compatible with the common market.

A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

2. Where the Commission finds that, following modification by the undertakings concerned, a notified concentration fulfils the criterion laid down in Article 2(2) and, in the cases referred to in Article 2(4), the criteria laid down in Article 81(3) of the Treaty, it shall issue a decision declaring the concentration compatible with the common market.

The Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

3. Where the Commission finds that a concentration fulfils the criterion defined in Article 2(3) or, in the cases referred to in Article 2(4), does not fulfil the criteria laid down in Article 81(3) of the Treaty, it shall issue a decision declaring that the concentration is incompatible with the common market.

4. Where the Commission finds that a concentration:

   (a) has already been implemented and that concentration has been declared incompatible with the common market, or

   (b) has been implemented in contravention of a condition attached to a decision taken under paragraph 2, which has found that, in the absence of the condition, the concentration would fulfil the criterion laid down in Article 2(3) or, in the cases referred to in Article 2(4), would not fulfil the criteria laid down in Article 81(3) of the Treaty,

the Commission may:

   — require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration; in circumstances where restoration of the situation prevailing before the implementation of the concentration is not possible through dissolution of the concentration, the Commission may take any other measure appropriate to achieve such restoration as far as possible,

   — order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision.

In cases falling within point (a) of the first subparagraph, the measures referred to in that subparagraph may be imposed either in a decision pursuant to paragraph 3 or by separate decision.

5. The Commission may take interim measures appropriate to restore or maintain conditions of effective competition where a concentration:

   (a) has been implemented in contravention of Article 7, and a decision as to the compatibility of the concentration with the common market has not yet been taken;

   (b) has been implemented in contravention of a condition attached to a decision under Article 6(1)(b) or paragraph 2 of this Article;

   (c) has already been implemented and is declared incompatible with the common market.

6. The Commission may revoke the decision it has taken pursuant to paragraphs 1 or 2 where:

   (a) the declaration of compatibility is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit; or

   (b) the undertakings concerned commit a breach of an obligation attached to the decision.

7. The Commission may take a decision pursuant to paragraphs 1 to 3 without being bound by the time limits referred to in Article 10(3), in cases where:

   (a) it finds that a concentration has been implemented

      (i) in contravention of a condition attached to a decision under Article 6(1)(b), or

      (ii) in contravention of a condition attached to a decision taken under paragraph 2 and in accordance with Article 10(2), which has found that, in the absence of the condition, the concentration would raise serious doubts as to its compatibility with the common market; or

   (b) a decision has been revoked pursuant to paragraph 6.
8. The Commission shall notify its decision to the undertakings concerned and the competent authorities of the Member States without delay.

Article 9

Referral to the competent authorities of the Member States

1. The Commission may, by means of a decision notified without delay to the undertakings concerned and the competent authorities of the other Member States, refer a notified concentration to the competent authorities of the Member State concerned in the following circumstances.

2. Within 15 working days of the date of receipt of the copy of the notification, a Member State, on its own initiative or upon the invitation of the Commission, may inform the Commission, which shall inform the undertakings concerned, that:

(a) a concentration threatens to affect significantly competition in a market within that Member State, which presents all the characteristics of a distinct market, or

(b) a concentration affects competition in a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market.

3. If the Commission considers that, having regard to the market for the products or services in question and the geographical reference market within the meaning of paragraph 7, there is such a distinct market and that such a threat exists, either:

(a) it shall itself deal with the case in accordance with this Regulation; or

(b) it shall refer the whole or part of the case to the competent authorities of the Member State concerned with a view to the application of that State's national competition law.

If, however, the Commission considers that such a distinct market or threat does not exist, it shall adopt a decision to that effect which it shall address to the Member State concerned, and shall itself deal with the case in accordance with this Regulation.

In cases where a Member State informs the Commission pursuant to paragraph 2(b) that a concentration affects competition in a distinct market within its territory that does not form a substantial part of the common market, the Commission shall refer the whole or part of the case relating to the distinct market concerned, if it considers that such a distinct market is affected.

4. A decision to refer or not to refer pursuant to paragraph 3 shall be taken:

(a) as a general rule within the period provided for in Article 10(1), second subparagraph, where the Commission, pursuant to Article 6(1)(b), has not initiated proceedings; or

(b) within 65 working days at most of the notification of the concentration concerned where the Commission has initiated proceedings under Article 6(1)(c), without taking the preparatory steps in order to adopt the necessary measures under Article 8(2), (3) or (4) to maintain or restore effective competition on the market concerned.

5. If within the 65 working days referred to in paragraph 4(b) the Commission, despite a reminder from the Member State concerned, has not taken a decision on referral in accordance with paragraph 3 nor has taken the preparatory steps referred to in paragraph 4(b), it shall be deemed to have taken a decision to refer the case to the Member State concerned in accordance with paragraph 3(b).

6. The competent authority of the Member State concerned shall decide upon the case without undue delay.

Within 45 working days after the Commission's referral, the competent authority of the Member State concerned shall inform the undertakings concerned of the result of the preliminary competition assessment and what further action, if any, it proposes to take. The Member State concerned may exceptionally suspend this time limit where necessary information has not been provided to it by the undertakings concerned as provided for by its national competition law.

Where a notification is requested under national law, the period of 45 working days shall begin on the working day following that of the receipt of a complete notification by the competent authority of that Member State.

7. The geographical reference market shall consist of 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, in particular, conditions of competition are appreciably different in those areas. This assessment should take account in particular of the nature and characteristics of the products or services concerned, of the existence of entry barriers or of consumer preferences, of appreciable differences of the undertakings' market shares between the area concerned and neighbouring areas or of substantial price differences.

8. In applying the provisions of this Article, the Member State concerned may take only the measures strictly necessary to safeguard or restore effective competition on the market concerned.

9. In accordance with the relevant provisions of the Treaty, any Member State may appeal to the Court of Justice, and in particular request the application of Article 243 of the Treaty, for the purpose of applying its national competition law.
Article 10

Time limits for initiating proceedings and for decisions

1. Without prejudice to Article 6(4), the decisions referred to in Article 6(1) shall be taken within 25 working days at most. That period shall begin on the working day following that of the receipt of a notification or, if the information to be supplied with the notification is incomplete, on the working day following that of the receipt of the complete information.

That period shall be increased to 35 working days where the Commission receives a request from a Member State in accordance with Article 9(2) or where, the undertakings concerned offer commitments pursuant to Article 6(2) with a view to rendering the concentration compatible with the common market.

2. Decisions pursuant to Article 8(1) or (2) concerning notified concentrations shall be taken as soon as it appears that the serious doubts referred to in Article 6(1)(c) have been removed, particularly as a result of modifications made by the undertakings concerned, and at the latest by the time limit laid down in paragraph 3.

3. Without prejudice to Article 8(7), decisions pursuant to Article 8(1) to (3) concerning notified concentrations shall be taken within not more than 90 working days of the date on which the proceedings are initiated. That period shall be increased to 105 working days where the undertakings concerned offer commitments pursuant to Article 8(2), second subparagraph, with a view to rendering the concentration compatible with the common market, unless these commitments have been offered less than 55 working days after the initiation of proceedings.

The periods set by the first subparagraph shall likewise be extended if the notifying parties make a request to that effect not later than 15 working days after the initiation of proceedings pursuant to Article 6(1)(c). The notifying parties may make only one such request. Likewise, at any time following the initiation of proceedings, the periods set by the first subparagraph may be extended by the Commission with the agreement of the notifying parties. The total duration of any extensions or extensions effected pursuant to this subparagraph shall not exceed 20 working days.

4. The periods set by paragraphs 1 and 3 shall exceptionally be suspended where, owing to circumstances for which one of the undertakings involved in the concentration is responsible, the Commission has had to request information by decision pursuant to Article 11 or to order an inspection by decision pursuant to Article 13.

The first subparagraph shall also apply to the period referred to in Article 9(4)(b).

5. Where the Court of Justice gives a judgment which annuls the whole or part of a Commission decision which is subject to a time limit set by this Article, the concentration shall be re-examined by the Commission with a view to adopting a decision pursuant to Article 6(1).

The concentration shall be re-examined in the light of current market conditions.

The notifying parties shall submit a new notification or supplement the original notification, without delay, where the original notification becomes incomplete by reason of intervening changes in market conditions or in the information provided. Where there are no such changes, the parties shall certify this fact without delay.

The periods laid down in paragraph 1 shall start on the working day following that of the receipt of complete information in a new notification, a supplemented notification, or a certification within the meaning of the third subparagraph.

The second and third subparagraphs shall also apply in the cases referred to in Article 6(4) and Article 8(7).

6. Where the Commission has not taken a decision in accordance with Article 6(1)(b), (c), 8(1), (2) or (3) within the time limits set in paragraphs 1 and 3 respectively, the concentration shall be deemed to have been declared compatible with the common market, without prejudice to Article 9.

Article 11

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 the persons referred to in Article 3(1)(b), as well as undertakings and associations of undertakings, to provide all necessary information.

2. When sending a simple request for information to a person, an undertaking or an 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, as well as the penalties provided for in Article 14 for supplying incorrect or misleading information.

3. Where the Commission requires a person, an undertaking or an association 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 14 and indicate or impose the penalties provided for in Article 15. 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 concerned. Persons 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 any decision taken pursuant to paragraph 3 to the competent authorities of the Member State in whose territory the residence of the person or the seat of the undertaking or association of undertakings is situated, and to the competent authority of the Member State whose territory is affected. At the specific request of the competent authority of a Member State, the Commission shall also forward to that authority copies of simple requests for information relating to a notified concentration.

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

7. 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. The Commission may be conducted by telephone or other electronic means, the Commission shall state the legal basis and the purpose of the interview.

Where an interview is not conducted on the premises of the Commission or by telephone or other electronic means, the Commission shall inform in advance the competent authority of the Member State in whose territory the interview takes place. If the competent authority of that Member State so requests, officials of that authority may assist the officials and other persons authorised by the Commission to conduct the interview.

**Article 12**

**Inspections by the authorities of the Member States**

1. At the request of the Commission, the competent authorities of the Member States shall undertake the inspections which the Commission considers to be necessary under Article 13(1), or which it has ordered by decision pursuant to Article 13(4). The officials of the competent 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.

2. If so requested by the Commission or by the competent authority of the Member State within 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.

3. Officials and other accompanying persons authorised by the Commission to conduct an inspection shall have the power:

(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;

(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.

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 14 and 15 and the right to have the decision reviewed by the Court of Justice. The Commission shall take such decisions after consulting the competent authority of the Member State in whose territory the inspection is to be conducted.

5. Officials of, and those authorised or appointed by, the competent 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.

**Article 13**

**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 shall have the power:

(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;

(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. 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 14, in the production of the required books or other records related to the business which is incomplete or where answers to questions asked under paragraph 2 of this Article are incorrect or misleading. In good time before the inspection, the Commission shall give notice of the inspection to the competent authority of the Member State in whose territory the inspection 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 14 and 15 and the right to have the decision reviewed by the Court of Justice. The Commission shall take such decisions after consulting the competent authority of the Member State in whose territory the inspection is to be conducted.

5. Officials of, and those authorised or appointed by, the competent 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, including the sealing of business premises, books or records, 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 ensure 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 proportionality of the coercive measures, the national judicial authority may ask the Commission, directly or through the competent authority of that Member State, for detailed explanations relating to the subject matter of the inspection. 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's decision shall be subject to review only by the Court of Justice.

**Article 14**

**Fines**

1. The Commission may by decision impose on the persons referred to in Article 3(1)b, undertakings or associations of undertakings, fines not exceeding 1 % of the aggregate turnover of the undertaking or association of undertakings concerned within the meaning of Article 5 where, intentionally or negligently:

- (a) they supply incorrect or misleading information in a submission, certification, notification or supplement thereto, pursuant to Article 4, Article 10(5) or Article 22(3);
- (b) they supply incorrect or misleading information in response to a request made pursuant to Article 11(2);
- (c) in response to a request made by decision adopted pursuant to Article 11(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time limit;
- (d) they produce the required books or other records related to the business in incomplete form during inspections under Article 13, or refuse to submit to an inspection ordered by decision taken pursuant to Article 13(4);
- (e) in response to a question asked in accordance with Article 13(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 13(4);
- (f) seals affixed by officials or other accompanying persons authorised by the Commission in accordance with Article 13(2)(d) have been broken.

2. The Commission may by decision impose fines not exceeding 10 % of the aggregate turnover of the undertaking concerned within the meaning of Article 5 on the persons referred to in Article 3(1)b or the undertakings concerned where, either intentionally or negligently, they:

- (a) fail to notify a concentration in accordance with Articles 4 or 22(3) prior to its implementation, unless they are expressly authorised to do so by Article 7(2) or by a decision taken pursuant to Article 7(3);
- (b) implement a concentration in breach of Article 7;
- (c) implement a concentration declared incompatible with the common market by decision pursuant to Article 8(3) or do not comply with any measure ordered by decision pursuant to Article 8(4) or (5);
- (d) fail to comply with a condition or an obligation imposed by decision pursuant to Articles 6(1)(b), Article 7(3) or Article 8(2), second subparagraph.

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

4. Decisions taken pursuant to paragraphs 1, 2 and 3 shall not be of a criminal law nature.

**Article 15**

**Periodic penalty payments**

1. The Commission may by decision impose on the persons referred to in Article 3(1)b, undertakings or associations of undertakings, periodic penalty payments not exceeding 5 % of the average daily aggregate turnover of the undertaking or association of undertakings concerned within the meaning of Article 5 for each working day of delay, calculated from the date set in the decision, in order to compel them:

- (a) to supply complete and correct information which it has requested by decision taken pursuant to Article 11(3);
- (b) to submit to an inspection which it has ordered by decision taken pursuant to Article 13(4);
(c) to comply with an obligation imposed by decision pursuant to Article 6(1)(b), Article 7(3) or Article 8(2), second subparagraph; or;

(d) to comply with any measures ordered by decision pursuant to Article 8(4) or (5).

2. Where the persons referred to in Article 3(1)(b), 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 payments at a figure lower than that which would arise under the original decision.

Article 16

Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction within the meaning of Article 229 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payments; it may cancel, reduce or increase the fine or periodic penalty payment imposed.

Article 17

Professional secrecy

1. Information acquired as a result of the application of this Regulation shall be used only for the purposes of the relevant request, investigation or hearing.

2. Without prejudice to Article 4(3), Articles 18 and 20, the Commission and the competent authorities of the Member States, their officials and other 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 they have acquired through the application of this Regulation of the kind covered by the obligation of professional secrecy.

3. Paragraphs 1 and 2 shall not prevent publication of general information or of surveys which do not contain information relating to particular undertakings or associations of undertakings.

Article 18

Hearing of the parties and of third persons

1. Before taking any decision provided for in Article 6(3), Article 7(3), Article 8(2) to (6), and Articles 14 and 15, the Commission shall give the persons, undertakings and associations of undertakings concerned the opportunity, at every stage of the procedure up to the consultation of the Advisory Committee, of making known their views on the objections against them.

2. By way of derogation from paragraph 1, a decision pursuant to Articles 7(3) and 8(5) may be taken provisionally, without the persons, undertakings or associations of undertakings concerned being given the opportunity to make known their views beforehand, provided that the Commission gives them that opportunity as soon as possible after having taken its decision.

3. The Commission shall base its decision only on objections on which the parties have been able to submit their observations. The rights of the defence shall be fully respected in the proceedings. Access to the file shall be open at least to the parties directly involved, subject to the legitimate interest of undertakings in the protection of their business secrets.

4. In so far as the Commission or the competent authorities of the Member States deem it necessary, they may also hear other natural or legal persons. Natural or legal persons showing a sufficient interest and especially members of the administrative or management bodies of the undertakings concerned or the recognised representatives of their employees shall be entitled, upon application, to be heard.

Article 19

Liaison with the authorities of the Member States

1. The Commission shall transmit to the competent authorities of the Member States copies of notifications within three working days and, as soon as possible, copies of the most important documents lodged with or issued by the Commission pursuant to this Regulation. Such documents shall include commitments offered by the undertakings concerned vis-à-vis the Commission with a view to rendering the concentration compatible with the common market pursuant to Article 6(2) or Article 8(2), second subparagraph.

2. The Commission shall carry out the procedures set out in this Regulation in close and constant liaison with the competent authorities of the Member States, which may express their views upon those procedures. For the purposes of Article 9 it shall obtain information from the competent authority of the Member State as referred to in paragraph 2 of that Article and give it the opportunity to make known its views at every stage of the procedure up to the adoption of a decision pursuant to paragraph 3 of that Article; to that end it shall give it access to the file.
3. An Advisory Committee on concentrations shall be consulted before any decision is taken pursuant to Article 8(1) to (6), Articles 14 or 15 with the exception of provisional decisions taken in accordance with Article 18(2).

4. The Advisory Committee shall consist of representatives of the competent authorities of the Member States. Each Member State shall appoint one or two representatives; if unable to attend, they may be replaced by other representatives. At least one of the representatives of a Member State shall be competent in matters of restrictive practices and dominant positions.

5. Consultation shall take place at a joint meeting convened at the invitation of and chaired by the Commission. A summary of the case, together with an indication of the most important documents and a preliminary draft of the decision to be taken for each case considered, shall be sent with the invitation. The meeting shall take place not less than 10 working days after the invitation has been sent. The Commission may in exceptional cases shorten that period as appropriate in order to avoid serious harm to one or more of the undertakings concerned by a concentration.

6. The Advisory Committee shall deliver an opinion on the Commission’s draft decision, if necessary by taking a vote. The Advisory Committee may deliver an opinion even if some members are absent and unrepresented. The opinion shall be delivered in writing and appended to the draft decision. The Commission shall take the utmost account of the opinion delivered by the Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.

7. The Commission shall communicate the opinion of the Advisory Committee, together with the decision, to the addressees of the decision. It shall make the opinion public together with the decision, having regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 20

Publication of decisions

1. The Commission shall publish the decisions which it takes pursuant to Article 8(1) to (6), Articles 14 and 15 with the exception of provisional decisions taken in accordance with Article 18(2) together with the opinion of the Advisory Committee in the Official Journal of the European Union.

2. The publication shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 21

Application of the Regulation and jurisdiction

1. This Regulation alone shall apply to concentrations as defined in Article 3, and Council Regulations (EC) No 1/2003 (1), (EEC) No 1017/68 (2), (EEC) No 4056/86 (3) and (EEC) No 3975/87 (4) shall not apply, except in relation to joint ventures that do not have a Community dimension and which have as their object or effect the coordination of the competitive behaviour of undertakings that remain independent.

2. Subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decisions provided for in this Regulation.

3. No Member State shall apply its national legislation on competition to any concentration that has a Community dimension.

The first subparagraph shall be without prejudice to any Member State’s power to carry out any enquiries necessary for the application of Articles 4(4), 9(2) or after referral, pursuant to Article 9(3), first subparagraph, indent (b), or Article 9(5), to take the measures strictly necessary for the application of Article 9(8).

4. Notwithstanding paragraphs 2 and 3, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law.

Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph.

Any other public interest must be communicated to the Commission by the Member State concerned and shall be recognised by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law before the measures referred to above may be taken. The Commission shall inform the Member State concerned of its decision within 25 working days of that communication.

Article 22

Referral to the Commission

1. One or more Member States may request the Commission to examine any concentration as defined in Article 3 that does not have a Community dimension within the meaning of Article 1 but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request.

Such a request shall be made at most within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned.

2. The Commission shall inform the competent authorities of the Member States and the undertakings concerned of any request received pursuant to paragraph 1 without delay. Any other Member State shall have the right to join the initial request within a period of 15 working days of being informed by the Commission of the initial request.

All national time limits relating to the concentration shall be suspended until, in accordance with the procedure set out in this Article, it has been decided where the concentration shall be examined. As soon as a Member State has informed the Commission and the undertakings concerned that it does not wish to join the request, the suspension of its national time limits shall end.

3. The Commission may, at the latest 10 working days after the expiry of the period set in paragraph 2, decide to examine, the concentration where it considers that it affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request. If the Commission does not take a decision within this period, it shall be deemed to have adopted a decision to examine the concentration in accordance with the request.

The Commission shall inform all Member States and the undertakings concerned of its decision. It may request the submission of a notification pursuant to Article 4.

The Member State or States having made the request shall no longer apply their national legislation on competition to the concentration.

4. Article 2, Article 4(2) to (3), Articles 5, 6, and 8 to 21 shall apply where the Commission examines a concentration pursuant to paragraph 3. Article 7 shall apply to the extent that the concentration has not been implemented on the date on which the Commission informs the undertakings concerned that a request has been made.

Where a notification pursuant to Article 4 is not required, the period set in Article 10(1) within which proceedings may be initiated shall begin on the working day following that on which the Commission informs the undertakings concerned that it has decided to examine the concentration pursuant to paragraph 3.

5. The Commission may inform one or several Member States that it considers a concentration fulfils the criteria in paragraph 1. In such cases, the Commission may invite that Member State or those Member States to make a request pursuant to paragraph 1.

Article 23

Implementing provisions

1. The Commission shall have the power to lay down in accordance with the procedure referred to in paragraph 2:

   (a) implementing provisions concerning the form, content and other details of notifications and submissions pursuant to Article 4;
   (b) implementing provisions concerning time limits pursuant to Article 4(4), (5) Articles 7, 9, 10 and 22;
   (c) the procedure and time limits for the submission and implementation of commitments pursuant to Article 6(2) and Article 8(2);
   (d) implementing provisions concerning hearings pursuant to Article 18.

2. The Commission shall be assisted by an Advisory Committee, composed of representatives of the Member States.

   (a) Before publishing draft implementing provisions and before adopting such provisions, the Commission shall consult the Advisory Committee.
   (b) Consultation shall take place at a meeting convened at the invitation of and chaired by the Commission. A draft of the implementing provisions to be taken shall be sent with the invitation. The meeting shall take place not less than 10 working days after the invitation has been sent.
   (c) The Advisory Committee shall deliver an opinion on the draft implementing provisions, if necessary by taking a vote. The Commission shall take the utmost account of the opinion delivered by the Committee.

Article 24

Relations with third countries

1. The Member States shall inform the Commission of any general difficulties encountered by their undertakings with concentrations as defined in Article 3 in a third country.

2. Initially not more than one year after the entry into force of this Regulation and, thereafter periodically, the Commission shall draw up a report examining the treatment accorded to undertakings having their seat or their principal fields of activity in the Community, in the terms referred to in paragraphs 3 and 4, as regards concentrations in third countries. The Commission shall submit those reports to the Council, together with any recommendations.
3. Whenever it appears to the Commission, either on the basis of the reports referred to in paragraph 2 or on the basis of other information, that a third country does not grant undertakings having their seat or their principal fields of activity in the Community, treatment comparable to that granted by the Community to undertakings from that country, the Commission may submit proposals to the Council for an appropriate mandate for negotiation with a view to obtaining comparable treatment for undertakings having their seat or their principal fields of activity in the Community.

4. Measures taken under this Article shall comply with the obligations of the Community or of the Member States, without prejudice to Article 307 of the Treaty, under international agreements, whether bilateral or multilateral.

Article 25
Repeal

1. Without prejudice to Article 26(2), Regulations (EEC) No 4064/89 and (EC) No 1310/97 shall be repealed with effect from 1 May 2004.

2. References to the repealed Regulations shall be construed as references to this Regulation and shall be read in accordance with the correlation table in the Annex.

Article 26
Entry into force and transitional provisions

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

It shall apply from 1 May 2004.

2. Regulation (EEC) No 4064/89 shall continue to apply to any concentration which was the subject of an agreement or announcement or where control was acquired within the meaning of Article 4(1) of that Regulation before the date of application of this Regulation, subject, in particular, to the provisions governing applicability set out in Article 25(2) and (3) of Regulation (EEC) No 4064/89 and Article 2 of Regulation (EEC) No 1310/97.

3. As regards concentrations to which this Regulation applies by virtue of accession, the date of accession shall be substituted for the date of application of this Regulation.

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


For the Council
The President
C. McCREEVY
## ANNEX

### Correlation table

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COMMISSION REGULATION (EC) No 802/2004
of 21 April 2004
implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings
(Text with EEA relevance)
(OJ L 133, 30.4.2004, p. 1)

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COMMISSION REGULATION (EC) No 802/2004

implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings

(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 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EC Merger Regulation) (1), and in particular Article 23(1) thereof,

Having regard to 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), and in particular Article 23 thereof,

Having consulted the Advisory Committee,

Whereas:

(1) Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings has been recast, with substantial amendments to various provisions of that Regulation.

(2) Commission Regulation (EC) No 447/98 (4) of 1 March 1998 on the notifications, time-limits and hearings provided for in Council Regulation (EEC) No 4064/89 must be modified in order to take account of those amendments. For the sake of clarity it should therefore be repealed and replaced by a new regulation.

(3) The Commission has adopted measures concerning the terms of reference of hearing officers in certain competition proceedings.

(4) Regulation (EC) No 139/2004 is based on the principle of compulsory notification of concentrations before they are put into effect. On the one hand, a notification has important legal consequences which are favourable to the parties to the proposed concentration, while, on the other hand, failure to comply with the obligation to notify renders the parties liable to fines and may also entail civil law disadvantages for them. It is therefore necessary in the interests of legal certainty to define precisely the subject matter and content of the information to be provided in the notification.

(5) It is for the notifying parties to make a full and honest disclosure to the Commission of the facts and circumstances which are relevant for taking a decision on the notified concentration.

(6) Regulation (EC) No 139/2004 also allows the undertakings concerned to request, in a reasoned submission, prior to notification, that a concentration fulfilling the requirements of that Regulation be referred to the Commission by one or more

Member States, or referred by the Commission to one or more Member States, as the case may be. It is important to provide the Commission and the competent authorities of the Member States concerned with sufficient information, in order to enable them to assess, within a short period of time, whether or not a referral ought to be made. To that end, the reasoned submission requesting the referral should contain certain specific information.

(7) In order to simplify and expedite examination of notifications and of reasoned submissions, it is desirable to prescribe that forms be used.

(8) Since notification sets in motion legal time-limits pursuant to Regulation (EC) No 139/2004, the conditions governing such time-limits and the time when they become effective should also be determined.

(9) Rules must be laid down in the interests of legal certainty for calculating the time-limits provided for in Regulation (EC) No 139/2004. In particular, the beginning and end of time periods and the circumstances suspending the running of such periods must be determined, with due regard to the requirements resulting from the exceptionally tight legal timeframe available for the proceedings.

(10) The provisions relating to the Commission's procedure must be framed in such a way as to safeguard fully the right to be heard and the rights of defence. For these purposes, the Commission should distinguish between the parties who notify the concentration, other parties involved in the proposed concentration, third parties and parties regarding whom the Commission intends to take a decision imposing a fine or periodic penalty payments.

(11) The Commission should give the notifying parties and other parties involved in the proposed concentration, if they so request, an opportunity before notification to discuss the intended concentration informally and in strict confidence. In addition, the Commission should, after notification, maintain close contact with those parties, to the extent necessary to discuss with them any practical or legal problems which it discovers on a first examination of the case, with a view, if possible, to resolving such problems by mutual agreement.

(12) In accordance with the principle of respect for the rights of defence, the notifying parties must be given the opportunity to submit their comments on all the objections which the Commission proposes to take into account in its decisions. The other parties involved in the proposed concentration should also be informed of the Commission's objections and should be granted the opportunity to express their views.

(13) Third parties demonstrating a sufficient interest must also be given the opportunity of expressing their views, if they make a written application to that effect.

(14) The various persons entitled to submit comments should do so in writing, both in their own interests and in the interests of sound administration, without prejudice to their right to request a formal oral hearing, where appropriate, to supplement the written procedure. In urgent cases, however, the Commission must be enabled to proceed immediately to formal oral hearings of the notifying parties, of other parties involved or of third parties.

(15) It is necessary to define the rights of persons who are to be heard, to what extent they should be granted access to the Commission's file and on what conditions they may be represented or assisted.

(16) When granting access to the file, the Commission should ensure the protection of business secrets and other confidential infor-
The Commission should be able to ask undertakings that have submitted documents or statements to identify confidential information.

(17) In order to enable the Commission to carry out a proper assessment of commitments offered by the notifying parties with a view to rendering the concentration compatible with the common market, and to ensure due consultation with other parties involved, with third parties and with the authorities of the Member States as provided for in Regulation (EC) No 139/2004, in particular Article 18(1), 18(4), Article 19(1), 19(2), 19(3) and 19(5) thereof, the procedure and time-limits for submitting the commitments referred to in Article 6(2) and Article 8(2) of that Regulation should be laid down.

(18) It is also necessary to define the rules applicable to certain time limits set by the Commission.

(19) The Advisory Committee on Concentrations must deliver its opinion on the basis of a preliminary draft decision. It must therefore be consulted on a case after the inquiry in to that case has been completed. Such consultation does not, however, prevent the Commission from reopening an inquiry if need be.

HAS ADOPTED THIS REGULATION:

CHAPTER I

SCOPE

Article 1

Scope

This Regulation shall apply to the control of concentrations conducted pursuant to Regulation (EC) No 139/2004.

CHAPTER II

NOTIFICATIONS AND OTHER SUBMISSIONS

Article 2

Persons entitled to submit notifications

1. Notifications shall be submitted by the persons or undertakings referred to in Article 4(2) of Regulation (EC) No 139/2004.

2. Where notifications are signed by representatives of persons or of undertakings, such representatives shall produce written proof that they are authorised to act.

3. Joint notifications shall be submitted by a joint representative who is authorised to transmit and to receive documents on behalf of all notifying parties.

Article 3

Submission of notifications

1. Notifications shall be submitted in the manner prescribed by Form CO as set out in Annex I. Under the conditions set out in Annex II, notifications may be submitted in Short Form as defined therein. Joint notifications shall be submitted on a single form.
2. One original and \textit{M1} 37 \textit{copies of the Form CO and the supporting documents shall be submitted to the Commission. The notification shall be delivered to the address referred to in Article 23(1) and in the format specified by the Commission.}

3. The supporting documents shall be either originals or copies of the originals; in the latter case the notifying parties shall confirm that they are true and complete.

4. Notifications shall be in one of the official languages of the Community. For the notifying parties, this language shall also be the language of the proceeding, as well as that of any subsequent proceedings relating to the same concentration. Supporting documents shall be submitted in their original language. Where the original language is not one of the official languages of the Community, a translation into the language of the proceeding shall be attached.

5. Where notifications are made pursuant to Article 57 of the Agreement on the European Economic Area, they may also be submitted in one of the official languages of the EFTA States or the working language of the EFTA Surveillance Authority. If the language chosen for the notifications is not an official language of the Community, the notifying parties shall simultaneously supplement all documentation with a translation into an official language of the Community. The language which is chosen for the translation shall determine the language used by the Commission as the language of the proceeding for the notifying parties.

\textit{Article 4}

\textbf{Information and documents to be provided}

1. Notifications shall contain the information, including documents, requested in the applicable forms set out in the Annexes. The information shall be correct and complete.

2. The Commission may dispense with the obligation to provide any particular information in the notification, including documents, or with any other requirement specified in Annexes I and II where the Commission considers that compliance with those obligations or requirements is not necessary for the examination of the case.

3. The Commission shall without delay acknowledge in writing to the notifying parties or their representatives receipt of the notification and of any reply to a letter sent by the Commission pursuant to Article 5(2) and 5(3).

\textit{Article 5}

\textbf{Effective date of notification}

1. Subject to paragraphs 2, 3 and 4, notifications shall become effective on the date on which they are received by the Commission.

2. Where the information, including documents, contained in the notification is incomplete in any material respect, the Commission shall inform the notifying parties or their representatives in writing without delay. In such cases, the notification shall become effective on the date on which the complete information is received by the Commission.

3. Material changes in the facts contained in the notification coming to light subsequent to the notification which the notifying parties know or ought to know, or any new information coming to light subsequent to the notification which the parties know or ought to know and which would have had to be notified if known at the time of notification, shall be communicated to the Commission without delay. In such cases, when these material changes or new information could have a
significant effect on the appraisal of the concentration, the notification may be considered by the Commission as becoming effective on the date on which the relevant information is received by the Commission; the Commission shall inform the notifying parties or their representatives of this in writing and without delay.

4. Incorrect or misleading information shall be considered to be incomplete information.

5. When the Commission publishes the fact of the notification pursuant to Article 4(3) of Regulation (EC) No 139/2004, it shall specify the date upon which the notification has been received. Where, further to the application of paragraphs 2, 3 and 4 of this Article, the effective date of notification is later than the date specified in that publication, the Commission shall issue a further publication in which it shall state the later date.

Article 6

Specific provisions relating to reasoned submissions, supplements and certifications

1. Reasoned submissions within the meaning of Article 4(4) and 4(5) of Regulation (EC) No 139/2004 shall contain the information, including documents, requested in accordance with Annex III to this Regulation.

2. Article 2, Article 3(1), third sentence, 3(2) to (5), Article 4, Article 5(1), 5 (2) first sentence, 5 (3), 5 (4), Article 21 and Article 23 of this Regulation shall apply mutatis mutandis to reasoned submissions within the meaning of Article 4(4) and 4(5) of Regulation (EC) No 139/2004.

Article 2, Article 3(1), third sentence, 3(2) to (5), Article 4, Article 5(1) to (4), Article 21 and Article 23 of this Regulation shall apply mutatis mutandis to supplements to notifications and certifications within the meaning of Article 10(5) of Regulation (EC) No 139/2004.

CHAPTER III

TIME-LIMITS

Article 7

Beginning of time periods

Time periods shall begin on the working day, as defined in Article 24 of this Regulation, following the event to which the relevant provision of Regulation (EC) No 139/2004 refers.

Article 8

Expiry of time periods

A time period calculated in working days shall expire at the end of its last working day.

A time period set by the Commission in terms of a calendar date shall expire at the end of that day.
Article 9
Suspension of time limit

1. The time limits referred to in Articles 9(4), Article 10(1) and 10(3) of Regulation (EC) No 139/2004 shall be suspended where the Commission has to take a decision pursuant to Article 11(3) or Article 13(4) of that Regulation, on any of the following grounds:

(a) information which the Commission has requested pursuant to Article 11(2) of Regulation (EC) No 139/2004 from one of the notifying parties or another involved party, as defined in Article 11 of this Regulation, is not provided or not provided in full within the time limit fixed by the Commission;

(b) information which the Commission has requested pursuant to Article 11(2) of Regulation (EC) No 139/2004 from a third party, as defined in Article 11 of this Regulation, is not provided or not provided in full within the time limit fixed by the Commission owing to circumstances for which one of the notifying parties or another involved party, as defined in Article 11 of this Regulation, is responsible;

(c) one of the notifying parties or another involved party, as defined in Article 11 of this Regulation, has refused to submit to an inspection deemed necessary by the Commission on the basis of Article 13(1) of Regulation (EC) No 139/2004 or to cooperate in the carrying out of such an inspection in accordance with Article 13(2) of that Regulation;

(d) the notifying parties have failed to inform the Commission of material changes in the facts contained in the notification, or of any new information of the kind referred to in Article 5(3) of this Regulation.

2. The time limits referred to in Articles 9(4), Article 10(1) and 10(3) of Regulation (EC) No 139/2004 shall be suspended where the Commission has to take a decision pursuant to Article 11(3) of that Regulation, without proceeding first by way of simple request for information, owing to circumstances for which one of the undertakings involved in the concentration is responsible.

3. The time limits referred to in Articles 9(4), Article 10(1) and (3) of Regulation (EC) No 139/2004 shall be suspended:

(a) in the cases referred to in points (a) and (b) of paragraph 1, for the period between the expiry of the time limit set in the simple request for information, and the receipt of the complete and correct information required by decision;

(b) in the cases referred to in point (c) of paragraph 1, for the period between the unsuccessful attempt to carry out the inspection and the completion of the inspection ordered by decision;

(c) in the cases referred to in point (d) of paragraph 1, for the period between the occurrence of the change in the facts referred to therein and the receipt of the complete and correct information.

(d) in the cases referred to in paragraph 2 for the period between the expiry of the time limit set in the decision and the receipt of the complete and correct information required by decision.

4. The suspension of the time limit shall begin on the working day following the date on which the event causing the suspension occurred. It shall expire with the end of the day on which the reason for suspension is removed. Where such a day is not a working day, the suspension of the time-limit shall expire with the end of the following working day.
Article 10

Compliance with the time-limits

1. The time limits referred to in Article 4(4), fourth subparagraph, Article 9(4), Article 10(1) and (3), and Article 22(3) of Regulation (EC) No 139/2004 shall be met where the Commission has taken the relevant decision before the end of the period.

2. The time limits referred to in Article 4(4), second subparagraph, Article 4(5), third subparagraph, Article 9(2), Article 22(1), second subparagraph, and 22(2), second subparagraph, of Regulation (EC) No 139/2004 shall be met by a Member State concerned where that Member State, before the end of the period, informs the Commission in writing or makes or joins the request in writing, as the case may be.

3. The time limit referred to in Article 9(6) of Regulation (EC) No 139/2004 shall be met where the competent authority of a Member State concerned informs the undertakings concerned in the manner set out in that provision before the end of the period.

CHAPTER IV

EXERCISE OF THE RIGHT TO BE HEARD; HEARINGS

Article 11

Parties to be heard

For the purposes of the rights to be heard pursuant to Article 18 of Regulation (EC) No 139/2004, the following parties are distinguished:

(a) notifying parties, that is, persons or undertakings submitting a notification pursuant to Article 4(2) of Regulation (EC) No 139/2004;

(b) other involved parties, that is, parties to the proposed concentration other than the notifying parties, such as the seller and the undertaking which is the target of the concentration;

(c) third persons, that is natural or legal persons, including customers, suppliers and competitors, provided they demonstrate a sufficient interest within the meaning of Article 18(4), second sentence, of Regulation (EC) No 139/2004, which is the case in particular
   — for members of the administrative or management bodies of the undertakings concerned or the recognised representatives of their employees;
   — for consumer associations, where the proposed concentration concerns products or services used by final consumers.

(d) parties regarding whom the Commission intends to take a decision pursuant to Article 14 or Article 15 of Regulation (EC) No 139/2004.

Article 12

Decisions on the suspension of concentrations

1. Where the Commission intends to take a decision pursuant to Article 7(3) of Regulation (EC) No 139/2004 which adversely affects one or more of the parties, it shall, pursuant to Article 18(1) of that Regulation, inform the notifying parties and other involved parties in writing of its objections and shall set a time limit within which they may make known their views in writing.

2. Where the Commission, pursuant to Article 18(2) of Regulation (EC) No 139/2004, has taken a decision referred to in paragraph 1 of
this Article provisionally without having given the notifying parties and other involved parties the opportunity to make known their views, it shall without delay send them the text of the provisional decision and shall set a time limit within which they may make known their views in writing.

Once the notifying parties and other involved parties have made known their views, the Commission shall take a final decision annulling, amending or confirming the provisional decision. Where they have not made known their views in writing within the time limit set, the Commission's provisional decision shall become final with the expiry of that period.

Article 13

Decisions on the substance of the case

1. Where the Commission intends to take a decision pursuant to Article 6(3) or Article 8(2) to (6) of Regulation (EC) No 139/2004, it shall, before consulting the Advisory Committee on Concentrations, hear the parties pursuant to Article 18(1) and (3) of that Regulation.

Article 12(2) of this Regulation shall apply mutatis mutandis where, in application of Article 18(2) of Regulation (EC) No 139/2004, the Commission has taken a decision pursuant to Article 8(5) of that Regulation provisionally.

2. The Commission shall address its objections in writing to the notifying parties. The Commission shall, when giving notice of objections, set a time limit within which the notifying parties may inform the Commission of their comments in writing.

The Commission shall inform other involved parties in writing of these objections.

The Commission shall also set a time limit within which those other involved parties may inform the Commission of their comments in writing.

The Commission shall not be obliged to take into account comments received after the expiry of a time limit which it has set.

3. The parties to whom the Commission's objections have been addressed or who have been informed of those objections shall, within the time limit set, submit in writing their comments on the objections. In their written comments, they may set out all facts and matters known to them which are relevant to their defence, and shall attach any relevant documents as proof of the facts set out. They may also propose that the Commission hear persons who may corroborate those facts. They shall submit one original and 10 copies of their comments to the Commission to the address of the Commission's Directorate General for Competition. An electronic copy shall also be submitted at the same address and in the format specified by the Commission. The Commission shall forward copies of such written comments without delay to the competent authorities of the Member States.

4. Where the Commission intends to take a decision pursuant to Article 14 or Article 15 of Regulation (EC) No 139/2004, it shall, before consulting the Advisory Committee on Concentrations, hear pursuant to Article 18(1) and (3) of that Regulation the parties regarding whom the Commission intends to take such a decision.

The procedure provided for in paragraph 2, first and second subparagraphs, and paragraph 3 shall apply, mutatis mutandis.
Article 14

Oral hearings

1. Where the Commission intends to take a decision pursuant to Article 6(3) or Article 8(2) to (6) of Regulation (EC) No 139/2004, it shall afford the notifying parties who have so requested in their written comments the opportunity to develop their arguments in a formal oral hearing. It may also, at other stages in the proceedings, afford the notifying parties the opportunity of expressing their views orally.

2. Where the Commission intends to take a decision pursuant to Article 6(3) or Article 8(2) to (6) of Regulation (EC) No 139/2004, it shall also afford other involved parties who have so requested in their written comments the opportunity to develop their arguments in a formal oral hearing. It may also, at other stages in the proceedings, afford other involved parties the opportunity of expressing their views orally.

3. Where the Commission intends to take a decision pursuant to Article 14 or Article 15 of Regulation (EC) No 139/2004, it shall afford parties on whom it proposes to impose a fine or periodic penalty payment the opportunity to develop their arguments in a formal oral hearing, if so requested in their written comments. It may also, at other stages in the proceedings, afford such parties the opportunity of expressing their views orally.

Article 15

Conduct of formal oral hearings

1. Formal oral hearings shall be conducted by the Hearing Officer in full independence.

2. The Commission shall invite the persons to be heard to attend the formal oral hearing on such date as it shall determine.

3. The Commission shall invite the competent authorities of the Member States to take part in any formal oral hearing.

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 and duly authorised persons admitted by the Hearing Officer.

6. Formal 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 all parties within the meaning of Article 11, the Commission services and the competent authorities of the Member States to ask questions during the formal oral hearing. The Hearing Officer may hold a preparatory meeting with the parties and the Commission services, so as to facilitate the efficient organisation of the formal oral hearing.

8. The statements made by each person heard shall be recorded. Upon request, the recording of the formal oral hearing shall be made available to the persons who attended that hearing. Regard shall be had to the legitimate interest of the undertakings in the protection of their business secrets and other confidential information.
**Article 16**

**Hearing of third persons**

1. If third persons apply in writing to be heard pursuant to Article 18(4), second sentence, of Regulation (EC) No 139/2004, 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.

2. The third persons referred to in paragraph 1 shall make known their views in writing within the time limit set. The Commission may, where appropriate, afford such third parties who have so requested in their written comments the opportunity to participate in a formal hearing. It may also in other cases afford such third parties the opportunity of expressing their views orally.

3. The Commission may likewise invite any other natural or legal person to express its views, in writing as well as orally, including at a formal oral hearing.

**CHAPTER V**

**ACCESS TO THE FILE AND TREATMENT OF CONFIDENTIAL INFORMATION**

**Article 17**

**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, for the purpose of enabling them to exercise their rights of defence. Access shall be granted after the notification of the statement of objections.

2. The Commission shall, upon request, also give the other involved parties who have been informed of the objections access to the file in so far as this is necessary for the purposes of preparing their comments.

3. The right of access to the file shall not extend to confidential information, or to internal documents of the Commission or of the competent authorities of the Member States. The right of access to the file shall equally not extend to correspondence between the Commission and the competent authorities of the Member States or between the latter.

4. Documents obtained through access to the file pursuant to this Article may only be used for the purposes of the relevant proceeding pursuant to Regulation (EC) No 139/2004.

**Article 18**

**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 the disclosure of which is not considered necessary by the Commission for the purpose of the procedure.

2. Any person which makes known its views or comments pursuant to Articles 12, Article 13 and Article 16 of this Regulation, or supplies information pursuant to Article 11 of Regulation (EC) No 139/2004, 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.
3. Without prejudice to paragraph 2, the Commission may require persons referred to in Article 3 of Regulation (EC) No 139/2004, undertakings and associations of undertakings in all cases where they produce or have produced documents or statements pursuant to Regulation (EC) No 139/2004 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 also require persons referred to in Article 3 of Regulation (EC) No 139/2004, undertakings or associations of undertakings to identify any part of a statement of objections, case summary or a decision adopted by the Commission which in their view contains business secrets.

Where business secrets or other confidential information are identified, the persons, undertakings and associations of undertakings shall give reasons and provide a separate non-confidential version by the date set by the Commission.

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

CHAPTER VI

COMMITMENTS OFFERED BY THE UNDERTAKINGS CONCERNED

Article 19

Time limits for submission of commitments

1. Commitments offered by the undertakings concerned pursuant to Article 6(2) of Regulation (EC) No 139/2004 shall be submitted to the Commission within not more than 20 working days from the date of receipt of the notification.

2. Commitments offered by the undertakings concerned pursuant to Article 8(2) of Regulation (EC) No 139/2004 shall be submitted to the Commission within not more than 65 working days from the date on which proceedings were initiated.

Where pursuant to Article 10(3), second subparagraph, of Regulation (EC) No 139/2004 the period for the adoption of a decision pursuant to Article 8(1), (2) and (3) is extended, the period of 65 working days for the submission of commitments shall automatically be extended by the same number of working days.

In exceptional circumstances, the Commission may accept commitments offered after the expiry of the time limit for their submission within the meaning of this paragraph provided that the procedure provided for in Article 19(5) of Regulation (EC) No 139/2004 is complied with.

3. Articles 7, 8 and 9 shall apply mutatis mutandis.

Article 20

Procedure for the submission of commitments

1. One original and 10 copies of commitments offered by the undertakings concerned pursuant to Article 6(2) or Article 8(2) of Regulation (EC) No 139/2004 shall be submitted to the Commission at the address of the Commission's Directorate General for Competition. An electronic
copy shall also be submitted at the same address and in the format
specified by the Commission. The Commission shall forward copies
of such commitments without delay to the competent authorities of
the Member States.

1a. In addition to the requirements set out in paragraph 1, the under-
takings concerned shall, at the same time as offering commitments
pursuant to Article 6(2) or Article 8(2) of Regulation (EC)
No 139/2004, submit one original and 10 copies of the information
and documents prescribed by the Form RM relating to remedies
(Form RM) as set out in Annex IV to this Regulation. The information
submitted shall be correct and complete.

2. When offering commitments pursuant to Articles 6(2) or
Article 8(2) of Regulation (EC) No 139/2004, the undertakings
concerned shall at the same time clearly identify any information
which they consider to be confidential, giving reasons, and shall
provide a separate non-confidential version.

Article 20a

Trustees

1. The commitments offered by the undertakings concerned pursuant
to Article 6(2) or Article 8(2) of Regulation (EC) No 139/2004 may
include, at the own expense of the undertakings concerned, the
appointment of an independent trustee (or trustees) assisting the
Commission in overseeing the parties’ compliance with the
commitments or having a mandate to implement the commitments.
The trustee may be appointed by the parties, after the Commission
has approved its identity, or by the Commission. The trustee shall
carry out its tasks under the supervision of the Commission.

2. The Commission may attach such trustee-related provisions of the
commitments as conditions and obligations pursuant to Article 6(2) or

CHAPTER VII

MISCELLANEOUS PROVISIONS

Article 21

Transmission of documents

1. Transmission of documents and invitations from the Commission
to the addressees may be effected in any of the following ways:
(a) delivery by hand against receipt;
(b) registered letter with acknowledgement of receipt;
(c) fax with a request for acknowledgement of receipt;
(d) telex;
(e) electronic mail with a request for acknowledgement of receipt.

2. Unless otherwise provided in this Regulation, paragraph 1 also
applies to the transmission of documents from the notifying parties,
from other involved parties or from third parties to the Commission.

3. Where a document is sent by telex, by fax or by electronic mail, it
shall be presumed that it has been received by the addressee on the day
on which it was sent.
**Article 22**

Setting of time limits

In setting the time limits provided for pursuant to Article 12(1) and (2), Article 13(2) and Article 16(1), the Commission shall have regard to the time required for the preparation of statements and to the urgency of the case. It shall also take account of working days as well as public holidays in the country of receipt of the Commission’s communication.

Time limits shall be set in terms of a precise calendar date.

**Article 23**

Receipt of documents by the Commission

1. In accordance with the provisions of Article 5(1) of this Regulation, notifications shall be delivered to the Commission at the address of the Commission’s Directorate General for Competition as published by the Commission in the *Official Journal of the European Union*.

2. Additional information requested to complete notifications must reach the Commission at the address referred to in paragraph 1.

3. Written comments on Commission communications pursuant to Article 12(1) and (2), Article 13(2) and Article 16(1) of this Regulation must have reached the Commission at the address referred to in paragraph 1 before the expiry of the time limit set in each case.

**Article 24**

Definition of working days

The expression working days in Regulation (EC) No 139/2004 and in this Regulation means all days other than Saturdays, Sundays, and Commission holidays as published in the *Official Journal of the European Union* before the beginning of each year.

**Article 25**

Repeal and transitional provision


   References to the repealed Regulation shall be construed as references to this Regulation.

2. Regulation (EC) No 447/98 shall continue to apply to any concentration falling within the scope of Regulation (EEC) No 4064/89.

3. For the purposes of paragraph 2, Sections 1 to 12 of the Annex to Regulation (EC) No 447/98 shall be replaced by Sections 1 to 11 of Annex I to this Regulation. In such cases references in those sections to the ‘EC Merger Regulation’ and to the ‘Implementing Regulation’ shall be read as referring to the corresponding provisions of Regulation (EEC) No 4064/89 and Regulation (EC) No 447/98, respectively.

**Article 26**

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 I

FORM CO RELATING TO THE NOTIFICATION OF A CONCENTRATION PURSUANT TO REGULATION (EC) No 139/2004

1. INTRODUCTION

1.1. The purpose of this Form

This Form specifies the information that must be provided by notifying parties when submitting a notification to the European Commission of a proposed merger, acquisition or other concentration. The merger control system of the European Union is laid down in Council Regulation (EC) No 139/2004 (hereinafter referred to as ‘the EC Merger Regulation’), and in Commission Regulation (EC) No 802/2004 (hereinafter referred to as ‘the Implementing Regulation’), to which this Form CO is annexed (1). The text of these regulations, as well as other relevant documents, can be found on the Competition page of the Commission’s Europa web site. Your attention is drawn to the corresponding provisions of the Agreement on the European Economic Area (hereinafter referred to as ‘the EEA Agreement’) (2).

In order to limit the time and expense involved in complying with various merger control procedures in several individual countries, the European Union has put in place a system of merger control by which concentrations having a Community dimension (normally, where the parties to the concentration fulfill certain turnover thresholds) (3) are assessed by the European Commission in a single procedure (the ‘one stop shop’ principle). Mergers which do not meet the turnover thresholds may fall within the competence of the Member States’ and/or the EFTA States’ authorities in charge of merger control.

The EC Merger Regulation requires the Commission to reach a decision within a legal deadline. In an initial phase the Commission normally has 25 working days to decide whether to clear the concentration or to ‘initiate proceedings’, i.e., to undertake an in-depth investigation (4). If the Commission decides to initiate proceedings, it normally has to take a final decision on the operation within no more than 90 working days of the date when proceedings are initiated (5).

In view of these deadlines, and for the ‘one stop shop’ principle to work, it is essential that the Commission is provided, in a timely fashion, with the information required to carry out the necessary investigation and to assess the impact of the concentration on the markets concerned. This requires that a certain amount of information be provided at the time of notification.

It is recognised that the information requested in this Form is substantial. However, experience has shown that, depending on the specific characteristics of the case, not all information is always necessary for an adequate examination of the proposed concentration. Accordingly, if you consider that any particular information requested by this Form may not be necessary for the Commission’s examination of the case, you are encouraged to ask the Commission to dispense with the obligation to provide certain information (‘waiver’). See Section 1.3(g) for more details.

(2) See in particular Article 57 of the EEA Agreement, point 1 of Annex XIV to the EEA Agreement, Protocols 21 and 24 to the EEA Agreement, as well as Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (hereinafter referred to as the ‘Surveillance and Court Agreement’). Any reference to EFTA States shall be understood to mean those EFTA States which are Contracting Parties to the EEA Agreement. As of 1 May 2004, these States are Iceland, Liechtenstein and Norway.
(3) The term ‘concentration’ is defined in Article 3 of the EC Merger Regulation and the term ‘Community dimension’ in Article 1 thereof. Furthermore, Article 4(5) provides that in certain circumstances where the Community turnover thresholds are not met, notifying parties may request that the Commission treat their proposed concentration as having a Community dimension.
(4) See Article 10(1) of the EC Merger Regulation.
(5) See Article 10(3) of the EC Merger Regulation.
Pre-notification contacts are extremely valuable to both the notifying parties and the Commission in determining the precise amount of information required in a notification and, in the majority of cases, will result in a significant reduction of the information required. Notifying parties may refer to the Commission’s Best Practices on the Conduct of EC Merger Control Proceedings, which provides guidance on pre-notification contacts and the preparation of notifications.

In addition, it should be noted that certain concentrations, which are unlikely to pose any competition concerns, can be notified using a Short Form, which is attached to the Implementing Regulation, as Annex II.

1.2. Who must notify

In the case of a merger within the meaning of Article 3(1)(a) of the EC Merger Regulation or the acquisition of joint control of an undertaking within the meaning of Article 3(1)(b) of the EC Merger Regulation, the notification shall be completed jointly by the parties to the merger or by those acquiring joint control, as the case may be (1).

In case of the acquisition of a controlling interest in one undertaking by another, the acquirer must complete the notification.

In the case of a public bid to acquire an undertaking, the bidder must complete the notification.

Each party completing the notification is responsible for the accuracy of the information which it provides.

1.3. The requirement for a correct and complete notification

All information required by this Form must be correct and complete. The information required must be supplied in the appropriate Section of this Form.

In particular you should note that:

(a) In accordance with Article 10(1) of the EC Merger Regulation and Article 5(2) and (4) of the Implementing Regulation, the time-limits of the EC Merger Regulation linked to the notification will not begin to run until all the information that has to be supplied with the notification has been received by the Commission. This requirement is to ensure that the Commission is able to assess the notified concentration within the strict time-limits provided by the EC Merger Regulation.

(b) The notifying parties should verify, in the course of preparing their notification, that contact names and numbers, and in particular fax numbers and e-mail addresses, provided to the Commission are accurate, relevant and up-to-date.

(c) Incorrect or misleading information in the notification will be considered to be incomplete information (Article 5(4) of the Implementing Regulation).

(d) If a notification is incomplete, the Commission will inform the notifying parties or their representatives in writing and without delay. The notification will only become effective on the date on which the complete and accurate information is received by the Commission (Article 10(1) of the EC Merger Regulation, Articles 5(2) and (4) of the Implementing Regulation).

(e) Under Article 14(1)(a) of the EC Merger Regulation, notifying parties who, either intentionally or negligently, supply incorrect or misleading information, may be liable to fines of up to 1 % of the aggregate turnover of the undertaking concerned. In addition, pursuant to Article 6(3)(a) and Article 8(6)(a) of the EC Merger Regulation the Commission may revoke its decision on the compatibility of a notified concentration where it is based on incorrect information for which one of the undertakings is responsible.

(1) See Article 4(2) of the EC Merger Regulation.
(f) You may request in writing that the Commission accept that the notification is complete notwithstanding the failure to provide information required by this Form, if such information is not reasonably available to you in part or in whole (for example, because of the unavailability of information on a target company during a contested bid).

The Commission will consider such a request, provided that you give reasons for the unavailability of that information, and provide your best estimates for missing data together with the sources for the estimates. Where possible, indications as to where any of the requested information that is unavailable to you could be obtained by the Commission should also be provided.

(g) You may request in writing that the Commission accept that the notification is complete notwithstanding the failure to provide information required by this Form, if you consider that any particular information required, in the full or short form version, may not be necessary for the Commission's examination of the case.

The Commission will consider such a request, provided that you give adequate reasons why that information is not relevant and necessary to its inquiry into the notified operation. You should explain this during your pre-notification contacts with the Commission and, submit a written request for a waiver, asking the Commission to dispense with the obligation to provide that information, pursuant to Article 4(2) of the Implementing Regulation.

1.4. How to notify

The notification must be completed in one of the official languages of the European Community. This language will thereafter be the language of the proceedings for all notifying parties. Where notifications are made in accordance with Article 12 of Protocol 24 to the EEA Agreement in an official language of an EFTA State which is not an official language of the Community, the notification must simultaneously be supplemented with a translation into an official language of the Community.

The information requested by this Form is to be set out using the sections and paragraph numbers of the Form, signing a declaration as provided in Section 11, and annexing supporting documentation. In completing Sections 7 to 9 of this Form, the notifying parties are invited to consider whether, for purposes of clarity, these sections are best presented in numerical order, or whether they can be grouped together for each individual affected market (or group of affected markets).

For the sake of clarity, certain information may be put in annexes. However, it is essential that all key substantive pieces of information, and in particular market share information for the parties and their largest competitors, are presented in the body of Form CO. Annexes to this Form shall only be used to supplement the information supplied in the Form itself.

Contact details must be provided in a format provided by the Commission's Directorate-General for Competition (DG Competition). For a proper investigatory process, it is essential that the contact details are accurate. Multiple instances of incorrect contact details may be a ground for declaring a notification incomplete.

Supporting documents are to be submitted in their original language; where this is not an official language of the Community, they must be translated into the language of the proceeding (Article 3(4) of the Implementing Regulation).

Supporting documents may be originals or copies of the originals. In the latter case, the notifying party must confirm that they are true and complete.

One original and ▶37 ◀ copies of the Form CO and the supporting documents shall be submitted to the Commission's Directorate-General for Competition.

The notification shall be delivered to the address referred to in Article 23 (1) of the Implementing Regulation and in the format specified by the Commission from time to time. This address is published in the Official
Journal of the European Union. The notification must be delivered to the Commission on working days as defined by Article 24 of the Implementing Regulation. In order to enable it to be registered on the same day, it must be delivered before 17.00 hrs on Mondays to Thursdays and before 16.00 hrs on Fridays and workdays preceding public holidays and other holidays as determined by the Commission and published in the Official Journal of the European Union. The security instructions given on DG Competition’s website must be adhered to.

1.5. Confidentiality

Article 287 of the Treaty and Article 17(2) of the EC Merger Regulation as well as the corresponding provisions of the EEA Agreement (1) require the Commission, the Member States, the EFTA Surveillance Authority and the EFTA States, their officials and other servants not to disclose information they have acquired through the application of the Regulation of the kind covered by the obligation of professional secrecy. The same principle must also apply to protect confidentiality between notifying parties.

If you believe that your interests would be harmed if any of the information you are asked to supply were to be published or otherwise divulged to other parties, submit this information separately with each page clearly marked ‘Business Secrets’. You should also give reasons why this information should not be divulged or published.

In the case of mergers or joint acquisitions, or in other cases where the notification is completed by more than one of the parties, business secrets may be submitted under separate cover, and referred to in the notification as an annex. All such annexes must be included in the submission in order for a notification to be considered complete.

1.6. Definitions and instructions for purposes of this Form

Notifying party or parties: in cases where a notification is submitted by only one of the undertakings who is a party to an operation, ‘notifying parties’ is used to refer only to the undertaking actually submitting the notification.

Party(ies) to the concentration or parties: these terms relate to both the acquiring and acquired parties, or to the merging parties, including all undertakings in which a controlling interest is being acquired or which is the subject of a public bid.

Except where otherwise specified, the terms notifying party(ies) and party(ies) to the concentration include all the undertakings which belong to the same groups as those parties.

Affected markets: Section 6 of this Form requires the notifying parties to define the relevant product markets, and further to identify which of those relevant markets are likely to be affected by the notified operation. This definition of affected market is used as the basis for requiring information for a number of other questions contained in this Form. The definitions thus submitted by the notifying parties are referred to in this Form as the affected market(s). This term can refer to a relevant market made up either of products or of services.

Year: all references to the word year in this Form should be read as meaning calendar year, unless otherwise stated. All information requested in this Form must, unless otherwise specified, relate to the year preceding that of the notification.

The financial data requested in Sections 3.3 to 3.5 must be provided in euros at the average exchange rates prevailing for the years or other periods in question.

All references contained in this Form are to the relevant articles and paragraphs of the EC Merger Regulation, unless otherwise stated.

(1) See, in particular, Article 122 of the EEA Agreement, Article 9 of Protocol 24 to the EEA Agreement and Article 17(2) of Chapter XIII of Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (ESA Agreement).
1.7. **Provision of information to Employees and their representatives**

The Commission would like to draw attention to the obligations to which the parties to a concentration may be subject under Community and/or national rules on information and consultation regarding transactions of a concentrative nature vis-à-vis employees and/or their representatives.

**SECTION 1**

**Description of the concentration**

1.1. Provide an executive summary of the concentration, specifying the parties to the concentration, the nature of the concentration (for example, merger, acquisition, or joint venture), the areas of activity of the notifying parties, the markets on which the concentration will have an impact (including the main affected markets (1)), and the strategic and economic rationale for the concentration.

1.2. Provide a summary (up to 500 words) of the information provided under Section 1.1. It is intended that this summary will be published on the Commission's website at the date of notification. The summary must be drafted so that it contains no confidential information or business secrets.

**SECTION 2**

**Information about the parties**

2.1. Information on notifying party (or parties)

   Give details of:

   2.1.1. name and address of undertaking;
   2.1.2. nature of the undertaking's business;
   2.1.3. name, address, telephone number, fax number and e-mail address of, and position held by, the appropriate contact person; and
   2.1.4. an address for service of the notifying party (or each of the notifying parties) to which documents and, in particular, Commission decisions may be delivered. The name, telephone number and e-mail address of a person at this address who is authorised to accept service must be provided.

2.2. Information on other parties (2) to the concentration

   For each party to the concentration (except the notifying party or parties) give details of:

   2.2.1. name and address of undertaking;
   2.2.2. nature of undertaking's business;
   2.2.3. name, address, telephone number, fax number and e-mail address of, and position held by, the appropriate contact person; and
   2.2.4. an address for service of the party (or each of the parties) to which documents and, in particular, Commission Decisions may be delivered. The name, e-mail address and telephone number of a person at this address who is authorised to accept service must be provided.

2.3. Appointment of representatives

   Where notifications are signed by representatives of undertakings, such representatives must produce written proof that they are authorised to act.

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(1) See Section 6.III for the definition of affected markets.

(2) This includes the target company in the case of a contested bid, in which case the details should be completed as far as is possible.
The written proof must contain the name and position of the persons granting such authority.

Provide the following contact details of any representatives who have been authorised to act for any of the parties to the concentration, indicating whom they represent:

2.3.1. name of representative;
2.3.2. address of representative;
2.3.3. name, address, telephone number, fax number and e-mail address of person to be contacted; and
2.3.4. an address of the representative (in Brussels if available) to which correspondence may be sent and documents delivered.

SECTION 3

Details of the concentration

3.1. Describe the nature of the concentration being notified. In doing so, state:

(a) whether the proposed concentration is a full legal merger, an acquisition of sole or joint control, a full-function joint venture within the meaning of Article 3(4) of the EC Merger Regulation or a contract or other means of conferring direct or indirect control within the meaning of Article 3(2) of the EC Merger Regulation;
(b) whether the whole or parts of parties are subject to the concentration;
(c) a brief explanation of the economic and financial structure of the concentration;
(d) whether any public offer for the securities of one party by another party has the support of the former's supervisory boards of management or other bodies legally representing that party;
(e) the proposed or expected date of any major events designed to bring about the completion of the concentration;
(f) the proposed structure of ownership and control after the completion of the concentration;
(g) any financial or other support received from whatever source (including public authorities) by any of the parties and the nature and amount of this support; and
(h) the economic sectors involved in the concentration.

3.2. State the value of the transaction (the purchase price or the value of all the assets involved, as the case may be).

3.3. For each of the undertakings concerned by the concentration (1) provide the following data (2) for the last financial year:

3.3.1. world-wide turnover;
3.3.2. Community-wide turnover;
3.3.3. EFTA-wide turnover;
3.3.4. turnover in each Member State;

(1) See Commission Notice on the concept of undertakings concerned.
(2) See, generally, the Commission Notice on calculation of turnover. Turnover of the acquiring party or parties to the concentration should include the aggregated turnover of all undertakings within the meaning of Article 5(4) of the EC Merger Regulation. Turnover of the acquired party or parties should include the turnover relating to the parts subject to the transaction within the meaning of Article 5(2) of the EC Merger Regulation. Special provisions are contained in Articles 5(3), (4) and (5) of the EC Merger Regulation for credit, insurance, other financial institutions and joint undertakings.
3.3.5. turnover in each EFTA State;

3.3.6. the Member State, if any, in which more than two-thirds of Community-wide turnover is achieved; and

3.3.7. the EFTA State, if any, in which more than two-thirds of EFTA-wide turnover is achieved.

3.4. For the purposes of Article 1(3) of the EC Merger Regulation, if the operation does not meet the thresholds set out in Article 1(2), provide the following data for the last financial year:

3.4.1. the Member States, if any, in which the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; and

3.4.2. the Member States, if any, in which the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million.

3.5. For the purposes of determining whether the concentration qualifies as an EFTA cooperation case (1), provide the following information with respect to the last financial year:

3.5.1. does the combined turnover of the undertakings concerned in the territory of the EFTA States equal 25 % or more of their total turnover in the EEA territory?

3.5.2. does each of at least two undertakings concerned have a turnover exceeding EUR 250 million in the territory of the EFTA States?

3.6. Describe the economic rationale of the concentration.

SECTION 4

Ownership and control (2)

4.1. For each of the parties to the concentration provide a list of all undertakings belonging to the same group.

This list must include:

4.1.1. all undertakings or persons controlling these parties, directly or indirectly;

4.1.2. all undertakings active on any affected market (3) that are controlled, directly or indirectly:

(a) by these parties;

(b) by any other undertaking identified in 4.1.1.

(1) See Article 57 of the EEA Agreement and, in particular, Article 2(1) of Protocol 24 to the EEA Agreement. A case qualifies as a cooperation case if the combined turnover of the undertakings concerned in the territory of the EFTA States equals 25 % or more of their total turnover within the territory covered by the EEA Agreement; or each of at least two undertakings concerned has a turnover exceeding EUR 250 million in the territory of the EFTA States; or the concentration is liable to significantly impede effective competition in the territories of the EFTA States or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position.

(2) See Articles 3(3), 3(4) and 3(5) and Article 5(4) of the EC Merger Regulation.

(3) See Section 6 for the definition of affected markets.
For each entry listed above, the nature and means of control should be specified.

The information sought in this section may be illustrated by the use of organization charts or diagrams to show the structure of ownership and control of the undertakings.

4.2. With respect to the parties to the concentration and each undertaking or person identified in response to Section 4.1, provide:

4.2.1. a list of all other undertakings which are active in affected markets (affected markets are defined in Section 6) in which the undertakings, or persons, of the group hold individually or collectively 10% or more of the voting rights, issued share capital or other securities;

in each case, identify the holder and state the percentage held;

4.2.2. a list for each undertaking of the members of their boards of management who are also members of the boards of management or of the supervisory boards of any other undertaking which is active in affected markets; and (where applicable) for each undertaking a list of the members of their supervisory boards who are also members of the boards of management of any other undertaking which is active in affected markets;

in each case, identify the name of the other undertaking and the positions held;

4.2.3. details of acquisitions made during the last three years by the groups identified above (Section 4.1) of undertakings active in affected markets as defined in Section 6.

Information provided here may be illustrated by the use of organization charts or diagrams to give a better understanding.

SECTION 5

Supporting documentation

Notifying parties must provide the following:

5.1. copies of the final or most recent versions of all documents bringing about the concentration, whether by agreement between the parties to the concentration, acquisition of a controlling interest or a public bid;

5.2. in a public bid, a copy of the offer document; if it is unavailable at the time of notification, it should be submitted as soon as possible and not later than when it is posted to shareholders;

5.3. copies of the most recent annual reports and accounts of all the parties to the concentration; and

5.4. copies of all analyses, reports, studies, surveys, and any comparable documents prepared by or for any member(s) of the board of directors, or the supervisory board, or the other person(s) exercising similar functions (or to whom such functions have been delegated or entrusted), or the shareholders' meeting, for the purpose of assessing or analysing the concentration with respect to market shares, competitive conditions, competitors (actual and potential), the rationale of the concentration, potential for sales growth or expansion into other product or geographic markets, and/or general market conditions. (1)

For each of these documents, indicate (if not contained in the document itself) the date of preparation, the name and title of each individual who prepared each such document.

(1) As set out in introductory Parts 1.1 and 1.3(g), in the context of pre-notification, you may want to discuss with the Commission to what extent dispensation (waivers) to provide the requested documents would be appropriate. Where waivers are sought, the Commission may specify the documents to be provided in a particular case in a request for information under Article 11 of the EC Merger Regulation.
SECTION 6

Market definitions

The relevant product and geographic markets determine the scope within which the market power of the new entity resulting from the concentration must be assessed. (1)

The notifying party or parties must provide the data requested having regard to the following definitions:

I. Relevant product markets:

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. A relevant product market may in some cases be composed of a number of individual products and/or services which present largely identical physical or technical characteristics and are interchangeable.

Factors relevant to the assessment of the relevant product market include the analysis of why the products or services in these markets are included and why others are excluded by using the above definition, and having regard to, for example, substitutability, conditions of competition, prices, cross-price elasticity of demand or other factors relevant for the definition of the product markets (for example, supply-side substitutability in appropriate cases).

II. Relevant geographic markets:

The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of relevant products 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.

Factors relevant to the assessment of the relevant geographic market include inter alia the nature and characteristics of the products or services concerned, the existence of entry barriers, consumer preferences, appreciable differences in the undertakings' market shares between neighbouring geographic areas or substantial price differences.

III. Affected markets:

For purposes of information required in this Form, affected markets consist of relevant product markets where, in the EEA territory, in the Community, in the territory of the EFTA States, in any Member State or in any EFTA State:

(a) two or more of the parties to the concentration are engaged in business activities in the same product market and where the concentration will lead to a combined market share of 15 % or more. These are horizontal relationships;

(b) one or more of the parties to the concentration are engaged in business activities in a product market, which is upstream or downstream of a product market in which any other party to the concentration is engaged, and any of their individual or combined market shares at either level is 25 % or more, regardless of whether there is or is not any existing supplier/customer relationship between the parties to the concentration (2). These are vertical relationships.

(1) See Commission Notice on the definition of the relevant market for the purposes of Community competition law.

(2) For example, if a party to the concentration holds a market share larger than 25 % in a market that is upstream to a market in which the other party is active, then both the upstream and the downstream markets are affected markets. Similarly, if a vertically integrated company merges with another party which is active at the downstream level, and the merger leads to a combined market share downstream of 25 % or more, then both the upstream and the downstream markets are affected markets.
On the basis of the above definitions and market share thresholds, provide the following information: (1)

— Identify each affected market within the meaning of Section III, at:
  — the EEA, Community or EFTA level;
  — the individual Member States or EFTA States level.

6.2. In addition, state and explain the parties’ view regarding the scope of the relevant geographic market within the meaning of Section II that applies in relation to each affected market identified above.

IV. Other markets in which the notified operation may have a significant impact

6.3. On the basis of the above definitions, describe the product and geographic scope of markets other than affected markets identified in Section 6.1 in which the notified operation may have a significant impact, for example, where:

(a) any of the parties to the concentration has a market share larger than 25 % and any other party to the concentration is a potential competitor into that market. A party may be considered a potential competitor, in particular, where it has plans to enter a market, or has developed or pursued such plans in the past two years;

(b) any of the parties to the concentration has a market share larger than 25 % and any other party to the concentration holds important intellectual property rights for that market;

(c) any of the parties to the concentration is present in a product market, which is a neighbouring market closely related to a product market in which any other party to the concentration is engaged, and the individual or combined market shares of the parties in any one of these markets is 25 % or more. Product markets are closely related neighbouring markets when the products are complementary to each other (2) or when they belong to a range of products that is generally purchased by the same set of customers for the same end use (3);

where such markets include the whole or a part of the EEA.

In order to enable the Commission to consider, from the outset, the competitive impact of the proposed concentration in the markets identified under this Section 6.3, notifying parties are invited to submit the information under Sections 7 and 8 of this Form in relation to those markets.

SECTON 7

Information on affected markets

For each affected relevant product market, for each of the last three financial years (4):

(a) for the EEA territory;
(b) for the Community as a whole;
(c) for the territory of the EFTA States as a whole;
(d) individually for each Member State and EFTA State where the parties to the concentration do business; and

(1) As set out in introductory Parts 1.1 and 1.3(g), in the context of pre-notification, you may want to discuss with the Commission to what extent dispensation (waivers) to provide the requested information would be appropriate for certain affected markets, or for certain other markets (as described under IV).

(2) Products (or services) are called complementary when, for example, the use (or consumption) of one product essentially implies the use (or consumption) of the other product, such as for staple machines and staples, and printers and printer cartridges.

(3) Examples of products belonging to such a range would be whisky and gin sold to bars and restaurants, and different materials for packaging a certain category of goods sold to producers of such goods.

(4) Without prejudice to Article 4(2) of the Implementing Regulation.
provide the following:

7.1. an estimate of the total size of the market in terms of sales value (in euros) and volume (units) (1). Indicate the basis and sources for the calculations and provide documents where available to confirm these calculations;

7.2. the sales in value and volume, as well as an estimate of the market shares, of each of the parties to the concentration;

7.3. an estimate of the market share in value (and where appropriate, volume) of all competitors (including importers) having at least 5 % of the geographic market under consideration. On this basis, provide an estimate of the HHI index (2) pre- and post-merger, and the difference between the two (the delta) (3). Indicate the proportion of market shares used as a basis to calculate the HHI. Identify the sources used to calculate these market shares and provide documents where available to confirm the calculation;

7.4. the name, address, telephone number, fax number and e-mail address of the head of the legal department (or other person exercising similar functions; and in cases where there is no such person, then the chief executive) for the competitors identified under 7.3;

7.5. an estimate of the total value and volume and source of imports from outside the EEA territory and identify:

(a) the proportion of such imports that are derived from the groups to which the parties to the concentration belong;

(b) an estimate of the extent to which any quotas, tariffs or non-tariff barriers to trade, affect these imports; and

(c) an estimate of the extent to which transportation and other costs affect these imports;

7.6. the extent to which trade among States within the EEA territory is affected by:

(a) transportation and other costs; and

(b) other non-tariff barriers to trade;

7.7. the manner in which the parties to the concentration produce, price and sell the products and/or services; for example, whether they manufacture and price locally, or sell through local distribution facilities;

7.8. a comparison of price levels in each Member State and EFTA State by each party to the concentration and a similar comparison of price levels between the Community, the EFTA States and other areas where these products are produced (e.g. Russia, the United States of America, Japan, China, or other relevant areas); and

7.9. the nature and extent of vertical integration of each of the parties to the concentration compared with their largest competitors.

(1) The value and volume of a market should reflect output less exports plus imports for the geographic areas under consideration. If readily available, please provide disaggregated information on imports and exports by country of origin and destination, respectively.

(2) HHI stands for Herfindahl-Hirschman Index, a measure of market concentration. The HHI is calculated by summing the squares of the individual market shares of all the firms in the market. For example, a market containing five firms with market shares of 40 %, 20 %, 15 %, 15 %, and 10 %, respectively, has an HHI of 2 550 \((40^2 + 20^2 + 15^2 + 15^2 + 10^2 = 2 550)\). The HHI ranges from close to zero (in an atomistic market) to 10 000 (in the case of a pure monopoly). The post-merger HHI is calculated on the working assumption that the individual market shares of the companies do not change. Although it is best to include all firms in the calculation, lack of information about very small firms may not be important because such firms do not affect the HHI significantly.

(3) The increase in concentration as measured by the HHI can be calculated independently of the overall market concentration by doubling the product of the market shares of the merging firms. For example, a merger of two firms with market shares of 30 % and 15 % respectively would increase the HHI by 900 \((30 \times 15 \times 2 = 900)\). The explanation for this technique is as follows: Before the merger, the market shares of the merging firms contribute to the HHI by their squares individually: \((a^2 + b^2)\). After the merger, the contribution is the square of their sum: \((a + b)^2\), which equals \((a^2 + b^2 + 2ab)\). The increase in the HHI is therefore represented by \(2ab\).
SECTION 8

General conditions in affected markets

8.1. Identify the five largest independent (1) suppliers to the parties to the concentration and their individual shares of purchases from each of these suppliers (of raw materials or goods used for purposes of producing the relevant products). Provide the name, address, telephone number, fax number and e-mail address of the head of the legal department (or other person exercising similar functions; and in cases where there is no such person, then the chief executive) for each of these suppliers.

Structure of supply in affected markets

8.2. Explain the distribution channels and service networks that exist in the affected markets. In so doing, take account of the following where appropriate:

(a) the distribution systems prevailing in the market and their importance. To what extent is distribution performed by third parties and/or undertakings belonging to the same group as the parties identified in Section 4?

(b) the service networks (for example, maintenance and repair) prevailing and their importance in these markets. To what extent are such services performed by third parties and/or undertakings belonging to the same group as the parties identified in Section 4?

8.3. Provide an estimate of the total Community-wide and EFTA-wide capacity for the last three years. Over this period what proportion of this capacity is accounted for by each of the parties to the concentration, and what have been their respective rates of capacity utilization. If applicable, identify the location and capacity of the manufacturing facilities of each of the parties to the concentration in affected markets.

8.4. Specify whether any of the parties to the concentration, or any of the competitors, have ‘pipeline products’, products likely to be brought to market in the near term, or plans to expand (or contract) production or sales capacity. If so, provide an estimate of the projected sales and market shares of the parties to the concentration over the next three to five years.

8.5. If you consider any other supply-side considerations to be relevant, they should be specified.

Structure of demand in affected markets

8.6. Identify the five (2) largest independent customers of the parties in each affected market and their individual share of total sales for such products accounted for by each of those customers. Provide the name, address, telephone number, fax number and e-mail address of the head of the legal department (or other person exercising similar functions; and in cases where there is no such person, then the chief executive) for each of these customers.

8.7. Explain the structure of demand in terms of:

(a) the phases of the markets in terms of, for example, take-off, expansion, maturity and decline, and a forecast of the growth rate of demand;

(b) the importance of customer preferences, for example in terms of brand loyalty, the provision of pre- and after-sales services, the provision of a full range of products, or network effects;

(1) That is, suppliers which are not subsidiaries, agents or undertakings forming part of the group of the party in question. In addition to those five independent suppliers the notifying parties can, if they consider it necessary for a proper assessment of the case, identify the intra-group suppliers. The same will apply in 8.6 in relation to customers.

(2) Experience has shown that the examination of complex cases often requires more customer contact details. In the course of pre-notification contacts, the Commission’s services may ask for more customer contact details for certain affected markets.
(c) the role of product differentiation in terms of attributes or quality, and the extent to which the products of the parties to the concentration are close substitutes;

(d) the role of switching costs (in terms of time and expense) for customers when changing from one supplier to another;

(e) the degree of concentration or dispersion of customers;

(f) segmentation of customers into different groups with a description of the ‘typical customer’ of each group;

(g) the importance of exclusive distribution contracts and other types of long-term contracts; and

(h) the extent to which public authorities, government agencies, State enterprises or similar bodies are important participants as a source of demand.

Market entry

8.8. Over the last five years, has there been any significant entry into any affected markets? If so, identify such entrants and provide the name, address, telephone number, fax number and e-mail address of the head of the legal department (or other person exercising similar functions; and in cases where there is no such person, then the chief executive) and an estimate of the current market share of each such entrant. If any of the parties to the concentration entered an affected market in the past five years, provide an analysis of the barriers to entry encountered.

8.9. In the opinion of the notifying parties, are there undertakings (including those at present operating only outside the Community or the EEA) that are likely to enter the market? If so, identify such entrants and provide the name, address, telephone number, fax number and e-mail address of the head of the legal department (or other person exercising similar functions; and in cases where there is no such person, then the chief executive). Explain why such entry is likely and provide an estimate of the time within which such entry is likely to occur.

8.10. Describe the various factors influencing entry into affected markets, examining entry from both a geographical and product viewpoint. In so doing, take account of the following where appropriate:

(a) the total costs of entry (R&D, production, establishing distribution systems, promotion, advertising, servicing, and so forth) on a scale equivalent to a significant viable competitor, indicating the market share of such a competitor;

(b) any legal or regulatory barriers to entry, such as government authorization or standard setting in any form, as well as barriers resulting from product certification procedures, or the need to have a proven track record;

(c) any restrictions created by the existence of patents, know-how and other intellectual property rights in these markets and any restrictions created by licensing such rights;

(d) the extent to which each of the parties to the concentration are holders, licensees or licensors of patents, know-how and other rights in the relevant markets;

(e) the importance of economies of scale for the production or distribution of products in the affected markets; and

(f) access to sources of supply, such as availability of raw materials and necessary infrastructure.

Research and development

8.11. Give an account of the importance of research and development in the ability of a firm operating the relevant market(s) to compete in the long term. Explain the nature of the research and development in affected markets carried out by the parties to the concentration.

In so doing, take account of the following, where appropriate:
(a) trends and intensities of research and development (1) in these markets and for the parties to the concentration;

(b) the course of technological development for these markets over an appropriate time period (including developments in products and/or services, production processes, distribution systems, and so on);

(c) the major innovations that have been made in these markets and the undertakings responsible for these innovations; and

(d) the cycle of innovation in these markets and where the parties are in this cycle of innovation.

Cooperative Agreements

8.12. To what extent do cooperative agreements (horizontal, vertical, or other) exist in the affected markets?

8.13. Give details of the most important cooperative agreements engaged in by the parties to the concentration in the affected markets, such as research and development, licensing, joint production, specialization, distribution, long term supply and exchange of information agreements and, where deemed useful, provide a copy of these agreements.

Trade associations

8.14. With respect to the trade associations in the affected markets:

(a) identify those of which the parties to the concentration are members; and

(b) identify the most important trade associations to which the customers and suppliers of the parties to the concentration belong.

Provide the name, address, telephone number, fax number and e-mail address of the appropriate contact person for all trade associations listed above.

SECTION 9

Overall market context and efficiencies

9.1. Describe the worldwide context of the proposed concentration, indicating the position of each of the parties to the concentration outside of the EEA territory in terms of size and competitive strength.

9.2. Describe how the proposed concentration is likely to affect the interests of intermediate and ultimate consumers and the development of technical and economic progress.

9.3. Should you wish the Commission specifically to consider from the outset (2) whether efficiency gains generated by the concentration are likely to enhance the ability and incentive of the new entity to act pro-competitively for the benefit of consumers, please provide a description of, and supporting documents relating to, each efficiency (including cost savings, new product introductions, and service or product improvements) that the parties anticipate will result from the proposed concentration relating to any relevant product (3).

For each claimed efficiency, provide:

(1) Research and development intensity is defined as research development expenditure as a proportion of turnover.

(2) It should be noted that submitting information in response to Section 9.3 is voluntary. Parties are not required to offer any justification for not completing this section. Failure to provide information on efficiencies will not be taken to imply that the proposed concentration does not create efficiencies or that the rationale for the concentration is to increase market power. Not providing the requested information on efficiencies at the notification stage does not preclude providing the information at a later stage. However, the earlier the information is provided, the better the Commission can verify the efficiency claim.

(3) For further guidance on the assessment of efficiencies, see the Commission Notice on the assessment of horizontal mergers.
(i) a detailed explanation of how the proposed concentration would allow the new entity to achieve the efficiency. Specify the steps that the parties anticipate taking to achieve the efficiency, the risks involved in achieving the efficiency, and the time and costs required to achieve it;

(ii) where reasonably possible, a quantification of the efficiency and a detailed explanation of how the quantification was calculated. Where relevant, also provide an estimate of the significance of efficiencies related to new product introductions or quality improvements. For efficiencies that involve cost savings, state separately the one-time fixed cost savings, recurring fixed cost savings, and variable cost savings (in euros per unit and euros per year);

(iii) the extent to which customers are likely to benefit from the efficiency and a detailed explanation of how this conclusion is arrived at; and

(iv) the reason why the party or parties could not achieve the efficiency to a similar extent by means other than through the concentration proposed, and in a manner that is not likely to raise competition concerns.

SECTION 10

Cooperative effects of a joint venture

10. For the purpose of Article 2(4) of the EC Merger Regulation, answer the following questions:

(a) Do two or more parents retain to a significant extent activities in the same market as the joint venture or in a market which is upstream or downstream from that of the joint venture or in a neighbouring market closely related to this market? (1)

If the answer is affirmative, please indicate for each of the markets referred to here:

— the turnover of each parent company in the preceding financial year;

— the economic significance of the activities of the joint venture in relation to this turnover;

— the market share of each parent.

If the answer is negative, please justify your answer.

(b) If the answer to (a) is affirmative and in your view the creation of the joint venture does not lead to coordination between independent undertakings that restricts competition within the meaning of Article 81(1) of the EC Treaty, and, where applicable, the corresponding provisions of the EEA Agreement (2), give your reasons.

(c) Without prejudice to the answers to (a) and (b) and in order to ensure that a complete assessment of the case can be made by the Commission, please explain how the criteria of Article 81(3) of the EC Treaty and, where applicable, the corresponding provisions of the EEA Agreement (3) apply. Under Article 81(3), the provisions of Article 81(1) may be declared inapplicable if the operation:

(i) contributes to improving the production or distribution of goods, or to promoting technical or economic progress;

(ii) allows consumers a fair share of the resulting benefit;

(iii) does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and

(iv) does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

(1) For market definitions refer to Section 6.
(2) See Article 53(1) of the EEA Agreement.
(3) See Article 53(3) of the EEA Agreement.
SECTION 11

Declaration

Article 2(2) of the Implementing Regulation states that where notifications are signed by representatives of undertakings, such representatives must produce written proof that they are authorized to act. Such written authorization must accompany the notification.

The notification must conclude with the following declaration which is to be signed by or on behalf of all the notifying parties:

The notifying party or parties declare that, to the best of their knowledge and belief, the information given in this notification is true, correct, and complete, that true and complete copies of documents required by Form CO have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

They are aware of the provisions of Article 14(1)(a) of the EC Merger Regulation.

Place and date:

Signatures:

Name/s and positions:

On behalf of:
ANNEX II

SHORT FORM FOR THE NOTIFICATION OF A CONCENTRATION
PURSUANT TO REGULATION (EC) No 139/2004

1. INTRODUCTION

1.1. The purpose of the Short Form

The Short Form specifies the information that must be provided by the notifying parties when submitting a notification to the European Commission of certain proposed mergers, acquisitions or other concentrations that are unlikely to raise competition concerns.

In completing this Form, your attention is drawn to Council Regulation (EC) No 139/2004 (hereinafter referred to as ‘the EC Merger Regulation’), and Commission Regulation (EC) No 802/2004 (hereinafter referred to as ‘the Implementing Regulation’), to which this Form is annexed (1). The text of these regulations, as well as other relevant documents, can be found on the Competition page of the Commission’s Europa web site. Your attention is also drawn to the corresponding provisions of the Agreement on the European Economic Area (hereinafter referred to as ‘the EEA Agreement’) (2).

As a general rule, the Short Form may be used for the purpose of notifying concentrations, where one of the following conditions is met:

1. in the case of a joint venture, the joint venture has no, or negligible, actual or foreseen activities within the territory of the European Economic Area (EEA). Such cases occur where:
   (a) the turnover of the joint venture and/or the turnover of the contributed activities is less than EUR 100 million in the EEA territory; and
   (b) the total value of the assets transferred to the joint venture is less than EUR 100 million in the EEA territory;

2. none of the parties to the concentration are engaged in business activities in the same relevant product and geographic market (no horizontal overlap), or in a market which is upstream or downstream of a market in which another party to the concentration is engaged (no vertical relationship);

3. two or more of the parties to the concentration are engaged in business activities in the same relevant product and geographic market (horizontal relationships), provided that their combined market share is less than 15 %; and/or one or more of the parties to the concentration are engaged in business activities in a product market which is upstream or downstream of a product market in which any other party to the concentration is engaged (vertical relationships), and provided that none of their individual or combined market shares at either level is 25 % or more; or

4. a party is to acquire sole control of an undertaking over which it already has joint control.

The Commission may require a full form notification where it appears either that the conditions for using the Short Form are not met, or, exceptionally, where they are met, the Commission determines, nonetheless, that a notification under Form CO is necessary for an adequate investigation of possible competition concerns.

(2) See in particular Article 57 of the EEA Agreement, point 1 of Annex XIV to the EEA Agreement, Protocols 21 and 24 to the EEA Agreement, as well as Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (hereinafter referred to as the ‘Surveillance and Court Agreement’). Any reference to EFTA States shall be understood to mean those EFTA States which are Contracting Parties to the EEA Agreement. As of 1 May 2004, these States are Iceland, Liechtenstein and Norway.
Examples of cases where a notification under Form CO may be necessary are concentrations where it is difficult to define the relevant markets (for example, in emerging markets or where there is no established case practice); where a party is a new or potential entrant, or an important patent holder; where it is not possible to adequately determine the parties’ market shares; in markets with high entry barriers, with a high degree of concentration or known competition problems; where at least two parties to the concentration are present in closely related neighbouring markets (¹); and in concentrations where an issue of coordination arises, as referred to in Article 2(4) of the EC Merger Regulation. Similarly, a Form CO notification may be required in the case of a party acquiring sole control of a joint venture in which it currently holds joint control, where the acquiring party and the joint venture, together, have a strong market position, or the joint venture and the acquiring party have strong positions in vertically related markets.

1.2. **Reversion to the full Form CO notification**

In assessing whether a concentration may be notified under the Short Form, the Commission will ensure that all relevant circumstances are established with sufficient clarity. In this respect, the responsibility to provide correct and complete information rests with the notifying parties.

If, after the concentration has been notified, the Commission considers that the case is not appropriate for notification under the Short Form, the Commission may require full, or where appropriate partial, notification under Form CO. This may be the case where:

- it appears that the conditions for using the Short Form are not met;
- although the conditions for using the Short Form are met, a full or partial notification under Form CO appears to be necessary for an adequate investigation of possible competition concerns or to establish that the transaction is a concentration within the meaning of Article 3 of the EC Merger Regulation;
- the Short Form contains incorrect or misleading information;
- a Member State or an EFTA State expresses substantiated competition concerns about the notified concentration within 15 working days of receipt of the copy of the notification; or
- a third party expresses substantiated competition concerns within the time-limit laid down by the Commission for such comments.

In such cases, the notification may be treated as being incomplete in a material respect pursuant to Article 5(2) of the Implementing Regulation. The Commission will inform the notifying parties or their representatives of this in writing and without delay. The notification will only become effective on the date on which all information required is received.

1.3. **Importance of pre-notification contacts**

Experience has shown that pre-notification contacts are extremely valuable to both the notifying parties and the Commission in determining the precise amount of information required in a notification. Also, in cases where the parties wish to submit a Short Form notification, they are advised to engage in pre-notification contacts with the Commission in order to discuss whether the case is one for which it is appropriate to use a Short Form. Notifying parties may refer to the Commission’s Best Practices on the Conduct of EC Merger Control Proceedings, which provides guidance on pre-notification contacts and the preparation of notifications.

(¹) Product markets are closely related neighbouring markets when the products are complementary to each other or when they belong to a range of products that is generally purchased by the same set of customers for the same end use.
1.4. **Who must notify**

In the case of a merger within the meaning of Article 3(1)(a) of the EC Merger Regulation or the acquisition of joint control of an undertaking within the meaning of Article 3(1)(b) of the EC Merger Regulation, the notification shall be completed jointly by the parties to the merger or by those acquiring joint control, as the case may be (1).

In the case of the acquisition of a controlling interest in one undertaking by another, the acquirer must complete the notification.

In the case of a public bid to acquire an undertaking, the bidder must complete the notification.

Each party completing the notification is responsible for the accuracy of the information which it provides.

1.5. **The requirement for a correct and complete notification**

All information required by this Form must be correct and complete. The information required must be supplied in the appropriate Section of this Form.

In particular you should note that:

(a) In accordance with Article 10(1) of the EC Merger Regulation and Article 5(2) and (4) of the Implementing Regulation, the time-limits of the EC Merger Regulation linked to the notification will not begin to run until all the information that must be supplied with the notification has been received by the Commission. This requirement is to ensure that the Commission is able to assess the notified concentration within the strict time-limits provided by the EC Merger Regulation.

(b) The notifying parties should verify, in the course of preparing their notification, that contact names and numbers, and in particular fax numbers and e-mail addresses, provided to the Commission are accurate, relevant and up-to-date.

(c) Incorrect or misleading information in the notification will be considered to be incomplete information (Article 5(4) of the Implementing Regulation).

(d) If a notification is incomplete, the Commission will inform the notifying parties or their representatives in writing and without delay. The notification will only become effective on the date on which the complete and accurate information is received by the Commission (Article 10(1) of the EC Merger Regulation, Article 5(2) and (4) of the Implementing Regulation).

(e) Under Article 14(1)(a) of the EC Merger Regulation, notifying parties who, either intentionally or negligently, supply incorrect or misleading information, may be liable to fines of up to 1 % of the aggregate turnover of the undertaking concerned. In addition, pursuant to Article 6(3)(a) and Article 8(6)(a) of the EC Merger Regulation the Commission may revoke its decision on the compatibility of a notified concentration where it is based on incorrect information for which one of the undertakings is responsible.

(f) You may request in writing that the Commission accept that the notification is complete notwithstanding the failure to provide information required by this Form, if such information is not reasonably available to you in part or in whole (for example, because of the unavailability of information on a target company during a contested bid).

The Commission will consider such a request, provided that you give reasons for the unavailability of that information, and provide your best estimates for missing data together with the sources for the estimates. Where possible, indications as to where any of the requested information that is unavailable to you could be obtained by the Commission should also be provided.

(g) You may request in writing that the Commission accept that the notification is complete notwithstanding the failure to provide information

(1) See Article 4(2) of the EC Merger Regulation.
required by this Form, if you consider that any particular information required may not be necessary for the Commission's examination of the case.

The Commission will consider such a request, provided that you give adequate reasons why that information is not relevant and necessary to its inquiry into the notified operation. You should explain this during your pre-notification contacts with the Commission and submit a written request for a waiver, asking the Commission to dispense with the obligation to provide that information, pursuant to Article 4(2) of the Implementing Regulation.

1.6. How to notify

The notification must be completed in one of the official languages of the European Community. This language will thereafter be the language of the proceedings for all notifying parties. Where notifications are made in accordance with Article 12 of Protocol 24 to the EEA Agreement in an official language of an EFTA State which is not an official language of the Community, the notification must simultaneously be supplemented with a translation into an official language of the Community.

The information requested by this Form is to be set out using the sections and paragraph numbers of the Form, signing a declaration as provided in Section 9, and annexing supporting documentation. In completing Section 7 of this Form, the notifying parties are invited to consider whether, for purposes of clarity, this section is best presented in numerical order, or whether information can be grouped together for each individual reportable market (or group of reportable markets).

For the sake of clarity, certain information may be put in annexes. However, it is essential that all key substantive pieces of information, in particular, market share information for the parties and their largest competitors, are presented in the body of this Form. Annexes to this Form shall only be used to supplement the information supplied in the Form itself.

Contact details must be provided in a format provided by the Commission's Directorate-General for Competition (DG Competition). For a proper investigatory process, it is essential that the contact details are accurate. Multiple instances of incorrect contact details may be a ground for declaring a notification incomplete.

Supporting documents are to be submitted in their original language; where this is not an official language of the Community, they must be translated into the language of the proceeding (Article 3(4) of the Implementing Regulation).

Supporting documents may be originals or copies of the originals. In the latter case, the notifying party must confirm that they are true and complete.

One original and ►MI 37 ◄ copies of the Short Form and the supporting documents shall be submitted to the Commission's Directorate-General for Competition.

The notification shall be delivered to the address referred to in Article 23(1) of the Implementing Regulation and in the format specified by the Commission from time to time. This address is published in the Official Journal of the European Union. The notification must be delivered to the Commission on working days as defined by Article 24 of the Implementing Regulation. In order to enable it to be registered on the same day, it must be delivered before 17.00 hrs on Mondays to Thursdays and before 16.00 hrs on Fridays and workdays preceding public holidays and other holidays as determined by the Commission and published in the Official Journal of the European Union. The security instructions given on DG Competition's website must be adhered to.
1.7. Confidentiality

Article 287 of the Treaty and Article 17(2) of the EC Merger Regulation as well as the corresponding provisions of the EEA Agreement (1) require the Commission, the Member States, the EFTA Surveillance Authority and the EFTA States, their officials and other servants not to disclose information they have acquired through the application of the Regulation of the kind covered by the obligation of professional secrecy. The same principle must also apply to protect confidentiality between notifying parties.

If you believe that your interests would be harmed if any of the information you are asked to supply were to be published or otherwise divulged to other parties, submit this information separately with each page clearly marked ‘Business Secrets’. You should also give reasons why this information should not be divulged or published.

In the case of mergers or joint acquisitions, or in other cases where the notification is completed by more than one of the parties, business secrets may be submitted under separate cover, and referred to in the notification as an annex. All such annexes must be included in the submission in order for a notification to be considered complete.

1.8. Definitions and instructions for purposes of this Form

Notifying party or parties: in cases where a notification is submitted by only one of the undertakings who is a party to an operation, ‘notifying parties’ is used to refer only to the undertaking actually submitting the notification.

Party(ies) to the concentration or parties: these terms relate to both the acquiring and acquired parties, or to the merging parties, including all undertakings in which a controlling interest is being acquired or which is the subject of a public bid.

Except where otherwise specified, the terms notifying party(ies) and party(ies) to the concentration include all the undertakings which belong to the same groups as those parties.

Year: all references to the word year in this Form should be read as meaning calendar year, unless otherwise stated. All information requested in this Form must, unless otherwise specified, relate to the year preceding that of the notification.

The financial data requested in Sections 3.3 to 3.5 must be provided in euros at the average exchange rates prevailing for the years or other periods in question.

All references contained in this Form are to the relevant articles and paragraphs of the EC Merger Regulation, unless otherwise stated.

1.9. Provision of information to employees and their representatives

The Commission would like to draw attention to the obligations to which the parties to a concentration may be subject under Community and/or national rules on information and consultation regarding transactions of a concentrative nature vis-à-vis employees and/or their representatives.

SECTION 1

Description of the concentration

1.1. Provide an executive summary of the concentration, specifying the parties to the concentration, the nature of the concentration (for example, merger, acquisition, joint venture), the areas of activity of the notifying parties, the markets on which the concentration will have an impact (including

(1) See, in particular, Article 122 of the EEA Agreement, Article 9 of Protocol 24 to the EEA Agreement and Article 17(2) of Chapter XIII of Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (ESA Agreement).
1.2. Provide a summary (up to 500 words) of the information provided under Section 1.1. It is intended that this summary will be published on the Commission's website at the date of notification. The summary must be drafted so that it contains no confidential information or business secrets.

SECTION 2

Information about the parties

2.1. Information on notifying party (or parties)

Give details of:

2.1.1. name and address of undertaking;
2.1.2. nature of the undertaking's business;
2.1.3. name, address, telephone number, fax number and e-mail address of, and position held by, the appropriate contact person; and
2.1.4. an address for service of the notifying party (or each of the notifying parties) to which documents and, in particular, Commission Decisions may be delivered. The name, e-mail address and telephone number of a person at this address who is authorised to accept service must be provided.

2.2. Information on other parties (1) to the concentration

For each party to the concentration (except the notifying party or parties) give details of:

2.2.1. name and address of undertaking;
2.2.2. nature of undertaking's business;
2.2.3. name, address, telephone number, fax number and e-mail address of, and position held by, the appropriate contact person; and
2.2.4. an address for service of the party (or each of the parties) to which documents and, in particular, Commission Decisions may be delivered.

2.3. Appointment of representatives

Where notifications are signed by representatives of undertakings, such representatives must produce written proof that they are authorised to act. The written proof must contain the name and position of the persons granting such authority.

Provide the following contact details of information of any representatives who have been authorised to act for any of the parties to the concentration, indicating whom they represent:

2.3.1. name of representative;
2.3.2. address of representative;
2.3.3. name, address, telephone number, fax number and e-mail address of person to be contacted; and
2.3.4. an address of the representative for service (in Brussels if available) to which correspondence may be sent and documents delivered.

1 See Section 6.III for the definition of reportable markets.
2 This includes the target company in the case of a contested bid, in which case the details should be completed as far as is possible.
SECTION 3

Details of the concentration

3.1. Describe the nature of the concentration being notified. In doing so state:

(a) whether the proposed concentration is a full legal merger, an acquisition of sole or joint control, a full-function joint venture within the meaning of Article 3(4) of the EC Merger Regulation or a contract or other means of conferring direct or indirect control within the meaning of Article 3(2) of the EC Merger Regulation;

(b) whether the whole or parts of parties are subject to the concentration;

(c) a brief explanation of the economic and financial structure of the concentration;

(d) whether any public offer for the securities of one party by another party has the support of the former’s supervisory boards of management or other bodies legally representing that party;

(e) the proposed or expected date of any major events designed to bring about the completion of the concentration;

(f) the proposed structure of ownership and control after the completion of the concentration;

(g) any financial or other support received from whatever source (including public authorities) by any of the parties and the nature and amount of this support; and

(h) the economic sectors involved in the concentration.

3.2. State the value of the transaction (the purchase price or the value of all the assets involved, as the case may be);

3.3. For each of the undertakings concerned by the concentration (1) provide the following data (2) for the last financial year:

3.3.1. world-wide turnover;

3.3.2. Community-wide turnover;

3.3.3. EFTA-wide turnover;

3.3.4. turnover in each Member State;

3.3.5. turnover in each EFTA State;

3.3.6. the Member State, if any, in which more than two-thirds of Community-wide turnover is achieved; and

3.3.7. the EFTA State, if any, in which more than two-thirds of EFTA-wide turnover is achieved.

3.4. For the purposes of Article 1(3) of the EC Merger Regulation, if the operation does not meet the thresholds set out in Article 1(2), provide the following data for the last financial year:

3.4.1. the Member States, if any, in which the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; and

(1) See Commission Notice on the concept of undertakings concerned.

(2) See, generally, the Commission Notice on calculation of turnover. Turnover of the acquiring party or parties to the concentration should include the aggregated turnover of all undertakings within the meaning of Article 5(4) of the EC Merger Regulation. Turnover of the acquired party or parties should include the turnover relating to the parts subject to the transaction within the meaning of Article 5(2) of the EC Merger Regulation. Special provisions are contained in Articles 5(3), (4) and 5(5) of the EC Merger Regulation for credit, insurance, other financial institutions and joint undertakings.
3.4.2. the Member States, if any, in which the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million.

3.5. For the purposes of determining whether the concentration qualifies as an EFTA cooperation case (1), provide the following information with respect to the last financial year:

3.5.1. does the combined turnover of the undertakings concerned in the territory of the EFTA States equal 25 % or more of their total turnover in the EEA territory?

3.5.2. does each of at least two undertakings concerned have a turnover exceeding EUR 250 million in the territory of the EFTA States?

3.6. In case the transaction concerns the acquisition of joint control of a joint venture, provide the following information:

3.6.1. the turnover of the joint venture and/or the turnover of the contributed activities to the joint venture; and/or

3.6.2. the total value of assets transferred to the joint venture.

3.7. Describe the economic rationale of the concentration.

SECTION 4

Ownership and control (2)

For each of the parties to the concentration provide a list of all undertakings belonging to the same group.

This list must include:

4.1. all undertakings or persons controlling these parties, directly or indirectly;

4.2. all undertakings active in any reportable market (3) that are controlled, directly or indirectly:
   (a) by these parties;
   (b) by any other undertaking identified in 4.1.

For each entry listed above, the nature and means of control should be specified.

The information sought in this section may be illustrated by the use of organisation charts or diagrams to show the structure of ownership and control of the undertakings.

SECTION 5

Supporting documentation

Notifying parties must provide the following:

5.1. copies of the final or most recent versions of all documents bringing about the concentration, whether by agreement between the parties to the concentration, acquisition of a controlling interest or a public bid; and

5.2. copies of the most recent annual reports and accounts of all the parties to the concentration.

(1) See Article 57 of the EEA Agreement and, in particular, Article 2(1) of Protocol 24 to the EEA Agreement. A case qualifies to be treated as a cooperation case if the combined turnover of the undertakings concerned in the territory of the EFTA States equals 25 % or more of their total turnover within the territory covered by the EEA Agreement; or each of at least two undertakings concerned has a turnover exceeding EUR 250 million in the territory of the EFTA States; or the concentration is liable to significantly impede effective competition in the territories of the EFTA States or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position.

(2) See Articles 3(3), 3(4) and 3(5) and Article 5(4) of the EC Merger Regulation.

(3) See Section 6.III for the definition of reportable markets.
SECTION 6

Market definitions

The relevant product and geographic markets determine the scope within which the market power of the new entity resulting from the concentration must be assessed. (1)

The notifying party or parties must provide the data requested having regard to the following definitions:

I. Relevant product markets

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. A relevant product market may in some cases be composed of a number of individual products and/or services which present largely identical physical or technical characteristics and are interchangeable.

Factors relevant to the assessment of the relevant product market include the analysis of why the products or services in these markets are included and why others are excluded by using the above definition, and having regard to, for example, substitutability, conditions of competition, prices, cross-price elasticity of demand or other factors relevant for the definition of the product markets (for example, supply-side substitutability in appropriate cases).

II. Relevant geographic markets

The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of relevant products 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.

Factors relevant to the assessment of the relevant geographic market include inter alia the nature and characteristics of the products or services concerned, the existence of entry barriers, consumer preferences, appreciable differences in the undertakings' market shares between neighbouring geographic areas, or substantial price differences.

III. Reportable markets

For purposes of information required in this Form, reportable markets consist of all relevant product and geographic markets, as well as plausible alternative relevant product and geographic market definitions, on the basis of which:

(a) two or more of the parties to the concentration are engaged in business activities in the same relevant market (horizontal relationships);

(b) one or more of the parties to the concentration are engaged in business activities in a product market, which is upstream or downstream of a market in which any other party to the concentration is engaged, regardless of whether there is or is not any existing supplier/customer relationship between the parties to the concentration (vertical relationships).

6.1. On the basis of the above market definitions, identify all reportable markets.

SECTION 7

Information on markets

For each reportable market described in Section 6, for the year preceding the operation, provide the following: (2)

(1) See Commission Notice on the definition of the relevant market for the purposes of Community competition law.

(2) In the context of pre-notification, you may want to discuss with the Commission to what extent dispensation (waivers) to provide the requested information would be appropriate for certain reportable markets.
7.1. an estimate of the total size of the market in terms of sales value (in euros) and volume (units) (1). Indicate the basis and sources for the calculations and provide documents where available to confirm these calculations;

7.2. the sales in value and volume, as well as an estimate of the market shares, of each of the parties to the concentration. Indicate if there have been significant changes to the sales and market shares for the last three financial years; and

7.3. for horizontal and vertical relationships, an estimate of the market share in value (and where appropriate, volume) of the three largest competitors (indicating the basis for the estimates). Provide the name, address, telephone number, fax number and e-mail address of the head of the legal department (or other person exercising similar functions; and in cases where there is no such person, then the chief executive) for these competitors.

SECTION 8

Cooperative effects of a joint venture

8. For the purpose of Article 2(4) of the EC Merger Regulation, please answer the following questions:

(a) Do two or more parents retain to a significant extent activities in the same market as the joint venture or in a market which is upstream or downstream from that of the joint venture or in a neighbouring market closely related to this market? (2)

If the answer is affirmative, please indicate for each of the markets referred to here:
— the turnover of each parent company in the preceding financial year;
— the economic significance of the activities of the joint venture in relation to this turnover;
— the market share of each parent.

If the answer is negative, please justify your answer.

(b) If the answer to (a) is affirmative and in your view the creation of the joint venture does not lead to coordination between independent undertakings that restricts competition within the meaning of Article 81(1) of the EC Treaty, and, where applicable, the corresponding provisions of the EEA Agreement (3), give your reasons.

(c) Without prejudice to the answers to (a) and (b) and in order to ensure that a complete assessment of the case can be made by the Commission, please explain how the criteria of Article 81(3) of the EC Treaty and, where applicable, the corresponding provisions of the EEA Agreement (4) apply. Under Article 81(3), the provisions of Article 81(1) may be declared inapplicable if the operation:

(i) contributes to improving the production or distribution of goods, or to promoting technical or economic progress;
(ii) allows consumers a fair share of the resulting benefit;
(iii) does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and
(iv) does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

(1) The value and volume of a market should reflect output less exports plus imports for the geographic areas under consideration.
(2) For market definitions refer to Section 6.
(3) See Article 53(1) of the EEA Agreement.
(4) See Article 53(3) of the EEA Agreement.
Declaration

Article 2(2) of the Implementing Regulation states that where notifications are signed by representatives of undertakings, such representatives must produce written proof that they are authorized to act. Such written authorization must accompany the notification.

The notification must conclude with the following declaration which is to be signed by or on behalf of all the notifying parties:

The notifying party or parties declare that, to the best of their knowledge and belief, the information given in this notification is true, correct, and complete, that true and complete copies of documents required by this Form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

They are aware of the provisions of Article 14(1)(a) of the EC Merger Regulation.

Place and date:

Signatures:

Name/s and positions:

On behalf of:
ANNEX III:

FORM RS (RS = reasoned submission pursuant to Article 4(4) and (5) of Council Regulation (EC) No 139/2004)

FORM RS RELATING TO REASONED SUBMISSIONS PURSUANT TO ARTICLES 4(4) AND 4(5) OF REGULATION (EC) No 139/2004

INTRODUCTION

A. The purpose of this Form

This Form specifies the information that requesting parties should provide when making a reasoned submission for a pre-notification referral under Article 4(4) or (5) of Council Regulation (EC) No 139/2004 (hereinafter referred to as ‘the EC Merger Regulation’) (1).

Your attention is drawn to the EC Merger Regulation and to Commission Regulation (EC) No 802/2004 (hereinafter referred to as ‘the EC Merger Implementing Regulation’), to which this Form RS is annexed. The text of these regulations, as well as other relevant documents, can be found on the Competition page of the Commission’s Europa web site. Your attention is also drawn to the corresponding provisions of the Agreement on the European Economic Area (hereinafter referred to as ‘the EEA Agreement’) (2).

Experience has shown that prior contacts are extremely valuable to both the parties and the relevant authorities in determining the precise amount and type of information required. Accordingly, parties are encouraged to consult the Commission and the relevant Member State/s or EFTA State/s regarding the adequacy of the scope and type of information on which they intend to base their reasoned submission.

B. The requirement for a reasoned submission to be correct and complete

All information required by this Form must be correct and complete. The information required must be supplied in the appropriate section of this Form.

Incorrect or misleading information in the reasoned submission will be considered to be incomplete information (Article 5(4) of the EC Merger Implementing Regulation).

If parties submit incorrect information, the Commission will have the power to revoke any Article 6 or 8 decision it adopts following an Article 4(5) referral, pursuant to Article 6(3)(a) or 8(6)(a) of the EC Merger Regulation. Following revocation, national competition laws would once again be applicable to the transaction. In the case of referrals under Article 4(4) made on the basis of incorrect information, the Commission may require a notification pursuant to Article 4(1). In addition, the Commission will have the power to impose fines for submission of incorrect or misleading information pursuant to Article 14(1)(a) of the EC Merger Regulation. (See point d below). Finally, parties should also be aware that, if a referral is made on the basis of incorrect, misleading or incomplete information included in Form RS, the Commission and/or the Member States and the EFTA States may consider making a post-notification referral rectifying any referral made at pre-notification.

In particular you should note that:

(2) See in particular Article 57 of the EEA Agreement, point 1 of Annex XIV to the EEA Agreement, Protocols 21 and 24 to the EEA Agreement, as well as Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (hereinafter referred to as the ‘Surveillance and Court Agreement’). Any reference to EFTA States shall be understood to mean those EFTA States which are Contracting Parties to the EEA Agreement. As of 1 May 2004, these States are Iceland, Liechtenstein and Norway.
In accordance with Articles 4(4) and (5) of the EC Merger Regulation, the Commission is obliged to transmit reasoned submissions to the Member States and the EFTA States without delay. The time limits for considering a reasoned submission will begin upon receipt of the submission by the relevant Member State/s or EFTA State/s. The decision whether or not to accede to a reasoned submission will normally be taken on the basis of the information contained therein, without further investigation efforts being undertaken by the authorities involved.

The submitting parties should therefore verify, in the course of preparing their reasoned submission, that all information and arguments relied upon are sufficiently supported by independent sources.

Under Article 14(1)(a) of the EC Merger Regulation, parties making a reasoned submission who, either intentionally or negligently, provide incorrect or misleading information, may be liable to fines of up to 1% of the aggregate turnover of the undertaking concerned.

You may request in writing that the Commission accept that the reasoned submission is complete notwithstanding the failure to provide information required by this Form, if such information is not reasonably available to you in part or in whole (for example, because of the unavailability of information on a target company during a contested bid).

The Commission will consider such a request, provided that you give reasons for the non-availability of that information, and provide your best estimates for missing data together with the sources for the estimates. Where possible, indications as to where any of the requested information that is unavailable to you could be obtained by the Commission or the relevant Member State/s and EFTA State/s should also be provided.

You may request that the Commission accept that the reasoned submission is complete notwithstanding the failure to provide information required by this Form, if you consider that any particular information requested by this Form may not be necessary for the Commission's or the relevant Member State/s' or EFTA State/s' examination of the case.

The Commission will consider such a request, provided that you give adequate reasons why that information is not relevant and necessary to dealing with your request for a pre-notification referral. You should explain this during your prior contacts with the Commission and with the relevant Member State/s and EFTA State/s, and submit a written request for a waiver asking the Commission to dispense with the obligation to provide that information, pursuant to Article 4(2) of the EC Merger Implementing Regulation. The Commission may consult with the relevant Member State or EFTA State authority or authorities before deciding whether to accede to such a request.

In the case of a merger within the meaning of Article 3(1)(a) of the EC Merger Regulation or the acquisition of joint control of an undertaking within the meaning of Article 3(1)(b) of the Merger Regulation, the reasoned submission must be completed jointly by the parties to the merger or by those acquiring joint control as the case may be.

In case of the acquisition of a controlling interest in one undertaking by another, the acquirer must complete the reasoned submission.

In the case of a public bid to acquire an undertaking, the bidder must complete the reasoned submission.

Each party completing a reasoned submission is responsible for the accuracy of the information which it provides.

C. Persons entitled to submit a reasoned submission

In the case of a merger within the meaning of Article 3(1)(a) of the EC Merger Regulation or the acquisition of joint control of an undertaking within the meaning of Article 3(1)(b) of the Merger Regulation, the reasoned submission must be completed jointly by the parties to the merger or by those acquiring joint control as the case may be.

In case of the acquisition of a controlling interest in one undertaking by another, the acquirer must complete the reasoned submission.

In the case of a public bid to acquire an undertaking, the bidder must complete the reasoned submission.

D. How to make a reasoned submission

The reasoned submission must be completed in one of the official languages of the European Union. This language will thereafter be the language of the proceedings for all submitting parties.
In order to facilitate treatment of Form RS by Member State and EFTA State authorities, parties are strongly encouraged to provide the Commission with a translation of their reasoned submission in a language or languages which will be understood by all addressees of the information. As regards requests for referral to (a) Member State/s or (an) EFTA State/s, the requesting parties are strongly encouraged to include a copy of the request in the language/s of the Member State/s and EFTA State/s to which referral is being requested.

The information requested by this Form is to be set out using the sections and paragraph numbers of the Form, signing the declaration at the end, and annexing supporting documentation. For the sake of clarity, certain information may be put in annexes. However, it is essential that all key substantive pieces of information are presented in the body of Form RS. Annexes to this Form shall only be used to supplement the information supplied in the Form itself.

Supporting documents are to be submitted in their original language; where this is not an official language of the Community, they must be translated into the language of the proceeding.

Supporting documents may be originals or copies of the originals. In the latter case, the submitting party must confirm that they are true and complete.

One original and 37 copies of the Form RS and of the supporting documents must be submitted to the Commission. The reasoned submission shall be delivered to the address referred to in Article 23 (1) of the EC Merger Implementing Regulation and in the format specified by the Commission services.

The submission must be delivered to the address of the Commission's Directorate-General for Competition (DG Competition). This address is published in the Official Journal of the European Union. The submission must be delivered to the Commission on working days as defined by Article 24 of the EC Merger Implementing Regulation. In order to enable it to be registered on the same day, it must be delivered before 17.00 hrs on Mondays to Thursdays and before 16.00 hrs on Fridays and workdays preceding public holidays and other holidays as determined by the Commission and published in the Official Journal of the European Union. The security instructions given on DG Competition's website must be adhered to.

E. Confidentiality

Article 287 of the Treaty and Article 17(2) of the EC Merger Regulation, as well as the corresponding provisions of the EEA Agreement (1) require the Commission, the Member States, the EFTA Surveillance Authority and the EFTA States, their officials and other servants not to disclose information they have acquired through the application of the Regulation of the kind covered by the obligation of professional secrecy. The same principle must also apply to protect confidentiality between notifying parties.

If you believe that your interests would be harmed if any of the information supplied were to be published or otherwise divulged to other parties, submit this information separately with each page clearly marked 'Business Secrets'. You should also give reasons why this information should not be divulged or published.

In the case of mergers or joint acquisitions, or in other cases where the reasoned submission is completed by more than one of the parties, business secrets may be submitted in separate annexes, and referred to in the submission as an annex. All such annexes must be included in the reasoned submission.

F. Definitions and instructions for the purposes of this Form

Submitting party or parties: in cases where a reasoned submission is made by only one of the undertakings who is a party to an operation, ‘submitting
parties’ is used to refer only to the undertaking actually making the submission.

Party(ies) to the concentration or parties: these terms relate to both the acquiring and acquired parties, or to the merging parties, including all undertakings in which a controlling interest is being acquired or which is the subject of a public bid.

Except where otherwise specified, the terms ‘submitting party(ies)’ and ‘party(ies) to the concentration’ include all the undertakings which belong to the same groups as those ‘parties’.

Affected markets: Section 4 of this Form requires the submitting parties to define the relevant product markets, and further to identify which of those relevant markets are likely to be affected by the operation. This definition of affected market is used as the basis for requiring information for a number of other questions contained in this Form. The definitions thus submitted by the submitting parties are referred to in this Form as the affected market(s). This term can refer to a relevant market made up of either of products or of services.

Year: all references to the word ‘year’ in this Form should be read as meaning calendar year, unless otherwise stated. All information requested in this Form relates, unless otherwise specified, to the year preceding that of the reasoned submission.

The financial data requested in this Form must be provided in Euros at the average exchange rates prevailing for the years or other periods in question.

All references contained in this Form are to the relevant Articles and paragraphs of the EC Merger Regulation, unless otherwise stated.

SECTION 1
Background information

1.0. Indicate whether the reasoned submission is made under Article 4(4) or (5).
   — Article 4(4) referral
   — Article 4(5) referral

1.1. Information on the submitting party (or parties)

   Give details of:
   1.1.1. the name and address of undertaking;
   1.1.2. the nature of the undertaking's business;
   1.1.3. the name, address, telephone number, fax number and electronic address of, and position held by, the appropriate contact person; and
   1.1.4. an address for service of the submitting party (or each of the submitting parties) to which documents and, in particular, Commission decisions may be delivered. The name, telephone number and e-mail address of a person at this address who is authorised to accept service must be provided.

1.2. Information on the other parties (1) to the concentration

   For each party to the concentration (except the submitting party or parties) give details of:
   1.2.1. the name and address of undertaking;
   1.2.2. the nature of undertaking's business;

(1) This includes the target company in the case of a contested bid, in which case the details should be completed as far as is possible.
1.2.3. the name, address, telephone number, fax number and electronic address of, and position held by the appropriate contact person;

1.2.4. an address for service of the party (or each of the parties) to which documents and, in particular, Commission Decisions may be delivered. The name, e-mail address and telephone number of a person at this address who is authorised to accept service must be provided.

1.3. Appointment of representatives

Where reasoned submissions are signed by representatives of undertakings, such representatives must produce written proof that they are authorized to act. The written proof must contain the name and position of the persons granting such authority.

Provide the following contact details of any representatives who have been authorized to act for any of the parties to the concentration, indicating whom they represent:

1.3.1. the name of the representative;

1.3.2. the address of the representative;

1.3.3. the name, address, telephone number, fax number and e-mail address of the person to be contacted; and

1.3.4. an address of the representative (in Brussels if available) to which correspondence may be sent and documents delivered.

SECTION 2
General background and details of the concentration

2.1. Describe the general background to the concentration. In particular, give an overview of the main reasons for the transaction, including its economic and strategic rationale.

Provide an executive summary of the concentration, specifying the parties to the concentration, the nature of the concentration (for example, merger, acquisition, or joint venture), the areas of activity of the submitting parties, the markets on which the concentration will have an impact (including the main affected markets \(^1\)), and the strategic and economic rationale for the concentration.

2.2. Describe the legal nature of the transaction which is the subject of the reasoned submission. In doing so, indicate:

(a) whether the whole or parts of the parties are subject to the concentration;

(b) the proposed or expected date of any major events designed to bring about the completion of the concentration;

(c) the proposed structure of ownership and control after the completion of the concentration; and

(d) whether the proposed transaction is a concentration within the meaning of Article 3 of the EC Merger Regulation.

2.3. List the economic sectors involved in the concentration.

2.3.1. State the value of the transaction (the purchase price or the value of all the assets involved, as the case may be).

\(^1\) See Section 4 for the definition of affected markets.
2.4. Provide sufficient financial or other data to show that the concentration meets OR does not meet the jurisdictional thresholds under Article 1 of the EC Merger Regulation.

2.4.1. Provide a breakdown of the Community-wide turnover achieved by the undertakings concerned, indicating, where applicable, the Member State, if any, in which more than two-thirds of this turnover is achieved.

2.4.2. Provide a breakdown of the EFTA-wide turnover achieved by the undertakings concerned, indicating, where applicable, the EFTA State, if any, in which more than two-thirds of this turnover is achieved.

SECTION 3
Ownership and control (1)

For each of the parties to the concentration provide a list of all undertakings belonging to the same group.

This list must include:

3.1. all undertakings or persons controlling these parties, directly or indirectly;

3.2. all undertakings active on any affected market (2) that are controlled, directly or indirectly:

(a) by these parties;

(b) by any other undertaking identified in 3.1.

For each entry listed above, the nature and means of control should be specified.

The information sought in this section may be illustrated by the use of organization charts or diagrams to show the structure of ownership and control of the undertakings.

SECTION 4
Market definitions

The relevant product and geographic markets determine the scope within which the market power of the new entity resulting from the concentration must be assessed (3).

The submitting party or parties must provide the data requested having regard to the following definitions:

1. Relevant product markets

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. A relevant product market may in some cases be composed of a number of individual products and/or services which present largely identical physical or technical characteristics and are interchangeable.

Factors relevant to the assessment of the relevant product market include the analysis of why the products or services in these markets are included and why others are excluded by using the above definition, and having regard to, for example, substitutability, conditions of competition, prices, cross-price elasticity of demand or other factors relevant for the definition of the product markets (for example, supply-side substitutability in appropriate cases).

(1) See Article 3(3), 3(4) and 3(5) and Article 5(4).
(2) See Section 4 for the definition of affected markets.
(3) See Commission Notice on the definition of the relevant market for the purposes of Community competition law.
II. Relevant geographic markets

The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of relevant products 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.

Factors relevant to the assessment of the relevant geographic market include *inter alia* the nature and characteristics of the products or services concerned, the existence of entry barriers, consumer preferences, appreciable differences in the undertakings' market shares between neighbouring geographic areas, or substantial price differences.

III. Affected markets

▼M2

For the purposes of the information required in this Form, affected markets consist of relevant product markets where, in the EEA territory, in the Community, in the territory of the EFTA States, in any Member State or in any EFTA State:

▼B

(a) two or more of the parties to the concentration are engaged in business activities in the same product market and where the concentration will lead to a combined market share of 15 % or more. These are horizontal relationships;

(b) one or more of the parties to the concentration are engaged in business activities in a product market, which is upstream or downstream of a product market in which any other party to the concentration is engaged, and any of their individual or combined market shares at either level is 25 % or more, regardless of whether there is or is not any existing supplier/customer relationship between the parties to the concentration (*¹*). These are vertical relationships.

On the basis of the above definitions and market share thresholds, provide the following information:

▼M2

4.1. Identify each affected market within the meaning of Section III:

(a) at the EEA, Community or EFTA level;

(b) in the case of a request for referral pursuant to Article 4(4) of the EC Merger Regulation, at the level of each individual Member State or EFTA State;

(c) in the case of a request for referral pursuant to Article 4(5) of the EC Merger Regulation, at the level of each Member State or EFTA State identified at Section 6.3.1 of this Form as capable of reviewing the concentration.

▼B

4.2. In addition, explain the submitting parties' view as to the scope of the relevant geographic market within the meaning of Section II in relation to each affected market identified at 4.1 above.

SECTION 5

Information on affected markets

▼M2

For each affected relevant product market, for the last financial year,

(¹) For example, if a party to the concentration holds a market share larger than 25 % in a market that is upstream to a market in which the other party is active, then both the upstream and the downstream markets are affected markets. Similarly, if a vertically integrated company merges with another party which is active at the downstream level, and the merger leads to a combined market share downstream of 25 % or more, then both the upstream and the downstream markets are affected markets.
(a) for the EEA territory, for the Community as a whole and for the EFTA States as a whole;

(b) in the case of a request for referral pursuant to Article 4(4) of the EC Merger Regulation, individually for each Member State/EFTA State where the parties to the concentration do business; and

(c) in the case of a request for referral pursuant to Article 4(5) of the EC Merger Regulation, individually for each Member State/EFTA State identified at Section 6.3.1 of this Form as capable of reviewing the concentration where the parties to the concentration do business; and

(d) where in the opinion of the submitting parties, the relevant geographic market is different;

provide the following information:

5.1. an estimate of the total size of the market in terms of sales value (in Euros) and volume (units) (1). Indicate the basis and sources for the calculations and provide documents where available to confirm these calculations;

5.2. the sales in value and volume, as well as an estimate of the market shares, of each of the parties to the concentration;

5.3. an estimate of the market share in value (and where appropriate volume) of all competitors (including importers) having at least 5 % of the geographic market under consideration;

   On this basis, provide an estimate of the HHI index (2) pre- and post-merger, and the difference between the two (the delta) (3). Indicate the proportion of market shares used as a basis to calculate the HHI; Identify the sources used to calculate these market shares and provide documents where available to confirm the calculation;

5.4. the five largest independent customers of the parties in each affected market and their individual share of total sales for such products accounted for by each of those customers;

5.5. the nature and extent of vertical integration of each of the parties to the concentration compared with their largest competitors;

5.6. identify the five largest independent (4) suppliers to the parties;

5.7. Over the last five years, has there been any significant entry into any affected markets? In the opinion of the submitting parties are there undertakings (including those at present operating only in extra-Community markets) that are likely to enter the market? Please specify.

5.8. To what extent do cooperative agreements (horizontal or vertical) exist in the affected markets?

5.9. If the concentration is a joint venture, do two or more parents retain to a significant extent activities in the same market as the joint venture or in a

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(1) The value and volume of a market should reflect output less exports plus imports for the geographic areas under consideration.

(2) HHI stands for Herfindahl-Hirschman Index, a measure of market concentration. The HHI is calculated by summing the squares of the individual market shares of all the firms in the market. For example, a market containing five firms with market shares of 40 %, 20 %, 15 %, 15 %, and 10 %, respectively, has an HHI of 2550 ($40^2 + 20^2 + 15^2 + 15^2 + 10^2 = 2550$). The HHI ranges from close to zero (in an atomistic market) to 10000 (in the case of a pure monopoly). The post-merger HHI is calculated on the working assumption that the individual market shares of the companies do not change. Although it is best to include all firms in the calculation, lack of information about very small firms may not be important because such firms do not affect the HHI significantly.

(3) The increase in concentration as measured by the HHI can be calculated independently of the overall market concentration by doubling the product of the market shares of the merging firms. For example, a merger of two firms with market shares of 30 % and 15 % respectively would increase the HHI by 900 ($30 \times 15 \times 2 = 900$). The explanation for this technique is as follows: Before the merger, the market shares of the merging firms contribute to the HHI by their squares individually: $(a)^2 + (b)^2$. After the merger, the contribution is the square of their sum: $(a + b)^2$, which equals $(a)^2 + (b)^2 + 2ab$. The increase in the HHI is therefore represented by $2ab$.

(4) That is suppliers which are not subsidiaries, agents or undertakings forming part of the group of the party in question. In addition to those five independent suppliers the notifying parties can, if they consider it necessary for a proper assessment of the case, identify the intra-group suppliers. The same applies in relation to customers.
market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market? (1)

5.10. Describe the likely impact of the proposed concentration on competition in the affected markets and how the proposed concentration is likely to affect the interests of intermediate and ultimate consumers and the development of technical and economic progress.

SECTION 6
Details of the referral request and reasons why the case should be referred

6.1. Indicate whether the reasoned submission is made pursuant to Article 4(4) or 4(5) of the EC Merger Regulation, and fill in only the relevant sub-section:
— Article 4.4. referral
— Article 4.5 referral

Sub-section 6.2
ARTICLE 4(4) REFERRAL

6.2.1. Identify the Member State/s and EFTA State/s which, pursuant to Article 4(4) of the EC Merger Regulation, you submit should examine the concentration, indicating whether or not you have made informal contact with this Member State/s and/or EFTA State/s.

6.2.2. Specify whether you are requesting referral of the whole or part of the case.

If you are requesting referral of part of the case, specify clearly the part or parts of the case for which you request the referral.

6.2.3. Explain in what way each of the affected markets in the Member State/s and EFTA State/s to which referral is requested presents all the characteristics of a distinct market within the meaning of Article 4(4) of the EC Merger Regulation.

6.2.4. Explain in what way competition may be significantly affected in each of the above-mentioned distinct markets within the meaning of Article 4(4).

6.2.5. In the event of a Member State/s and/or EFTA State/s becoming competent to review the whole or part of the case following a referral pursuant to Article 4(4) of the EC Merger Regulation, do you consent to the information contained in this Form being relied upon by the Member State/s and/or EFTA State/s in question for the purpose of its/their national proceedings relating to that case or part thereof? YES or NO

Sub-section 6.3
ARTICLE 4(5) REFERRAL

6.3.1. For each Member State and/or EFTA State, specify whether the concentration is or is not capable of being reviewed under its national competition law. You must tick one box for each and every Member State and/or EFTA State.

Is the concentration capable of being reviewed under the national competition law of each of the following Member States and/or

(1) For market definitions refer to Section 4.
EFTA States? You must reply for each Member State and/or EFTA State. Only indicate YES or NO for each Member State and/or EFTA State. Failure to indicate YES or NO for any Member State and/or EFTA State shall be deemed to constitute an indication of YES for that Member State and/or EFTA State.

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6.3.2. For each Member State and/or EFTA State, provide sufficient financial or other data to show that the concentration meets or does not meet the relevant jurisdictional criteria under the applicable national law.

6.3.3. Explain why the case should be examined by the Commission. Explain in particular whether the concentration might affect competition beyond the territory of one Member State and/or EFTA State.

SECTION 7

Declarations

It follows from Articles 2(2) and 6(2) of the EC Merger Implementing Regulation that where reasoned submissions are signed by representatives of under-
takings, such representatives must produce written proof that they are authorized to act. Such written authorization must accompany the submission.

The reasoned submission must conclude with the following declaration which is to be signed by or on behalf of all the submitting parties:

The submitting party or parties declare that, following careful verification, the information given in this reasoned submission is to the best of their knowledge and belief true, correct, and complete, that true and complete copies of documents required by Form RS, have been supplied, and that all estimates are identified as such and are their best estimates of the underlying facts and that all the opinions expressed are sincere.

They are aware of the provisions of Article 14(1)(a) of the EC Merger Regulation.

Place and date:

Signatures:

Name/s and positions:

On behalf of:
ANNEX IV

FORM RM relating to the information concerning commitments submitted pursuant to Article 6(2) and Article 8(2) of Regulation (EC) No 139/2004

INTRODUCTION

This form specifies the information and documents to be submitted by the undertakings concerned at the same time as offering commitments pursuant to Article 6(2) or Article 8(2) of Regulation (EC) No 139/2004. The information requested is necessary to allow the Commission to examine whether the commitments are capable of rendering the concentration compatible with the common market in that they will prevent a significant impediment to effective competition. The Commission may dispense with the obligation to provide any particular information in respect of the commitments offered, including documents, or with any other requirement laid down in this form where it considers that compliance with those obligations or requirements is not necessary for the examination of the commitments offered. The level of information required will vary according to the type and structure of the remedy proposed. For example, carve-out remedies will typically require more detailed information than divestitures of stand-alone businesses. The Commission is available to discuss the scope of the information required with the parties upfront. If you consider that any particular information requested by this Form may not be necessary for the Commission's assessment, you may approach the Commission asking to dispense with certain requirements, giving adequate reasons why that information is not relevant.

SECTION 1

Description of the commitment

1.1. Provide detailed information on

(i) the object of the commitments offered, and

(ii) the conditions for their implementation.

1.2. Where the commitments offered consist in the divestiture of a business, Section 5 provides for the specific information required.

SECTION 2

Suitability to remove competition concerns

2. Provide information showing the suitability of the commitments offered to remove the significant impediment of effective competition identified by the Commission.

SECTION 3

Deviation from Model Texts

3. Identify any deviations of the commitments offered from the pertinent Model Commitments texts published by the Commission's services, as revised from time-to-time, and explain the reasons for the deviations.

SECTION 4

Summary of the commitments

4. Provide a non-confidential summary of the nature and scope of the commitments offered and why, in your view, they are suitable to remove any significant impediment to effective competition. The Commission may use this summary for the market test of the commitments offered with third parties.

SECTION 5

Information on a business to be divested

5. Where the commitments offered consist in the divestiture of a business, provide the following information and documents.
General information on the business to be divested

The following information should be provided as to the current operation of the business to be divested and changes already planned for the future:

5.1. Describe the business to be divested generally, including the entities belonging to it, their registered place of business and place of management, other locations for production or provisions of services, the general organisational structure and any other relevant information relating to the administrative structure of the business to be divested.

5.2. State whether there are and describe any legal obstacles for the transfer of the business to be divested or the assets, including third party rights and administrative approvals required.

5.3. List and describe the products manufactured or services provided, in particular their technical and other characteristics, the brands involved, the turnover generated with each of these products or services, and any innovations or new products or services planned.

5.4. Describe the level on which the essential functions of the business to be divested are operated if they are not operated on the level of the business to be divested itself, including such functions as research and development, production, marketing and sales, logistics, relations with customers, relations with suppliers, IT systems, etc. The description should contain the role performed by those other levels, the relations with the business to be divested and the resources (personnel, assets, financial resources, etc.) involved in the function.

5.5. Describe in detail the links between the business to be divested and other undertakings controlled by the notifying parties (irrespective of the direction of the link), such as:
   — supply, production, distribution, service or other contracts,
   — shared tangible or intangible assets,
   — shared or seconded personnel,
   — shared IT systems or other systems, and
   — shared customers.

5.6. Describe in general terms all relevant tangible and intangible assets used and/or owned by the business to be divested, including, in any case, IP rights and brands.

5.7. Submit an organisational chart identifying the number of personnel currently working in each of the functions of the business to be divested and a list of those employees who are indispensable for the operation of the business to be divested, describing their functions.

5.8. Describe the customers of the business to be divested, including a list of customers, a description of the corresponding records available, and provide the total turnover generated by the business to be divested with each of these customers (in EUR and as percentage of the total turnover of business to be divested).

5.9. Provide financial data for the business to be divested, including the turnover and the EBITDA achieved in the last two years, and the forecast for the next two years.

5.10. Identify and describe any changes that have occurred in the last two years, in the organisation of the business to be divested or in the links with other undertakings controlled by the notifying parties.

5.11. Identify and describe any changes, planned for the next two years, in the organisation of the business to be divested or in the links with other undertakings controlled by the notifying parties.

General information on the business to be divested as described in the commitments

5.12. Describe any areas where the business to be divested as set out in the commitments offered differs from the nature and scope of the business as currently operated.
5.13. Explain the reasons why, in your view, the business will be acquired by a suitable purchaser in the time-frame proposed in the commitments offered.
Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings

(2004/C 31/03)

1. INTRODUCTION

1. Article 2 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (1) (hereinafter: the 'Merger Regulation') provides that the Commission has to appraise concentrations within the scope of the Merger Regulation with a view to establishing whether or not they are compatible with the common market. For that purpose, the Commission must assess, pursuant to Article 2(2) and (3), whether or not a concentration would significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position, in the common market or a substantial part of it.

2. Accordingly, the Commission must take into account any significant impediment to effective competition likely to be caused by a concentration. The creation or the strengthening of a dominant position is a primary form of such competitive harm. The concept of dominance was defined in the context of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (hereinafter 'Regulation No 4064/89') as:

'a situation where one or more undertakings wield economic power which would enable them to prevent effective competition from being maintained in the relevant market by giving them the opportunity to act to a considerable extent independently of their competitors, their customers and, ultimately, of consumers' (2).

3. For the purpose of interpreting the concept of dominance in the context of Regulation No 4064/89, the Court of Justice referred to the fact that it 'is intended to apply to all concentrations with a Community dimension insofar as they are likely, because of their effect on the structure of competition within the Community, to prove incompatible with the system of undistorted competition envisaged by the Treaty' (3).

4. The creation or strengthening of a dominant position held by a single firm as a result of a merger has been the most common basis for finding that a concentration would result in a significant impediment to effective competition. Furthermore, the concept of dominance has also been applied in an oligopolistic setting to cases of collective dominance. As a consequence, it is expected that most cases of incompatibility of a concentration with the common market will continue to be based upon a finding of dominance. That concept therefore provides an important indication as to the standard of competitive harm that is applicable when determining whether a concentration is likely to impede effective competition to a significant degree, and hence, as to the likelihood of intervention (4). To that effect, the present notice is intended to preserve the guidance that can be drawn from past decisional practice and to take full account of past case-law of the Community Courts.

5. The purpose of this notice is to provide guidance as to how the Commission assesses concentrations (5) when the undertakings concerned are actual or potential competitors on the same relevant market (6). In this notice such mergers will be denoted 'horizontal mergers'. While the notice presents the analytical approach used by the Commission in its appraisal of horizontal mergers it cannot provide details of all possible applications of this approach. The Commission applies the approach described in the notice to the particular facts and circumstances of each case.

6. The guidance set out in this notice draws and elaborates on the Commission's evolving experience with the appraisal of horizontal mergers under Regulation No 4064/89 since its entry into force on 21 September 1990 as well as on the case-law of the Court of Justice and the Court of First Instance of the European Communities. The principles contained here will be applied and further developed and refined by the Commission in individual cases. The Commission may revise this notice from time to time in the light of future developments.

7. The Commission's interpretation of the Merger Regulation as regards the appraisal of horizontal mergers 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. OVERVIEW

8. Effective competition brings benefits to consumers, such as low prices, high quality products, a wide selection of goods and services, and innovation. Through its control of mergers, the Commission prevents mergers that would be likely to deprive customers of these benefits by significantly increasing the market power of firms. By 'increased market power' is meant the ability of one or more firms to profitably increase prices, reduce output, choice or quality of goods and services, diminish innovation, or otherwise influence parameters of competition. In this notice, the expression 'increased prices' is often used as shorthand for these various ways in which a merger may result in competitive harm (7). Both suppliers and buyers can have market power. However, for clarity, market power will usually refer here to a supplier's market power. Where a buyer's market power is the issue, the term 'buyer power' is employed.
9. In assessing the competitive effects of a merger, the Commission compares the competitive conditions that would result from the notified merger with the conditions that would have prevailed without the merger (9). In most cases the competitive conditions existing at the time of the merger constitute the relevant comparison for evaluating the effects of a merger. However, in some circumstances, the Commission may take into account future changes to the market that can reasonably be predicted (9). It may, in particular, take account of the likely entry or exit of firms if the merger did not take place when considering what constitutes the relevant comparison (10).

10. The Commission's assessment of mergers normally entails:

(a) definition of the relevant product and geographic markets;

(b) competitive assessment of the merger.

The main purpose of market definition is to identify in a systematic way the immediate competitive constraints facing the merged entity. Guidance on this issue can be found in the Commission's Notice on the definition of the relevant market for the purposes of Community competition law (11). Various considerations leading to the delineation of the relevant markets may also be of importance for the competitive assessment of the merger.

11. This notice is structured around the following elements:

(a) The approach of the Commission to market shares and concentration thresholds (Section III).

(b) The likelihood that a merger would have anti-competitive effects in the relevant markets, in the absence of countervailing factors (Section IV).

(c) The likelihood that buyer power would act as a countervailing factor to an increase in market power resulting from the merger (Section V).

(d) The likelihood that entry would maintain effective competition in the relevant markets (Section VI).

(e) The likelihood that efficiencies would act as a factor counteracting the harmful effects on competition which might otherwise result from the merger (Section VII).

(f) The conditions for a failing firm defence (Section VIII).

12. In order to assess the foreseeable impact (12) of a merger on the relevant markets, the Commission analyses its possible anti-competitive effects and the relevant counter-vailing factors such as buyer power, the extent of entry barriers and possible efficiencies put forward by the parties. In exceptional circumstances, the Commission considers whether the conditions for a failing firm defence are met.

13. In the light of these elements, the Commission determines, pursuant to Article 2 of the Merger Regulation, whether the merger would significantly impede effective competition, in particular through the creation or the strengthening of a dominant position, and should therefore be declared incompatible with the common market. It should be stressed that these factors are not a 'checklist' to be mechanically applied in each and every case. Rather, the competitive analysis in a particular case will be based on an overall assessment of the foreseeable impact of the merger in the light of the relevant factors and conditions. Not all the elements will always be relevant to each and every horizontal merger, and it may not be necessary to analyse all the elements of a case in the same detail.

III. MARKET SHARE AND CONCENTRATION LEVELS

14. Market shares and concentration levels provide useful first indications of the market structure and of the competitive importance of both the merging parties and their competitors.

15. Normally, the Commission uses current market shares in its competitive analysis (13). However, current market shares may be adjusted to reflect reasonably certain future changes, for instance in the light of exit, entry or expansion (14). Post-merger market shares are calculated on the assumption that the post-merger combined market share of the merging parties is the sum of their pre-merger market shares (13). 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 firms 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 (16).

16. The overall concentration level in a market may also provide useful information about the competitive situation. In order to measure concentration levels, the Commission often applies the Herfindahl-Hirschman Index (HHI) (17). The HHI is calculated by summing the squares of the individual market shares of all the firms in the market (17). The HHI gives proportionately greater weight to the market shares of the larger firms. Although it is best to include all firms in the calculation, lack of information about very small firms may not be important because such firms do not affect the HHI significantly. While the absolute level of the HHI can give an initial indication of the competitive pressure in the market post-merger, the change in the HHI (known as the 'delta') is a useful proxy for the change in concentration directly brought about by the merger (19).
Market share levels

17. According to well-established case law, very large market shares — 50 % or more — may in themselves be evidence of the existence of a dominant market position (20). However, smaller competitors may act as a sufficient constraining influence if, for example, they have the ability and incentive to increase their supplies. A merger involving a firm whose market share will remain below 50 % after the merger may also raise competition concerns in view of other factors such as the strength and number of competitors, the presence of capacity constraints or the extent to which the products of the merging parties are close substitutes. The Commission has thus in several cases considered mergers resulting in firms holding market shares between 40 % and 50 % (21), and in some cases below 40 % (22), to lead to the creation or the strengthening of a dominant position.

18. Concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market. Without prejudice to Articles 81 and 82 of the Treaty, an indication to this effect exists, in particular, where the market share of the undertakings concerned does not exceed 25 % (23) either in the common market or in a substantial part of it (24).

HHI levels

19. The Commission is unlikely to identify horizontal competition concerns in a market with a post-merger HHI below 1 000. Such markets normally do not require extensive analysis.

20. The Commission is also unlikely to identify horizontal competition concerns in a merger with a post-merger HHI between 1 000 and 2 000 and a delta below 250, or a merger with a post-merger HHI above 2 000 and a delta below 150, except where special circumstances such as, for instance, one or more of the following factors are present:

(a) a merger involves a potential entrant or a recent entrant with a small market share;

(b) one or more merging parties are important innovators in ways not reflected in market shares;

(c) there are significant cross-shareholdings among the market participants (25);

(d) one of the merging firms is a maverick firm with a high likelihood of disrupting coordinated conduct;

(e) indications of past or ongoing coordination, or facilitating practices, are present;

(f) one of the merging parties has a pre-merger market share of 50 % of more (26).

21. Each of these HHI levels, in combination with the relevant deltas, may be used as an initial indicator of the absence of competition concerns. However, they do not give rise to a presumption of either the existence or the absence of such concerns.

IV. POSSIBLE ANTI-COMPETITIVE EFFECTS OF HORIZONTAL MERGERS

22. There are two main ways in which horizontal mergers may significantly impede effective competition, in particular by creating or strengthening a dominant position:

(a) by eliminating important competitive constraints on one or more firms, which consequently would have increased market power, without resorting to coordinated behaviour (non-coordinated effects);

(b) by changing the nature of competition in such a way that firms that previously were not coordinating their behaviour, are now significantly more likely to coordinate and raise prices or otherwise harm effective competition. A merger may also make coordination easier, more stable or more effective for firms which were coordinating prior to the merger (coordinated effects).

23. The Commission assesses whether the changes brought about by the merger would result in any of these effects. Both instances mentioned above may be relevant when assessing a particular transaction.

Non-coordinated effects (27)

24. A merger may significantly impede effective competition in a market by removing important competitive constraints on one or more sellers, who consequently have increased market power. The most direct effect of the merger will be the loss of competition between the merging firms. For example, if prior to the merger one of the merging firms had raised its price, it would have lost some sales to the other merging firm. The merger removes this particular constraint. Non-merging firms in the same market can also benefit from the reduction of competitive pressure that results from the merger, since the merging firms' price increase may switch some demand to the rival firms, which, in turn, may find it profitable to increase their prices (28). The reduction in these competitive constraints could lead to significant price increases in the relevant market.
25. Generally, a merger giving rise to such non-coordinated effects would significantly impede effective competition by creating or strengthening the dominant position of a single firm, one which, typically, would have an appreciably larger market share than the next competitor post-merger. Furthermore, mergers in oligopolistic markets involving the elimination of important competitive constraints that the merging parties previously exerted upon each other together with a reduction of competitive pressure on the remaining competitors may, even where there is little likelihood of coordination between the members of the oligopoly, also result in a significant impediment to competition. The Merger Regulation clarifies that all mergers giving rise to such non-coordinated effects shall also be declared incompatible with the common market.

26. A number of factors, which taken separately are not necessarily decisive, may influence whether significant non-coordinated effects are likely to result from a merger. Not all of these factors need to be present for such effects to be likely. Nor should this be considered an exhaustive list.

**Merging firms have large market shares**

27. The larger the market share, the more likely a firm is to possess market power. And the larger the addition of market share, the more likely it is that a merger will lead to a significant increase in market power. The larger the increase in the sales base on which to enjoy higher margins after a price increase, the more likely it is that the merging firms will find such a price increase profitable despite the accompanying reduction in output. Although market shares and additions of market shares only provide first indications of market power and increases in market power, they are normally important factors in the assessment.

**Merging firms are close competitors**

28. Products may be differentiated within a relevant market such that some products are closer substitutes than others. The higher the degree of substitutability between the merging firms' products, the more likely it is that the merging firms will raise prices significantly. For example, a merger between two producers offering products which a substantial number of customers regard as their first and second choices could generate a significant price increase. Thus, the fact that rivalry between the parties has been an important source of competition on the market may be a central factor in the analysis. High pre-merger margins may also make significant price increases more likely. The merging firms' incentive to raise prices is more likely to be constrained when rival firms produce close substitutes to the products of the merging firms than when they offer less close substitutes. It is therefore less likely that a merger will significantly impede effective competition, in particular through the creation or strengthening of a dominant position, when there is a high degree of substitutability between the products of the merging firms and those supplied by rival producers.

29. When data are available, the degree of substitutability may be evaluated through customer preference surveys, analysis of purchasing patterns, estimation of the cross-price elasticities of the products involved, or diversion ratios. In bidding markets it may be possible to measure whether historically the submitted bids by one of the merging parties have been constrained by the presence of the other merging party.

30. In some markets it may be relatively easy and not too costly for the active firms to reposition their products or extend their product portfolio. In particular, the Commission examines whether the possibility of repositioning or product line extension by competitors or the merging parties may influence the incentive of the merged entity to raise prices. However, product repositioning or product line extension often entails risks and large sunk costs and may be less profitable than the current line.

**Customers have limited possibilities of switching supplier**

31. Customers of the merging parties may have difficulties switching to other suppliers because there are few alternative suppliers or because they face substantial switching costs. Such customers are particularly vulnerable to price increases. The merger may affect these customers' ability to protect themselves against price increases. In particular, this may be the case for customers that have used dual sourcing from the two merging firms as a means of obtaining competitive prices. Evidence of past customer switching patterns and reactions to price changes may provide important information in this respect.

**Competitors are unlikely to increase supply if prices increase**

32. When market conditions are such that the competitors of the merging parties are unlikely to increase their supply substantially if prices increase, the merging firms may have an incentive to reduce output below the combined pre-merger levels, thereby raising market prices. The merger increases the incentive to reduce output by giving the merged firm a larger base of sales on which to enjoy the higher margins resulting from an increase in prices induced by the output reduction.

33. Conversely, when market conditions are such that rival firms have enough capacity and find it profitable to expand output sufficiently, the Commission is unlikely to find that the merger will create or strengthen a dominant position or otherwise significantly impede effective competition.

34. Such output expansion is, in particular, unlikely when competitors face binding capacity constraints and the expansion of capacity is costly or if existing excess capacity is significantly more costly to operate than capacity currently in use.
35. Although capacity constraints are more likely to be important when goods are relatively homogeneous, they may also be important where firms offer differentiated products.

**Merged entity able to hinder expansion by competitors**

36. Some proposed mergers would, if allowed to proceed, significantly impede effective competition by leaving the merged firm in a position where it would have the ability and incentive to make the expansion of smaller firms and potential competitors more difficult or otherwise restrict the ability of rival firms to compete. In such a case, competitors may not, either individually or in the aggregate, be in a position to constrain the merged entity to such a degree that it would not increase prices or take other actions detrimental to competition. For instance, the merged entity may have such a degree of control, or influence over, the supply of inputs or distribution possibilities that expansion or entry by rival firms may be more difficult. Similarly, the merged entity's control over patents or other types of intellectual property (e.g. brands) may make expansion or entry by rivals more difficult. In markets where interoperability between different infrastructures or platforms is important, a merger may give the merged entity the ability and incentive to raise the costs or decrease the quality of service of its rivals. In making this assessment the Commission may take into account, inter alia, the financial strength of the merged entity relative to its rivals.

**Merger eliminates an important competitive force**

37. Some firms have more of an influence on the competitive process than their market shares or similar measures would suggest. A merger involving such a firm may change the competitive dynamics in a significant, anti-competitive way, in particular when the market is already concentrated. For instance, a firm may be a recent entrant that is expected to exert significant competitive pressure in the future on the other firms in the market.

38. In markets where innovation is an important competitive force, a merger may increase the firms' ability and incentive to bring new innovations to the market and, thereby, the competitive pressure on rivals to innovate in that market. Alternatively, effective competition may be significantly impeded by a merger between two important innovators, for instance between two companies with 'pipeline' products related to a specific product market. Similarly, a firm with a relatively small market share may nevertheless be an important competitive force if it has promising pipeline products.

**Coordinated effects**

39. In some markets the structure may be such that firms would consider it possible, economically rational, and hence preferable, to adopt a sustainable basis a course of action on the market aimed at selling at increased prices. A merger in a concentrated market may significantly impede effective competition, through the creation or the strengthening of a collective dominant position, because it increases the likelihood that firms are able to coordinate their behaviour in this way and raise prices, even without entering into an agreement or resorting to a concerted practice within the meaning of Article 81 of the Treaty. A merger may also make coordination easier, more stable or more effective for firms, that were already coordinating before the merger, either by making the coordination more robust or by permitting firms to coordinate on even higher prices.

40. Coordination may take various forms. In some markets, the most likely coordination may involve keeping prices above the competitive level. In other markets, coordination may aim at limiting production or the amount of new capacity brought to the market. Firms may also coordinate by dividing the market, for instance by geographic area or other customer characteristics, or by allocating contracts in bidding markets.

41. Coordination is more likely to emerge in markets where it is relatively simple to reach a common understanding on the terms of coordination. In addition, three conditions are necessary for coordination to be sustainable. First, the coordinating firms must be able to monitor to a sufficient degree whether the terms of coordination are being adhered to. Second, discipline requires that there is some form of credible deterrent mechanism that can be activated if deviation is detected. Third, the reactions of outsiders, such as current and future competitors not participating in the coordination, as well as customers, should not be able to jeopardise the results expected from the coordination.

42. The Commission examines whether it would be possible to reach terms of coordination and whether the coordination is likely to be sustainable. In this respect, the Commission considers the changes that the merger brings about. The reduction in the number of firms in a market may, in itself, be a factor that facilitates coordination. However, a merger may also increase the likelihood or significance of coordinated effects in other ways. For instance, a merger may involve a 'maverick' firm that has a history of preventing or disrupting coordination, for example by failing to follow price increases by its competitors, or has characteristics that gives it an incentive to favour different strategic choices than its coordinating competitors would prefer. If the merged firm were to adopt strategies similar to those of other competitors, the remaining firms would find it easier to coordinate, and the merger would increase the likelihood, stability or effectiveness of coordination.

43. In assessing the likelihood of coordinated effects, the Commission takes into account all available relevant information on the characteristics of the markets concerned, including both structural features and the past behaviour of firms. Evidence of past coordination is important if the relevant market characteristics have not changed appreciably or are not likely to do so in the near future. Likewise, evidence of coordination in similar markets may be useful information.
Reaching terms of coordination

44. Coordination is more likely to emerge if competitors can easily arrive at a common perception as to how the coordination should work. Coordinating firms should have similar views regarding which actions would be considered to be in accordance with the aligned behaviour and which actions would not.

45. Generally, the less complex and the more stable the economic environment, the easier it is for the firms to reach a common understanding on the terms of coordination. For instance, it is easier to coordinate among a few players than among many. It is also easier to coordinate on a price for a single, homogeneous product, than on hundreds of prices in a market with many differentiated products. Similarly, it is easier to coordinate on a price when demand and supply conditions are relatively stable than when they are continuously changing (60). In this context volatile demand, substantial internal growth by some firms in the market or frequent entry by new firms may indicate that the current situation is not sufficiently stable to make coordination likely (61). In markets where innovation is important, coordination may be more difficult since innovations, particularly significant ones, may allow one firm to gain a major advantage over its rivals.

46. Coordination by way of market division will be easier if customers have simple characteristics that allow the coordinating firms to readily allocate them. Such characteristics may be based on geography; on customer type or simply on the existence of customers who typically buy from one specific firm. Coordination by way of market division may be relatively straightforward if it is easy to identify each customer’s supplier and the coordination device is the allocation of existing customers to their incumbent supplier.

47. Coordinating firms may, however, find other ways to overcome problems stemming from complex economic environments short of market division. They may, for instance, establish simple pricing rules that reduce the complexity of coordinating on a large number of prices. One example of such a rule is establishing a small number of pricing points, thus reducing the coordination problem. Another example is having a fixed relationship between certain base prices and a number of other prices, such that prices basically move in parallel. Publicly available key information, exchange of information through trade associations, or information received through cross-shareholdings or participation in joint ventures may also help firms reach terms of coordination. The more complex the market situation is, the more transparency or communication is likely to be needed to reach a common understanding on the terms of coordination.

48. Firms may find it easier to reach a common understanding on the terms of coordination if they are relatively symmetric (62), especially in terms of cost structures, market shares, capacity levels and levels of vertical integration (63). Structural links such as cross-shareholding or participation in joint ventures may also help in aligning incentives among the coordinating firms (64).

Monitoring deviations

49. Coordinating firms are often tempted to increase their share of the market by deviating from the terms of coordination, for instance by lowering prices, offering secret discounts, increasing product quality or capacity or trying to win new customers. Only the credible threat of timely and sufficient retaliation keeps firms from deviating. Markets therefore need to be sufficiently transparent to allow the coordinating firms to monitor to a sufficient degree whether other firms are deviating, and thus know when to retaliate (65).

50. Transparency in the market is often higher, the lower the number of active participants in the market. Further, the degree of transparency often depends on how market transactions take place in a particular market. For example, transparency is likely to be high in a market where transactions take place on a public exchange or in an open outcry auction (66). Conversely, transparency may be low in a market where transactions are confidentially negotiated between buyers and sellers on a bilateral basis (67). When evaluating the level of transparency in the market, the key element is to identify what firms can infer about the actions of other firms from the available information (68). Coordinating firms should be able to interpret with some certainty whether unexpected behaviour is the result of deviation from the terms of coordination. For instance, in unstable environments it may be difficult for a firm to know whether its lost sales are due to an overall low level of demand or due to a competitor offering particularly low prices. Similarly, when overall demand or cost conditions fluctuate, it may be difficult to interpret whether a competitor is lowering its price because it expects the coordinated prices to fall or because it is deviating.

51. In some markets where the general conditions may seem to make monitoring of deviations difficult, firms may nevertheless engage in practices which have the effect of easing the monitoring task, even when these practices are not necessarily entered into for such purposes. These practices, such as meeting-competition or most-favoured-customer clauses, voluntary publication of information, announcements, or exchange of information through trade associations, may increase transparency or help competitors interpret the choices made. Cross-directorships, participation in joint ventures and similar arrangements may also make monitoring easier.

Deterrent mechanisms

52. Coordination is not sustainable unless the consequences of deviation are sufficiently severe to convince coordinating firms that it is in their best interest to adhere to the terms of coordination. It is thus the threat of future retaliation that keeps the coordination sustainable (69). However the threat is only credible if, where deviation by one of the firms is detected, there is sufficient certainty that some deterrent mechanism will be activated (70).
53. Retaliation that manifests itself after some significant time lag, or is not certain to be activated, is less likely to be sufficient to offset the benefits from deviating. For example, if a market is characterised by infrequent, large-volume orders, it may be difficult to establish a sufficiently severe deterrent mechanism, since the gain from deviating at the right time may be large, certain and immediate, whereas the losses from being punished may be small and uncertain and only materialise after some time. The speed with which deterrent mechanisms can be implemented is related to the issue of transparency. If firms are only able to observe their competitors’ actions after a substantial delay, then retaliation will be similarly delayed and this may influence whether it is sufficient to deter deviation.

54. The credibility of the deterrence mechanism depends on whether the other coordinating firms have an incentive to retaliate. Some deterrent mechanisms, such as punishing the deviator by temporarily engaging in a price war or increasing output significantly, may entail a short-term economic loss for the firms carrying out the retaliation. This does not necessarily remove the incentive to retaliate since the short-term loss may be smaller than the long-term benefit of retaliating resulting from the return to the regime of coordination.

55. Retaliation need not necessarily take place in the same market as the deviation (73). If the coordinating firms have commercial interaction in other markets, these may offer various methods of retaliation (74). The retaliation could take many forms, including cancellation of joint ventures or other forms of cooperation or selling of shares in jointly owned companies.

Reactions of outsiders

56. For coordination to be successful, the actions of non-coordinating firms and potential competitors, as well as customers, should not be able to jeopardise the outcome expected from coordination. For example, if coordination aims at reducing overall capacity in the market, this will only hurt consumers if non-coordinating firms are unable to have no incentive to respond to this decrease by increasing their own capacity sufficiently to prevent a net decrease in capacity, or at least to render the coordinated capacity decrease unprofitable (75).

57. The effects of entry and countervailing buyer power of customers are analysed in later sections. However, special consideration is given to the possible impact of these elements on the stability of coordination. For instance, by concentrating a large amount of its requirements with one supplier or by offering long-term contracts, a large buyer may make coordination unstable by successfully tempting one of the coordinating firms to deviate in order to gain substantial new business.

Merger with a potential competitor

58. Concentrations where an undertaking already active on a relevant market merges with a potential competitor in this market can have similar anti-competitive effects to mergers between two undertakings already active on the same relevant market and, thus, significantly impede effective competition, in particular through the creation or the strengthening of a dominant position.

59. A merger with a potential competitor can generate horizontal anti-competitive effects, whether coordinated or non-coordinated, if the potential competitor significantly constrains the behaviour of the firms active in the market. This is the case if the potential competitor possesses assets that could easily be used to enter the market without incurring significant sunk costs. Anti-competitive effects may also occur where the merging partner is very likely to incur the necessary sunk costs to enter the market in a relatively short period of time after which this company would constrain the behaviour of the firms currently active in the market (76).

60. For a merger with a potential competitor to have significant anti-competitive effects, two basic conditions must be fulfilled. First, the potential competitor must already exert a significant constraining influence or there must be a significant likelihood that it would grow into an effective competitive force. Evidence that a potential competitor has plans to enter a market in a significant way could help the Commission to reach such a conclusion (77). Second, there must not be a sufficient number of other potential competitors, which could maintain sufficient competitive pressure after the merger (78).

Mergers creating or strengthening buyer power in upstream markets

61. The Commission may also analyse to what extent a merged entity will increase its buyer power in upstream markets. On the one hand, a merger that creates or strengthens the market power of a buyer may significantly impede effective competition, in particular by creating or strengthening a dominant position. The merged firm may be in a position to obtain lower prices by reducing its purchase of inputs. This may, in turn, lead it also to lower its level of output in the final product market, and thus harm consumer welfare (79). Such effects may in particular arise when upstream sellers are relatively fragmented. Competition in the downstream markets could also be adversely affected if, in particular, the merged entity were likely to use its buyer power vis-à-vis its suppliers to foreclose its rivals (79).

62. On the other hand, increased buyer power may be beneficial for competition. If increased buyer power lowers input costs without restricting downstream competition or total output, then a proportion of these cost reductions are likely to be passed onto consumers in the form of lower prices.
63. In order to assess whether a merger would significantly impede effective competition by creating or strengthening buyer power, an analysis of the competitive conditions in upstream markets and an evaluation of the possible positive and negative effects described above are therefore required.

V. COUNTERVAILING BUYER POWER

64. The competitive pressure on a supplier is not only exercised by competitors but can also come from its customers. Even firms with very high market shares may not be in a position, post-merger, to significantly impede effective competition, in particular by acting to an appreciable extent independently of their customers, if the latter possess countervailing buyer power (87). Countervailing buyer power in this context should be understood as the bargaining strength that the buyer has vis-à-vis the seller in commercial negotiations due to its size, its commercial significance to the seller and its ability to switch to alternative suppliers.

65. The Commission considers, when relevant, to what extent customers will be in a position to counter the increase in market power that a merger would otherwise be likely to create. One source of countervailing buyer power would be if a customer could credibly threaten to resort, within a reasonable timeframe, to alternative sources of supply should the supplier decide to increase prices (80) or to otherwise deteriorate quality or the conditions of delivery. This would be the case if the buyer could immediately switch to other suppliers (84), credibly threaten to vertically integrate into the upstream market or to sponsor upstream expansion or entry (82) for instance by persuading a potential entrant to enter by committing to placing large orders with this company. It is more likely that large and sophisticated customers will possess this kind of countervailing buyer power than smaller firms in a fragmented industry (84). A buyer may also exercise countervailing buying power by refusing to buy other products produced by the supplier or, particularly in the case of durable goods, delaying purchases.

66. In some cases, it may be important to pay particular attention to the incentives of buyers to utilise their buyer power (84). For example, a downstream firm may not wish to make an investment in sponsoring new entry if the benefits of such entry in terms of lower input costs could also be reaped by its competitors.

67. Countervailing buyer power cannot be found to sufficiently off-set potential adverse effects of a merger if it only ensures that a particular segment of customers (84), with particular bargaining strength, is shielded from significantly higher prices or deteriorated conditions after the merger (84). Furthermore, it is not sufficient that buyer power exists prior to the merger, it must also exist and remain effective following the merger. This is because a merger of two suppliers may reduce buyer power if it thereby removes a credible alternative.

68. When entering a market is sufficiently easy, a merger is unlikely to pose any significant anti-competitive risk. Therefore, entry analysis constitutes an important element of the overall competitive assessment. For entry to be considered a sufficient competitive constraint on the merging parties, it must be shown to be likely, timely and sufficient to deter or defeat any potential anti-competitive effects of the merger.

VI. ENTRY

69. The Commission examines whether entry is likely or whether potential entry is likely to constrain the behaviour of incumbents post-merger. For entry to be likely, it must be sufficiently profitable taking into account the price effects of injecting additional output into the market and the potential responses of the incumbents. Entry is thus less likely if it would only be economically viable on a large scale, thereby resulting in significantly depressed price levels. And entry is likely to be more difficult if the incumbents are able to protect their market shares by offering long-term contracts or giving targeted pre-emptive price reductions to those customers that the entrant is trying to acquire. Furthermore, high risk and costs of failed entry may make entry less likely. The costs of failed entry will be higher, the higher is the level of sunk cost associated with entry (87).

70. Potential entrants may encounter barriers to entry which determine entry costs and thus have an impact on the profitability of entry. Barriers to entry are specific features of the market, which give incumbent firms advantages over potential competitors. When entry barriers are low, the merging parties are more likely to be constrained by entry. Conversely, when entry barriers are high, price increases by the merging firms would not be significantly constrained by entry. Historical examples of entry and exit in the industry may provide useful information about the size of entry barriers.

71. Barriers to entry can take various forms:

(a) Legal advantages encompass situations where regulatory barriers limit the number of market participants by, for example, restricting the number of licences (88). They also cover tariff and non-tariff trade barriers (88).

(b) The incumbents may also enjoy technical advantages, such as preferential access to essential facilities, natural resources (89), innovation and R & D (90), or intellectual property rights (91), which make it difficult for any firm to compete successfully. For instance, in certain industries, it might be difficult to obtain essential input materials, or patents might protect products or processes. Other factors such as economies of scale and scope, distribution and sales networks (90), access to important technologies, may also constitute barriers to entry.
72. The expected evolution of the market should be taken into account when assessing whether or not entry would be profitable. Entry is more likely to be profitable in a market that is expected to experience high growth in the future than in a market that is mature or expected to decline. Scale economies or network effects may make entry unprofitable unless the entrant can obtain a sufficiently large market share.

73. Entry is particularly likely if suppliers in other markets already possess production facilities that could be used to enter the market in question, thus reducing the sunk costs of entry. The smaller the difference in profitability between entry and non-entry prior to the merger, the more likely such a reallocation of production facilities.

**Sufficiency**

75. Entry must be of sufficient scope and magnitude to deter or defeat the anti-competitive effects of the merger. Small-scale entry, for instance into some market ‘niche’, may not be considered sufficient.

76. Corporate reorganisations in the form of mergers may be in line with the requirements of dynamic competition and are capable of increasing the competitiveness of industry, thereby improving the conditions of growth and raising the standard of living in the Community. It is possible that efficiencies brought about by a merger counteract the effects on competition and in particular the potential harm to consumers that it might otherwise have. In order to assess whether a merger would significantly impede effective competition, in particular through the creation or the strengthening of a dominant position, within the meaning of Article 2(2) and (3) of the Merger Regulation, the Commission performs an overall competitive appraisal of the merger. In making this appraisal, the Commission takes into account the factors mentioned in Article 2(1), including the development of technical and economic progress provided that it is to the consumers' advantage and does not form an obstacle to competition.

77. The Commission considers any substantiated efficiency claim in the overall assessment of the merger. It may decide that, as a consequence of the efficiencies that the merger brings about, there are no grounds for declaring the merger incompatible with the common market pursuant to Article 2(3) of the Merger Regulation. This will be the case when the Commission is in a position to conclude on the basis of sufficient evidence that the efficiencies generated by the merger are likely to enhance the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers, thereby counteracting the adverse effects on competition which the merger might otherwise have.

78. For the Commission to take account of efficiency claims in its assessment of the merger and be in a position to reach the conclusion that as a consequence of efficiencies, there are no grounds for declaring the merger to be incompatible with the common market, the efficiencies have to benefit consumers, be merger-specific and be verifiable. These conditions are cumulative.

**Benefit to consumers**

79. The relevant benchmark in assessing efficiency claims is that consumers will not be worse off as a result of the merger. For that purpose, efficiencies should be substantial and timely, and should, in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur.

80. Mergers may bring about various types of efficiency gains that can lead to lower prices or other benefits to consumers. For example, cost savings in production or distribution may give the merged entity the ability and incentive to charge lower prices following the merger. In line with the need to ascertain whether efficiencies will lead to a net benefit to consumers, cost efficiencies that lead to reductions in variable or marginal costs are more likely to be relevant to the assessment of efficiencies than reductions in fixed costs; the former are, in principle, more likely to result in lower prices for consumers. Cost reductions, which merely result from anti-competitive reductions in output, cannot be considered as efficiencies benefiting consumers.

81. Consumers may also benefit from new or improved products or services, for instance resulting from efficiency gains in the sphere of R & D and innovation. A joint venture company set up in order to develop a new product may bring about the type of efficiencies that the Commission can take into account.
82. In the context of coordinated effects, efficiencies may increase the merged entity's incentive to increase production and reduce prices, and thereby reduce its incentive to coordinate its market behaviour with other firms in the market. Efficiencies may therefore lead to a lower risk of coordinated effects in the relevant market.

83. In general, the later the efficiencies are expected to materialise in the future, the less weight the Commission can assign to them. This implies that, in order to be considered as a counteracting factor, the efficiencies must be timely.

84. The incentive on the part of the merged entity to pass efficiency gains on to consumers is often related to the existence of competitive pressure from the remaining firms in the market and from potential entry. The greater the possible negative effects on competition, the more the Commission has to be sure that the claimed efficiencies are substantial, likely to be realised, and to be passed on, to a sufficient degree, to the consumer. It is highly unlikely that a merger leading to a market position approaching that of a monopoly, or leading to a similar level of market power, can be declared compatible with the common market on the ground that efficiency gains would be sufficient to counteract its potential anti-competitive effects.

Merger specificity

85. Efficiencies are relevant to the competitive assessment when they are a direct consequence of the notified merger and cannot be achieved to a similar extent by less anticompetitive alternatives. In these circumstances, the efficiencies are deemed to be caused by the merger and thus, merger-specific (108). It is for the merging parties to provide in due time all the relevant information necessary to demonstrate that there are no less anticompetitive, realistic and attainable alternatives of a non-concentrative nature (e.g. a licensing agreement, or a cooperative joint venture) or of a concentrative nature (e.g. a concentrative joint venture, or a differently structured merger) than the notified merger which preserve the claimed efficiencies. The Commission only considers alternatives that are reasonably practical in the business situation faced by the merging parties having regard to established business practices in the industry concerned.

Verifiability

86. Efficiencies have to be verifiable such that the Commission can reasonably certain that the efficiencies are likely to materialise, and be substantial enough to counteract a merger's potential harm to consumers. The more precise and convincing the efficiency claims are, the better the Commission can evaluate the claims. Where reasonably possible, efficiencies and the resulting benefit to consumers should therefore be quantified. When the necessary data are not available to allow for a precise quantitative analysis, it must be possible to foresee a clearly identifiable positive impact on consumers, not a marginal one. In general, the longer the start of the efficiencies is projected into the future, the less probability the Commission may be able to assign to the efficiencies actually being brought about.

87. Most of the information, allowing the Commission to assess whether the merger will bring about the sort of efficiencies that would enable it to clear a merger, is solely in the possession of the merging parties. It is, therefore, incumbent upon the notifying parties to provide in due time all the relevant information necessary to demonstrate that the claimed efficiencies are merger-specific and likely to be realised. Similarly, it is for the notifying parties to show to what extent the efficiencies are likely to counteract any adverse effects on competition that might otherwise result from the merger, and therefore benefit consumers.

88. Evidence relevant to the assessment of efficiency claims includes, in particular, internal documents that were used by the management to decide on the merger, statements from the management to the owners and financial markets about the expected efficiencies, historical examples of efficiencies and consumer benefit, and pre-merger external experts' studies on the type and size of efficiency gains, and on the extent to which consumers are likely to benefit.

VIII. FAILING FIRM

89. The Commission may decide that an otherwise problematic merger is nevertheless compatible with the common market if one of the merging parties is a failing firm. The basic requirement is that the deterioration of the competitive structure that follows the merger cannot be said to be caused by the merger (109). This will arise where the competitive structure of the market would deteriorate to at least the same extent in the absence of the merger (110).

90. The Commission considers the following three criteria to be especially relevant for the application of a ‘failing firm defence’. First, the allegedly failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking. Second, there is no less anti-competitive alternative purchase than the notified merger. Third, in the absence of a merger, the assets of the failing firm would inevitably exit the market (111).

91. It is for the notifying parties to provide in due time all the relevant information necessary to demonstrate that the deterioration of the competitive structure that follows the merger is not caused by the merger.
In markets with cross-shareholdings or joint ventures the Commission may use a modified HHI, which takes into account such shareholdings (see, e.g. Case COMP/M.2337 — Nestlé/Ralston Purina, points 48-50).

The term ‘concentration’ used in the Merger Regulation covers various types of transactions such as mergers, acquisitions, takeovers, and certain types of joint ventures. In the remainder of this notice, unless otherwise specified, the term ‘merger’ will be used as a synonym for concentration and therefore cover all the above types of transactions.

The calculation of market shares depends critically on market definition. It must be emphasised that the Commission does not necessarily accept the parties’ proposed market definition.

The increase in concentration as measured by the HHI can be calculated independently of the overall market concentration by doubling the product of the market shares of the merging firms. For example, a merger of two firms with market shares of 30% and 15% respectively would increase the HHI by 900 (30 × 15 × 2 = 900). The explanation for this technique is as follows: Before the merger, the market shares of the merging firms contribute to the HHI by their squares individually: (a)² + (b)². After the merger, the contribution is the square of their sum: (a + b)², which equals (a)² + (b)² + 2ab. The increase in the HHI is therefore represented by 2ab.

As to the calculation of market shares, see also Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 3, paragraphs 54-55.

When relevant, market shares may be adjusted, in particular, to account for controlling interests in other firms (See, e.g. Case IV/M.1383 — ExxonMobil, points 225-229; Case COMP/M.2434 — Grupo Villar Mir/EnBW/Hidroelectrica del Cantabrico, points 67-71).
(26) See paragraph 17.
(27) Also often called 'unilateral' effects.
(28) Such expected reactions by competitors may be a relevant factor influencing the merged entity's incentives to increase prices.
(29) An oligopolistic market refers to a market structure with a limited number of sizeable firms. Because the behaviour of one firm has an appreciable impact on the overall market conditions, and thus indirectly on the situation of each of the other firms, oligopolistic firms are interdependent.
(30) Recital 25 of the Merger Regulation.
(31) See, in particular, paragraphs 17 and 18.
(32) Products may be differentiated in various ways. There may, for example, be differentiation in terms of geographic location, based on branch or stores location; location matters for retail distribution, banks, travel agencies, or petrol stations. Likewise, differentiation may be based on brand image, technical specifications, quality or level of service. The level of advertising in a market may be an indicator of the firms' effort to differentiate their products. For other products, buyers may have to incur switching costs to use a competitor's product.
(33) For the definition of the relevant market, see the Commission's Notice on the definition of the relevant market for the purposes of Community competition law, cited above.
(36) Typically, the relevant margin (m) is the difference between price (p) and the incremental cost (c) of supplying one more unit of output expressed as a percentage of price (m = (p - c)p)).
(37) See, e.g. Case IV/M.1980 — Volvo/Renault VI point 34; Case COMP/M.2256 — Phillips Agilent/Healthcare Solutions, points 33-35; Case COMP/M.2537 — Philips/Marconi Medical Systems, points 31-34.
(38) The cross-price elasticity of demand measures the extent to which the quantity of a product demanded changes in response to a change in the price of some other product, all other things remaining equal. The own-price elasticity measures the extent to which demand for a product changes in response to the change in the price of the product itself.
(39) The diversion ratio from product A to product B measures the proportion of the sales of product A lost due to a price increase of A that are captured by product B.
(41) Sunk costs are costs which are unrecoverable upon exit from the market.
(44) See, e.g. Case COMP/M.2187 — CVC/Lenzing, points 162-170.
(45) When analysing the possible expansion of capacity by rivals, the Commission considers factors similar to those described in Section VI on entry. See, e.g. Case COMP/M.2187 — CVC/Lenzing, points 162-173.
(47) See, e.g. Case T-222/97, Kesko v Commission, [1999], ECR II-3775, paragraphs 141 et seq.
(48) This is, for example, the case in network industries such as energy, telecommunications and other communication industries.
(50) See, e.g. Case T-222/97, Kesko v Commission, [1999], ECR II-3775, paragraphs 143 et seq.
(51) For an example of pipeline products of one merging party likely to compete with the other party's pipeline or existing products, see, e.g. Case IV/M.1846 — Glaxo Wellcome/SmithKline Beecham, point 188.
In assessing whether or not a merger may increase the symmetry of the various firms present on the market, efficiency gains may provide important indications (see also paragraph 82 of the notice).


See Case COMP/M.2389 — Shell/DEA, point 121, and Case COMP/M.2533 — BP/E.ON, point 111.

Although deterrent mechanisms are sometimes called 'punishment' mechanisms, this should not be understood in the strict sense that such a mechanism necessarily punishes individually a firm that has deviated. The expectation that coordination may break down for a certain period of time, if a deviation is identified as such, may in itself constitute a sufficient deterrent mechanism.


These elements are analysed in a similar way to non-coordinated effects.

See, e.g. Case IV/M.1630 — Air Liquide/BOC, points 201 et seq. For an example of a case where entry by the other merging firm was not sufficiently likely in the short to medium term (Case T-158/00, ARD v Commission, [2003] ECR II-000, paragraphs 115-127).

See, e.g. Case IV/M.2389 — Shell/DEA, points 121, and Case COMP/M.2533 — BP/E.ON, point 111.

It may also be appropriate to compare the concentration existing on the customer side with the concentration on the supply side (Case COMP/JV 55 — Hutchison/RCPM/ECT, point 119, and Commission Decision 1999/641/EC in Case COMP/M.1225 — Enso/Stora, OJ L 254, 29.9.1999, p. 9, points 89-91).

It may also be appropriate to compare the concentration existing on the customer side with the concentration on the supply side (Case COMP/JV 55 — Hutchison/RCPM/ECT, point 119, and Commission Decision 1999/641/EC in Case COMP/M.1225 — Enso/Stora, OJ L 254, 29.9.1999, p. 9, point 97).

See, e.g. Case COMP/JV 55 — Hutchison/RCPM/ECT, points 129-130.

See, e.g. Case IV/M.2187 — CVC/Lenzing, point 223.


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It may also be appropriate to compare the concentration existing on the customer side with the concentration on the supply side (Case COMP/JV 55 — Hutchison/RCPM/ECT, point 119, and Commission Decision 1999/641/EC in Case COMP/M.1225 — Enso/Stora, OJ L 254, 29.9.1999, p. 9, point 97).
(109) See Recital 4 of the Merger Regulation.
(110) See Recital 29 of the Merger Regulation.
(111) Cf. Article 2(1)(b) of the Merger Regulation.
(112) Pursuant to Article 2(1)(b), the concept of ‘consumers’ encompasses intermediate and ultimate consumers, i.e. users of the products covered by the merger. In other words, consumers within the meaning of this provision include the customers, potential and/or actual, of the parties to the merger.
(113) Variable costs should be viewed as those costs that vary with the level of production or sales over the relevant time period. Marginal costs are those costs associated with expanding production or sales at the margin.
(114) Generally, fixed cost savings are not given such weight as the relationship between fixed costs and consumer prices is normally less direct, at least in the short run.
(115) In line with the general principle set out in paragraph 9 of this notice.
(116) Joined Cases C-68/94 and C-30/95, Kali and Salz, paragraph 110.
(117) Joined Cases C-68/94 and C-30/95, Kali and Salz, paragraph 114. See also Commission Decision 2002/365/EC in Case COMP/M.2314 — BASF/Pantochim/Eurodiol, OJ L 132, 17.5.2002, p. 45, points 157-160. This requirement is linked to the general principle set out in paragraph 9 of this notice.
(118) The inevitability of the assets of the failing firm leaving the market in question may, in particular in a case of merger to monopoly, underlie a finding that the market share of the failing firm would in any event accrue to the other merging party. See Joined Cases C-68/94 and C-30/95, Kali and Salz, paragraphs 115-116.
Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings

(2008/C 265/07)

I. INTRODUCTION

1. Article 2 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (1) (hereinafter: the ’Merger Regulation’) provides that the Commission has to appraise concentrations within the scope of the Merger Regulation with a view to establishing whether or not they are compatible with the common market. For that purpose, the Commission must assess, pursuant to Article 2(2) and (3), whether or not a concentration would significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position in the common market or a substantial part of it.

2. This document develops guidance as to how the Commission assesses concentrations (2) where the undertakings concerned are active on different relevant markets (3). In this document, these concentrations will be called ‘non-horizontal mergers’.

3. Two broad types of non-horizontal mergers can be distinguished: vertical mergers and conglomerate mergers.

4. Vertical mergers involve companies operating at different levels of the supply chain. For example, when a manufacturer of a certain product (the ‘upstream firm’) merges with one of its distributors (the ‘downstream firm’), this is called a vertical merger (4).

5. Conglomerate mergers are mergers between firms that are in a relationship which is neither horizontal (as competitors in the same relevant market) nor vertical (as suppliers or customers) (5). In practice, the focus of the present guidelines is on mergers between companies that are active in closely related markets (e.g. mergers involving suppliers of complementary products or products that belong to the same product range).

6. The general guidance already given in the Notice on horizontal mergers is also relevant in the context of non-horizontal mergers. The purpose of the present document is to concentrate on the competition aspects that are relevant to the specific context of non-horizontal mergers. In addition, it will set out the Commission’s approach to market shares and concentration thresholds in this context.

7. In practice, mergers may entail both horizontal and non-horizontal effects. This may for instance be the case where the merging firms are not only in a vertical or conglomerate relationship, but are also actual or potential competitors of each other in one or more of the relevant markets concerned (6). In such a case, the Commission will appraise horizontal, vertical and/or conglomerate effects in accordance with the guidance set out in the relevant notices (7).

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(2) The term concentration used in the Merger Regulation covers various types of transactions such as mergers, acquisitions, takeovers, and certain types of joint ventures. In the remainder of this Document, unless otherwise specified, the term ‘merger’ will be used as a synonym for concentration and therefore cover all the above types of transactions.
(3) Guidance on the assessment of mergers involving undertakings which are actual or potential competitors on the same relevant market (‘horizontal mergers’) is given in the Commission Notice: Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 31, 3.2.2004, p. 5) (’Notice on Horizontal Mergers’).
(4) In the present document, the terms ‘downstream’ and ‘upstream’ are used to describe the (potential) commercial relationship that the merging entities have with each other. Generally the commercial relationship is one where the ‘downstream’ firm purchases the output from the ‘upstream’ firm and uses it as an input in its own production, which it then sells on to its customers. The market where the former transactions take place is referred to as the intermediate market (upstream market). The latter market is referred to as the downstream market.
(5) The distinction between conglomerate mergers and horizontal mergers may be subtle, e.g. when a conglomerate merger involves products that are weak substitutes for each other. The same holds true for the distinction between conglomerate mergers and vertical mergers. For instance, products may be supplied by some companies with the inputs already integrated (vertical relationship), whereas other producers leave it to the customers to select and assemble the inputs themselves (conglomerate relationship).
(6) For instance, in certain markets upstream or downstream firms are often well-placed potential entrants. See e.g. in the electricity and gas sector, Case COMP/M.3440 — EDP/ENI/GDP (2004). The same may hold for producers of complementary products. See e.g. in the liquid packaging sector, Case COMP/M.2416 — TetraLaval/Sidel (2001).
(7) Guidance on the assessment of mergers with a potential competitor is given in the Notice on horizontal mergers, in particular at paragraphs 58 to 60 thereof.
8. The guidance set out in this document draws and elaborates on the Commission’s evolving experience with the appraisal of non-horizontal mergers under Regulation (EEC) No 4064/89 since its entry into force on 21 September 1990, the Merger Regulation presently in force as well as on the case-law of the Court of Justice and the Court of First Instance of the European Communities. The principles contained here will be applied and further developed and refined by the Commission in individual cases. The Commission may revise the notice on non-horizontal mergers from time to time in the light of future developments and of evolving insight.

9. The Commission’s interpretation of the Merger Regulation as regards the appraisal of non-horizontal mergers 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. OVERVIEW

10. Effective competition brings benefits to consumers, such as low prices, high quality products, a wide selection of goods and services, and innovation. Through its control of mergers, the Commission prevents mergers that would be likely to deprive customers of these benefits by significantly increasing the market power of firms. An ‘increase in market power’ in this context refers to the ability of one or more firms to profitably increase prices, reduce output, choice or quality of goods and services, diminish innovation, or otherwise negatively influence parameters of competition (1).

11. Non-horizontal mergers are generally less likely to significantly impede effective competition than horizontal mergers.

12. First, unlike horizontal mergers, vertical or conglomerate mergers do not entail the loss of direct competition between the merging firms in the same relevant market (2). As a result, the main source of anti-competitive effect in horizontal mergers is absent from vertical and conglomerate mergers.

13. Second, vertical and conglomerate mergers provide substantial scope for efficiencies. A characteristic of vertical mergers and certain conglomerate mergers is that the activities and/or the products of the companies involved are complementary to each other (3). The integration of complementary activities or products within a single firm may produce significant efficiencies and be pro-competitive. In vertical relationships for instance, a result of the complementarity, a decrease in mark-ups downstream will lead to higher demand also upstream. A part of the benefit of this increase in demand will accrue to the upstream suppliers. An integrated firm will take this benefit into account. Vertical integration may thus provide an increased incentive to seek to decrease prices and increase output because the integrated firm can capture a larger fraction of the benefits. This is often referred to as the ‘internalisation of double mark-ups’. Similarly, other efforts to increase sales at one level (e.g. improve service or stepping up innovation) may provide a greater reward for an integrated firm that will take into account the benefits accruing at other levels.

14. Integration may also decrease transaction costs and allow for a better co-ordination in terms of product design, the organisation of the production process, and the way in which the products are sold. Similarly, mergers which involve products belonging to a range or portfolio of products that are generally sold to the same set of customers (be they complementary products or not) may give rise to customer benefits such as one-stop-shopping.

(1) In this document, the expression ‘increased prices’ is often used as shorthand for these various ways in which a merger may result in competitive harm. The expression should also be understood to cover situations where, for instance, prices are decreased less, or are less likely to decrease, than they otherwise would have without the merger and where prices are increased more, or are more likely to increase, than they otherwise would have without the merger.

(2) Such a loss of direct competition can, nevertheless, arise where one of the merging firms is a potential competitor in the relevant market where the other merging firm operates. See paragraph 7 above.

(3) In this document, products or services are called ‘complementary’ (or ‘economic complements’) when they are worth more to a customer when used or consumed together than when used or consumed separately. Also a merger between upstream and downstream activities can be seen as a combination of complements which go into the final product. For instance, both production and distribution fulfil a complementary role in getting a product to the market.
15. However, there are circumstances in which non-horizontal mergers may significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position. This is essentially because a non-horizontal merger may change the ability and incentive to compete on the part of the merging companies and their competitors in ways that cause harm to consumers.

16. In the context of competition law, the concept of ‘consumers’ encompasses intermediate and ultimate consumers (1). When intermediate customers are actual or potential competitors of the parties to the merger, the Commission focuses on the effects of the merger on the customers to which the merged entity and those competitors are selling. Consequently, the fact that a merger affects competitors is not in itself a problem. It is the impact on effective competition that matters, not the mere impact on competitors at some level of the supply chain (2). In particular, the fact that rivals may be harmed because a merger creates efficiencies cannot in itself give rise to competition concerns.

17. There are two main ways in which non-horizontal mergers may significantly impede effective competition: non-coordinated effects and coordinated effects (3).

18. Non-coordinated effects may principally arise when non-horizontal mergers give rise to foreclosure. In this document, the term ‘foreclosure’ will be used to describe any instance where actual or potential rivals’ access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing these companies’ ability and/or incentive to compete. As a result of such foreclosure, the merging companies—and, possibly, some of its competitors as well—may be able to profitably increase the price (4) charged to consumers. These instances give rise to a significant impediment to effective competition and are therefore referred to hereafter as ‘anticompetitive foreclosure’.

19. Coordinated effects arise where the merger changes the nature of competition in such a way that firms that previously were not coordinating their behaviour, are now significantly more likely to coordinate to raise prices or otherwise harm effective competition. A merger may also make coordination easier, more stable or more effective for firms which were coordinating prior to the merger.

20. In assessing the competitive effects of a merger, the Commission compares the competitive conditions that would result from the notified merger with the conditions that would have prevailed without the merger (5). In most cases the competitive conditions existing at the time of the merger constitute the relevant comparison for evaluating the effects of a merger. However, in some circumstances, the Commission will take into account future changes to the market that can reasonably be predicted. It may, in particular, take account of the likely entry or exit of firms if the merger did not take place when considering what constitutes the relevant comparison. The Commission may take into account future market developments that result from impending regulatory changes (6).

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(2) One example of this approach can be found in the case COMP/M.3653 — Siemens/VA Tech (2005), in which the Commission assessed the effect of the transaction on the two complementary markets for electrical rail vehicles and electrical traction systems for rail vehicles, which combine into a full rail vehicle. While the merger allegedly reduced the independent supply of electrical traction systems, there would still be several integrated suppliers which could deliver the rail vehicle. The Commission thus concluded that even if the merger had negative consequences for independent suppliers of electrical rail vehicles ‘sufficient competition would remain in the relevant downstream market for rail vehicles’.

(3) See Section II of the Notice on Horizontal Mergers.

(4) For the meaning of the expression ‘increased prices’ see footnote 8.

(5) For analogy, in the case of a merger that has been implemented without having been notified, the Commission would assess the merger in the light of the competitive conditions that would have prevailed without the implemented merger.

(6) This may be particularly relevant in cases where effective competition is expected to arise in the future as a result of market opening. See e.g. Case COMP/M.3696 — E.ON/MOL (2005), at points 457 to 463.
21. In its assessment, the Commission will consider both the possible anti-competitive effects arising from the merger and the possible pro-competitive effects stemming from substantiated efficiencies benefiting consumers (1). The Commission examines the various chains of cause and effect with a view to ascertaining which of them is the most likely. The more immediate and direct the perceived anti-competitive effects of a merger, the more likely the Commission is to raise competition concerns. Likewise, the more immediate and direct the pro-competitive effects of a merger, the more likely the Commission is to find that they counteract any anti-competitive effects.

22. This document describes the main scenarios of competitive harm and sources of efficiencies in the context of vertical mergers and, subsequently, in the context of conglomerate mergers.

III. MARKET SHARE AND CONCENTRATION LEVELS

23. Non-horizontal mergers pose no threat to effective competition unless the merged entity has a significant degree of market power (which does not necessarily amount to dominance) in at least one of the markets concerned. The Commission will examine this issue before proceeding to assess the impact of the merger on competition.

24. Market shares and concentration levels provide useful first indications of the market power and the competitive importance of both the merging parties and their competitors (2).

25. The Commission is unlikely to find concern in non-horizontal mergers, be it of a coordinated or of a non-coordinated nature, where the market share post-merger of the new entity in each of the markets concerned is below 30 % (3) and the post-merger HHI is below 2 000.

26. In practice, the Commission will not extensively investigate such mergers, except where special circumstances such as, for instance, one or more of the following factors are present:

(a) a merger involves a company that is likely to expand significantly in the near future, e.g. because of a recent innovation;

(b) there are significant cross-shareholdings or cross-directorships among the market participants;

(c) one of the merging firms is a firm with a high likelihood of disrupting coordinated conduct;

(d) indications of past or ongoing coordination, or facilitating practices, are present.

27. The Commission will use the above market share and HHI thresholds as an initial indicator of the absence of competition concerns. However, these thresholds do not give rise to a legal presumption. The Commission is of the opinion that it is less appropriate in this context to present market share and concentration levels above which competition concerns would be deemed to be likely, as the existence of a significant degree of market power in at least one of the markets concerned is a necessary condition for competitive harm, but is not a sufficient condition (4).

IV. VERTICAL MERGERS

28. This Section sets out the Commission’s framework of analysis in the context of vertical mergers. In its assessment, the Commission will consider both the possible anti-competitive effects arising from vertical mergers and the possible pro-competitive effects stemming from efficiencies substantiated by the parties.

(1) See Section VII on efficiencies in the Notice on Horizontal Mergers.

(2) See also Section III of the Notice on Horizontal Mergers. The calculation of market shares depends critically on market definition (see Commission notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997)). Special care must be taken in contexts where vertically integrated companies supply products internally.

(3) In analogy to the indications given in Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ L 336, 29.12.1999, p. 21). Where a merged entity would have a market share just above the 30 % threshold on one market but substantially below on other, related, markets competition concerns will be less likely.

(4) See Sections IV and V.
A. Non-coordinated effects: foreclosure

29. A merger is said to result in foreclosure where actual or potential rivals’ access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing these companies’ ability and/or incentive to compete. Such foreclosure may discourage entry or expansion of rivals or encourage their exit. Foreclosure thus can be found even if the foreclosed rivals are not forced to exit the market: It is sufficient that the rivals are disadvantaged and consequently led to compete less effectively. Such foreclosure is regarded as anti-competitive where the merging companies — and, possibly, some of its competitors as well — are as a result able to profitably increase the price charged to consumers (1).

30. Two forms of foreclosure can be distinguished. The first is where the merger is likely to raise the costs of downstream rivals by restricting their access to an important input (input foreclosure). The second is where the merger is likely to foreclose upstream rivals by restricting their access to a sufficient customer base (customer foreclosure) (2).

1. Input foreclosure

31. Input foreclosure arises where, post-merger, the new entity would be likely to restrict access to the products or services that it would have otherwise supplied absent the merger, thereby raising its downstream rivals’ costs by making it harder for them to obtain supplies of the input under similar prices and conditions as absent the merger. This may lead the merged entity to profitably increase the price charged to consumers, resulting in a significant impediment to effective competition. As indicated above, for input foreclosure to lead to consumer harm, it is not necessary that the merged firm’s rivals are forced to exit the market. The relevant benchmark is whether the increased input costs would lead to higher prices for consumers. Any efficiencies resulting from the merger may, however, lead the merged entity to reduce price, so that the overall likely impact on consumers is neutral or positive. A graphical presentation of this mechanism is provided in Figure 1.

Figure 1

Input foreclosure

(1) For the meaning of the expression ‘increased prices’ see footnote 8. For the meaning of ‘consumers’, see footnote 16.
(2) See Merger Regulation, Article 2(1)(b), referring to ‘access to supplies’ and ‘access to […] markets’, respectively.
In assessing the likelihood of an anticompetitive input foreclosure scenario, the Commission examines, first, whether the merged entity would have, post-merger, the ability to substantially foreclose access to inputs, second, whether it would have the incentive to do so, and third, whether a foreclosure strategy would have a significant detrimental effect on competition downstream (1). In practice, these factors are often examined together since they are closely intertwined.

A. Ability to foreclose access to inputs (2)

Input foreclosure may occur in various forms. The merged entity may decide not to deal with its actual or potential competitors in the vertically related market. Alternatively, the merged firm may decide to restrict supplies and/or to raise the price it charges when supplying competitors and/or to otherwise make the conditions of supply less favourable than they would have been absent the merger (3). Further, the merged entity may opt for a specific choice of technology within the new firm which is not compatible with the technologies chosen by rival firms (4). Foreclosure may also take more subtle forms, such as the degradation of the quality of input supplied (5). In its assessment, the Commission may consider a series of alternative or complementary possible strategies.

Input foreclosure may raise competition problems only if it concerns an important input for the downstream product (6). This is the case, for example, when the input concerned represents a significant cost factor relative to the price of the downstream product. Irrespective of its cost, an input may also be sufficiently important for other reasons. For instance, the input may be a critical component without which the downstream product could not be manufactured or effectively sold on the market (7), or it may represent a significant source of product differentiation for the downstream product (8). It may also be that the cost of switching to alternative inputs is relatively high.

For input foreclosure to be a concern, the vertically integrated firm resulting from the merger must have a significant degree of market power in the upstream market. It is only in these circumstances that the merged firm can be expected to have a significant influence on the conditions of competition in the upstream market and thus, possibly, on prices and supply conditions in the downstream market.

The merged entity would only have the ability to foreclose downstream competitors if, by reducing access to its own upstream products or services, it could negatively affect the overall availability of inputs to the downstream market in terms of price or quality. This may be the case where the remaining upstream suppliers are less efficient, offer less preferred alternatives, or lack the ability to expand output in response to the supply restriction, for example because they face capacity constraints or, more generally, face decreasing returns to scale (9). Also, the presence of exclusive contracts between the merged entity and independent input providers may limit the ability of downstream rivals to have adequate access to inputs.


(2) The term ‘inputs’ is used here as a generic term and may also cover services, access to infrastructure and access to intellectual property rights.


(4) See e.g. Case COMP/M.2861 — Siemens/Draegerwerk/JV (2003), Case COMP/M.3998 — Axalto, point 75.

(5) See e.g. Case COMP/M.4314 — Johnson & Johnson/Pfizer Consumer Healthcare, points 127-130.


(7) For instance, an engine starter can be considered a critical component to an engine (Case T-210/01, General Electric v Commission [2005] ECR II-000); see also, e.g. Case COMP/M.3410 — Total/GDF, points 53-54 and 60-61.

(8) For instance, personal computers are often sold with specific reference to the type of microprocessor they contain.

(9) See e.g. Case COMP/M.4494 — Evraz/Highveld, point 92 and points 97-112.
37. When determining the extent to which input foreclosure may occur, it must be taken into account that the decision of the merged entity to rely on its upstream division's supply of inputs may also free up capacity on the part of the remaining input suppliers from which the downstream division used to purchase before. In fact, the merger may merely realign purchase patterns among competing firms.

38. When competition in the input market is oligopolistic, a decision of the merged entity to restrict access to its inputs reduces the competitive pressure exercised on remaining input suppliers, which may allow them to raise the input price they charge to non-integrated downstream competitors. In essence, input foreclosure by the merged entity may expose its downstream rivals to non-vertically integrated suppliers with increased market power (1). This increase in third-party market power will be greater the lower the degree of product differentiation between the merged entity and other upstream suppliers and the higher the degree of upstream concentration. However, the attempt to raise the input price may fail when independent input suppliers, faced with a reduction in the demand for their products (from the downstream division of the merged entity or from independent downstream firms), respond by pricing more aggressively (2).

39. In its assessment, the Commission will consider, on the basis of the information available, whether there are effective and timely counter-strategies that the rival firms would be likely to deploy. Such counter-strategies include the possibility of changing their production process so as to be less reliant on the input concerned or sponsoring the entry of new suppliers upstream.

B. Incentive to foreclose access to inputs

40. The incentive to foreclose depends on the degree to which foreclosure would be profitable. The vertically integrated firm will take into account how its supplies of inputs to competitors downstream will affect not only the profits of its upstream division, but also of its downstream division. Essentially, the merged entity faces a trade-off between the profit lost in the upstream market due to a reduction of input sales to (actual or potential) rivals and the profit gain, in the short or longer term, from expanding sales downstream or, as the case may be, being able to raise prices to consumers.

41. The trade-off is likely to depend on the level of profits the merged entity obtains upstream and downstream (3). Other things constant, the lower the margins upstream, the lower the loss from restricting input sales. Similarly, the higher the downstream margins, the higher the profit gain from increasing market share downstream at the expense of foreclosed rivals (4).

42. The incentive for the integrated firm to raise rivals' costs further depends on the extent to which downstream demand is likely to be diverted away from foreclosed rivals and the share of that diverted

(1) The analysis of the likely effect of the removal of a competitive constraint is similar to the analysis of non-coordinated effects with horizontal mergers (see Section IV of the Notice on Horizontal Mergers).

(2) Also the nature of the supply contracts between upstream suppliers and the downstream independent firms may be important in this respect. For instance, when these contracts use a price system combining a fixed fee and a per-unit supply price, the effect on downstream competitors' marginal costs may be affected less than when these contracts involve only per-unit supply prices.

(3) See e.g. Case COMP/M.4300 — Philips/Intemagnetics, points 56-62, Case COMP/M.4576 — AVR/Van Gansewinkel, points 33-38.

(4) It has to be considered that upstream and downstream margins may change as a result of the merger. This may impact upon the merged entity's incentive to engage in foreclosure.
demand that the downstream division of the integrated firm can capture \(^{(1)}\). This share will normally be higher the less capacity constrained the merged entity will be relative to non-foreclosed downstream rivals and the more the products of the merged entity and foreclosed competitors are close substitutes. The effect on downstream demand will also be higher if the affected input represents a significant proportion of downstream rivals’ costs or if the affected input represents a critical component of the downstream product \(^{(2)}\).

43. The incentive to foreclose actual or potential rivals may also depend on the extent to which the downstream division of the integrated firm can be expected to benefit from higher price levels downstream as a result of a strategy to raise rivals’ costs \(^{(3)}\). The greater the market shares of the merged entity downstream, the greater the base of sales on which to enjoy increased margins \(^{(4)}\).

44. An upstream monopolist that is already able to fully extract all available profits in vertically related markets may not have any incentive to foreclose rivals following a vertical merger. The ability to extract available profits from the consumers does not follow immediately from a very high market share \(^{(5)}\). Such a finding would require a more thorough analysis of the actual and future constraints under which the monopolist operates. When all available profits cannot be extracted, a vertical merger — even if it involves an upstream monopolist — may give the merged entity the incentive to raise the costs of downstream rivals, thereby reducing the competitive constraint they exert on the merged entity in the downstream market.

45. In its assessment of the likely incentives of the merged firm, the Commission may take into account various considerations such as the ownership structure of the merged entity \(^{(6)}\), the type of strategies adopted on the market in the past \(^{(7)}\) or the content of internal strategic documents such as business plans.

\(^{(1)}\) See e.g. Case COMP/M.3943 — Saint-Gobain/BPB (2005), point 78. The Commission noted that it would be very unlikely that BPB, the main supplier of plaster board in the UK, would cut back on supplies to rival distributors of Saint-Gobain, in part because expansion of Saint-Gobain’s distribution capacity was difficult.

\(^{(2)}\) Conversely, if the input accounts only for a small share of the downstream product and is not a critical component, even a high market share upstream may not give the merged entity the incentive to foreclose downstream rivals because few, if any, sales would be diverted to the integrated firm’s downstream unit. See e.g. Case COMP/M.2738 — GEES/Unison: Case COMP M.4561 — GE/Smiths Aerospace, points 60-62.

\(^{(3)}\) See e.g. Case COMP/M.4314 — Johnson & Johnson/Pfizer Consumer Healthcare, points 131-132.

\(^{(4)}\) It must be noted that the less the merged firm can target a specific downstream market, the less it is likely to raise its prices for the input it supplies, as it would have to incur opportunity costs in other downstream markets. In this respect, the extent to which the merged entity can price discriminate when the merged entity supplies several downstream markets and/or ancillary markets may be taken into account (e.g. for spare parts).

\(^{(5)}\) One situation in which this may not be the case would be when the monopolist has a so-called commitment problem which it is unable to solve. For example, a downstream buyer may be willing to pay a high price to an upstream monopolist if the latter does not subsequently sell additional quantities to a competitor. But once the terms of supply are fixed with one downstream firm, the upstream supplier may have an incentive to increase its supplies to other downstream firms, thereby making the first purchase unprofitable. Since downstream firms will anticipate this kind of opportunistic behavior, the upstream supplier will be unable to fully exploit its market power. Vertical integration may restore the upstream supplier’s ability to commit not to expand input sales as this would harm its own downstream division. Another case in which the monopolist cannot obtain all available monopoly profits may arise when the company cannot differentiate its prices among customers.

\(^{(6)}\) For instance, in cases where two companies have joint control over a firm active in the upstream market, and only one of them is active downstream, the company without downstream activities may have little interest in foregoing input sales. In such cases, the incentive to foreclose is smaller than when the upstream company is fully controlled by a company with downstream activities. See e.g. Case COMP/M.3440 — EDI/ENI/GDP (2004), Case COMP/M.4405 — Thales/Finnmeccanica/Acal/Alenia Space/Telespazio, points 121 and 268.

\(^{(7)}\) The fact that, in the past, a competitor with a similar market position as the merged entity has stopped supplying inputs may demonstrate that it is commercially rational to adopt such a strategy (see e.g. COMP/M.3225 — Alcan/Reichney (2004), at point 40).
46. In addition, when the adoption of a specific course of conduct by the merged entity is an essential step in foreclosure, the Commission examines both the incentives to adopt such conduct and the factors liable to reduce, or even eliminate, those incentives, including the possibility that the conduct is unlawful. Conduct may be unlawful inter alia because of competition rules or sector-specific rules at the EU or national levels. This appraisal, however, does not require an exhaustive and detailed examination of the rules of the various legal orders which might be applicable and of the enforcement policy practised within them (1). Moreover, the illegality of a conduct may be likely to provide significant disincentives for the merged entity to engage in such conduct only in certain circumstances. In particular, the Commission will consider, on the basis of a summary analysis: (i) the likelihood that this conduct would be clearly, or highly probably, unlawful under Community law (2), (ii) the likelihood that this illegal conduct could be detected (3), and (iii) the penalties which could be imposed.

C. Overall likely impact on effective competition

47. In general, a merger will raise competition concerns because of input foreclosure when it would lead to increased prices in the downstream market thereby significantly impeding effective competition.

48. First, anticompetitive foreclosure may occur when a vertical merger allows the merging parties to increase the costs of downstream rivals in the market thereby leading to an upward pressure on their sales prices. Significant harm to effective competition normally requires that the foreclosed firms play a sufficiently important role in the competitive process on the downstream market. The higher the proportion of rivals which would be foreclosed on the downstream market, the more likely the merger can be expected to result in a significant price increase in the downstream market and, therefore, to significantly impede effective competition therein (4). Despite a relatively small market share compared to other players, a specific firm may play a significant competitive role compared to other players (5), for instance because it is a close competitor of the vertically integrated firm or because it is a particularly aggressive competitor.

49. Second, effective competition may be significantly impeded by raising barriers to entry to potential competitors (6). A vertical merger may foreclose potential competition on the downstream market when the merged entity would be likely not to supply potential downstream entrants, or only on less favourable terms than absent the merger. The mere likelihood that the merged entity would carry out a foreclosure strategy post-merger may already create a strong deterrent effect on potential entrants (7). Effective competition on the downstream market may be significantly impeded by raising barriers to entry, in particular if input foreclosure would entail for such potential competitors the need to enter at both the downstream and the upstream level in order to compete effectively on either market. The concern of raising entry barriers is particularly relevant in those industries that are opening up to competition or are expected to do so in the foreseeable future (8).

(2) Case T-210/01, General Electric v Commission [2003] ECR II-000, specifically at points 74-75 and 311-312.
(3) For instance, in Case COMP/M.3696 — E.ON/MOL (2005), points 433 and 443-446, the Commission attached importance to the fact that the national Hungarian regulator for the gas sector indicated that in a number of settings, although it has the right to control and to force market players to act without discrimination, it would not be able to obtain adequate information on the commercial behaviour of the operators. See also Case COMP/M.3440 — EDP/ENI/GDP (2004), point 424.
(4) See e.g. Case COMP/M.4494 — Eraz/Highveld, points 97-112.
(6) See e.g. Case COMP/M.4180 — Gaz de France/Suez, points 876-931, Case COMP/M.4576 — AVR/Van Gansewinkel, points 33-38.
(7) See Case COMP/M.3696 — E.ON/MOL (2005), at point 662 et seq.
(8) See paragraph 20. It is important that regulatory measures aimed at opening a market are not rendered ineffective through vertically-related incumbent companies merging and thereby closing off the market, or eliminating each other as potential entrants.
50. If there remain sufficient credible downstream competitors whose costs are not likely to be raised, for example because they are themselves vertically integrated (1) or they are capable of switching to adequate alternative inputs, competition from those firms may constitute a sufficient constraint on the merged entity and therefore prevent output prices from rising above pre-merger levels.

51. The effect on competition on the downstream market must also be assessed in light of countervailing factors such as the presence of buyer power (2) or the likelihood that entry upstream would maintain effective competition (3).

52. Further, the effect on competition needs to be assessed in light of efficiencies substantiated by the merging parties (4). The Commission may decide that, as a consequence of the efficiencies that the merger brings about, there are no grounds for declaring the merger incompatible with the common market pursuant to Article 2(3) of the Merger Regulation. This will be the case when the Commission is in a position to conclude on the basis of sufficient evidence that the efficiencies generated by the merger are likely to enhance the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers, thereby counteracting the adverse effects on competition which the merger might otherwise have.

53. When assessing efficiencies in the context of non-horizontal mergers, the Commission applies the principles already set out in Section VII of the Notice on Horizontal Mergers. In particular, for the Commission to take account of efficiency claims in its assessment of the merger, the efficiencies have to benefit consumers, be merger-specific and be verifiable. These conditions are cumulative (5).

54. Vertical mergers may entail some specific sources of efficiencies, the list of which is not exhaustive.

55. In particular, a vertical merger allows the merged entity to internalise any pre-existing double mark-ups resulting from both parties setting their prices independently pre-merger (6). Depending on the market conditions, reducing the combined mark-up (relative to a situation where pricing decisions at both levels are not aligned) may allow the vertically integrated firm to profitably expand output on the downstream market (7).

56. A vertical merger may further allow the parties to better coordinate the production and distribution process, and therefore to save on inventories costs.

57. More generally, a vertical merger may align the incentives of the parties with regard to investments in new products, new production processes and in the marketing of products. For instance, whereas before the merger, a downstream distributor entity might have been reluctant to invest in advertising and informing customers about the qualities of products of the upstream entity when such investment would also have benefited the sale of other downstream firms, the merged entity may reduce such incentive problems.

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(1) See e.g. Case COMP/M.3653 — Siemens/VA Tech (2005), at point 164.
(2) See Section V on countervailing buyer power in the Notice on Horizontal Mergers.
(3) See Section VI on entry in the Notice on Horizontal Mergers.
(4) See Section VII on efficiencies in the Notice on Horizontal Mergers.
(5) See, more specifically, paragraphs 79 to 88 of the Notice on Horizontal Mergers.
(6) See also paragraph 13 above.
(7) It is important to recognise, however, that the problem of double mark-ups is not always present or significant pre-merger, for instance because the merging parties had already concluded a supply agreement with a price mechanism providing for volume discounts eliminating the mark-up. The efficiencies associated with the elimination of double mark-ups may thus not always be merger specific because vertical cooperation or vertical agreements may, short of a merger, achieve similar benefits with less anti-competitive effects. In addition, a merger may not fully eliminate the double mark-up when the supply of the input is limited by capacity constraints and there is an equally profitable alternative use for the input. In such circumstances, the internal use of the input entails an opportunity cost for the vertically integrated company: using more of the input internally to increase output downstream means selling less in the alternative market. As a result, the incentive to use the input internally and increase output downstream is less than when there is no opportunity cost.
2. **Customer foreclosure**

58. Customer foreclosure may occur when a supplier integrates with an important customer in the downstream market (1). Because of this downstream presence, the merged entity may foreclose access to a sufficient customer base to its actual or potential rivals in the upstream market (the input market) and reduce their ability or incentive to compete. In turn, this may raise downstream rivals’ costs by making it harder for them to obtain supplies of the input under similar prices and conditions as absent the merger. This may allow the merged entity profitably to establish higher prices on the downstream market. Any efficiencies resulting from the merger, however, may lead the merged entity to reduce price, so that there is overall not a negative impact on consumers. For customer foreclosure to lead to consumer harm, it is thus not necessary that the merged firm’s rivals are forced to exit the market. The relevant benchmark is whether the increased input costs would lead to higher prices for consumers. A graphical presentation of this mechanism is provided in Figure 2.

![Figure 2: Customer foreclosure](image)

59. In assessing the likelihood of an anticompetitive customer foreclosure scenario, the Commission examines, first, whether the merged entity would have the ability to foreclose access to downstream markets by reducing its purchases from its upstream rivals, second, whether it would have the incentive to reduce its purchases upstream, and third, whether a foreclosure strategy would have a significant detrimental effect on consumers in the downstream market (2).

A. **Ability to foreclose access to downstream markets**

60. A vertical merger may affect upstream competitors by increasing their cost to access downstream customers or by restricting access to a significant customer base. Customer foreclosure may take various forms. For instance, the merged entity may decide to source all of its required goods or services from its upstream division and, as a result, may stop purchasing from its upstream rivals. It may also reduce its purchases from upstream rivals, or purchase from those rivals on less favourable terms than it would have done absent the merger (3).

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(1) See footnote 4 for the definition of ‘downstream’ and ‘upstream’.
(2) See e.g. Case COMP/M.4389—WLR/BST.
(3) For instance, in cases involving distribution, the merged entity may be less likely to grant access to its outlets under the same conditions as absent the merger.
61. When considering whether the merged entity would have the ability to foreclose access to downstream markets, the Commission examines whether there are sufficient economic alternatives in the downstream market for the upstream rivals (actual or potential) to sell their output (1). For customer foreclosure to be a concern, it must be the case that the vertical merger involves a company which is an important customer with a significant degree of market power in the downstream market (2). If, on the contrary, there is a sufficiently large customer base, at present or in the future, that is likely to turn to independent suppliers, the Commission is unlikely to raise competition concerns on that ground (3).

62. Customer foreclosure can lead to higher input prices in particular if there are significant economies of scale or scope in the input market or when demand is characterised by network effects (4). It is mainly in such circumstances that the ability to compete of upstream rivals, be they actual or potential, can be impaired.

63. For instance, customer foreclosure can lead to higher input prices when existing upstream rivals operate at or close to their minimum efficient scale. To the extent that customer foreclosure and the corresponding loss of output for the upstream rivals increases their variable costs of production, this may result in an upward pressure on the prices they charge to their customers operating in the downstream market.

64. In the presence of economies of scale or scope, customer foreclosure may also render entry upstream by potential entrants unattractive by significantly reducing the revenue prospects of potential entrants. When customer foreclosure effectively results in entry deterrence, input prices may remain at a higher level than otherwise would have been the case, thereby raising the cost of input supply to downstream competitors of the merged firm.

65. Further, when customer foreclosure primarily impacts upon the revenue streams of upstream rivals, it may significantly reduce their ability and incentive to invest in cost reduction, R & D and product quality (5). This may reduce their ability to compete in the long run and possibly even cause their exit from the market.

66. In its assessment, the Commission may take into account the existence of different markets corresponding to different uses for the input. If a substantial part of the downstream market is foreclosed, an upstream supplier may fail to reach efficient scale and may also operate at higher costs in the other market(s). Conversely, an upstream supplier may continue to operate efficiently if it finds other uses or secondary markets for its input without incurring significantly higher costs.

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1 The loss of the integrated firm as a customer is normally less significant if that firm’s pre-merger purchases from non-integrated firms are a small share of the available sales base for those firms. In that case, sufficient alternative customers are more likely to be available. The presence of exclusive contracts between the merged entity and other downstream firms may limit the ability of upstream rivals to reach a sufficient sales volume.

2 See e.g. Case COMP/M.2822 — ENBW/ENI/GVS (2002) at points 54-57.

3 See e.g. Case COMP/M.81 — VIAG/Continental Can (1991), point 51, see e.g. Case COMP/M.4389 — WLR/BST, points 33-35.

4 Economies of scale or scope exist when an increase in scale or scope of production leads to a reduction in average unit cost. Network effects occur when the value of a product for a customer increases when the number of other customers also using it increases. Examples include communication devices, specific software programmes, products requiring standardisation, and platforms bringing together buyers and sellers.

5 An input supplier foreclosed from an important customer may prefer to stay out of the market if it fails to reach some minimum viable scale following the investment. Such minimum viable scale may be achieved, however, if a potential entrant has access to a broader customer base including customers in other relevant markets. See Case COMP/M.1879 — Boeing/Hughes (2000); Case COMP/M.2978 — Lagardere/Natexis/VUP (2003).
In its assessment, the Commission will consider, on the basis of the information available, whether there are effective and timely counter-strategies, sustainable over time, that the rival firms would be likely to deploy. Such counterstrategies include the possibility that upstream rivals decide to price more aggressively to maintain sales levels in the downstream market, so as to mitigate the effect of foreclosure (1).

B. Incentive to foreclose access to downstream markets

68. The incentive to foreclose depends on the degree to which it is profitable. The merged entity faces a trade-off between the possible costs associated with not procuring products from upstream rivals and the possible gains from doing so, for instance, because it allows the merged entity to raise price in the upstream or downstream markets.

69. The costs associated with reducing purchases from rival upstream suppliers are higher, when the upstream division of the integrated firm is less efficient than the foreclosed suppliers. Such costs are also higher if the upstream division of the merged firm is capacity constrained or rivals’ products are more attractive due to product differentiation.

70. The incentive to engage in customer foreclosure further depends on the extent to which the upstream division of the merged entity can benefit from possibly higher price levels in the upstream market arising as a result of upstream rivals being foreclosed. The incentive to engage in customer foreclosure also becomes higher, the more the downstream division of the integrated firm can be expected to enjoy the benefits of higher price levels downstream resulting from the foreclosure strategy. In this context, the greater the market shares of the merged entity’s downstream operations, the greater the base of sales on which to enjoy increased margins (2).

71. When the adoption of a specific conduct by the merged entity is an essential step in foreclosure, the Commission examines both the incentives to adopt such conduct and the factors liable to reduce, or even eliminate, those incentives, including the possibility that the conduct is unlawful (3).

C. Overall likely impact on effective competition

72. Foreclosing rivals in the upstream market may have an adverse impact in the downstream market and harm consumers. By denying competitive access to a significant customer base for the foreclosed rivals’ (upstream) products, the merger may reduce their ability to compete in the foreseeable future. As a result, rivals downstream are likely to be put at a competitive disadvantage, for example in the form of raised input costs. In turn, this may allow the merged entity to profitably raise prices or reduce the overall output on the downstream market.

(1) For instance, in Case COMP/M.1879 — Boeing/Hughes (2000), point 100, it was considered, among several other factors, that in view of the high fixed costs involved, if competing satellite launch vehicle providers were to become less cost-competitive relative to the merged entity, they would try to cut prices in order to salvage volume and recoup at least part of their fixed costs rather than accept losing a contract and incur a higher loss. The most likely impact would therefore be greater price competition rather than market monopolisation.

(2) If the vertically integrated firm partially supplies inputs to downstream competitors it may benefit from the ability to expand sales, or as the case may be, to increase input prices.

(3) The analysis of these incentives will be conducted as set out in paragraph 46 above.
73. The negative impact on consumers may take some time to materialise when the primary impact of customer foreclosure is on the revenue streams of upstream rivals, reducing their incentives to make investments in cost reduction, product quality or in other competitive dimensions so as to remain competitive.

74. It is only when a sufficiently large fraction of upstream output is affected by the revenue decreases resulting from the vertical merger that the merger may significantly impede effective competition on the upstream market. If there remain a number of upstream competitors that are not affected, competition from those firms may be sufficient to prevent prices from rising in the upstream market and, consequently, in the downstream market. Sufficient competition from these non-foreclosed upstream firms requires that they do not face barriers to expansion e.g. through capacity constraints or product differentiation (1). When the reduction of competition upstream affects a significant fraction of output downstream, the merger is likely, as with input foreclosure, to result in a significant increase of the price level in the downstream market and, therefore, to significantly impede effective competition (2).

75. Effective competition on the upstream market may also be significantly impeded by raising barriers to entry to potential competitors. This may be so in particular if customer foreclosure would entail for such potential competitors the need to enter at both the downstream and the upstream level in order to compete effectively on either market. In such a context, customer foreclosure and input foreclosure may thus be part of the same strategy. The concern of raising entry barriers is particularly relevant in those industries that are opening up to competition or are expected to do so in the foreseeable future (3).

76. The effect on competition must be assessed in light of countervailing factors such as the presence of countervailing buyer power (4) or the likelihood that entry would maintain effective competition in the upstream or downstream markets (5).

77. Further, the effect on competition needs to be assessed in light of efficiencies substantiated by the merging parties (6).

B. Other non-coordinated effects

78. The merged entity may, by vertically integrating, gain access to commercially sensitive information regarding the upstream or downstream activities of rivals (7). For instance, by becoming the supplier of a downstream competitor, a company may obtain critical information, which allows it to price less aggressively in the downstream market to the detriment of consumers (8). It may also put competitors at a competitive disadvantage, thereby dissuading them to enter or expand in the market.

(1) The analysis of such non-coordinated effects bears similarities with the analysis of non-coordinated effects in horizontal mergers (see Section IV of the Notice on Horizontal Mergers).

(2) See paragraph 47-50 of the present Notice.

(3) It is important that regulatory measures aimed at opening a market are not rendered ineffective through vertically-related incumbent companies merging and thereby closing off the market, or eliminating each other as potential entrants.

(4) See Section V on countervailing buyer power in the Notice on Horizontal Mergers.

(5) See Section VI on entry in the Notice on Horizontal Mergers.

(6) For the assessment of efficiencies in a vertical context, see Section V.A.1 above.


C. Coordinated effects

79. As set out in Section IV of the Notice on Horizontal Mergers, a merger may change the nature of competition in such a way that firms that previously were not coordinating their behaviour, are now significantly more likely to coordinate and raise prices or otherwise harm effective competition. A merger may also make coordination easier, more stable or more effective for firms which were coordinating prior to the merger (1).

80. Market coordination may arise where competitors are able, without entering into an agreement or resorting to a concerted practice within the meaning of Article 81 of the Treaty, to identify and pursue common objectives, avoiding the normal mutual competitive pressure by a coherent system of implicit threats. In a normal competitive setting, each firm constantly has an incentive to compete. This incentive is ultimately what keeps prices low, and what prevents firms from jointly maximising their profits. Coordination involves a departure from normal competitive conditions in that firms are able to sustain prices in excess of what independent short term profit maximisation would yield. Firms will refrain from undercutting the high prices charged by their competitors in a coordinated way because they anticipate that such behaviour would jeopardise coordination in the future. For coordinated effects to arise, the profit that firms could make by competing aggressively in the short term (‘deviating’) has to be less than the expected reduction in revenues that this behaviour would entail in the longer term, as it would be expected to trigger an aggressive response by competitors (a punishment).

81. Coordination is more likely to emerge in markets where it is relatively simple to reach a common understanding on the terms of coordination. In addition, three conditions are necessary for coordination to be sustainable. First, the coordinating firms must be able to monitor to a sufficient degree whether the terms of coordination are being adhered to. Second, discipline requires that there is some form of deterrent mechanism that can be activated if deviation is detected. Third, the reactions of outsiders, such as current and future competitors not participating in the coordination, as well as customers, should not be able to jeopardise the results expected from the coordination (2).

Reaching terms of coordination

82. A vertical merger may make it easier for the firms in the upstream or downstream market to reach a common understanding on the terms of coordination (3).

83. For instance, when a vertical merger leads to foreclosure (4), it results in a reduction in the number of effective competitors in the market. Generally speaking, a reduction in the number of players makes it easier to coordinate among the remaining market players.

84. Vertical mergers may also increase the degree of symmetry between firms active in the market (5). This may increase the likelihood of coordination by making it easier to reach a common understanding on the terms of coordination. Likewise, vertical integration may increase the level of market transparency, making it easier to coordinate among the remaining market players.

85. Further, a merger may involve the elimination of a maverick in a market. A maverick is a supplier that for its own reasons is unwilling to accept the co-ordinated outcome and thus maintains aggressive competition. The vertical integration of the maverick may alter its incentives to such an extent that co-ordination will no longer be prevented.

(3) See e.g. Case COMP/M.3314 — Air Liquide/Messer Targets, points 91-100.
(4) Foreclosure would have to be shown by the Commission along the lines of Part A of this Section.
(5) See Case COMP/M.2389 — Shell/DEA; Case COMP/M.2533 — BP/EON. Alternatively, vertical integration may also decrease the degree of symmetry between firms active in the market, rendering coordination more difficult.
Monitoring deviations

86. Vertical integration may facilitate coordination by increasing the level of market transparency between firms through access to sensitive information on rivals or by making it easier to monitor pricing. Such concerns may arise, for example, if the level of price transparency is higher downstream than upstream. This could be the case when prices to final consumers are public, while transactions at the intermediate market are confidential. Vertical integration may give upstream producers control over final prices and thus monitor deviations more effectively.

87. When it leads to foreclosure, a vertical merger may also induce a reduction in the number of effective competitors in a market. A reduction in the number of players may make it easier to monitor each other’s actions in the market.

Deterrent mechanisms

88. Vertical mergers may affect coordinating firms’ incentives to adhere to the terms of coordination. For instance, a vertically integrated company may be in a position to more effectively punish rival companies when they choose to deviate from the terms of coordination, because it is either a crucial customer or supplier to them (1).

Reactions of outsiders

89. Vertical mergers may reduce the scope for outsiders to destabilise the coordination by increasing barriers to enter the market or otherwise limiting the ability to compete on the part of outsiders to the coordination.

90. A vertical merger may also involve the elimination of a disruptive buyer in a market. If upstream firms view sales to a particular buyer as sufficiently important, they may be tempted to deviate from the terms of co-ordination in an effort to secure their business. Similarly, a large buyer may be able to tempt the co-ordinating firms to deviate from these terms by concentrating a large amount of its requirements on one supplier or by offering long term contracts. The acquisition of such a buyer may increase the risk of co-ordination in a market.

V. CONGLOMERATE MERGERS

91. Conglomerate mergers are mergers between firms that are in a relationship which is neither purely horizontal (as competitors in the same relevant market) nor vertical (as supplier and customer). In practice, the focus is on mergers between companies that are active in closely related markets (2) (e.g. mergers involving suppliers of complementary products or of products which belong to a range of products that is generally purchased by the same set of customers for the same end use).

92. Whereas it is acknowledged that conglomerate mergers in the majority of circumstances will not lead to any competition problems, in certain specific cases there may be harm to competition. In its assessment, the Commission will consider both the possible anti-competitive effects arising from conglomerate mergers and the possible pro-competitive effects stemming from efficiencies substantiated by the parties.

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(1) For instance, in a case that was subsequently withdrawn (Case COMP/M.2322 — CRH/Addtek (2001)) the merger involved an upstream dominant supplier of cement and a downstream producer or pre-cast concrete products, both active in Finland. The Commission provisionally took the view in the administrative procedure that the new entity would be able to discipline the downstream rivals by using the fact that they would be highly dependent on cement supplies of the merged entity. As a result, the downstream entity would be able to increase the price of its pre-cast concrete products while making sure that the competitors would follow these price increases and avoiding that they turn to cement imports from the Baltic States and Russia.

(2) See also Form CO, Section IV, 6.3(c).
A. Non-coordinated effects: foreclosure

93. The main concern in the context of conglomerate mergers is that of foreclosure. The combination of products in related markets may confer on the merged entity the ability and incentive to leverage \( ^{1} \) a strong market position from one market to another by means of tying or bundling or other exclusionary practices \( ^{2} \). Tying and bundling as such are common practices that often have no anticompetitive consequences. Companies engage in tying and bundling in order to provide their customers with better products or offerings in cost-effective ways. Nevertheless, in certain circumstances, these practices may lead to a reduction in actual or potential rivals’ ability or incentive to compete. This may reduce the competitive pressure on the merged entity allowing it to increase prices.

94. In assessing the likelihood of such a scenario, the Commission examines, first, whether the merged firm would have the ability to foreclose its rivals, second, whether it would have the economic incentive to do so and, third, whether a foreclosure strategy would have a significant detrimental effect on competition, thus causing harm to consumers \( ^{3} \). In practice, these factors are often examined together as they are closely intertwined.

A. Ability to foreclose

95. The most immediate way in which the merged entity may be able to use its market power in one market to foreclose competitors in another is by conditioning sales in a way that links the products in the separate markets together. This is done most directly either by tying or bundling.

96. ‘Bundling’ usually refers to the way products are offered and priced by the merged entity. One can distinguish in this respect between pure bundling and mixed bundling. In the case of pure bundling the products are only sold jointly in fixed proportions. With mixed bundling the products are also available separately, but the sum of the stand-alone prices is higher than the bundled price \( ^{4} \). Rebates, when made dependent on the purchase of other goods, may be considered a form of mixed bundling.

97. ‘Tying’ usually refers to situations where customers that purchase one good (the tying good) are required to also purchase another good from the producer (the tied good). Tying can take place on a technical or contractual basis. For instance, technical tying occurs when the tying product is designed in such a way that it only works with the tied product (and not with the alternatives offered by competitors). Contractual tying entails that the customer when purchasing the tying good undertakes only to purchase the tied product (and not the alternatives offered by competitors).

98. The specific characteristics of the products may be relevant for determining whether any of these means of linking sales between separate markets are available to the merged entity. For instance, pure bundling is very unlikely to be possible if products are not bought simultaneously or by the same customers \( ^{5} \). Similarly, technical tying is only an option in certain industries.

99. In order to be able to foreclose competitors, the new entity must have a significant degree of market power, which does not necessarily amount to dominance, in one of the markets concerned. The effects of bundling or tying can only be expected to be substantial when at least one of the merging

\(^{1}\) There is no received definition of ‘leveraging’ but, in a neutral sense, it implies being able to increase sales of a product in one market (the ‘tied market’ or ‘bundled market’), by virtue of the strong market position of the product to which it is tied or bundled (the ‘tying market’ or ‘leveraging market’).

\(^{2}\) These concepts are defined further below.


\(^{4}\) The distinction between mixed bundling and pure bundling is not necessarily clear-cut. Mixed bundling may come close to pure bundling when the prices charged for the individual offerings are high.

\(^{5}\) See e.g. Case COMP/M.3304 — GE/Amersham (2004), point 35.
parties’ products is viewed by many customers as particularly important and there are few relevant alternatives for that product, e.g. because of product differentiation (1) or capacity constraints on the part of rivals.

100. Further, for foreclosure to be a potential concern it must be the case that there is a large common pool of customers for the individual products concerned. The more customers tend to buy both products (instead of only one of the products), the more demand for the individual products may be affected through bundling or tying. Such a correspondence in purchasing behaviour is more likely to be significant when the products in question are complementary.

101. Generally speaking, the foreclosure effects of bundling and tying are likely to be more pronounced in industries where there are economies of scale and the demand pattern at any given point in time has dynamic implications for the conditions of supply in the market in the future. Notably, where a supplier of complementary goods has market power in one of the products (product A), the decision to bundle or tie may result in reduced sales by the non-integrated suppliers of the complementary good (product B). If further there are network externalities at play (2) this will significantly reduce these rivals’ scope for expanding sales of product B in the future. Alternatively, where entry into the market for the complementary product is contemplated by potential entrants, the decision to bundle by the merged entity may have the effect of deterring such entry. The limited availability of complementary products with which to combine may, in turn, discourage potential entrants to enter market A.

102. It can also be noted that the scope for foreclosure tends to be smaller where the merging parties cannot commit to making their tying or bundling strategy a lasting one, for example through technical tying or bundling which is costly to reverse.

103. In its assessment, the Commission considers, on the basis of the information available, whether there are effective and timely counter-strategies that the rival firms may deploy. One such example is when a strategy of bundling would be defeated by single-product companies combining their offers so as to make them more attractive to customers (3). Bundling is further less likely to lead to foreclosure if a company in the market would purchase the bundled products and profitably resell them unbundled. In addition, rivals may decide to price more aggressively to maintain market share, mitigating the effect of foreclosure (4).

104. Customers may have a strong incentive to buy the range of products concerned from a single source (one-stop-shopping) rather than from many suppliers, e.g. because it saves on transaction costs. The fact that the merged entity will have a broad range or portfolio of products does not, as such, raise competition concerns (5).

B. Incentive to foreclose

105. The incentive to foreclose rivals through bundling or tying depends on the degree to which this strategy is profitable. The merged entity faces a trade-off between the possible costs associated with bundling or tying its products and the possible gains from expanding market shares in the market(s) concerned or, as the case may be, being able to raise price in those market(s) due to its market power.

(1) For instance, in the context of branded products, particularly important products are sometimes referred to as ‘must stock’ products. See e.g. Case COMP/M.3732 — Procter&Gamble/Colgate (2005), point 110.

(2) When a product features network externalities, this means that customers or producers derive benefit from the fact that other customers or producers are using the same products as well. Examples include communication devices, specific software programmes, products requiring standardisation, and platforms bringing together buyers and sellers.

(3) See e.g. Case COMP/M.3304 — GE/Amersham (2004), point 39.

(4) See e.g. Case COMP/M.1879 — Boeing/Hughes (2000), point 100; Case COMP/M.3304 — GE/Amersham (2004), point 39. The resulting loss of revenues may, however, in certain circumstances, have an impact on the ability of rivals to compete. See Section C.

(5) See e.g. Case COMP/M.2608 — INA/FAG, point 34.
106. Pure bundling and tying may entail losses for the merged company itself. For instance, if a significant number of customers are not interested in buying the bundle, but instead prefers to buy only one product (e.g. the product used to leverage), sales of that product (as contained in the bundle) may significantly fall. Furthermore, losses on the leveraging product may arise where customers who, before the merger, used to ‘mix and match’ the leveraging product of a merging party with the product of another company, decide to purchase the bundle offered by rivals or no longer to purchase at all (1).

107. In this context it may thus be relevant to assess the relative value of the different products. By way of example, it is unlikely that the merged entity would be willing to forego sales on one highly profitable market in order to gain market shares on another market where turnover is relatively small and profits are modest.

108. However, the decision to bundle and tie may also increase profits by gaining market power in the tied goods market, protecting market power in the tying goods market, or a combination of the two (see Section C below).

109. In its assessment of the likely incentives of the merged firm, the Commission may take into account other factors such as the ownership structure of the merged entity (2), the type of strategies adopted on the market in the past or the content of internal strategic documents such as business plans.

110. When the adoption of a specific conduct by the merged entity is an essential step in foreclosure, the Commission examines both the incentives to adopt such conduct and the factors liable to reduce, or even eliminate, those incentives, including the possibility that the conduct is unlawful (3).

C. Overall likely impact on prices and choice

111. Bundling or tying may result in a significant reduction of sales prospects faced by single-component rivals in the market. The reduction in sales by competitors is not in and of itself a problem. Yet, in particular industries, if this reduction is significant enough, it may lead to a reduction in rivals’ ability or incentive to compete. This may allow the merged entity to subsequently acquire market power (in the market for the tied or bundled good) and/or to maintain market power (in the market for the tying or leveraging good).

112. In particular, foreclosure practices may deter entry by potential competitors. They may do so for a specific market by reducing sales prospects for potential rivals in that market to a level below minimum viable scale. In the case of complementary products, deterring entry in one market through bundling or tying may also allow the merged entity to deter entry in another market if the bundling or tying forces potential competitors to enter both product markets at the same time rather than entering only one of them or entering them sequentially. The latter may have a significant impact in particular in those industries where the demand pattern at any given point in time has dynamic implications for the conditions of supply in the market in the future.

113. It is only when a sufficiently large fraction of market output is affected by foreclosure resulting from the merger that the merger may significantly impede effective competition. If there remain effective single-product players in either market, competition is unlikely to deteriorate following a conglomerate merger. The same holds when few single-product rivals remain, but these have the ability and incentive to expand output.

(1) See e.g. Case COMP/M.3304 — GE/Amersham (2004), point 59.
(2) For instance, in cases where two companies have joint control over a firm active in one market, and only one of them is active on the neighbouring market, the company without activities on the latter market may have little interest in foregoing sales in the former market. See e.g. Case T-210/01, General Electric v Commission [2005] ECR II-000, paragraph 383 and Case COMP/M.4561 — GE/Smiths Aerospace, point 119.
(3) The analysis of these incentives will be conducted as set out in paragraph 46 above.
114. The effect on competition needs to be assessed in light of countervailing factors such as the presence of countervailing buyer power (1) or the likelihood that entry would maintain effective competition in the upstream or downstream markets (2).

115. Further, the effect on competition needs to be assessed in light of the efficiencies substantiated by the merging parties (3).

116. Many of the efficiencies identified in the context of vertical mergers may, mutatis mutandis, also apply to conglomerate mergers involving complementary products.

117. Notably, when producers of complementary goods are pricing independently, they will not take into account the positive effect of a drop in the price of their product on the sales of the other product. Depending on the market conditions, a merged firm may internalise this effect and may have a certain incentive to lower margins if this leads to higher overall profits (this incentive is often referred to as the 'Cournot effect'). In most cases, the merged firm will make the most out of this effect by means of mixed bundling, i.e. by making the price drop conditional upon whether or not the customer buys both products from the merged entity (4).

118. Specific to conglomerate mergers is that they may produce cost savings in the form of economies of scope (either on the production or the consumption side), yielding an inherent advantage to supplying the goods together rather than apart (5). For instance, it may be more efficient that certain components are marketed together as a bundle rather than separately. Value enhancements for the customer can result from better compatibility and quality assurance of complementary components. Such economies of scope however are necessary but not sufficient to provide an efficiency justification for bundling or tying. Indeed, benefits from economies of scope frequently can be realised without any need for technical or contractual bundling.

B. Co-ordinated effects

119. Conglomerate mergers may in certain circumstances facilitate anticompetitive co-ordination in markets, even in the absence of an agreement or a concerted practice within the meaning of Article 81 of the Treaty. The framework set out in Section IV of the Notice on Horizontal Mergers also applies in this context. In particular, co-ordination is more likely to emerge in markets where it is fairly easy to identify the terms of co-ordination and where such co-ordination is sustainable.

120. One way in which a conglomerate merger may influence the likelihood of a coordinated outcome in a given market is by reducing the number of effective competitors to such an extent that tacit co-ordination becomes a real possibility. Also when rivals are not excluded from the market, they may find themselves in a more vulnerable situation. As a result, foreclosed rivals may choose not to contest the situation of co-ordination, but may prefer instead to live under the shelter of the increased price level.

121. Further, a conglomerate merger may increase the extent and importance of multi-market competition. Competitive interaction on several markets may increase the scope and effectiveness of disciplining mechanisms in ensuring that the terms of co-ordination are being adhered to.

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(1) See Section V on countervailing buyer power in the Notice on Horizontal Mergers.
(2) See e.g. Case COMP/M.3732 — Procter&Gamble/Gillette (2005), point 131. See also Section VI on entry in the Notice on Horizontal Mergers.
(3) See Section VII on efficiencies in the Notice on Horizontal Mergers.
(4) It is important to recognise however that the problem of double mark-ups is not always present or significant pre-merger. In the context of mixed bundling, it must further be noted that while the merged entity may have an incentive to reduce the price for the bundle, the effect on the prices of the individual products is less clear cut. The incentive for the merged entity to raise its single product prices may come from the fact that it counts on selling more bundled products instead. The merged entity's bundle price and prices of the individually sold products (if any) will further depend on the price reactions of rivals in the market.
(5) See e.g. Case COMP/M.3732 — Procter&Gamble/Gillette (2005), point 131.
## II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS AND BODIES

COMMISSION

Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings

(2008/C 95/01)

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A. INTRODUCTION

(1) The purpose of this Notice is to provide guidance as to jurisdictional issues under Council Regulation (EC) No 139/2004, OJ L 24, 29.1.2003, page 1 (the Merger Regulation). This formal guidance should enable firms to establish more quickly, in advance of any contact with the Commission, whether and to what extent their operations may be covered by Community control of concentrations.

(2) This Notice replaces the Notice on the concept of concentration (1), the Notice on the concept of full-function joint ventures (2), the Notice on the concept of undertakings concerned (3) and the Notice on calculation of turnover (4).

(3) This Notice deals with the concepts of a concentration and of a full-function joint venture, undertakings concerned and the calculation of turnover as set out in Articles 1, 3 and 5 of the Merger Regulation. Issues concerning referrals are dealt with in the Notice on referrals (5). The Commission’s interpretation of Articles 1, 3 and 5 in the present Notice is without prejudice to the interpretation which may be given by the Court of Justice or by the Court of First Instance of the European Communities.

(4) The guidance set out in this Notice reflects the Commission’s experience in applying the recast Merger Regulation and the former Merger Regulation since the latter entered into force on 21 September 1990. The general principles governing the issues dealt with in this Notice have not been changed by the entry into force of Regulation (EC) No 139/2004, but where changes have occurred, the Notice deals with them explicitly. The principles contained in the Notice will be applied and further developed by the Commission in individual cases.

(5) According to Article 1, the Merger Regulation only applies to operations that satisfy two conditions. First, there must be a concentration of two or more undertakings within the meaning of Article 3 of the Merger Regulation. Secondly, the turnover of the undertakings concerned, calculated in accordance with Article 5, must satisfy the thresholds set out in Article 1 of the Regulation. The notion of a concentration (including the particular requirements for joint ventures), as the first condition, is dealt with under Part B; the identification of undertakings concerned and the calculation of their turnover as relevant for the second condition are dealt with under Part C.

(6) The Commission addresses the question of its jurisdiction over a concentration in decisions according to Article 6 of the Merger Regulation (7).

B. THE CONCEPT OF CONCENTRATION

(7) According to Article 3(1) of the Merger Regulation, a concentration only covers operations where a change of control in the undertakings concerned occurs on a lasting basis. Recital 20 in the preamble to the Merger Regulation further explains that the concept of concentration is intended to relate to operations which bring about a lasting change in the structure of the market. Because the test in Article 3 is centred on the concept of control, the existence of a concentration is to a great extent determined by qualitative rather than quantitative criteria.


(2) OJ C 66, 2.3.1998, p. 5.


(7) See also opinion of AG Kokott in Case C-202/06 Cementbouw v Commission of 26 April 2007, paragraph 56 (not yet reported).
Article 3(1) of the Merger Regulation defines two categories of concentrations:

— those arising from a merger between previously independent undertakings (point (a));

— those arising from an acquisition of control (point (b)).

These are treated respectively in Sections I and II below.

I. MERGERS BETWEEN PREVIOUSLY INDEPENDENT UNDERTAKINGS

A merger within the meaning of Article 3(1)(a) of the Merger Regulation occurs when two or more independent undertakings amalgamate into a new undertaking and cease to exist as separate legal entities. A merger may also occur when an undertaking is absorbed by another, the latter retaining its legal identity while the former ceases to exist as a legal entity. This may arise in particular where two or more undertakings, while retaining their individual legal personalities, establish contractually a common economic management or the structure of a dual listed company. If this leads to a de facto amalgamation of the undertakings concerned into a single economic unit, the operation is considered to be a merger. A prerequisite for the determination of such a de facto merger is the existence of a permanent, single economic management. Other relevant factors may include internal profit and loss compensation or a revenue distribution as between the various entities within the group, and their joint liability or external risk sharing. The de facto amalgamation may be solely based on contractual arrangements, but it can also be reinforced by cross-shareholdings between the undertakings forming the economic unit.

II. ACQUISITION OF CONTROL

1. Concept of control

1.1. Person or undertaking acquiring control

Article 3 (1)(b) provides that a concentration occurs in the case of an acquisition of control. Such control may be acquired by one undertaking acting alone or by several undertakings acting jointly.

See, for example, Case COMP/M. 1673 — Yebu/VIAG of 13 June 2000; Case COMP/M.1806 — AstraZeneca/Novartis of 26 July 2000; Case COMP/M.2208 — Chevron/Texaco of 26 January 2001; and Case IV/M.1383 — ExxonMobil of 29 September 1999. A merger in the meaning of Article 3(1)(a) is not deemed to occur if a target company is merged with a subsidiary of the acquiring company to the effect that the parent company acquires control of the target undertaking under Article 3(1)(b), see Case COMP/M.2510 — Cendant/Galileo of 24 September 2001.

In determining the previous independence of undertakings, the issue of control may be relevant as the merger might otherwise only be an internal restructuring within the group. In this specific context, the assessment of control also follows the general concept set out below and includes de jure as well as de facto control.

This could apply for example in the case of a ‘Gleichordnungskonzern’ in German law, certain ‘Groupements d’Intérêt Economique’ in French law, and the amalgamation of partnerships, as in Case IV/M.1016 — Price Waterhouse/Coopers&Lybrand of 20 May 1998.


Person controlling another undertaking

(12) Control may also be acquired by a person in circumstances where that person already controls (whether solely or jointly) at least one other undertaking or, alternatively, by a combination of persons (which control another undertaking) and undertakings. The term ‘person’ in this context extends to public bodies (13) and private entities, as well as natural persons. Acquisitions of control by natural persons are only considered to bring about a lasting change in the structure of the undertakings concerned if those natural persons carry out further economic activities on their own account or if they control at least one other undertaking (14).

Acquirer of control

(13) Control is normally acquired by persons or undertakings which are the holders of the rights or are entitled to rights conferring control under the contracts concerned (Article 3(3)(a)). However, there are also situations where the formal holder of a controlling interest differs from the person or undertaking having in fact the real power to exercise the rights resulting from this interest. This may be the case, for example, where an undertaking uses another person or undertaking for the acquisition of a controlling interest and has the power to exercise the rights conferring control through this person or undertaking, i.e. the latter is formally the holder of the rights, but acts only as a vehicle. In such a situation, control is acquired by the undertaking which in reality is behind the operation and in fact enjoys the power to control the target undertaking (Article 3(3)(b)). The Court of First Instance concluded from this provision that control held by commercial companies can be attributed to their exclusive shareholder, their majority shareholders or to those jointly controlling the companies since these companies comply in any event with the decisions of those shareholders (15). A controlling shareholding which is held by different entities in a group is normally attributed to the undertaking exercising control over the different formal holders of the rights. In other cases, the evidence needed to establish this type of indirect control may include, either separately or in combination and to be assessed on a case-by-case basis, factors such as shareholdings, contractual relations, source of financing or family links (16).

Acquisition of control by investment funds

(14) Specific issues may arise in the case of acquisitions of control by investment funds. The Commission will analyse structures involving investment funds on a case-by-case basis, but some general features of such structures can be set out on the basis of the Commission’s past experience.

(15) Investment funds are often set up in the legal form of limited partnerships, in which the investors participate as limited partners and normally do not exercise control, either individually or collectively. The investment funds usually acquire the shares and voting rights which confer control over the portfolio companies. Depending on the circumstances, control is normally exercised by the investment company which has set up the fund as the fund itself is typically a mere investment vehicle; in more exceptional circumstances, control may be exercised by the fund itself. The investment company usually exercises control by means of the organisational structure, e.g. by controlling the general partner of fund partnerships, or by contractual arrangements, such as advisory agreements, or by a combination of both. This may be the case even if the investment company itself does not own the company acting as a general partner, but their shares are held by natural persons (who may be linked to the investment company) or by a trust. Contractual arrangements with the investment company, in particular advisory agreements,

(13) Including the State itself, e.g. Case IV/M.157 — Air France/Sabena, of 5 October 1992 in relation to the Belgian State, or other public bodies such as the Treuhandanstalt in Case IV/M.308 — Kali und Salz/MDK/Treuhand, of 14 December 1993. See, however, recital 22 of the Merger Regulation.
(14) Case IV/M.82 — Asko/Jakobs/Adia of 16 May 1991 including a private individual as undertaking concerned.; Case COMP/M3762 — Apax/Travelex of 16 June 2005 in which a private individual acquiring joint control was not considered an undertaking concerned.
will become even more important if the general partner does not have any own resources and personnel for the management of the portfolio companies, but only constitutes a company structure whose acts are performed by persons linked to the investment company. In these circumstances, the investment company normally acquires indirect control within the meaning of Article 3(1)(b) and 3(3)(b) of the Merger Regulation, and has the power to exercise the rights which are directly held by the investment fund. (17)

1.2. Means of control

(16) Control is defined by Article 3(2) of the Merger Regulation as the possibility of exercising decisive influence on an undertaking. It is therefore not necessary to show that the decisive influence is or will be actually exercised. However, the possibility of exercising that influence must be effective. (18) Article 3(2) further provides that the possibility of exercising decisive influence on an undertaking can exist on the basis of rights, contracts or any other means, either separately or in combination, and having regard to the considerations of fact and law involved. A concentration therefore may occur on a legal or a de facto basis, may take the form of sole or joint control, and extend to the whole or parts of one or more undertakings (cf. Article 3(1)(b)).

Control by the acquisition of shares or assets

(17) Whether an operation gives rise to an acquisition of control therefore depends on a number of legal and/or factual elements. The most common means for the acquisition of control is the acquisition of shares, possibly combined with a shareholders' agreement in cases of joint control, or the acquisition of assets.

Control on a contractual basis

(18) Control can also be acquired on a contractual basis. In order to confer control, the contract must lead to a similar control of the management and the resources of the other undertaking as in the case of acquisition of shares or assets. In addition to transferring control over the management and the resources, such contracts must be characterised by a very long duration (ordinarily without a possibility of early termination for the party granting the contractual rights). Only such contracts can result in a structural change in the market. (19) Examples of such contracts are organisational contracts under national company law (20) or other types of contracts, e.g., in the form of agreements for the lease of the business, giving the acquirer control over the management and the resources despite the fact that property rights or shares are not transferred. In this respect, Article 3(2)(a) specifies that control may also be constituted by a right to use the assets of an undertaking. (21) Such contracts may also lead to a situation of joint control if both the owner of the assets as well as the undertaking controlling the management enjoy veto rights over strategic business decisions. (22)

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(17) This structure also has an effect on how the turnover is calculated in situations involving investment funds, see paragraphs 189ff.


(19) In Case COMP/M.3858 — Lehman Brothers/SCG/Starwood/Le Meridien of 20 July 2005 the management agreements had a duration of 10-15 years; in Case COMP/M.2632 — Deutsche Bahn/ECT International/United Depots/JV of 11 February 2002 the contract had a duration of 8 years.

(20) Examples of such specific contracts under national company law are the ‘Beherrschungsvertrag’ in German law or the ‘Contrato de subordinación’ in Portuguese law; such contracts do not exist in all Member States.

(21) See Case COMP/M.2060 — Bosch/Rexroth of 12 January 2001 concerning a control contract (Beherrschungsvertrag) in combination with a business lease; Case COMP/M.3136 — GE/Agfa NDT of 5 December 2003 concerning a specific contract to transfer control over entrepreneurial resources, management and risks; Case COMP/M.2632 — Deutsche Bahn/ECT International/United Depots/JV of 11 February 2002 concerning a business lease.

(22) Case COMP/M.3858 — Lehman Brothers/SCG/Starwood/Le Meridien of 20 July 2005; see also case IV/M.126 — Accor/Wagon-Lits of 28 April 1992 in the context of Article 5(4)(b) of the Merger Regulation.
Control by other means

(19) In line with these considerations, franchising agreements as such do not normally confer control over the franchisee’s business on the franchisor. The franchisee usually exploits the entrepreneurial resources on its own account even if essential parts of the assets may belong to the franchisor (23). Furthermore, purely financial agreements, such as sale-and-lease-back transactions with arrangements for a buyback of the assets at the end of the term, do not normally constitute a concentration as they do not change control over the management and the resources.

(20) Furthermore, control can also be established by any other means. Purely economic relationships may play a decisive role for the acquisition of control. In exceptional circumstances, a situation of economic dependence may lead to control on a de facto basis where, for example, very important long-term supply agreements or credits provided by suppliers or customers, coupled with structural links, confer decisive influence (24). In such a situation, the Commission will carefully analyse whether such economic links, combined with other links, are sufficient to lead to a change of control on a lasting basis (25).

(21) There may be an acquisition of control even if it is not the declared intention of the parties or if the acquirer is only passive and the acquisition of control is triggered by action of third parties. Examples are situations where the change of control results from the inheritance of a shareholder or where the exit of a shareholder triggers a change of control, in particular a change from joint to sole control (26). Article 3(1)(b) covers such scenarios in specifying that control may also be acquired ‘by any other means’.

Control and national company law

(22) National legislation within a Member State may provide specific rules on the structure of bodies representing the organization of decision-making within an undertaking. While such legislation may confer some power of control upon persons other than the shareholders, in particular on representatives of employees, the concept of control under the Merger Regulation is not related to such a means of influence as the Merger Regulation focuses on decisive influence enjoyed on the basis of rights, assets or contracts or equivalent de facto means. Restrictions in the articles of association or in general law concerning the persons eligible to sit on the board, such as provisions requiring the appointment of independent members or excluding persons holding office or employment in the parent companies, do not exclude the existence of control as long as the shareholders decide the composition of the decision-making bodies (27). Similarly, despite provisions of national law foreseeing that decisions of a company must be taken by its company organs in its interests, those persons holding the voting rights have the power to adopt those decisions and therefore have the possibility to exercise decisive influence on the company (28).

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(23) Case M.940 — UBS/Mister Minit, in the context of Article 5(4)(b) of the Merger Regulation. For the treatment of franchising relationships in the competitive assessment, see Case COMP/M.4220 — Food Service Project/Tele Pizza of 6 June 2006. The situation in Case IV/M.126 — Accor/Wagon-Lits of 28 April 1992 has to be distinguished from franchising agreements. In this case, again in the context of Article 5(4)(b), the hotel company had a right to manage also hotels in which it only owned a minority stake as it had entered into long-term hotel management agreements giving it decisive influence over the day-to-day operations of these hotels, including decisions on budgetary matters.


(25) See Case IV/M.258 — CCIE/GTE, of 25 September 1992 where the Commission did not find control due to the temporary nature of the commercial agreements involved.


Control in other areas of legislation

(23) The concept of control under the Merger Regulation may be different from that applied in specific areas of Community and national legislation concerning, for example, prudential rules, taxation, air transport or the media. The interpretation of 'control' in other areas is therefore not necessarily decisive for the concept of control under the Merger Regulation

1.3. Object of control

(24) The Merger Regulation provides in Article 3(1)(b), (2) that the object of control can be one or more, or also parts of, undertakings which constitute legal entities, or the assets of such entities, or only some of these assets. The acquisition of control over assets can only be considered a concentration if those assets constitute the whole or a part of an undertaking, i.e. a business with a market presence, to which a market turnover can be clearly attributed (29). The transfer of the client base of a business can fulfil these criteria if this is sufficient to transfer a business with a market turnover (30). A transaction confined to intangible assets such as brands, patents or copyrights may also be considered to be a concentration if those assets constitute a business with a market turnover. In any case, the transfer of licences for brands, patents or copyrights, without additional assets, can only fulfil these criteria if the licences are exclusive at least in a certain territory and the transfer of such licences will transfer the turnover-generating activity (31). For non-exclusive licences it can be excluded that they may constitute on their own a business to which a market turnover is attached.

(25) Specific issues arise in cases where an undertaking outsources in-house activities, such as the provision of services or the manufacturing of products, to a service provider. Typical cases are the outsourcing of IT services to specialised IT companies. Outsourcing contracts can take several forms; their common characteristic is that the outsourcing service supplier shall provide those services to the customer which the latter has performed in-house before. Cases of simple outsourcing do not involve any transfer of assets or employees to the outsourcing service suppliers, but it is usually the case that any assets or employees are retained by the customer. Such an outsourcing contract is akin to a normal service contract and even if the outsourcing service supplier acquires a right to direct those assets and employees of the customer, no concentration arises if the assets and employees will be used exclusively to service the customer.

(26) The situation may be different if the outsourcing service supplier, in addition to taking over a certain activity which was previously provided internally, is transferred the associated assets and/or personnel. A concentration only arises in these circumstances if the assets constitute the whole or part of an undertaking, i.e. a business with access to the market. This requires that the assets previously dedicated to in-house activities of the seller will enable the outsourcing service supplier to provide services not only to the outsourcing customer but also to third parties, either immediately or within a short period after the transfer. This will be the case if the transfer relates to an internal business unit or a subsidiary already engaged in the provision of services to third parties. If third parties are not yet supplied, the assets transferred in the case of manufacturing should contain production facilities, the product know-how (it is sufficient if the assets transferred allow the build-up of such capabilities in the near future) and, if there is no existing market access, the means for the purchaser to develop a market access within a short period.

\(^{(30)}\) Case COMP/M.2857 — ECS/IEH of 23 December 2002.
\(^{(31)}\) In addition, the granting of licences and the transfer of patent licences will only constitute a concentration if this is done on a lasting basis. In this respect, similar considerations as set out above in paragraph 18 for the acquisition of control by (long-term) agreements apply.
of time (e.g. including existing contracts or brands) \(^{(27)}\). As regards the provision of services, the assets transferred should include the required know-how (e.g. the relevant personnel and intellectual property) and those facilities which allow market access (such as, e.g., marketing facilities) \(^{(28)}\). The assets transferred therefore have to include at least those core elements that would allow an acquirer to build up a market presence in a time-frame similar to the start-up period for joint ventures as set out below under paragraphs 97, 100. As in the case of joint ventures, the Commission will take account of substantiated business plans and general market features for assessing this.

\(^{(27)}\) If the assets transferred do not allow the purchaser to at least develop a market presence, it is likely that they will be used only for providing services to the outsourcing customer. In such circumstances, the transaction will not result in a lasting change in the market structure and the outsourcing contract is again similar to a service contract. The transaction will not constitute a concentration. The specific requirements under which a joint venture for the provision of outsourcing services is qualified as a concentration are assessed in the present Notice in the section on full-function joint ventures.

\(^{1.4.}\) **Change of control on a lasting basis**

\(^{(28)}\) Article 3(1) of the Merger Regulation defines the concept of a concentration in such a manner as to cover operations only if they bring about a lasting change in the control of the undertakings concerned and, as recital 20 adds, in the structure of the market. The Merger Regulation therefore does not deal with transactions resulting only in a temporary change of control. However, a change of control on a lasting basis is not excluded by the fact that the underlying agreements are entered into for a definite period of time, provided those agreements are renewable. A concentration may arise even in cases in which agreements envisage a definite end-date, if the period envisaged is sufficiently long to lead to a lasting change in the control of the undertakings concerned \(^{(29)}\).

\(^{(29)}\) The question whether an operation results in a lasting change in the market structure is also relevant for the assessment of several operations occurring in succession, where the first transaction is only transitory in nature. Several scenarios can be distinguished in this respect.

\(^{(30)}\) In one scenario, several undertakings come together solely for the purpose of acquiring another company on the basis of an agreement to divide up the acquired assets according to a pre-existing plan immediately upon completion of the transaction. In such circumstances, in a first step, the acquisition of the entire target company is carried out by one or several undertakings. In a second step, the acquired assets are divided among several undertakings. The question is then whether the first transaction is to be considered as a separate concentration, involving an acquisition of sole control (in the case of a single purchaser) or of joint control (in the case of a joint purchase) of the entire target undertaking, or whether only the acquisitions in the second step constitute concentrations, whereby each of the acquiring undertakings acquires its relevant part of the target undertaking.


\(^{(32)}\) See, in cases of joint ventures, Case COMP/M.2903 — DaimlerChrysler/Deutsche Telekom/JV of 30 April 2003 where a period of 12 years was considered sufficient; Case COMP/M.2632 — Deutsche Bahn/ECT International/United Depots/JV of 11 February 2002 with a contract duration of 8 years. In Case COMP/M.3858 Lehman Brothers/Starwood/Le Meridien of 20 July 2005, the Commission considered a minimum period of 10-15 years sufficient, but not a period of three years. The acquisition of control by the acquisition of shares or assets is not normally confined to a definite period of time and is therefore assumed to lead to a change of control on a lasting basis. Only in the scenarios set out in paragraphs 29 ff., will an acquisition of control by shares or assets be exceptionally considered to be transitory in nature and thus not to lead to a lasting change in the control of the undertakings concerned.
The Commission considers that the first transaction does not constitute a concentration, and examines the acquisitions of control by the ultimate acquirers, provided a number of conditions are met: First, the subsequent break-up must be agreed between the different purchasers in a legally binding way. Second, there must not be any uncertainty that the second step, the division of the acquired assets, will take place within a short time period after the first acquisition. The Commission considers that normally the maximum time-frame for the division of the assets should be one year.

If both conditions are met, the first acquisition does not result in a structural change on a lasting basis. There is no effective concentration of economic power between the acquirer(s) and the target company as a whole since the acquired assets are not held in an undivided way on a lasting basis, but only for the time necessary to carry out the immediate split-up of the acquired assets. In those circumstances, only the acquisitions of the different parts of the undertaking in the second step will constitute concentrations, whereby each of these acquisitions by different purchasers will constitute a separate concentration. This is irrespective of whether the first acquisition is carried out by only one undertaking or jointly by the undertakings which are also involved in the second step. In any case, it must be noted that the scope of a clearance decision will only allow for a takeover of the entire target if the break-up can proceed within a short time-frame afterwards and the different parts of the target undertaking are directly sold on to the respective ultimate buyer.

However, if these conditions are not fulfilled, in particular if it is not certain that the second step will proceed within a short time-frame after the first acquisition, the Commission will consider the first transaction as a separate concentration, involving the entire target undertaking. This, e.g., is the case if the first transaction may also proceed independently of the second transaction or if a longer transitory period is needed to divide up the target undertaking.

A second scenario is an operation leading to joint control for a starting-up period but, according to legally binding agreements, this joint control will be converted to sole control by one of the shareholders. As the joint control situation may not constitute a lasting change of control, the whole operation may be considered to be an acquisition of sole control. In the past, the Commission accepted that such a start-up period could last up to three years. Such a period seems to be too long to exclude that the joint control scenario has an impact on the structure of the market. The period therefore should, in general, not exceed one year and the joint control period should be only transitory in nature. Only such a relatively short period will make it unlikely that the joint control period will have a distinct impact on the market structure and can therefore be considered as not leading to a change in control on a lasting basis.

In a third scenario, an undertaking is ‘parked’ with an interim buyer, often a bank, on the basis of an agreement on the future onward sale of the business to an ultimate acquirer. The interim buyer generally acquires shares ‘on behalf’ of the ultimate acquirer, which often bears the major part of the economic risks and may also be granted specific rights. In such circumstances, the first transaction is only undertaken to facilitate the second transaction and the first buyer is directly linked to the ultimate acquirer. Contrary to the situation described in the first scenario in paragraphs 30-33, no other ultimate

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(31) The Commission considers that the first transaction does not constitute a concentration, and examines the acquisitions of control by the ultimate acquirers, provided a number of conditions are met: First, the subsequent break-up must be agreed between the different purchasers in a legally binding way. Second, there must not be any uncertainty that the second step, the division of the acquired assets, will take place within a short time period after the first acquisition. The Commission considers that normally the maximum time-frame for the division of the assets should be one year.

(32) If both conditions are met, the first acquisition does not result in a structural change on a lasting basis. There is no effective concentration of economic power between the acquirer(s) and the target company as a whole since the acquired assets are not held in an undivided way on a lasting basis, but only for the time necessary to carry out the immediate split-up of the acquired assets. In those circumstances, only the acquisitions of the different parts of the undertaking in the second step will constitute concentrations, whereby each of these acquisitions by different purchasers will constitute a separate concentration. This is irrespective of whether the first acquisition is carried out by only one undertaking or jointly by the undertakings which are also involved in the second step. In any case, it must be noted that the scope of a clearance decision will only allow for a takeover of the entire target if the break-up can proceed within a short time-frame afterwards and the different parts of the target undertaking are directly sold on to the respective ultimate buyer.

(33) However, if these conditions are not fulfilled, in particular if it is not certain that the second step will proceed within a short time-frame after the first acquisition, the Commission will consider the first transaction as a separate concentration, involving the entire target undertaking. This, e.g., is the case if the first transaction may also proceed independently of the second transaction or if a longer transitory period is needed to divide up the target undertaking.

(34) A second scenario is an operation leading to joint control for a starting-up period but, according to legally binding agreements, this joint control will be converted to sole control by one of the shareholders. As the joint control situation may not constitute a lasting change of control, the whole operation may be considered to be an acquisition of sole control. In the past, the Commission accepted that such a start-up period could last up to three years. Such a period seems to be too long to exclude that the joint control scenario has an impact on the structure of the market. The period therefore should, in general, not exceed one year and the joint control period should be only transitory in nature. Only such a relatively short period will make it unlikely that the joint control period will have a distinct impact on the market structure and can therefore be considered as not leading to a change in control on a lasting basis.

(35) In a third scenario, an undertaking is ‘parked’ with an interim buyer, often a bank, on the basis of an agreement on the future onward sale of the business to an ultimate acquirer. The interim buyer generally acquires shares ‘on behalf’ of the ultimate acquirer, which often bears the major part of the economic risks and may also be granted specific rights. In such circumstances, the first transaction is only undertaken to facilitate the second transaction and the first buyer is directly linked to the ultimate acquirer. Contrary to the situation described in the first scenario in paragraphs 30-33, no other ultimate

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(31) See, e.g., Cases COMP/M. Case No COMP/M.3779 — Pernod Ricard/Allied Domecq of 24 June 2005 and COMP/M.3813 — Fortune Brands/Allied Domecq of 10 June 2005, where the split-up of the assets was foreseen to become effective within 6 months after the acquisition.


(37) See Case M.2389 — Shell/DEA of 20 December 2001 where the ultimate acquirer of sole control had a strong influence in the operational management during the joint control period; Case M.2854 — RAG/Degussa of 18 November 2002 where the transitional period was designed to facilitate internal post-merger restructuring.
acquirer is involved, the target business remains unchanged, and the sequence of transactions is initiated alone by the sole ultimate acquirer. From the date of the adoption of this Notice, the Commission will examine the acquisition of control by the ultimate acquirer, as provided for in the agreements entered into by the parties. The Commission will consider the transaction by which the interim buyer acquires control in such circumstances as the first step of a single concentration comprising the lasting acquisition of control by the ultimate buyer.

1.5. Interrelated transactions

1.5.1. Relation between Article 3 and Article 5(2) second subparagraph

Several transactions can be treated as a single concentration under the Merger Regulation either according to the general rule of Article 3 — as the transactions are interdependent — or according to the specific provision of Article 5(2) second subparagraph.

1.5.2. Interdependent transactions under Article 3

The general and teleological definition of a concentration set out in Article 3(1) — the result being control of one or more undertakings — implies that it makes no difference whether control was acquired by one or several legal transactions, provided that the end result constitutes a single concentration. Two or more transactions constitute a single concentration for the purposes of Article 3 if they are unitary in nature. It should therefore be determined whether the result leads to conferring one or more undertakings direct or indirect economic control over the activities of one or more other undertakings. For the assessment, the economic reality underlying the transactions is to be identified and thus the economic aim pursued by the parties. In other words, in order to determine the unitary nature of the transactions in question, it is necessary, in each individual case, to ascertain whether those transactions are interdependent, in such a way that one transaction would not have been carried out without the other.

Recital 20 to the Merger Regulation explains in this respect that it is appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition. The requirement that the transactions are interdependent as set out by the Court of First Instance in the Cementbouw judgment thereby corresponds to the explanation set out in recital 20 that the transactions are linked by condition.

This general approach reflects, on the one hand, that under the Merger Regulation transactions which stand or fall together according to the economic objectives pursued by the parties should also be analysed in one procedure. In these circumstances, the change of the market structure is brought about by these transactions together. On the other hand, if different transactions are not interdependent and if the parties would proceed with one of the transactions if the other ones would not succeed, it seems appropriate to assess these transactions individually under the Merger Regulation.

However, several transactions, even if linked by condition upon each other, can only be treated as a single concentration, if control is acquired ultimately by the same undertaking(s). Only in these circumstances two or more transactions can be considered to be unitary in nature and therefore to constitute a single concentration for the purposes of Article 3 (45). This excludes de-mergers of joint ventures by which different parts of an undertaking are split between its former parent companies. The Commission will consider those transactions as separate concentrations (46). The same applies to transactions where two (or more) companies exchange assets in transactions involving de-mergers of joint ventures or assets swaps. Although the parties will normally consider those transactions as interdependent, the purpose of the Merger Regulation requires a separate assessment of the results of each of the transactions: Several undertakings acquire control of different assets; a separate combination of resources takes place for each of the acquiring undertakings; and the impact on the market of each of those acquisitions of control needs to be analysed separately under the Merger Regulation.

The acquisition of different degrees of control (for example joint control of one business and sole control of another business) raises specific questions. An operation involving the acquisition of joint control of one part of an undertaking and sole control of another part is in principle regarded as two separate concentrations under the Merger Regulation (47). Those transactions constitute only one concentration if they are interdependent and if the undertaking acquiring sole control is also acquiring joint control. In any case, such a scenario is considered to constitute one concentration where a corporate entity is acquired to which both the solely controlled and the jointly controlled undertaking belong. On the basis of the interpretation in recital 20, the situation where the same undertaking acquires sole and joint control of other undertakings based on interdependent agreements is not to be treated differently. These transactions, if they are interdependent, therefore constitute a single concentration.

Requirement of conditionality of transactions

The required conditionality implies that none of the transactions would take place without the others and they therefore constitute a single operation (48). Such conditionality is normally demonstrated if the transactions are linked de jure, i.e. the agreements themselves are linked by mutual conditionality. If de facto conditionality can be satisfactorily demonstrated, it may also suffice for treating the transactions as a single concentration. This requires an economic assessment of whether each of the transactions necessarily depends on the conclusion of the others (49). Further indications of the interdependence of several transactions may be the statements of the parties themselves or the simultaneous conclusion of the relevant agreements. A conclusion of de facto interconditionality of several transactions will be difficult to reach in the absence of their simultaneity. A pronounced lack of simultaneity of legally interconditionational transactions may likewise put into doubt their true interdependence.

The principle that several transactions can be treated as a single concentration under the mentioned conditions only applies if the result is that control of one or more undertakings is acquired by the same person(s) or undertaking(s). First, this may be the case if a single business or undertaking is acquired via several legal transactions. Second, also the acquisition of control of several undertakings — which could constitute concentrations in themselves — can be linked in such a way that it constitutes a single concentration. However, it is not possible under the Merger Regulation to link different legal transactions which only partly concern the acquisition of control of undertakings, but partly also the acquisition of


(45) This also covers situations where an undertaking sells a business to a purchaser and then acquires the seller including the business sold, see Case COMP/M.4521 — LGI/Telenet of 26 February 2007.
(49) Judgment in Case T-282/02 Cementbouw v Commission, paragraphs 131 et seq. [2006] ECR II-319. See Case COMP/ M.4521 — LGI/Telenet of 26 February 2007, where the interdependence was based on the fact that two transactions were decided and carried out simultaneously and that, according to the economic aims of the parties, each of the transactions would not have been carried out without the other.
other assets, such as non-controlling minority stakes in other companies. It would not be in line with the general framework and the purpose of the Merger Regulation if different transactions, linked by conditionality, were assessed as a whole under the Merger Regulations if only some of these transactions lead to a change in control of a given target.

**Acquisition of a single business**

(45) A single concentration may therefore exist if the same purchaser(s) acquire control of a single business, i.e. a single economic entity, via several legal transactions if those are inter-conditional. This is the case irrespective of whether the business is acquired in a corporate structure, consisting of one or several companies, or whether various assets are acquired which form a single business, i.e. a single economic entity managed for a common commercial purpose to which all the assets contribute. Such a business may comprise majority and minority stakes in companies as well as tangible and intangible assets. If several legal transactions which are interdependent are required to transfer such a business, these transactions constitute one concentration (50).

**Parallel and serial acquisitions of control**

(46) For the treatment of several acquisitions of control as a single concentration, several scenarios have arisen in the Commission's past decisional practice. One such scenario is a parallel acquisition of control, i.e. undertaking A acquires control of undertaking B and C in parallel from separate sellers on condition that A is not obliged to buy either and neither seller is obliged to sell, unless both transactions proceed (51). Another scenario is a serial acquisition of control, i.e. undertaking A acquires control of undertaking B conditional on B's prior or simultaneous acquisition of undertaking C, as illustrated by the Kingfisher case (52).

**Serial acquisition of sole/joint control**

(47) In the same way as the Kingfisher scenario, the Commission approaches cases where, in a serial transaction, an undertaking agrees to acquire first sole control of a target undertaking, with a view to directly selling on parts of the acquired stake in the target to another undertaking, finally resulting in joint control of both acquirers over the target company. If both acquisitions are inter-conditional, the two transactions constitute a single concentration and only the acquisition of joint control, as the final result of the transactions, will be considered by the Commission (53).

1.5.3. Series of transactions in securities

(48) Recital 20 of the Merger Regulation further explains that a single concentration will also arise in cases where control over one undertaking is acquired by a series of transactions in securities from one or several sellers taking place within a reasonably short period of time. The concentration in these scenarios is not limited to the acquisition of the ‘one and decisive’ share, but will cover all the acquisitions of securities which take place in the reasonably short period of time.

(50) See Case IV/M.470 — Gencor/Shell of 29 August 1994; COMP/M.3410 — Total/Gaz de France of 8 October 2004; Case IV/M.957 — L'Oreal/Procasa/Cosmetique Iberica/Albesa of 19 September 1997; Case IV/M.861 — Telectron/Kautex of 18 December 1996 where all the assets were also used in the same product market. The same considerations apply if a joint venture is created by several companies, forming a single business, see Case M.4048 — Sonae Industria/Tarkett of 12 June 2006 where the interdependence of transactions establishing, respectively, a production and a distribution joint venture was necessary in order to demonstrate that there was a single concentration that would create a full-function joint venture.

(51) Case COMP/M.2926 — EQT/H&R/Dragooco of 16 September 2002; the same considerations apply to the question when several mergers constitute one concentration in the meaning of Article 3(1)(a), Case COMP/M. 2824 — Ernst & Young/Andersen Germany of 27 August 2002.


1.5.4. Article 5(2) subparagraph 2

(49) Article 5(2) subparagraph 2 provides a specific rule which allows the Commission to consider successive transactions occurring in a fixed period of time a single concentration for the purposes of calculating the turnover of the undertakings concerned. The purpose of this provision is to ensure that the same persons do not break a transaction down into series of sales of assets over a period of time, with the aim of avoiding the competence conferred on the Commission by the Merger Regulation (54).

(50) If two or more transactions (each of them bringing about an acquisition of control) take place within a two-year period between the same persons or undertakings, they shall be qualified as a single concentration (55), irrespective of whether or not those transactions relate to parts of the same business or concern the same sector. This does not apply where the same persons or undertakings are joined by other persons or undertakings for only some of the transactions involved. It is sufficient if the transactions, although not carried out between the same companies, are carried out between companies belonging to the same respective groups. The provision also applies to two or more transactions between the same persons or undertakings if they are carried out simultaneously. Whenever they lead to acquisitions of control by the same undertaking, such simultaneous transactions between the same parties form a single concentration even if they are not conditional upon each other (56). However, Article 5(2) subparagraph 2 would not appear to apply to different transactions at least one of which involves an undertaking concerned which is distinct from the common seller(s) and buyer(s). In situations involving two transactions where one transaction results in sole control and the other in joint control, Article 5(2) subparagraph 2 therefore does not apply unless the other jointly controlling parent(s) in the latter transaction are the seller(s) of the solely controlling stake in the former transaction.

1.6. Internal restructuring

(51) A concentration within the meaning of the Merger Regulation is limited to changes in control. An internal restructuring within a group of companies does not constitute a concentration. This applies, e.g., to increases in shareholdings not accompanied by changes of control or to restructuring operations such as a merger of a dual listed company into a single legal entity or a merger of subsidiaries. A concentration could only arise if the operation leads to a change in the quality of control of one undertaking and therefore is no longer purely internal.

1.7. Concentrations involving State-owned undertakings

(52) An exceptional situation exists where both the acquiring and acquired undertakings are companies owned by the same State (or by the same public body or municipality). In this case, whether the operation is to be regarded as an internal restructuring depends in turn on the question whether both undertakings were formerly part of the same economic unit. Where the undertakings were formerly part of different economic units having an independent power of decision, the operation will be deemed to constitute a concentration and not an internal restructuring (57). However, where the different economic units will continue to have an independent power of decision also after the operation, the operation is only to be regarded as an internal restructuring, even if the shares of the undertakings, constituting different economic units, should be held by a single entity, such as a pure holding company (58).

(55) See Case COMP/M.3173 — E.ON/Fortum Burghausen/Smaland/Endenderry of 13 June 2003. This also applies to situations where sole control is acquired whereby only parts of the undertaking were previously jointly controlled by the acquiring undertaking, case COMP/M. 2679 — EdF/TXU/Europe/24 Seven of 20 December 2001.
(58) Specific issues concerning the calculation of turnover for state-owned companies are dealt with in paragraphs 192-194.
However, the prerogatives exercised by a State acting as a public authority rather than as a shareholder, in so far as they are limited to the protection of the public interest, do not constitute control within the meaning of the Merger Regulation to the extent that they have neither the aim nor the effect of enabling the State to exercise a decisive influence over the activity of the undertaking (59).

2. Sole control

Sole control is acquired if one undertaking alone can exercise decisive influence on an undertaking. Two general situations in which an undertaking has sole control can be distinguished. First, the solely controlling undertaking enjoys the power to determine the strategic commercial decisions of the other undertaking. This power is typically achieved by the acquisition of a majority of voting rights in a company. Second, a situation also conferring sole control exists where only one shareholder is able to veto strategic decisions in an undertaking, but this shareholder does not have the power, on his own, to impose such decisions (the so-called negative sole control). In these circumstances, a single shareholder possesses the same level of influence as that usually enjoyed by an individual shareholder which jointly-controls a company, i.e. the power to block the adoption of strategic decisions. In contrast to the situation in a jointly controlled company, there are no other shareholders enjoying the same level of influence and the shareholder enjoying negative sole control does not necessarily have to cooperate with specific other shareholders in determining the strategic behaviour of the controlled undertaking. Since this shareholder can produce a deadlock situation, the shareholder acquires decisive influence within the meaning of Article 3(2) and therefore control within the meaning of the Merger Regulation (60).

Sole control can be acquired on a de jure and/or de facto basis.

De jure sole control

Sole control is normally acquired on a legal basis where an undertaking acquires a majority of the voting rights of a company. In the absence of other elements, an acquisition which does not include a majority of the voting rights does not normally confer control even if it involves the acquisition of a majority of the share capital. Where the company statutes require a supermajority for strategic decisions, the acquisition of a simple majority of the voting rights may not confer the power to determine strategic decisions, but may be sufficient to confer a blocking right on the acquirer and therefore negative control.

Even in the case of a minority shareholding, sole control may occur on a legal basis in situations where specific rights are attached to this shareholding. These may be preferential shares to which special rights are attached enabling the minority shareholder to determine the strategic commercial behaviour of the target company, such as the power to appoint more than half of the members of the supervisory board or the administrative board. Sole control can also be exercised by a minority shareholder who has the right to manage the activities of the company and to determine its business policy on the basis of the organisational structure (e.g. as a general partner in a limited partnership which often does not even have a shareholding).

A typical situation of negative sole control occurs where one shareholder holds 50 % in an undertaking whilst the remaining 50 % is held by several other shareholders (assuming this does not lead to positive sole control on a de facto basis), or where there is a supermajority required for strategic decisions which in fact confers a veto right upon only one shareholder, irrespective of whether it is a majority or a minority shareholder (63).

(60) Since this shareholder is the only undertaking acquiring a controlling influence, only this shareholder is obliged to submit a notification under the Merger Regulation.
(61) See consecutive Cases COMP/M.3537 — BBVA/BNL of 20 August 2004 and M.3768 — BBVA/BNL of 27 April 2005; Case M.3198 — VW-Audi/VW-Audi Vertriebszentren of 29 July 2003; Case COMP/M.2777 — Cinven Limited/Angel Street Holdings of 8 May 2002; Case IV/M.238 — CCIE/GTE, of 25 September 1992. In Case COMP/M.3876 — Diester Industrie/Bunge/JV of 30 September 2005, there was the specific situation that a joint venture held a stake in a company by which it had negative sole control over this company.
De facto sole control

(59) A minority shareholder may also be deemed to have sole control on a *de facto* basis. This is in particular the case where the shareholder is highly likely to achieve a majority at the shareholders’ meetings, given the level of its shareholding and the evidence resulting from the presence of shareholders in the shareholders’ meetings in previous years (62). Based on the past voting pattern, the Commission will carry out a prospective analysis and take into account foreseeable changes of the shareholders’ presence which might arise in future following the operation (63). The Commission will further analyse the position of other shareholders and assess their role. Criteria for such an assessment are in particular whether the remaining shares are widely dispersed, whether other important shareholders have structural, economic or family links with the large minority shareholder or whether other shareholders have a strategic or a purely financial interest in the target company; these criteria will be assessed on a case-by-case basis (64). Where, on the basis of its shareholding, the historic voting pattern at the shareholders’ meeting and the position of other shareholders, a minority shareholder is likely to have a stable majority of the votes at the shareholders’ meeting, then that large minority shareholder is taken to have sole control (65).

(60) An option to purchase or convert shares cannot in itself confer sole control unless the option will be exercised in the near future according to legally binding agreements (66). However, in exceptional circumstances an option, together with other elements, may lead to the conclusion that there is *de facto* sole control (67).

Sole control acquired by other means than voting rights

(61) Apart from the acquisition of sole control on the basis of voting rights, the considerations outlined in section 1.2 concerning the acquisition of sole control by purchase of assets, by contract, or by any other means also apply.

3. Joint control

(62) Joint control exists where two or more undertakings or persons have the possibility of exercising decisive influence over another undertaking. Decisive influence in this sense normally means the power to block actions which determine the strategic commercial behaviour of an undertaking. Unlike sole control, which confers upon a specific shareholder the power to determine the strategic decisions in an undertaking, joint control is characterized by the possibility of a deadlock situation resulting from the power of two or more parent companies to reject proposed strategic decisions. It follows, therefore, that these shareholders must reach a common understanding in determining the commercial policy of the joint venture and that they are required to cooperate (68).

(63) As in the case of sole control, the acquisition of joint control can also be established on a *de jure* or *de facto* basis. There is joint control if the shareholders (the parent companies) must reach agreement on major decisions concerning the controlled undertaking (the joint venture).

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(63) See Case COMP/M.4336 — MAN/Scania of 20 December 2006 as regards the question whether Volkswagen had acquired control of MAN.

(64) Case IV/M.754 — Anglo American/Lonrho of 23 April 1997; Case IV/M.025 — Arjomari/Wiggins Teape, of 10 February 1990.


(66) Judgment in Case T 2/93, Air France v Commission [1994] ECR II-323. Even though an option does normally not in itself lead to a concentration, it can be taken into account for the substantive assessment in a related concentration, see Case COMP/M.3696 — E.ON/MOL of 21 December 2005, at paragraphs 12-14, 480, 762 et subseq.


3.1. *Equality in voting rights or appointment to decision-making bodies*

(64) The clearest form of joint control exists where there are only two parent companies which share equally the voting rights in the joint venture. In this case, it is not necessary for a formal agreement to exist between them. However, where there is a formal agreement, it must be consistent with the principle of equality between the parent companies, by laying down, for example, that each is entitled to the same number of representatives in the management bodies and that none of the members has a casting vote (69). Equality may also be achieved where both parent companies have the right to appoint an equal number of members to the decision-making bodies of the joint venture.

3.2. *Veto rights*

(65) Joint control may exist even where there is no equality between the two parent companies in votes or in representation in decision-making bodies or where there are more than two parent companies. This is the case where minority shareholders have additional rights which allow them to veto decisions which are essential for the strategic commercial behaviour of the joint venture (70). These veto rights may be set out in the statute of the joint venture or conferred by agreement between its parent companies. The veto rights themselves may operate by means of a specific quorum required for decisions taken at the shareholders’ meeting or by the board of directors to the extent that the parent companies are represented on this board. It is also possible that strategic decisions are subject to approval by a body, e.g. supervisory board, where the minority shareholders are represented and form part of the quorum needed for such decisions.

(66) These veto rights must be related to strategic decisions on the business policy of the joint venture. They must go beyond the veto rights normally accorded to minority shareholders in order to protect their financial interests as investors in the joint venture. This normal protection of the rights of minority shareholders is related to decisions on the essence of the joint venture, such as changes in the statute, an increase or decrease in the capital or liquidation. A veto right, for example, which prevents the sale or winding-up of the joint venture does not confer joint control on the minority shareholder concerned (71).

(67) In contrast, veto rights which confer joint control typically include decisions on issues such as the budget, the business plan, major investments or the appointment of senior management. The acquisition of joint control, however, does not require that the acquirer has the power to exercise decisive influence on the day-to-day running of an undertaking. The crucial element is that the veto rights are sufficient to enable the parent companies to exercise such influence in relation to the strategic business behaviour of the joint venture. Moreover, it is not necessary to establish that an acquirer of joint control of the joint venture will actually make use of its decisive influence. The possibility of exercising such influence and, hence, the mere existence of the veto rights, is sufficient.

(68) In order to acquire joint control, it is not necessary for a minority shareholder to have all the veto rights mentioned above. It may be sufficient that only some, or even one such right, exists. Whether or not this is the case depends upon the precise content of the veto right itself and also the importance of this right in the context of the specific business of the joint venture.


Appointment of senior management and determination of budget

(69) Very important are the veto rights concerning decisions on the appointment and dismissal of the senior management and the approval of the budget. The power to co-determine the structure of the senior management, such as the members of the board, usually confers upon the holder the power to exercise decisive influence on the commercial policy of an undertaking. The same is true with respect to decisions on the budget since the budget determines the precise framework of the activities of the joint venture and, in particular, the investments it may make.

Business plan

(70) The business plan normally provides details of the aims of a company together with the measures to be taken in order to achieve those aims. A veto right over this type of business plan may be sufficient to confer joint control even in the absence of any other veto right. In contrast, where the business plan contains merely general declarations concerning the business aims of the joint venture, the existence of a veto right will be only one element in the general assessment of joint control but will not, on its own, be sufficient to confer joint control.

Investments

(71) In the case of a veto right on investments, the importance of this right depends, first, on the level of investments which are subject to the approval of the parent companies and, secondly, on the extent to which investments constitute an essential feature of the market in which the joint venture is active. In relation to the first criterion, where the level of investments necessitating approval of the parent companies is extremely high, this veto right may be closer to the normal protection of the interests of a minority shareholder than to a right conferring a power of co-determination over the commercial policy of the joint venture. With regard to the second, the investment policy of an undertaking is normally an important element in assessing whether or not there is joint control. However, there may be some markets where investment does not play a significant role in the market behaviour of an undertaking.

Market-specific rights

(72) Apart from the typical veto rights mentioned above, there exist a number of other possible veto rights related to specific decisions which are important in the context of the particular market of the joint venture. One example is the decision on the technology to be used by the joint venture where technology is a key feature of the joint venture’s activities. Another example relates to markets characterized by product differentiation and a significant degree of innovation. In such markets, a veto right over decisions relating to new product lines to be developed by the joint venture may also be an important element in establishing the existence of joint control.

Overall context

(73) In assessing the relative importance of veto rights, where there are a number of them, these rights should not be evaluated in isolation. On the contrary, the determination of whether or not joint control exists is based upon an assessment of these rights as a whole. However, a veto right which does not relate either to strategic commercial policy, to the appointment of senior management or to the budget or business plan cannot be regarded as giving joint control to its owner (72).

3.3. Joint exercise of voting rights

(74) Even in the absence of specific veto rights, two or more undertakings acquiring minority shareholdings in another undertaking may obtain joint control. This may be the case where the minority shareholders together provide the means for controlling the target undertaking. This means that the minority shareholders, together, will have a majority of the voting rights; and they will act together in exercising

these voting rights. This can result from a legally binding agreement to this effect, or it may be established on a _de facto_ basis.

(75) The legal means to ensure the joint exercise of voting rights can be in the form of a (jointly controlled) holding company to which the minority shareholders transfer their rights, or an agreement by which they undertake to act in the same way (pooling agreement).

(76) Very exceptionally, collective action can occur on a _de facto_ basis where strong common interests exist between the minority shareholders to the effect that they would not act against each other in exercising their rights in relation to the joint venture. The greater the number of parent companies involved in such a joint venture, however, the more remote is the likelihood of this situation occurring.

(77) Indicative for such a commonality of interests is a high degree of mutual dependency as between the parent companies to reach the strategic objectives of the joint venture. This is in particular the case when each parent company provides a contribution to the joint venture which is vital for its operation (e.g. specific technologies, local know-how or supply agreements) (73). In these circumstances, the parent companies may be able to block the strategic decisions of the joint venture and, thus, they can operate the joint venture successfully only with each other's agreement on the strategic decisions even if there is no express provision for any veto rights. The parent companies will therefore be required to cooperate (74). Further factors are decision making procedures which are tailored in such a way as to allow the parent companies to exercise joint control even in the absence of explicit agreements granting veto rights or other links between the minority shareholders related to the joint venture (75).

(78) Such a scenario may not only occur in a situation where two or more minority shareholders jointly control an undertaking on a _de facto_ basis, but also where there is high degree of dependency of a majority shareholder on a minority shareholder. This may be the case where the joint venture economically and financially depends on the minority shareholder or where only the minority shareholder has the required know-how for, and will play a major role in, the operation of the joint undertaking whereas the majority shareholder is a mere financial investor (76). In such circumstances, the majority shareholder will not be able to enforce its position, but the joint venture partner may be able to block strategic decisions so that both parent undertakings will be required to cooperate permanently. This leads to a situation of _de facto_ joint control which prevails over a pure _de jure_ assessment according to which the majority shareholder could have been considered to have sole control.

(79) These criteria apply to the formation of a new joint venture as well as to acquisitions of minority shareholdings, together conferring joint control. In case of acquisitions of shareholdings, there is a higher probability of a commonality of interests if the shareholdings are acquired by means of concerted action. However, an acquisition by way of a concerted action is not alone sufficient for the purposes of establishing _de facto_ joint control. In general, a common interest as financial investors (or creditors) of a company in a return on investment does not constitute a commonality of interests leading to the exercise of _de facto_ joint control.


In the absence of strong common interests such as those outlined above, the possibility of changing coalitions between minority shareholders will normally exclude the assumption of joint control. Where there is no stable majority in the decision-making procedure and the majority can on each occasion be any of the various combinations possible amongst the minority shareholders, it cannot be assumed that the minority shareholders (or a certain group thereof) will jointly control the undertaking (77). In this context, it is not sufficient that there are agreements between two or more parties having an equal shareholding in the capital of an undertaking which establish identical rights and powers between the parties, where these fall short of strategic veto rights. For example, in the case of an undertaking where three shareholders each own one-third of the share capital and each elect one-third of the members of the Board of Directors, the shareholders do not have joint control since decisions are required to be taken on the basis of a simple majority.

3.4. Other considerations related to joint control

Unequal role of the parent companies

Joint control is not incompatible with the fact that one of the parent companies enjoys specific knowledge of and experience in the business of the joint venture. In such a case, the other parent company can play a modest or even non-existent role in the daily management of the joint venture where its presence is motivated by considerations of a financial, long-term-strategy, brand image or general policy nature. Nevertheless, it must always retain the real possibility of contesting the decisions taken by the other parent company on the basis of equality in voting rights or rights of appointment to decision making bodies or of veto rights related to strategic issues. Without this, there would be sole control.

Casting vote

For joint control to exist, there should not be a casting vote for one parent company only as this would lead to sole control of the company enjoying the casting vote. However, there can be joint control when this casting vote is in practice of limited relevance and effectiveness. This may be the case when the casting vote can be exercised only after a series of stages of arbitration and attempts at reconciliation or in a very limited field or if the exercise of the casting vote triggers a put option implying a serious financial burden or if the mutual interdependence of the parent companies would make the exercise of the casting vote unlikely (78).

III. CHANGES IN THE QUALITY OF CONTROL

The Merger Regulation covers operations resulting in the acquisition of sole or joint control, including operations leading to changes in the quality of control. First, such a change in the quality of control, resulting in a concentration, occurs if there is a change between sole and joint control. Second, a change in the quality of control occurs between joint control scenarios before and after the transaction if there is an increase in the number or a change in the identity of controlling shareholders. However, there is no change in the quality of control if a change from negative to positive sole control occurs. Such a change affects neither the incentives of the negatively controlling shareholder nor the nature of the control structure, as the controlling shareholder did not necessarily have to cooperate with specific shareholders at the time when it enjoyed negative control. In any case, mere changes in the level of shareholdings of the same controlling shareholders, without changes of the powers they hold in a company and of the composition of the control structure of the company, do not constitute a change in the quality of control and therefore are not a notifiable concentration.

(77) Case IV/JV.12 — Ericsson/Nokia/Psion/Motorola of 22 December 1998.
These changes in the quality of control will be discussed in two categories: first, an entrance of one or more new controlling shareholders irrespective of whether or not they replace existing controlling shareholders and, second, a reduction of the number of controlling shareholders.

1. Entry of controlling shareholders

An entry of new controlling shareholders leading to a joint control scenario can either result from a change from sole to joint control, or from the entry of an additional shareholder or a replacement of an existing shareholder in an already jointly controlled undertaking.

A move from sole control to joint control is considered a notifiable operation as this changes the quality of control of the joint venture. First, there is a new acquisition of control for the shareholder entering the controlled undertaking. Second, only the new acquisition of control makes the controlled undertaking to a joint venture which changes decisively also the situation for the remaining controlling undertaking under the Merger Regulation: In the future, it has to take into account the interests of one or more other controlling shareholder(s) and it is required to cooperate permanently with the new shareholder(s). Before, it could either determine the strategic behaviour of the controlled undertaking alone (in the case of sole control) or was not forced to take into account the interests of specific other shareholders and was not forced to cooperate with those shareholders permanently.

The entry of a new shareholder in a jointly controlled undertaking — either in addition to the already controlling shareholders or in replacement of one of them — also constitutes a notifiable concentration, although the undertaking is jointly controlled before and after the operation (79). First, also in this scenario there is a shareholder newly acquiring control of the joint venture. Second, the quality of control of the joint venture is determined by the identity of all controlling shareholders. It lies in the nature of joint control that, since each shareholder alone has a blocking right concerning strategic decisions, the jointly controlling shareholders have to take into account each others interests and are required to cooperate for the determination of the strategic behaviour of the joint venture (80). The nature of joint control therefore does not exhaust itself in a pure mathematical addition of the blocking rights exercised by several shareholders, but is determined by the composition of the jointly controlling shareholders. One of the most obvious scenarios leading to a decisive change in the nature of the control structure of a jointly controlled undertaking is a situation where in a joint venture, jointly controlled by a competitor of the joint venture and a financial investor, the financial investor is replaced by another competitor. In these circumstances, the control structure and the incentives of the joint venture may entirely change, not only because of the entry of the new controlling shareholder, but also due to the change in the behaviour of the remaining shareholder. The replacement of a controlling shareholder or the entry of a new shareholder in a jointly controlled undertaking therefore constitutes a change in the quality of control (81).

(81) Generally, it should be noted that the Commission will not assess as a separate concentration the indirect replacement of a controlling shareholder in a joint control scenario which takes place via an acquisition of control of one of its parent undertakings. The Commission will assess any changes occurring in the competitive situation of the joint venture in the framework of the overall acquisition of control of its parent undertaking. In those circumstances, the other controlling shareholders in the joint venture will therefore not be undertakings concerned by the concentration which relates to its parent undertaking.
However, the entry of new shareholders only results in a notifiable concentration if one or several shareholders acquire sole or joint control by virtue of the operation. The entry of new shareholders may lead to a situation where joint control can neither be established on a *de jure* basis nor on a *de facto* basis as the entry of the new shareholder leads to the consequence that changing coalitions between minority shareholders are possible (82).

2. **Reduction in the number of shareholders**

A reduction in the number of controlling shareholders constitutes a change in the quality of control and is thus to be considered as a concentration if the exit of one or more controlling shareholders results in a change from joint to sole control. Decisive influence exercised alone is substantially different from decisive influence exercised jointly, since in the latter case the jointly controlling shareholders have to take into account the potentially different interests of the other party or parties involved (83).

Where the operation involves a reduction in the number of jointly controlling shareholders, without leading to a change from joint to sole control, the transaction will normally not lead to a notifiable concentration.

IV. **JOINT VENTURES — THE CONCEPT OF FULL-FUNCTIONALITY**

Article 3(1)(b) provides that a concentration shall be deemed to arise where control is acquired by one or more undertakings of the whole or parts of another undertaking. The new acquisition of another undertaking by several jointly controlling undertakings therefore constitutes a concentration under the Merger Regulation. As in the case of the acquisition of sole control of an undertaking, such an acquisition of joint control will lead to a structural change in the market even if, according to the plans of the acquiring undertakings, the acquired undertaking would no longer be considered full-function after the transaction (e.g. because it will sell exclusively to the parent undertakings in future). Thus, a transaction involving several undertakings acquiring joint control of another undertaking or parts of another undertaking, fulfilling the criteria set out in paragraph 24, from third parties will constitute a concentration according to Article 3(1) without it being necessary to consider the full-functionality criterion (84).

Article 3(4) provides in addition that the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity (so-called full-function joint ventures) shall constitute a concentration within the meaning of the Merger Regulation. The full-functionality criterion therefore delineates the application of the Merger Regulation for the creation of joint ventures by the parties, irrespective of whether such a joint venture is created as a ‘greenfield operation’ or whether the parties contribute assets to the joint venture which they previously owned individually. In these circumstances, the joint venture must fulfil the full-functionality criterion in order to constitute a concentration.

The fact that a joint venture may be a full-function undertaking and therefore economically autonomous from an operational viewpoint does not mean that it enjoys autonomy as regards the adoption of its strategic decisions. Otherwise, a jointly controlled undertaking could never be considered a full-function joint venture and therefore the condition laid down in Article 3(4) would never be complied with (85). It is therefore sufficient for the criterion of full-functionality if the joint venture is autonomous in operational respect.

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(82) Case IV/JV.12 — Ericsson/Nokia/Psion/Motorola of 22 December 1998.
(84) These considerations do not apply to Article 2(4) in the same way. Whereas the interpretation of Article 3, paragraphs (1) and (4) relates to the applicability of the Merger Regulation to joint ventures, Article 2(4) relates to the substantive analysis of joint ventures. The ‘creation of a joint venture constituting a concentration pursuant to Article 3’, as provided for in Article 2(4), comprises the acquisition of joint control according to Article 3, paragraphs (1) and (4).
1. **Sufficient resources to operate independently on a market**

(94) Full function character essentially means that a joint venture must operate on a market, performing the functions normally carried out by undertakings operating on the same market. In order to do so the joint venture must have a management dedicated to its day-to-day operations and access to sufficient resources including finance, staff, and assets (tangible and intangible) in order to conduct on a lasting basis its business activities within the area provided for in the joint-venture agreement (86). The personnel do not necessarily need to be employed by the joint venture itself. If it is standard practice in the industry where the joint venture is operating, it may be sufficient if third parties envisage the staffing under an operational agreement or if staff is assigned by an interim employment agency. The secondment of personnel by the parent companies may also be sufficient if this is done either only for a start-up period or if the joint venture deals with the parent companies in the same way as with third parties. The latter case requires that the joint venture deals with the parents at arm's length on the basis of normal commercial conditions and that the joint venture is also free to recruit its own employees or to obtain staff via third parties.

2. **Activities beyond one specific function for the parents**

(95) A joint venture is not full-function if it only takes over one specific function within the parent companies’ business activities without its own access to or presence on the market. This is the case, for example, for joint ventures limited to R&D or production. Such joint ventures are auxiliary to their parent companies’ business activities. This is also the case where a joint venture is essentially limited to the distribution or sales of its parent companies’ products and, therefore, acts principally as a sales agency. However, the fact that a joint venture makes use of the distribution network or outlet of one or more of its parent companies normally will not disqualify it as ‘full-function’ as long as the parent companies are acting only as agents of the joint venture (87).

(96) A frequent example where this question arises are joint ventures involved in the holding of real estate property, which are typically set up for tax and other financial reasons. As long as the purpose of the joint venture is limited to the acquisition and/or holding of certain real estate for the parents and based on financial resources provided by the parents, it will not usually be considered to be full-function, as it lacks an autonomous, long term business activity on the market and will typically also lack the necessary resources to operate independently. This has to be distinguished from joint ventures that are actively managing a real estate portfolio and who act on their own behalf on the market, which typically indicates full-functionality (88).

3. **Sale/purchase relations with the parents**

(97) The strong presence of the parent companies in upstream or downstream markets is a factor to be taken into consideration in assessing the full-function character of a joint venture where this presence results in substantial sales or purchases between the parent companies and the joint venture. The fact that, for an

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(86) Case IV/M.527 — Thomson CSF/Deutsche Aerospace, of 2 December 1994 — intellectual rights, Case IV/M.560 EDS/Lufthansa of 11 May 1995 — outsourcing, Case IV/M.585 — Voest Alpine Industrieanlagenbau GmbH/Davy International Ltd, of 7 September 1995 — joint venture’s right to demand additional expertise and staff from its parent companies, Case IV/M.686 — Nokia/Autoliv, of 5 February 1996, joint venture able to terminate ‘service agreements’ with parent company and to move from site retained by parent company, Case IV/M.791 — British Gas Trading Ltd/Group 4 Utility Services Ltd, of 7 October 1996, joint venture’s intended assets will be transferred to leasing company and leased by joint venture.

(87) Case IV/M.102 — TNT/Canada Post etc. of 2 December 1991.

initial start-up period only, the joint venture relies almost entirely on sales to or purchases from its parent companies does not normally affect its full-function character. Such a start-up period may be necessary in order to establish the joint venture on a market. But the period will normally not exceed a period of three years, depending on the specific conditions of the market in question \(^{(89)}\).

**Sales to the parents**

\(^{(98)}\) Where sales from the joint venture to the parent companies are intended to be made on a lasting basis, the essential question is whether, regardless of these sales, the joint venture is geared to play an active role on the market and can be considered economically autonomous from an operational viewpoint. In this respect the relative proportion of sales made to its parents compared with the total production of the joint venture is an important factor. Due to the particularities of each individual case, it is impossible to define a specific turnover ratio which distinguishes full-function from other joint ventures. If the joint venture achieves more than 50% of its turnover with third parties, this will typically be an indication of full-functionality. Below this indicative threshold, a case-by-case analysis is required, whereby, for the finding of operational autonomy, the relationship between the joint venture and its parents must be truly commercial in character. For this purpose, it is to be demonstrated that the joint venture will supply its goods or services to the purchaser who values them most and will pay most and that the joint venture will also deal with its parents’ companies at arm’s length on the basis of normal commercial conditions \(^{(90)}\). Under these circumstances, i.e. if the joint venture will treat its parent companies in the same commercial way as third parties, it may be sufficient that at least 20% of the joint venture’s predicted sales will go to third parties. However, the greater the proportion of sales likely to be made to the parents, the greater will be the need for clear evidence of the commercial character of the relationship.

\(^{(99)}\) For the determination of the proportion between sales to the parents and to third parties, the Commission will take past accounts and substantiated business plans into account. However, especially where substantial third-party sales cannot be readily foreseen, the Commission will base its finding also on the general market structure. This may be a relevant factor as well for the assessment whether the joint venture will deal with its parents on an arm’s length basis.

\(^{(100)}\) These issues frequently arise with regard to outsourcing agreements, where an undertaking creates a joint venture with a service provider \(^{(9)}\) which will carry out functions that were previously dealt with by the undertaking in-house. The JV typically cannot be considered to be full-function in these scenarios: it provides its services exclusively to the client undertaking, and it is dependent for its services on input from the service provider. The fact that the joint venture’s business plan often at least does not exclude that the joint venture can provide its services to third parties does not alter this assessment, as in the typical outsourcing setup any third party revenues are likely to remain ancillary to the joint venture’s main activities for the client undertaking. However, this general rule does not exclude that there are outsourcing situations where the joint venture partners, for example for reasons of economies of scale, set up a joint venture with the perspective of significant market access. This could qualify the joint venture as full function if significant third-party sales are foreseen and if the relationship between the joint venture and its parent will be truly commercial in character and if the joint venture deals with its parents on the basis of normal commercial conditions.

\(^{(9)}\) Case IV/M.560 — EDS/Lufthansa of 11 May 1995; Case IV/M.686 Nokia/Autoliv of 5 February 1996; to be contrasted with Case IV/M.904 — RSB/Tenex/Fuel Logistics of 2 April 1997 and Case IV/M.979 — Preussag/Voest-Alpine of 1 October 1997. A special case exists where sales by the joint venture to its parent are caused by a legal monopoly downstream of the joint venture, see Case IV/M.468 — Siemens/Italtel of 17 February 1995, or where the sales to a parent company consist of by-products, which are of minor importance to the joint venture, see Case IV/M.550 — Union Carbide/Enichem of 13 March 1995.

\(^{(90)}\) Case IV/M.556 — Zeneca/Vanderhave of 9 April 1996; Case IV/M.751 — Bayer/Hüls of 3 July 1996.

\(^{(91)}\) The question under which circumstances an outsourcing arrangement qualifies as a concentration is dealt with in paragraphs 25ff. of this Notice.
Purchases from the parents

(101) In relation to purchases made by the joint venture from its parent companies, the full-function character of the joint venture is questionable in particular where little value is added to the products or services concerned at the level of the joint venture itself. In such a situation, the joint venture may be closer to a joint sales agency.

Trade markets

(102) However, in contrast to this situation where a joint venture is active in a trade market and performs the normal functions of a trading company in such a market, it normally will not be an auxiliary sales agency but a full-function joint venture. A trade market is characterised by the existence of companies which specialise in the selling and distribution of products without being vertically integrated in addition to those which are integrated, and where different sources of supply are available for the products in question. In addition, many trade markets may require operators to invest in specific facilities such as outlets, stockholding, warehouses, depots, transport fleets and sales and service personnel. In order to constitute a full-function joint venture in a trade market, an undertaking must have the necessary facilities and be likely to obtain a substantial proportion of its supplies not only from its parent companies but also from other competing sources (92).

4. Operation on a lasting basis

(103) Furthermore, the joint venture must be intended to operate on a lasting basis. The fact that the parent companies commit to the joint venture the resources described above normally demonstrates that this is the case. In addition, agreements setting up a joint venture often provide for certain contingencies, for example, the failure of the joint venture or fundamental disagreement as between the parent companies (93). This may be achieved by the incorporation of provisions for the eventual dissolution of the joint venture itself or the possibility for one or more parent companies to withdraw from the joint venture. This kind of provision does not prevent the joint venture from being considered as operating on a lasting basis. The same is normally true where the agreement specifies a period for the duration of the joint venture where this period is sufficiently long in order to bring about a lasting change in the structure of the undertakings concerned (94), or where the agreement provides for the possible continuation of the joint venture beyond this period.

(104) By contrast, the joint venture will not be considered to operate on a lasting basis where it is established for a short finite duration. This would be the case, for example, where a joint venture is established in order to construct a specific project such as a power plant, but it will not be involved in the operation of the plant once its construction has been completed.

(105) A joint venture also lacks the sufficient operations on a lasting basis at a stage where there are decisions of third parties outstanding that are of an essential core importance for starting the joint venture’s business activity. Only decisions that go beyond mere formalities and the award of which is typically uncertain qualify for these scenarios. Examples are the award of a contract (e.g., in public tenders), licences (e.g., in the telecoms sector) or access rights to property (e.g., exploration rights for oil and gas). Pending the decision on such factors, it is unclear whether the joint venture will become operational at all. Thus, at that stage the joint venture cannot be considered to perform economic functions on a lasting

(92) Case IV/M.788 — AgrEVO/Marubeni of 3 September 1996.
(94) See Case COMP/M.2903 — DaimlerChrysler/Deutsche Telekom/JV of 30 April 2001 where a period of 12 years was considered sufficient; Case COMP/M.2632 — Deutsche Bahn/ECT International/United Depots/JV of 11 February 2002 with a contract duration of 8 years. In Case COMP/M.3858 Lehman Brothers/Starwood/Le Meridien of 20 July 2005, the Commission considered a minimum period of 10-15 years sufficient, but not a period of three years.
basis and consequently does not qualify as full function. However, once a decision has been taken in favour of the joint venture in question, this criterion is fulfilled and a concentration arises (95).

5. Changes in the activities of the joint venture

(106) The parents may decide to enlarge the scope of the activities of the joint venture in the course of its lifetime. This will be considered as a new concentration that may trigger a notification requirement if this enlargement entails the acquisition of the whole or part of another undertaking from the parents that would, considered in isolation, qualify as a concentration as explained in paragraph 24 of this Notice (96).

(107) A concentration may also arise if the parent companies transfer significant additional assets, contracts, know-how or other rights to the joint venture and these assets and rights constitute the basis or nucleus of an extension of the activities of the joint venture into other product or geographic markets which were not the object of the original joint venture, and if the joint venture performs such activities on a full-function basis. As the transfer of the assets or rights shows that the parents are the real players behind the extension of the joint venture's scope, the enlargement of the activities of the joint venture can be considered in the same way as the creation of a new joint venture within the meaning of Article 3(4) (97).

(108) If the scope of a joint venture is enlarged without additional assets, contracts, know-how or rights being transferred, no concentration will be deemed to arise.

(109) A concentration arises if a change in the activity of an existing non-full-function joint venture occurs so that a full-function joint venture within the meaning of Article 3(4) is created. The following examples may be given: a change of the organisational structure of a joint venture so that it fulfils the full functionality criterion (98); a joint venture that used to supply only the parent companies, which subsequently starts a significant activity on the market; or scenarios, as described in paragraph 105 above, where a joint venture can only start its activity on the market once it has essential input (such as a licence for a joint venture in the telecoms sector). Such a change in the activity of the joint venture will frequently require a decision by its shareholders or its management. Once the decision is taken that leads to the joint venture meeting the full functionality criterion, a concentration arises.

V. EXCEPTIONS

(110) Article 3(5) sets out three exceptional situations where the acquisition of a controlling interest does not constitute a concentration under the Merger Regulation.

(111) First, the acquisition of securities by companies whose normal activities include transactions and dealing in securities for their own account or for the account of others is not deemed to constitute a concentration if such an acquisition is made in the framework of these businesses and if the securities are held on only a temporary basis (Article 3(5)(a)). In order to fall within this exception, the following requirements must be fulfilled:

— the acquiring undertaking must be a credit or other financial institution or insurance company the normal activities of which are described above;

(95) Subject to the other criteria mentioned in this chapter of the Notice.
(97) The triggering event for the notification in such a case will be the agreement or other legal act underlying the transfer of the assets, contracts, know-how or other rights.
— the securities must be acquired with a view to their resale;

— the acquiring undertaking must not exercise the voting rights with a view to determining the strategic commercial behaviour of the target company or must exercise these rights only with a view to preparing the total or partial disposal of the undertaking, its assets or the securities;

— the acquiring undertaking must dispose of its controlling interest within one year of the date of the acquisition, that is, it must reduce its shareholding within this one-year period at least to a level which no longer confers control. This period, however, may be extended by the Commission where the acquiring undertaking can show that the disposal was not reasonably possible within the one-year period.

(112) Second, there is no change of control, and hence no concentration within the meaning of the Merger Regulation, where control is acquired by an office-holder according to the law of a Member State relating to liquidation, winding-up, insolvency, cessation of payments, compositions or analogous proceedings (Article 3(5)(b));

(113) Third, a concentration does not arise where a financial holding company within the meaning of Article 5(3) of the Council Directive 78/660/EEC (99) acquires control. The notion of ‘financial holding company’ is thus limited to companies whose sole purpose it is to acquire holdings in other undertakings without involving themselves directly or indirectly in the management of those undertakings, the foregoing without prejudice to their rights as shareholders. Such investment companies must be further structured in a way that compliance with these limitations can be supervised by an administrative or judicial authority. The Merger Regulation provides for an additional condition for this exception to apply: such companies may exercise the voting rights in the other undertakings only to maintain the full value of those investments and not to determine directly or indirectly the strategic commercial conduct of the controlled undertaking.

(114) The exceptions under Article 3(5) of the Merger Regulation only apply to a very limited field. First, these exceptions only apply if the operation would otherwise be a concentration in its own right, but not if the transaction is part of a broader, single concentration, in circumstances in which the ultimate acquirer of control would not fall within the terms of Article 3(5) (see e.g. paragraph 35 above). Second, the exceptions under Article 3(5)(a) and (c) only apply to acquisitions of control by way of purchase of securities, not to acquisitions of assets.

(115) The exceptions do not apply to typical investment fund structures. According to their objectives, these funds usually do not limit themselves in the exercise of the voting rights, but adopt decisions to appoint the members of the management and the supervisory bodies of the undertakings or to even restructure those undertakings. This would not be compatible with the requirement under both Article 3(5)(a) and (c) that the acquiring companies do not exercise the voting rights with a view to determine the competitive conduct of the other undertaking (100).

(116) The question may arise whether an operation to rescue an undertaking before or from insolvency proceedings constitutes a concentration under the Merger Regulation. Such a rescue operation typically involves the conversion of existing debt into a new company, through which a syndicate of banks may acquire joint control of the company concerned. Where such an operation meets the criteria for joint

(99) Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies, OJ L 222, 14.8.1978, p. 11, as last amended by Directive 2003/51/EC of 18 June 2003, OJ L 178, 17.7.2003, p. 16. Article 5(3) of this Directive defines financial holding companies as ‘those companies the sole objective of which is to acquire holdings in other undertakings, and to manage such holdings and turn them to profit, without involving themselves directly or indirectly in the management of those undertakings, the foregoing without prejudice to their rights as shareholders. The limitations imposed on the activities of these companies must be such that compliance with them can be supervised by an administrative or judicial authority’.

(100) Case IV/M.669 — Charterhouse/Porterbrook, of 11 December 1995.
control, as outlined above, it will normally be considered to be a concentration (101). Although the primary intention of the banks is to restructure the financing of the undertaking concerned for its subsequent resale, the exception set out in Article 3(5)(a) is normally not applicable to such an operation. In a similar way as set out for investment funds, the restructuring programme normally requires the controlling banks to determine the strategic commercial behaviour of the rescued undertaking. Furthermore, it is not normally a realistic proposition to transform a rescued company into a commercially viable entity and to resell it within the permitted one-year period. Moreover, the length of time needed to achieve this aim may be so uncertain that it would be difficult to grant an extension of the disposal period.

VI. ABANDONMENT OF CONCENTRATIONS

(117) A concentration ceases to exist and the Merger Regulation ceases to be applicable if the undertakings concerned abandon the concentration.

(118) In this respect, the revised Merger Regulation 139/2004 introduced a new provision related to the closure of procedures concerning the control of concentrations without a final decision after the Commission has initiated proceedings under Article 6(1)(c), first sentence. That sentence reads as follows: Without prejudice to Article 9, such proceedings shall be closed by means of a decision as provided for in Article 8(1) to (4), unless the undertakings concerned have demonstrated to the satisfaction of the Commission that they have abandoned the concentration. Prior to the initiation of proceedings, such requirements do not apply.

(119) As a general principle, the requirements for the proof of the abandonment must correspond in terms of legal form, intensity etc. to the initial act that was considered sufficient to make the concentration notifiable. In case the parties proceed from that initial act to a strengthening of their contractual links during the procedure, for example by concluding a binding agreement after the transaction was notified on the basis of a good faith intention, the requirements for the proof of the abandonment must correspond also to the nature of the latest act.

(120) In line with this principle, in case of implementation of the concentration prior to a Commission decision, the re-establishment of the status quo ante has to be shown. The mere withdrawal of the notification is not considered as sufficient proof that the concentration has been abandoned in the sense of Article 6(1)(c). Likewise, minor modifications of a concentration which do not affect the change in control or the quality of that change, cannot be considered as an abandonment of the original concentration (102).

— Binding agreement: proof of the legally binding cancellation of the agreement in the form envisaged by the initial agreement (i.e. usually a document signed by all the parties) will be required. Expressions of intention to cancel the agreement or not to implement the notified concentration, as well as unilateral declarations by (one of) the parties will not be considered sufficient (103).

— Good faith intention to conclude an agreement: In case of a letter of intent or memorandum of understanding reflecting such good faith intention, documents proving that this basis for the good faith intention has been cancelled will be required. As for possible other forms that indicated the good faith intention, the abandonment must reverse this good faith intention and correspond in terms of form and intensity to the initial expression of intent.

— Public announcement of a public bid or of the intention to make a public bid: a public announcement terminating the bidding procedure or renouncing to the intention to make a public bid will be required. The format and public reach of this announcement must be comparable to the initial announcement.

(102) This paragraph does not prejudge the assessment whether the modification requires submitting additional information to the Commission under Article 5(3) of Regulation (EC) No 802/2004.
(103) See Case COMP/M.4381 — JCI/VB/FIAMM of 10 May 2007, paragraph 15, where only one party did no longer wished to implement an agreement, whereas the other party still considered the agreement to be binding and enforceable.
— Implemented concentrations: In case the concentration has been implemented prior to a Commission decision, the parties will be required to show that the situation prevailing before the implementation of the concentration has been re-established.

(121) It is for the parties to submit the necessary documentation to meet these requirements in due time.

VII. CHANGES OF TRANSACTIONS AFTER A COMMISSION AUTHORISATION DECISION

(122) In some cases, parties may wish not to implement the concentration in the form foreseen after authorisation of the concentration by the Commission. The question arises whether the Commission’s authorisation decision still covers the changed structure of the transaction.

(123) Broadly speaking, if, before implementation of the authorised concentration, the transactional structure is changed from an acquisition of control, falling under Article 3(1)(b), to a merger according to Article 3(1)(a), or vice versa, then the change in the transactional structure is considered a different concentration under the Merger Regulation and a new notification is required (104). However, less significant modifications of the transaction, for example minor changes in the shareholding percentages which do not affect the change in control or the quality of that change, changes in the offer price in the case of public bids or changes in the corporate structure by which the transaction is implemented without effects on the relevant control situation under the Merger Regulation, are considered as being covered by the Commission’s authorisation decision.

C. COMMUNITY DIMENSION

I. THRESHOLDS

(124) A two fold test defines the operations to which the Merger Regulation applies. The first test is that the operation must be a concentration within the meaning of Article 3. The second comprises the turnover thresholds contained in Article 1, designed to identify those operations which have an impact upon the Community and can be deemed to be of ‘Community dimension’. Turnover is used as a proxy for the economic resources being combined in a concentration, and is allocated geographically in order to reflect the geographic distribution of those resources.

(125) Two sets of thresholds are set out in Article 1 to establish whether the operation has a Community dimension. Article 1(2) establishes three different criteria: The worldwide turnover threshold is intended to measure the overall dimension of the undertakings concerned; the Community turnover threshold seek to determine whether the concentration involves a minimum level of activities in the Community; and the two-thirds rule aims to exclude purely domestic transactions from Community jurisdiction.

(126) This second set of thresholds, contained in Article 1(3), is designed to tackle those concentrations which fall short of achieving Community dimension under Article 1(2), but would have a substantial impact in at least three Member States leading to multiple notifications under national competition rules of those Member States. For this purpose, Article 1(3) provides for lower turnover thresholds, both worldwide and Community-wide, and for a minimum level of activities of the undertakings concerned, jointly and individually, in at least three Member States. Similarly to Article 1(2), Article 1(3) also contains a two-thirds rule excluding predominantly domestic concentrations (105).

(104) See cases COMP/M.2706 — Carnival Corporation/P&O Princess of 11 April 2002 and COMP/M.3071 — Carnival Corporation/P&O Princess of 10 February 2003. In such circumstances, the identity of the notifying parties changes, as both parties to a merger must notify, whereas only the party acquiring control must do so. However, if the parties implement an acquisition of control over a target company and only subsequently decide to merge with the newly acquired subsidiary, this would be regarded as an internal restructuring that does not give rise to a change in control and would thus not fall within the terms of Article 3 of the Merger Regulation.

(105) A concentration is further deemed to have a Community dimension if it is referred to the Commission under Article 4(5) of the Merger Regulation. These cases are dealt with in the Commission Notice on Case Referral in respect of concentrations, OJ C 56, 5.3.2005, p. 2.
The thresholds as such are designed to govern jurisdiction and not to assess the market position of the parties to the concentration nor the impact of the operation. In so doing they include turnover derived from, and thus the resources devoted to, all areas of activity of the parties, and not just those directly involved in the concentration. The thresholds are purely quantitative, since they are only based on turnover calculation instead of market share or other criteria. They pursue the objective to provide a simple and objective mechanism that can be easily handled by the companies involved in a merger in order to determine if their transaction has a Community dimension and is therefore notifiable.

Whereas Article 1 sets out the numerical thresholds to establish jurisdiction, the purpose of Article 5 is to explain how turnover should be calculated to ensure that the resulting figures are a true representation of economic reality.

II. NOTION OF UNDERTAKING CONCERNED

1. General

From the point of view of determining jurisdiction, the undertakings concerned are those participating in a concentration, i.e. a merger or an acquisition of control as foreseen in Article 3(1). The individual and aggregate turnover of those undertakings will be decisive in determining whether the thresholds are met.

Once the undertakings concerned have been identified in a given transaction, their turnover for the purposes of determining jurisdiction is to be calculated according to the rules set out in Article 5. Article 5(4) sets out detailed criteria to identify undertakings whose turnover may be attributed to the undertaking concerned because of certain direct or indirect links with the latter. The legislator’s intention was to lay down concrete rules which, seen together, can be taken to establish the notion of a ‘group’ for the purposes of the turnover thresholds in the Merger Regulation. The term ‘group’ will be used in the following sections exclusively to refer to the collection of undertakings whose relations with an undertaking concerned come within the terms of one or more of the sub-paragraphs of Article 5(4) of the Merger Regulation.

It is important, when referring to the various undertakings which may be involved in a procedure, not to confuse the concept of ‘undertakings concerned’ under Articles 1 and 5 with the terminology used elsewhere in the Merger Regulation and in Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (hereinafter referred to as the ‘Implementing Regulation’) referring to the various undertakings which may be involved in a procedure. This terminology refers to the notifying parties, other involved parties, third parties and parties who may be subject to fines or periodic penalty payments, and they are defined in Chapter IV of the Implementing Regulation, along with their respective rights and duties.

2. Mergers

In a merger the undertakings concerned are each of the merging entities.

3. Acquisition of control

In the remaining cases, it is the concept of ‘acquiring control’ that will determine which are the undertakings concerned. On the acquiring side, there can be one or more undertakings acquiring sole or joint control. On the acquired side, there can be one or more undertakings as a whole or parts thereof. As a general rule, each of these undertakings will be an undertaking concerned within the meaning of the Merger Regulation.

Acquisition of sole control

Acquisition of sole control of the whole undertaking is the most straightforward case of acquisition of control. The undertakings concerned will be the acquiring undertaking and the target undertaking.

(135) Where the target undertaking is acquired by a group through one of its subsidiaries, the undertakings concerned are the target undertaking and the acquiring subsidiary if this is not a mere acquisition vehicle. However, even though the subsidiary is normally the undertaking concerned for the purpose of calculating turnover, the turnover of all undertakings with which the undertaking concerned has the links as specified in Article 5(4) shall be included in the threshold calculations. In this respect, the group is considered to be a single economic unit and the different companies belonging to the same group cannot be considered as different undertakings concerned for jurisdictional purposes under the Merger Regulation. The actual notification can be made by the subsidiary concerned or by its parent company.

*Acquisition of parts of an undertaking and staggered operations — Article 5(2)*

(136) The first subparagraph of Article 5(2) of the Merger Regulation provides that when the operation concerns the acquisition of parts of one or more undertakings, only those parts which are the subject of the transaction shall be taken into account with regard to the seller. The possible impact of the transaction on the market will depend only on the combination of the economic and financial resources that are the subject of the transaction with those of the acquirer and not on the remaining business of the seller. In this case, the undertakings concerned will be the acquirer(s) and the acquired part(s) of the target undertaking, but the remaining businesses of the seller will be ignored.

(137) The second subparagraph of Article 5(2) includes a special provision on staggered operations or follow-up deals. The previous concentrations (within two years) involving the same parties become (re)notifiable with the most recent transaction, provided this constitutes a concentration, if the thresholds are met whether for one or more of the transactions taken in isolation or cumulatively. In this case, the undertakings concerned are the acquirer(s) and the different acquired part(s) of the target company taken as a whole.

*Change from joint to sole control*

(138) If the acquisition of control occurs by way of a change from joint control to sole control, one shareholder normally acquires the stake previously held by the other shareholder(s). In this situation, the undertakings concerned are the acquiring shareholder and the joint venture. As is the case for any other seller, the ‘exiting’ shareholder is not an undertaking concerned (107).

*Acquisition of joint control*

(139) In the case of acquisition of joint control of a newly-created undertaking, the undertakings concerned are each of the companies acquiring control of the newly set-up joint venture (which, as it does not yet exist, cannot be considered to be an undertaking concerned and moreover, as yet, has no turnover of its own). The same rule applies where one undertaking contributes a pre-existing subsidiary or a business (over which it previously exercised sole control) to a newly created joint venture. In these circumstances, each of the jointly-controlling undertakings is considered an undertaking concerned whereas any company or business contributed to the joint venture is not an undertaking concerned, and its turnover is part of the turnover of the initial parent company.

(140) The situation is different if undertakings newly acquire joint control of a pre-existing undertaking or business. The undertakings concerned are each of the undertakings acquiring joint control on the one hand, and the pre-existing acquired undertaking or business on the other.

(141) The acquisition of a company with a view to immediately split up the assets is, as explained above in paragraph 32, mostly not considered as an acquisition of joint control of the entire target company, but as the acquisition of sole control by each of the ultimate acquirers of the respective parts of the target company. In line with the considerations for the acquisition of sole control, undertakings concerned are the acquiring undertakings and the acquired parts in each of the transactions.

Changes of controlling shareholders in cases of joint control of an existing joint venture

(142) A notifiable concentration may arise, as explained above, where a change in the quality of control occurs in a joint control structure due to the entrance of new controlling shareholders, irrespective of whether or not they replace existing controlling shareholders.

(143) In the case where one or more shareholders acquire control, either by entry or by substitution of one or more shareholders, in a situation of joint control both before and after the operation, the undertakings concerned are the shareholders (both existing and new) who exercise joint control and the joint venture itself (108). On the one hand, similar to the acquisition of joint control of an existing company, the joint venture itself can be considered as an undertaking concerned as it is an already pre-existing undertaking. On the other hand, as set out above, the entry of a new shareholder is not only in itself a new acquisition of control, but also leads to a change in the quality of control for the remaining controlling shareholders as the quality of control of the joint venture is determined by the identity and composition of the controlling shareholders and therefore also by the relationship between them. Furthermore, the Merger Regulation considers a joint venture as a combination of the economic resources of the parent companies, together with the joint venture if it already generates turnover on the market. For these reasons, the newly entering controlling shareholders are undertakings concerned alongside with the remaining controlling shareholders. Due to the change of the quality in control, all of them are considered to undertake an acquisition of control.

(144) As Article 4(2) first sentence of the Merger Regulation foresees that all acquisitions of joint control shall be notified jointly by the undertakings acquiring joint control, existing and new shareholders in principle have to notify concentrations arising from such changes in joint control scenarios jointly.

Acquisition of control by a joint venture

(145) In transactions where a joint venture acquires control of another company, the question arises whether or not the joint venture should be regarded as the undertaking concerned (the turnover of which would include the turnover of its parent companies), or whether each of its parent companies should individually be regarded as undertakings concerned. This question may be decisive for jurisdictional purposes (109). Whereas, in principle, the undertaking concerned is the joint venture as the direct participant in the acquisition of control, there may be circumstances where companies set up ‘shell’ companies and the parent companies will individually be considered as undertakings concerned. In this type of situation, the Commission will look at the economic reality of the operation to determine which are the undertakings concerned.

(146) Where the acquisition is carried out by a full-function joint venture, with the features set out above, and already operates on the same market, the Commission will normally consider the joint venture itself and the target undertaking to be the undertakings concerned (and not the joint venture’s parent companies).


(109) Assume the following scenario: The target company has an aggregate Community turnover of less than EUR 250 million, and the acquiring parties are two (or more) undertakings, each with a Community turnover exceeding EUR 250 million, and thus one of the cumulative threshold conditions for Community jurisdiction, namely, the existence of at least two undertakings with a Community turnover exceeding EUR 250 million, would not be fulfilled. Conversely, if instead of acting through a ‘shell’ company, the acquiring undertakings acquire the target undertaking themselves, then the turnover threshold would be met and the Merger Regulation would apply to this transaction. The same considerations apply to the national turnover thresholds referred to in Article 1(3).
Conversely, where the joint venture can be regarded as a mere vehicle for an acquisition by the parent companies, the Commission will consider each of the parent companies themselves to be the undertakings concerned, rather than the joint venture, together with the target company. This is the case in particular where the joint venture is set up especially for the purpose of acquiring the target company or has not yet started to operate, where an existing joint venture has no full-function character as referred to above or where the joint venture is an association of undertakings. The same applies where there are elements which demonstrate that the parent companies are in fact the real players behind the operation. These elements may include a significant involvement by the parent companies themselves in the initiation, organisation and financing of the operation. In those cases, the parent companies are regarded as undertakings concerned.

Break-up of joint ventures and exchange of assets

When two (or more) undertakings break up a joint venture and split the assets (constituting businesses) between them, this will normally be considered as more than one acquisition of control, as explained above in paragraph 41. For example, undertakings A and B form a joint venture and subsequently split it up, in particular with a new asset configuration. The break-up of the joint venture involves a change from joint control over the joint venture's entire assets to sole control over the divided assets by each of the acquiring undertakings (110).

For each break-up operation, and in line with the consideration to the acquisition of sole control, the undertakings concerned will be, on the one hand, the acquiring party and, on the other, the assets that this undertaking will acquire.

Similar to the break-up scenario is the situation where two (or more) companies exchange assets constituting a business on each side. In this case, each acquisition of control is considered an independent acquisition of sole control. The undertakings concerned will be, for each transaction, the acquiring companies and the acquired undertaking or assets.

Acquisitions of control by natural persons

Control may also be acquired by natural persons, within the meaning of Article 3 of the Merger Regulation, if those persons themselves carry out further economic activities (and are therefore classified as economic undertakings in their own right) or if they control one or more other economic undertakings. In such a situation, the undertakings concerned are the target undertaking and the individual acquirer (with the turnover of the undertaking(s) controlled by that natural person being included in the calculation of the natural person's turnover to the extent that the terms of Article 5(4) are satisfied) (111).

An acquisition of control of an undertaking by its managers is also an acquisition by natural persons, and paragraph 151 above is also relevant. However, the managers may pool their interests through a 'vehicle company', so that it acts with a single voice and also to facilitate decision-making. Such a vehicle company may be, but is not necessarily, an undertaking concerned. The general guidance given above in paragraphs 145-147 on acquisitions of control by a joint venture also applies here.


(111) See Case IV/M.082 — Asko/Jacobs/Adia, of 16 May 1991 where a private individual with other economic activities acquired joint control of an undertaking and was considered an undertaking concerned.
Acquisition of control by a State-owned undertaking

(153) As described above, a merger or an acquisition of control arising between two undertakings owned by the same State (or the same public body) may constitute a concentration if the undertakings were formerly part of different economic units having an independent power of decision. If this is the case, both of them will qualify as undertakings concerned although both are owned by the same State (112).

III. RELEVANT DATE FOR ESTABLISHING JURISDICTION

(154) The legal situation for establishing the Commission’s jurisdiction has been changed under the recast Merger Regulation. Under the former Merger Regulation, the relevant date was the triggering event for a notification according to Article 4(1) of this Regulation — the conclusion of a final agreement or the announcement of a public bid or the acquisition of a controlling interest — or, at the latest, the time when the parties were obliged to notify (i.e. one week after a triggering event for a notification) (113).

(155) Under the recast Merger Regulation, there is no longer an obligation for the parties to notify within a certain time-frame (provided the parties do not implement the planned concentration before notification). Moreover, according to Article 4(1) second subparagraph, the undertakings concerned can already notify the transaction on the basis of a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced an intention to make such a bid. At the time of the notification at the latest, the Commission — as well as national competition authorities — must be able to determine their jurisdiction. Article 4(1) subparagraph 1 of the Merger Regulation provides, generally, that concentrations shall be notified following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. The dates of these events are therefore still decisive under the recast Merger Regulation in order to determine the relevant date for establishing jurisdiction, if a notification does not occur before such events on the basis of a good faith intention or an announced intention (114).

(156) The relevant date for establishing Community jurisdiction over a concentration is therefore the date of the conclusion of the binding legal agreement, the announcement of a public bid or the acquisition of a controlling interest or the date of the first notification, whichever date is earlier (115). Regarding the date of notification, a notification to either the Commission or to a Member State authority is relevant. The relevant date needs in particular to be considered for the question whether acquisitions or divestitures which occur after the period covered by the relevant account, but before the relevant date, require adaptations to those accounts according to the principles set out in paragraphs 172 and 173.

IV. TURNOVER

1. The concept of turnover

(157) The concept of turnover as used in Article 5 of the Merger Regulation comprises ‘the amounts derived [...] from the sale of products and the provision of services’. Those amounts generally appear in company accounts under the heading ‘sales’. In the case of products, turnover can be determined without difficulty, namely by identifying each commercial act involving a transfer of ownership.

(112) See recital 22 of the Merger Regulation, directly related to the calculation of turnover of a state-owned undertaking concerned in the context of Article 5(4).


(114) The alternative possibility that turnover should be defined on the latest date when the relevant parties are obliged to notify (seven days after the ‘triggering event’ under the former Merger Regulation) cannot be retained under the recast merger Regulation, because there is no deadline for notification.

(115) See also opinion of AG Kokott in Case C-202/06 Cementbouw v Commission of 26 April 2007, paragraph 46 (not yet reported). Only the recast merger Regulation has provided for the possibility to take into account the first notification if this is earlier than the date of the conclusion of the binding legal agreement, the announcement of a public bid or the acquisition of a controlling interest, see fn. 35 of the opinion.
In the case of services, the method of calculating turnover in general does not differ from that used in the case of products: the Commission takes into consideration the total amount of sales. However, the calculation of the amounts derived from the provision of services may be more complex as this depends on the exact service provided and the underlying legal and economic arrangements in the sector in question. Where one undertaking provides the entire service directly to the customer, the turnover of the undertaking concerned consists of the total amount of sales for the provision of services in the last financial year.

In other areas, this general principle may have to be adapted to the specific conditions of the service provided. In certain sectors of activity (such as package holidays and advertising), the service may be sold through intermediaries. Even if the intermediary invoices the entire amount to the final customer, the turnover of the undertaking acting as an intermediary consists solely of the amount of its commission. For package holidays, the entire amount paid by the final customer is then allocated to the tour operator which uses the travel agency as distribution network. In the case of advertising, only the amounts received (without the commission) are considered to constitute the turnover of the TV channel or the magazine since media agencies, as intermediaries, do not constitute the distribution channel for the sellers of advertising space, but are chosen by the customers, i.e. those undertakings wishing to place advertising.

The examples mentioned show that, due to the diversity of services, many different situations may arise and the underlying legal and economic relations have to be carefully analysed. Similarly, specific situations for the calculation of turnover may arise in the areas of credit, financial services and insurance. These issues will be dealt with in Section VI.

2. Ordinary activities

Article 5(1) provides that the amounts to be included in the calculation of turnover should correspond to the ‘ordinary activities’ of the undertakings concerned. This is the turnover achieved from the sale of products or the provision of services in the normal course of its business. It generally excludes those items which are listed under the headers ‘financial income’ or ‘extraordinary income’ in the company’s accounts. Such extraordinary income may be derived from the sale of businesses or of fixed assets. However, company accounts do not necessarily delineate the revenues derived from ordinary activities in the way required for the purposes of turnover calculation under the Merger Regulation. In some cases, the qualification of the items in the accounts may have to be adapted to the requirements of the Merger Regulation.

The revenues do not necessarily have to be derived from the customer of the products or services. With regard to aid granted to undertakings by public bodies, any aid has to be included in the calculation of turnover if the undertaking is itself the recipient of the aid and if the aid is directly linked to the sale of products and the provision of services by the undertaking. The aid is therefore an income of the undertaking from the sale of products or provision of services in addition to the price paid by the consumer.

Specific issues have arisen for the calculation of turnover of a business unit which only had internal revenues in the past. This may in particular apply for transactions involving the outsourcing of services by transfer of a business unit. If such a transaction constitutes a concentration on the basis of the considerations outlined in paragraphs 25 ff. of this Notice, the Commission’s practice is that the turnover should normally be calculated on the basis of the previously internal turnover or of publicly quoted


[117] In Case IV/M.126 — Accor/Wagons-Lits, of 28 April 1992, the Commission decided to consider certain income from car-hire activities as revenues from ordinary activities although they were included as ‘other operating proceeds’ in Wagons-Lits’ profit and loss account.

[118] See Case IV/M.156 — Cereol/Continente Italiana of 27 November 1991. In this case, the Commission excluded Community aid from the calculation of turnover because the aid was not intended to support the sale of products manufactured by one of the undertakings involved in the merger, but the producers of the raw materials (grain) used by the undertaking, which specialised in the crushing of grain.
prices where such prices exist (e.g. in the oil industry). Where the previously internal turnover does not appear to correspond to a market valuation of the activities in question (and, thus, to the expected future turnover on the market), the forecast revenues to be received on the basis of an agreement with the former parent may be a suitable proxy.

3. ‘Net’ turnover

(164) The turnover to be taken into account is ‘net’ turnover, after deduction of a number of components specified in the Regulation. The aim is to adjust turnover in such a way as to enable it to reflect the real economic strength of the undertaking.

3.1. Deduction of rebates and taxes

(165) Article 5(1) provides for the ‘deduction of sales rebates and of value added tax and other taxes directly related to turnover’. Sales rebates mean all rebates or discounts which are granted by the undertakings to their customers and which have a direct influence on the amounts of sales.

(166) As regards the deduction of taxes, the Merger Regulation refers to VAT and ‘other taxes directly related to turnover’. The concept of ‘taxes directly related to turnover’ refers to indirect taxation linked to turnover, such as, for example, taxes on alcoholic beverages or cigarettes.

3.2. The treatment of ‘internal’ turnover

(167) The first subparagraph of Article 5(1) states that ‘the aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 4, i.e. the group to which the undertaking concerned belongs. The aim is to exclude the proceeds of business dealings within a group so as to take account of the real economic weight of each entity in the form of market turnover. Thus, the ‘amounts’ taken into account by the Merger Regulation reflect only the transactions which take place between the group of undertakings on the one hand and third parties on the other.

(168) Article 5(5)(a) of the Merger Regulation applies the principle that double counting is to be avoided specifically to the situation where two or more undertakings concerned in a concentration jointly have the rights or powers listed in Article 5(4)(b) in another company. According to this provision, the turnover resulting from the sale of products or the provision of services between the joint venture and each of the undertakings concerned (or any other undertaking connected with any one of them in the sense of Article 5(4)) should be excluded. As regards joint ventures between undertakings concerned and third parties, insofar as their turnover is taken into account according to Article 5(4)(b) as set out in paragraph 181 below, the turnover generated by sales between the joint venture and the undertaking concerned (as well as undertakings linked to the undertaking concerned in accordance with the criteria set out in Article 5(4)) is not taken into account according to Article 5(1).

4. Turnover calculation and financial accounts

4.1. The general rule

(169) The Commission seeks to base itself upon the most accurate and reliable figures available. Generally, the Commission will refer to accounts which relate to the closest financial year to the date of the transaction and which are audited under the standard applicable to the undertaking in question and compulsory for the relevant financial year. An adjustment of the audited figures should only take place if this is required by the provisions of the Merger Regulation, including the cases explained in more detail in paragraph 172.

(170) The Commission is reluctant to rely on management or any other form of provisional accounts in any but exceptional circumstances \(^\text{[120]}\). Where a concentration takes place within the first months of the year and audited accounts are not yet available for the most recent financial year, the figures to be taken into account are those relating to the previous year. Where there is a major divergence between the two sets of accounts, due to significant and permanent changes in the undertaking concerned, and, in particular, when the final draft figures for the most recent year have been approved by the board of management, the Commission may decide to take those figures into account.

(171) Despite the general rule, in cases where major differences between the Community's accounting standards and those of a non-member country are observed, the Commission may consider it necessary to restate these accounts in accordance with Community standards in respect of turnover.

4.2. Adjustments after the date of the last audited accounts

(172) Notwithstanding the foregoing paragraphs, an adjustment must always be made to account for permanent changes in the economic reality of the undertakings concerned, such as acquisitions or divestments which are not or not fully reflected in the audited accounts. Such changes have to be taken into account in order to identify the true resources being concentrated and to better reflect the economic situation of the undertakings concerned. Those adjustments are only selective in nature and do not endanger the principle that there should be a simple and objective mechanism to determine the Commission's jurisdiction as they do not require a complete revision of the audited accounts \(^\text{[121]}\). First, this applies to acquisitions, divestments or closure of part of its business subsequent to the date of the audited accounts. This is relevant if a company closes a transaction concerning the divestment and closure of part of its business at any time before the relevant date for establishing jurisdiction (see paragraph 154) or where such a divestment or closure of a business is a pre-condition for the operation \(^\text{[122]}\). In this case, the turnover to be attributed to that part of the business must be subtracted from the turnover of the notifying party as shown in its last audited accounts. If an agreement for the sale of part of its business is signed, but the closing of the sale (in other words, its legal implementation and the transfer of the legal title to the shares or assets acquired) has not yet occurred, such a change is not taken into account \(^\text{[123]}\), unless the sale is a pre-condition for the notified operation. Conversely, the turnover of those businesses whose acquisition has been closed subsequent to the preparation of the most recent audited accounts, but before the relevant date for establishing jurisdiction, must be added to a company's turnover for notification purposes.

(173) Second, an adjustment may also be necessary for acquisitions, divestments or closure of part of the business which have taken place during the financial year for which the audited accounts are drawn up. If acquisitions, divestments or closure of part of the business within this period are made, the changes in the economic resources may only partly be reflected in the audited accounts of the undertaking concerned. As the turnover of the businesses acquired may be included in the accounts only from the time of their acquisition, this may not reflect the full annual turnover of the acquired business. Conversely, the turnover of the businesses divested or closed may still be included in the audited accounts up to the point in time of their actual divestment or closure. In these cases, adjustments have to be made to remove the turnover generated by the divested or closed businesses from the audited accounts until the time of de-consolidation and to add the turnover which the acquired businesses have generated in the year until the time they have been consolidated in the accounts. As a result, the turnover of the businesses divested or closed must be excluded in full and the full annual turnover of the businesses acquired must be included.


5. Attribution of turnover under Article 5(4)

5.1. Identification of undertakings whose turnover is taken into account

When an undertaking concerned by a concentration belongs to a group, not only the turnover of the undertaking concerned is considered, but the Merger Regulation requires to also take into account the turnover of those undertakings with which the undertaking concerned has links consisting in the rights or powers listed in Article 5(4) in order to determine whether the thresholds contained in Article 1 of the Merger Regulation are met. The aim is again to capture the total volume of the economic resources that are being combined through the operation irrespective of whether the economic activities are carried out directly by the undertaking concerned or whether they are undertaken indirectly via undertakings with which the undertaking concerned possesses the links described in Article 5(4).

The Merger Regulation does not delineate the concept of a group in a single abstract definition, but sets out in Article 5(4)(b) certain rights or powers. If an undertaking concerned directly or indirectly has such links with other companies, those are to be regarded as part of its group for purposes of turnover calculation under the Merger Regulation.

Article 5(4) of the Merger Regulation provides the following:

'Without prejudice to paragraph 2 [acquisitions of parts], the aggregate turnover of an undertaking concerned within the meaning of Article 1(2) and (3) shall be calculated by adding together the respective turnovers of the following:

(a) the undertaking concerned;

(b) those undertakings in which the undertaking concerned directly or indirectly:

(i) owns more than half the capital or business assets, or

(ii) has the power to exercise more than half the voting rights, or

(iii) has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or

(iv) has the right to manage the undertaking’s affairs;

(c) those undertakings which have in an undertaking concerned the rights or powers listed in (b);

(d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b);

(e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (b).'

An undertaking which has in another undertaking the rights and powers mentioned in Article 5(4)(b) will be referred to as the ‘parent’ of the latter in the present section of this Notice dealing with the calculation of turnover, whereas the latter is referred to as ‘subsidiary’ of the former. In short, Article 5(4) therefore provides that the turnover of the undertaking concerned by the concentration (point (a)) should include its subsidiaries (point (b)), its parent companies (point (c)), the other subsidiaries of its parent undertakings (point (d)) and any other subsidiary jointly held by two or more of the undertakings identified under (a)-(d) (point (e)).
(178) A graphic example is as follows:

The undertaking concerned and its group:

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  c1
   \--------\     / 100 %  \
    \     /     /
       / 50 %  / 50 %
      /     /     /
     /  c   c   / 100 %
    /       /     /
   /       / 50 %
  a       /     /
     \     / 51 %
       /     /
      /      /
     / 51 %
   \     /     /
     \   / 100 %
    / b   b   /
   /      /     /
  b1  100 %  \     /
      /     / 50 %
     /     /
    / 50 %
   /     /
  b2 100 %
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a: The undertaking concerned (124)
b: Its subsidiaries, jointly held companies together with third parties (b3) and their own subsidiaries (b1 and b2)
c: Its parent companies and their own parent companies (c1)
d: Other subsidiaries of the parent companies of the undertaking concerned
e: Companies jointly held by two (or more) companies of the group
x: Third party

Note: the letters a — e correspond to the relevant points of Article 5(4). Percentages set out in the graph relate to the percentage of voting rights held by the respective parent company.

(179) The rights or powers listed in Article 5(4)(b)(i)-(iii) can be identified in a rather straightforward way as they refer to quantitative thresholds. These thresholds are fulfilled if the undertaking concerned owns more than half of the capital or business assets of other undertakings, has more than half of the voting rights or has legally the power to appoint more than half of the board members in other undertakings. However, the thresholds are also met if the undertaking concerned de facto has the power to exercise more than half of the voting rights in the shareholders' assembly or the power to appoint more than half of the board members in other undertakings (125).

(124) For the graph it is assumed that the joint venture itself is the undertaking concerned according to the criteria set out in paragraph 146 (acquisition by a full-function JV operating on the same market).
The provision contained in Article 5(4)(b)(iv) refers to the right to manage the undertaking’s affairs. Such a right to manage exists under company law in particular on the basis of organisational contracts such as a ‘Beherrschungsvertrag’ under German law, on the basis of business lease agreements or on the basis of the organisation structure for the general partner in a limited partnership \(^{(126)}\). However, the ‘right to manage’ may also result from the holding of voting rights (alone or in combination with contractual arrangements, such as a shareholders’ agreement) which enable, on a stable, de jure basis, to determine the strategic behaviour of an undertaking.

The right to manage also covers situations in which the undertaking concerned jointly has the right to manage an undertaking’s affairs together with third parties \(^{(127)}\). The underlying consideration is that the undertakings exercising joint control have jointly the right to manage the controlled undertakings’ affairs even if each of them individually may have those rights only in a negative sense, i.e. in the form of veto rights. In the example, the undertaking (b3) which is jointly controlled by the undertaking concerned (a) and a third party (x) is taken into account as both (a) and (x) have veto rights in (b3) on the basis of their equal shareholding in (b3) \(^{(128)}\). Under Article 5(4)(b)(iv) the Commission only takes into account those joint ventures in which the undertaking concerned and third parties have de jure rights that give rise to a clear-cut right to manage. The inclusion of joint ventures is therefore limited to situations where the undertaking concerned and third parties have a joint right to manage on the basis of an agreement, e.g. a shareholders’ agreement, or where the undertaking concerned and a third party have an equality of voting rights to the effect that they have the right to appoint an equal number of members to the decision-making bodies of the joint venture.

In the same way, where two or more companies jointly control the undertaking concerned in the sense that the agreement of each and all of them is needed in order to manage the undertaking affairs, the turnover of all of them is included. In the example, the two parent companies (c) of the undertaking concerned (a) would be taken into account as well as their own parent companies (c1 in the example). This interpretation results from the referral from Article 5(4)(c), dealing with this case, to Article 5(4)(b), which is applicable to jointly controlled companies as set out in the preceding paragraph.

When any of the companies identified on the basis of Article 5(4) also has links as defined in Article 5(4) with other undertakings, these should also be brought into the calculation. In the example, one of the subsidiaries of the undertaking concerned (a) has in turn its own subsidiaries b1 and b2 and one of the parent companies (c) has its own subsidiary (d).

Article 5(4) sets out specific criteria for identifying undertakings whose turnover can be attributed to the undertaking concerned. These criteria, including the ‘right to manage the undertaking’s affairs’, are not coextensive with the notion of ‘control’ under Article 3(2). There are significant differences between Articles 3 and 5, as those provisions fulfill different roles. The differences are most apparent in the field of de facto control. Whereas under Article 3(2) even a situation of economic dependence may lead to control on a de facto basis (see in detail above), a solely controlled subsidiary is only taken into account on a de facto basis under Article 5(4)(b) if it is clearly demonstrated that the undertaking concerned has the power to exercise more than half of the voting rights or to appoint more than half of the board members. Concerning joint control scenarios, Article 5(4)(b)(iv) covers those scenarios where the controlling undertakings jointly have a right to manage on the basis of individual veto rights. However, Article 5(4) would not cover situations where joint control occurs on a de facto basis due to strong common interests between different minority shareholders of the joint venture company on the basis of shareholders’ attendance. The difference is reflected in the fact that Article 5(4)(b)(iv) refers to the right to manage, and not a power (as in subparagraph (b)(ii) and (iii)) and is explained by the need for precision and certainty in the criteria used for calculating turnover so that jurisdiction can be readily verified.

\(^{(127)}\) Case COMP/M.1741 — MCI Worldcom/Sprint; Case IV/M. 187 — Ifint/Exor; Case IV/M.1046 — Ameritech/Tele Danmark.
\(^{(128)}\) However, only half of the turnover generated by b3 is taken into account, see paragraph 187.
Under Article 3(3), however, the question whether a concentration arises can be much more comprehensively investigated. In addition, situations of negative sole control are only exceptionally covered (if the conditions of Article 5(4)(b)(i)-(iii) are met in the specific case); the 'right to manage' under Article 5(4)(b)(iv) does not cover negative control scenarios. Finally, Article 5(4)(b)(ii), for example, covers situations where 'control' under Article 3(2) may not exist.

5.2. **Allocation of turnover of the undertakings identified**

(185) In general, as long as the test under Article 5(4)(b) is fulfilled, the whole turnover of the subsidiary in question will be taken into account regardless of the actual shareholding which the undertaking concerned holds in the subsidiary. In the chart, the whole turnover of the subsidiaries called b of the undertaking concerned a will be taken into account.

(186) However, the Merger Regulation includes specific rules for joint ventures. Article 5(5)(b) provides that for joint ventures between two or more undertakings concerned, the turnover of the joint venture (as far as the turnover is generated from activities with third parties as set out above in paragraph 168) should be apportioned equally amongst the undertakings concerned, irrespective of their share of the capital or the voting rights.

(187) The principle contained in Article 5(5)(b) is followed by analogy for the allocation of turnover for joint ventures between undertakings concerned and third parties if their turnover is taken into account according to Article 5(4)(b) as set out above in paragraph 181. The Commission's practice has been to allocate to the undertaking concerned the turnover of the joint venture on a per capita basis according to the number of undertakings exercising joint control. In the example, half of the turnover of b3 is taken into account.

(188) The rules of Article 5(4) also have to be adapted in situations involving a change from joint to sole control in order to avoid double counting of the turnover of the joint venture. Even if the acquiring undertaking has rights or powers in the joint venture which satisfy the requirements of Article 5(4), the turnover of the acquiring shareholder has to be calculated without the turnover of the joint venture, and the turnover of the joint venture has to be taken without the turnover of the acquiring shareholder.

5.3. **Allocation of turnover in case of investment funds**

(189) The investment company, as set out above in paragraph 15, normally acquires indirect control over portfolio companies held by an investment fund. In the same way, the investment company may be considered to indirectly have the powers and rights which are set out in Article 5(4)(b), in particular to indirectly have the power to exercise the voting rights held by the investment fund in the portfolio companies.

(190) The same considerations, as set out above in the framework of Article 3 (paragraph 15), may also apply if an investment company sets up several investment funds with possibly different investors. Typically, on the basis of the organisational structure, in particular links between the investment company and the general partner(s) of the different funds organised as limited partnerships, or contractual arrangements, especially advisory agreements between the general partner or the investment fund and the investment company, the investment company will indirectly have the power to exercise the voting rights held by the investment fund in the portfolio companies or indirectly have one of the other powers or rights set out in Article 5(4)(b). In these circumstances, the investment company may exercise a common control structure over the different funds which it has set up and the common operation of the different funds by the investment company is often indicated by a common brand for the funds.
(191) Consequently, such an organisation of the different funds by the investment company may lead to the result that the turnover of all portfolio companies held by different funds is taken into account for the purpose of assessing whether the turnover thresholds in Article 1 are met if the investment company acquires indirect control of a portfolio company via one of the funds.

5.4. **Allocation of turnover for State-owned undertakings**

(192) As regards the calculation of turnover of State-owned undertakings, Article 5(4) should be read in conjunction with recital 22 of the Merger Regulation. This recital declares that, in order to avoid discrimination between the public and private sectors, ‘in the public sector, calculation of the turnover of an undertaking concerned in a concentration needs, therefore, to take account of undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them’ (127).

(193) This recital clarifies that Member States (or other public bodies) are not considered as ‘undertakings’ under Article 5(4) simply because they have interests in other undertakings which satisfy the conditions of Article 5(4). Therefore, for the purposes of calculating turnover of State-owned undertakings, account is only taken of those undertakings which belong to the same economic unit, having the same independent power of decision.

(194) Thus, where a State-owned company is not subject to any coordination with other State-controlled holdings, it should be treated as independent for the purposes of Article 5, and the turnover of other companies owned by that State should not be taken into account. Where, however, several State-owned companies are under the same independent centre of commercial decision-making, then the turnover of those businesses should be considered part of the group of the undertaking concerned for the purposes of Article 5.

V. **GEOGRAPHIC ALLOCATION OF TURNOVER**

(195) The thresholds concerning Community-wide and Member State turnover in Article 1(2) and (3) aim to identify cases which have sufficient turnover within the Community in order to be of Community interest and which are primarily cross-border in nature. They require turnover to be allocated geographically to the Community and to individual Member States. Since audited accounts often do not provide a geographical breakdown as required by the Merger Regulation, the Commission will rely on the best figures available provided by the undertakings. The second subparagraph of Article 5(1) provides that the location of turnover is determined by the location of the customer at the time of the transaction:

‘Turnover, in the Community or in a Member State, shall comprise products sold and services provided to undertakings or consumers, in the Community or in that Member State as the case may be.’

**General rule**

(196) The Merger Regulation does not discriminate between ‘products sold’ and ‘services provided’ for the geographic allocation of turnover. In both cases, the general rule is that turnover should be attributed to the place where the customer is located. The underlying principle is that turnover should be allocated to the location where competition with alternative suppliers takes place. This location is normally also the place where the characteristic action under the contract in question is to be performed, i.e. where the service is actually provided and the product is actually delivered. In the case of Internet transactions, it may be difficult for the undertakings to determine the location of the customer at the time when the contract is concluded via the Internet. If the product or the service itself is not supplied via the Internet, focusing on the place where the characteristic action under the contract is performed may avoid those difficulties. In the following, the sale of goods and the provision of services are dealt with separately as they exhibit certain different features in terms of allocation of turnover.

(127) See also Case IV/M.216 — CEA Industrie/France Telecom/Finnmeccanica/SGS-Thomson, of 22 February 1993.
Sale of goods

(197) For the sale of goods, particular situations may arise in situations in which the place where the customer was located at the time of concluding the purchase agreement is different from the billing address and/or the place of delivery. In these situations, the place where the purchase agreement was entered into and the place of delivery are more important than the billing address. As the delivery is in general the characteristic action for the sale of goods, the place of delivery may even be prevailing over the place where the customer was located at the time when the purchase agreement was concluded. This will depend on whether the place of delivery is to be considered the place where competition takes place for the sale of goods or whether competition rather takes place at the residence of the customer. In the case of a sale of mobile goods, such as a motor car, to a final consumer, the place where the car is delivered to the customer is decisive even if the agreement was concluded via the phone or the Internet before.

(198) A specific situation arises in cases where a multinational corporation has a Community buying strategy and sources all its requirements for a good from one location. As a central purchasing organisation can take different forms, it is necessary to consider its concrete form since this may determine how to allocate the turnover. Where goods are purchased by and delivered to the central purchasing organisation and are subsequently re-distributed internally to different plants in a variety of Member States, turnover is allocated only to the Member State where the central purchasing organisation is located. In this case, competition takes place at the location of the central purchasing organisation and this is also the place where the characteristic action under the sales contract is performed. The situation is different in case of direct links between the seller and the different subsidiaries. This comprises the case where the central purchasing organisation concludes a mere framework agreement, but the individual orders are placed by and the products are directly delivered to the subsidiaries in different Member States as well as the case where the individual orders are placed via the central purchasing organisation, but the products are directly delivered to the subsidiaries. In both cases, turnover is to be allocated to the different Member States in which the subsidiaries are located, irrespective of whether the central purchasing organisation or the subsidiaries receive the bills and effect the payment. The reason is that in both cases competition with alternative suppliers takes place for the delivery of products to the different subsidiaries even though the contract is concluded centrally. In the first case, in addition, the subsidiaries actually decide upon the quantities to be delivered and on an element essential for competition on their own.

Provision of services

(199) For services, the Merger Regulation foresees that the place of their provision to the customer is relevant. Services containing cross-border elements can be considered to fall into three general categories. The first category comprises cases where the service provider travels, the second category cases where the customer travels. The third category comprises those cases where a service is provided without either the service provider or the customer having to travel. In the first two categories, the turnover generated is to be allocated to the place of destination of the traveller, i.e. the place where the service is actually provided to the customer. In the third category, the turnover is generally to be allocated to the location of the customer. For the central sourcing of services the above outlined principles for the central purchasing of goods apply in an analogous way.

(200) An example of the first category would be a situation where a non-European company provides special airplane maintenance services to a carrier in a Member State. In this case, the service provider travels to the Community where the service is actually provided and where also competition for this service takes place. If a European tourist hires a car or books a hotel directly in the United States, this falls into the second category as the service is provided outside the Community and also competition takes place between hotels and rental car companies at the location chosen. However, the case is different for package holidays. For this kind of holiday, the service starts with the sale of the package through a travel agent at the customer's location and competition for the sale of holidays through travel agents takes place locally, as with retail shopping, even though parts of the service may be provided in a number of distant locations. The case therefore falls into the third category and the turnover generated is to be allocated to the customer's location. The third category also comprises cases like the supply of software or the distribution of films which are made outside the Community, but are supplied to a customer in a Member State so that the service is actually provided to the customer within the Community.
Cases concerning the transport of goods are different as the customer, to whom those services are provided, does not travel, but the transport service is provided to the customer at its location. Those cases fall into the third category and the location of the customer is the relevant criterion for the allocation of the turnover.

In telecom cases, the qualification of call termination services may raise problems. Although call termination would appear to fall into the third category, there are reasons to treat it differently. Call termination services are provided, e.g., in situations where a call, originating from a European operator, is being terminated in the United States. Although neither the European nor the US operator travels, the signal travels and the service is provided by the US network to the European operator in the United States. This is also the place where competition takes place (if any). The turnover is therefore to be considered as non-Community turnover (130).

Specific sectors

Certain sectors do, however, pose very particular problems with regard to the geographical allocation of turnover. These will be dealt with in Section VI below.

VI. CONVERSION OF TURNOVER INTO EURO

When converting turnover figures into euro great care should be taken with the exchange rate used. The annual turnover of a company should be converted at the average rate for the twelve months concerned. This average can be obtained via DG Competition's website (131). The audited annual turnover figures should be converted as such and not be broken down into quarterly or monthly figures which would then be converted individually.

When a company has sales in a range of currencies, the procedure is no different. The total turnover given in the consolidated audited accounts and in that company's reporting currency is converted into euros at the yearly average rate. Local currency sales should not be converted directly into euros since these figures are not from the consolidated audited accounts of the company.

VII. PROVISIONS FOR CREDIT AND OTHER FINANCIAL INSTITUTIONS AND INSURANCE UNDERTAKINGS

1. Scope of application

Due to the specific nature of the sector, Article 5(3) contains specific rules for the calculation of turnover of credit and other financial institutions as well as insurance undertakings.

In order to define the terms 'credit institutions and other financial institutions' under the Merger Regulation, the Commission in its practice has consistently adopted the definitions provided in the applicable European regulation in the banking sector. The Directive on the taking up and pursuit of the business of credit institutions foresees that (132):

— ‘Credit institution shall mean an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account.’

— ‘Financial institution shall mean an undertaking other than a credit institution, the principal activity of which is to acquire holdings or to carry on one or more of the activities listed in points 2 to 12 of Annex I.’

This does not affect the turnover which the European telephony operator generates vis-à-vis its own customer with this call.


The definitions are to be found in Article 1 (1) and (5) of Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (OJ L 126, 26.5.2000, p. 1).
Financial institutions within the meaning of Article 5(3) of the Merger Regulation are, accordingly, on the one hand holding companies and, on the other hand, undertakings which perform on a regular basis as a principal activity one or more activities expressly mentioned in points 2 to 12 of the Annex of the banking Directive. These activities include:

- lending (comprising activities such as consumer credit, mortgage credit, factoring);
- financial leasing;
- money transmission services;
- issuing and administering means of payment (e.g. credit cards, travellers' cheques and bankers' drafts);
- guarantees and commitments;
- trading for own account or for account of customers in money market instruments, (cheques, bills, certificates of deposit, etc.), foreign exchange, financial futures and options, exchange and interest-rate instruments, transferable securities;
- participation in securities issues and the provision of services related to such issues;
- money broking;
- portfolio management and advice; and
- safekeeping and administration of securities.

2. **Calculation of turnover**

Article 5(3) of the Merger Regulation sets out the methods of calculation of turnover for credit and other financial institutions and for insurance undertakings. In the following Section, some supplementary questions related to turnover calculation for the abovementioned types of undertakings are addressed.

2.1. **Calculation of turnover of credit and financial institutions (other than financial holding companies)**

2.1.1. General

There are normally no particular difficulties in applying the banking income criterion for the definition of the worldwide turnover to credit institutions and other kinds of financial institutions.

For the geographic allocation of turnover to the Community and to individual Member States, the specific provision of Article 5 (3)(a) second subparagraph applies. It specifies that the turnover is to be allocated to the branch or division established in the Community or in the Member State which receives this income.

2.1.2. **Turnover of leasing companies**

There is a fundamental distinction to be made between financial leases and operating leases. Basically, financial leases are made for longer periods than operating leases and ownership is generally transferred to the lessee at the end of the lease term by means of a purchase option included in the lease contract. Under an operating lease, on the contrary, ownership is not transferred to the lessee at the end of the lease term and the costs of maintenance, repair and insurance of the leased equipment are included in the lease payments. A financial lease therefore functions as a loan by the lessor to enable the lessee to purchase a given asset.
(212) As already mentioned above, a company performing as its principal activity financial leasing is a financial institution within the meaning of Article 5(3)(a) and its turnover is to be calculated according to the specific rules set out in this provision. All payments on financial leasing contracts, except for the redemption part, are to be taken into account; a sale of future leasing payments at the beginning of the contract for re-financing purposes is not relevant.

(213) Operational leasing activities are, however, not considered to be carried out by financial institutions, and therefore the general turnover calculation rules of Article 5(1) apply (133).

2.2. Insurance undertakings

(214) In order to measure the turnover of insurance undertakings, Article 5(3)(b) of the Merger Regulation provides that gross premiums written are taken into account. The gross premiums written are the sum of received premiums, including any received reinsurance premiums if the undertaking concerned has activities in the field of reinsurance. Outgoing or outward reinsurance premiums, i.e. all amounts paid and payable by the undertaking concerned to get reinsurance cover, are only costs related to the provision of insurance coverage and are not to be deducted from the gross premiums written.

(215) The premiums to be taken into account are not only related to new insurance contracts made during the accounting year being considered but also to all premiums related to contracts made in previous years which remain in force during the period taken into consideration.

(216) In order to constitute appropriate reserves allowing for the payment of claims, insurance undertakings, usually hold a portfolio of investments in shares, interest-bearing securities, land and property and other assets providing annual revenues. The annual revenues coming from those sources are not considered as turnover for insurance undertakings under Article 5(3)(b). However, a distinction has to be made between pure financial investments, which do not confer the rights and powers specified in Article 5(4) to the insurance undertaking in the undertakings in which the investment has been made, and those investments leading to the acquisition of an interest which meets the criteria specified in Article 5(4)(b). In the latter case, Article 5(4) of the Merger Regulation applies, and the turnover of this undertaking has to be added to the turnover of the insurance undertaking, as calculated according to Article 5(3)(b), for the determination of the thresholds laid down in the Merger Regulation (134).

2.3. Financial holding companies

(217) As an ‘other financial institution’ within the meaning of Article 5(3)(a) of the Merger Regulation, the turnover of a financial holding company has to be calculated according to the specific rules set out in this provision. However, in the same way as mentioned above for insurance undertakings, Article 5(4) applies to those participations which meet the criteria specified in Article 5(4)(b). Thus, the turnover of a financial holding is to be basically calculated according to Article 5(3), but it may be necessary to add turnover of undertakings falling within the categories set out in Article 5(4) (‘Art. 5(4) companies’) (135).

(135) The principles for financial holding companies may to a certain extent be applied to fund management companies.
(218) In practice, the turnover of the financial holding company (non-consolidated) must first be taken into account. Then the turnover of the Art. 5(4) companies must be added, whilst taking care to deduct dividends and other income distributed by those companies to the financial holdings. The following provides an example for this kind of calculation:

<table>
<thead>
<tr>
<th>(EUR million)</th>
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<tbody>
<tr>
<td>1. Turnover related to financial activities (from non-consolidated P&amp;L)</td>
</tr>
<tr>
<td>2. Turnover related to insurance Art. 5(4) companies (gross premiums written)</td>
</tr>
<tr>
<td>3. Turnover of industrial Article 5(4) companies</td>
</tr>
<tr>
<td>4. Deduct dividends and other income derived from Art. 5(4) companies 2 and 3</td>
</tr>
<tr>
<td>Total turnover financial holding and its group</td>
</tr>
</tbody>
</table>

(219) In such calculations different accounting rules may need to be taken into consideration. Whilst this consideration applies to any type of undertaking concerned by the Merger Regulation, it is particularly important in the case of financial holding companies (136) where the number and the diversity of enterprises controlled and the degree of control the holding holds on its subsidiaries, affiliated companies and other companies in which it has shareholding requires careful examination.

(220) Turnover calculation for financial holding companies as described above may in practice prove onerous. Therefore a strict and detailed application of this method will be necessary only in cases where it seems that the turnover of a financial holding company is likely to be close to the Merger Regulation thresholds; in other cases it may well be obvious that the turnover is far from the thresholds of the Merger Regulation, and therefore the published accounts are adequate for the establishment of jurisdiction.

(136) See for example Case IV/M.166 — Torras/Sarrió, of 24 February 1992.
I. REGULATION 1/2003

1. Regulation 1/2003 (1) 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 (2) 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 (3).

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) (4). 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 (5) 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. (6) 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 (7). 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 (8).

7. While Regulation 1/2003 is without prejudice to the ability of the Commission to issue informal guidance to individual undertakings (9), 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.

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(2) 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’.

(3) All texts mentioned are available at: http://europa.eu.int/comm/competition/index_en.html


(7) Cf. in particular Articles 7 to 9, 12, 17-24, 29 of Regulation 1/2003.

(8) Cf. in particular Recital 3 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 prejudge 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 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 (1), 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 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 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 (1), 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 (2) 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

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 or a statement of objections or the date on which a notice pursuant to Article 27(4) of that Regulation is published, whichever is the earlier.

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 not be obliged to take into account any further written submission received after the expiry of that time-limit.

CHAPTER IV

HANDLING OF COMPLAINTS

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

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 and set a time-limit within which the complainant may make known its views in writing.

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.
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

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

2. The Commission shall, when notifying the statement of objections to the parties concerned, set a time-limit within which these parties may inform the Commission 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, 28 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.

Article 11

Right to be heard

1. The Commission shall give the parties to whom it has addressed 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.

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

Article 12

Right to an oral hearing

The Commission shall give the parties to whom it has addressed a statement of objections the opportunity to develop their arguments at an oral hearing, if they so request in their written submissions.

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 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.

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.

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

1. In setting the time-limits provided for in Article 3(3), Article 4(3), Article 6(1), Article 7(1), Article 10(2) 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.
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.

3. The time-limits referred to in Article 3(3), Article 4(3) and Article 16(3) shall be at least two weeks.

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

**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.

Done at Brussels, 7 April 2004.

For the Commission

Mario MONTI

Member of the Commission
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 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 (1) (hereafter the 'Council Regulation') creates a system of parallel competences in which the Commission and the Member States' competition authorities (hereafter the 'NCAs') (2) 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 (3). The enforcement systems of the Member States differ but they have recognised the standards of each other's systems as a basis for cooperation (4).

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 (5) 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 (6). 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.

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.

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).
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 with 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 (7).

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 (8). 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 (11)). 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. 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 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 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. 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 subseq.). 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. 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 (17) 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

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 (19).

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 (20). 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 (21) 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 (22).

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 (23).

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 (24).
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 (15) 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.

(2) In this notice, the European Commission and the NCAs are collectively referred to as 'the competition authorities'.
(4) 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).
(5) 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.
(6) See Recital 18 of the Council Regulation.
(7) For cases initiated following a leniency application see paragraphs 37 et subseq.
(8) 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.
(9) See Commission notice on complaints.
(14) 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.
(15) See paragraphs 8 to 15 above.
(16) 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.
(17) See paragraph 17.
(18) 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.
(19) See paragraph 24 of the Joint Statement on the functioning of the network mentioned above in footnote 4.
(21) 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.'
(22) See paragraph 22 of the Joint Statement mentioned above in footnote 4.
(23) 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.
(25) See paragraphs 37 et subseq.
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)
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 (1).

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’) (2). 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 (3).

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 (4), they have the power to apply Articles 81 and 82 EC (5). 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 (6). 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 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 (7).

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 (8). 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 (9). Indeed, national courts can give effect to Articles 81 and 82 EC by finding contracts to be void or by awards of damages.

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 (10) or to any abuse prohibited by Article 82 EC, they also have to apply EC competition rules to those agreements, decisions or practices (11).

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 (12). 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 (13). 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 (14).

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 (15) 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 (16).

8. The application of Articles 81 and 82 EC by national courts often depends on complex economic and legal assessments (17). 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 (18). 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 (19). 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 (20) and in the annual report on competition policy (21).

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 (22) 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 (23). 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 (24).

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 (25);

(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 (26);
(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) (27) and they

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

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 (29). 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 (29). To that effect, the national court may ask the Commission whether it has initiated proceedings regarding the same agreements, decisions or practices (31) and if so, about the progress of proceedings and the likelihood of a decision in that case (32). The national court may, for reasons of legal certainty, also consider staying its proceedings until the Commission has reached a decision (33). 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 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 (34).

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 (34). 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 (34).

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 (36).

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 (37). Equally, national courts may be obliged to assist the Commission in the fulfilment of its tasks (38).
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 possi-
bility for national competition authorities to submit obser-
vations 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 possi-
bilities the regulation offers (49).

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

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 (49). 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 (49).

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 (42). 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 (43).

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 (44). 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 (45). Therefore, the Commission will not transmit to national courts information voluntarily submitted by a leniency applicant without the consent of that applicant.

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 (46). 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 (47). 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 (48). 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 (49).

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 (50).

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) (51); 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 (52), 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 (53).

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 (54).

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 (55). 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 (56).

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 (57).

(1) 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'.


(3) 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.

(4) 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.

(5) See Article 6 of the regulation.


(8) 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.

For further clarification of the effect on trade concept, see the notice on this issue (OJ L 101, 27.4.2004, p. 81).

Article 3(1) of the regulation.

See also the notice on the application of Article 81(3) EC (OJ L 101, 27.4.2004, p. 2).


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.


On the parallel or consecutive application of EC competition rules by national courts and the Commission, see also points 11 to 14.

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/.


On the possibility for national courts to ask the Commission for an opinion, see further in points 27 to 30.

On the submission of observations, see further in points 31 to 35.


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.

Article 16(1) of the regulation.

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).


(39) On the compatibility of such national procedural rules with the general principles of Community law, see points 9 and 10 of this notice.

(40) On these duties, see e.g. points 23 to 26 of this notice.


(46) See point 8 of this notice.


(49) 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.

(50) 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.

(51) Joined cases 46/87 and 227/88 Hoechst [1989] ECR, 2859, 33. See also Article 15(3) of the regulation.


(53) Article 20(6) to (8) of the regulation and case C-94/00 Roquette Frères [2002] ECR 9011.

(54) Article 21(3) of the regulation.


(56) See also ibidem, 91 and 92.

(57) OJ C 39, 13.2.93, p. 6.
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

3. Horizontal co-operation agreements
   — 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
   — 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

2. Motor vehicles
3. Telecommunications and postal services


— 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)

I. INTRODUCTION AND SUBJECT-MATTER OF THE NOTICE

1. Regulation 1/2003 (1) 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 (2).

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 (3), 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 (4). 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 (5).

— 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 (6).

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 (7).

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 (8).

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 (9), concentrating its resources on the most serious infringements (10);

   — 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 (11).

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 (12).

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 (13). 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 (14).

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 (15).

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 (16). 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 (17).

   — National courts are usually better placed than the Commission to adopt interim measures (18).
— 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 (19).

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 (20). 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 (21):

‘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.}

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. 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.

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 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.

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. 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 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 (32). Member States are deemed to have a legitimate interest for all 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:

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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 (38). Conversely, the Commission has been found to be entitled not to pursue the complaint of an association of undertakings whose members were not entitled in the type of business transactions complained of (38).

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 (39). 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 (39).

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 (39).
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 (34) 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 (35), 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 (36). The position is different only if the complaint falls within the exclusive competence of the Commission (37).

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 (38).

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 (39). Where appropriate, the Commission may give priority to a single criterion for assessing the Community interest (40).

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 (41).

— 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 (42).

— 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 (43).

— 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 (44).

— The Commission may reject a complaint on the ground that the conduct complained of is not an infringement of Articles 81 or 82 (45). 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 (46).

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 (47). However, the Commission is not obliged to set aside a complaint for lack of Community interest (48).

(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 (49).
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 (51), 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 (52).

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 (53).

51. Agreements that fulfil the conditions of a block exemption regulation are deemed to satisfy the conditions of Article 81(3) (54). 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) (55).

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 (56).

54. In the Commission’s procedure for dealing with complaints, different stages can be distinguished (57).

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 (58).

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 (59).
(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 (60). 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 (61).

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 (62), 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 (63).

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 (64). 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 (65). 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 cognizance 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 (66).

(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 (66).

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 (66).

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 (69).

(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 (70).

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 (71), unless the request to remain anonymous is manifestly unjustified.

(2) Cf. in particular Recitals 3-7 and 35 of Regulation 1/2003.


(4) The Commission handles correspondence from informants in accordance with its principles of good administrative practice.

(5) Notice on cooperation within the Network of competition authorities (p. 43).


(8) 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.

(9) Cf. Notice on cooperation within the network of competition authorities . . ., points 5 ss.

(10) Cf. Recital 3 of Regulation 1/20003.


(13) Cf. Articles 1, 6 and 15 as well as Recital 7 of Regulation 1/2003.


(15) 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 . . .


(18) 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.

(19) Cf. points 41 ss. below.

(20) Notice on cooperation within the Network of competition authorities (p. 43).

(21) Notice on cooperation within the Network of competition authorities . . ., points 8-15.

(22) Article 11(2) and (3) of Regulation 1/2003; Notice on cooperation within the Network of Competition Authorities . . ., points 16/17.

(23) Notice on cooperation within the Network of Competition Authorities, . . ., point 34.

(24) For more extensive explanations on this notion in particular, cf. points 33 ss. below.


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.


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.

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.

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.

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.


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.


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.


Extensive guidance can be found on the Commission's website at http://europa.eu.int/comm/competition/index_en.html

Notice on the effect on trade concept contained in Articles 81 and 82 of the Treaty (p. 81).


The texts of all block exemption regulations are available on the Commission's website at http://europa.eu.int/comm/competition/index_en.html

Commission Notice — Guidelines on the application of Article 81(3) of the Treaty (p. 97).


(68) 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 Bloembloem- en Kwekerijprodukten and Others v Commission of the European Communities, [1997] ECR II-759, para 75.


(71) 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 Bloembloem- en Kwekerijprodukten and Others v Commission of the European Communities, [1997] ECR II-759, para 75.

(72) Article 27(2) of Regulation 1/2003.


(75) Settled case law since Case 210/81, Oswald Schmidt, trading as Demo-Studio Schmidt v Commission of the European Communities, [1983] ECR 3045.


(77) Depending on the case, Member States’ competition authorities may equally be well placed to adopt interim measures.

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 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 (1), Article 15(1) of Commission Regulation (EC) No 773/2004 (the Implementing Regulation) (2), Article 18(1) and (3) of the Council Regulation (EC) No 139/2004 (Merger Regulation) (3) and Article 17(1) of Commission Regulation (EC) No 802/2004 (the Merger Implementing Regulation) (4). 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 (5).

2. This specific right outlined above is distinct from the general right to access to documents under Regulation (EC) No 1049/2001 (6), 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.

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(5) References in this Notice to Articles 81 and 82 therefore apply also to Articles 53 and 54 of the EEA Agreement.
6. As from its publication, this notice replaces the 1997 Commission notice on access to the file (1). 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 (2). It also takes into account the recent case law of the Court of Justice and the Court of First Instance of the European Communities (3) 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 (4), as the case may be, to which the Commission addresses its objections (5) (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 (6), 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 (7).

(3) In particular Joint Cases T-25/95 et al., Cimenteries CBR SA et al. v Commission, [2000] ECR II-0491.
(4) 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.
(5) Cf. Article 15(1) of the Implementing Regulation, Article 18(3) of the Merger Regulation and Article 17(1) of the Merger Implementing Regulation.
(6) 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.
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 (1). 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 (2). 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 (3).

13. There is no obligation on the Commission departments to draft any minutes of meetings (4) 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 (5).

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 (6);

— correspondence between the Commission and other public authorities of the Member States (7);

— correspondence between the Commission, the EFTA Surveillance Authority and public authorities of EFTA States (8);

— 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 (9).

(1) Examples of internal documents are drafts, opinions, memos or notes from the Commission departments or other public authorities concerned.

(2) 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.

(3) Cf. paragraph 1 above.

(4) 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.

(5) 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.

(6) 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.

(7) 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.


(9) In this notice the term ‘EFTA States’ includes the EFTA States that are parties to the EEA Agreement.

(1) 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 (1).

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 (2). 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 (3). 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 (4). 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.

(1) 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.


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 (\(^1\)).

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 (\(^2\)). 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 (\(^3\)). 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 (\(^4\)).

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 (\(^5\)). 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 (\(^6\)).

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 (\(^7\)).

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.

\(^{1}\) See paragraph 40 below.
\(^{2}\) See paragraph 35 below.
\(^{3}\) 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.
\(^{4}\) See paragraphs 33-38 below on asking undertakings to identify confidential information.
\(^{5}\) Cf. Article 27(2) of Regulation (EC) No 1/2003 and Article 15(3) of the Implementing Regulation.
\(^{6}\) Article 18(1) of the Merger Implementing Regulation.
\(^{7}\) Cf. paragraph 42 below.
1. **In antitrust proceedings under Articles 81 and 82 of the Treaty**

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**

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 (1).

### 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 (2), 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 (3) 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 (4), may request access to the documents on which the Commission has based its provisional assessment (5). 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 (6).

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(2) 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’.

(3) 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.

(4) By means of a letter issued in accordance with Article 7(1) of the Implementing Regulation.

(5) Cf. Article 8(1) of the Implementing Regulation.

(6) 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 (1).

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 (2):

a) In antitrust proceedings

— an addressee of a Commission’s statement of objections making known its views on the objections (3);

— a complainant making known its views on a Commission statement of objections (4);

— 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 (5);

— a complainant making known his views on a Commission letter informing him on the Commission’s intention to reject the complaint (6).

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 (7);

— 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 (8);

— 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 (9);

— any person which supplies information pursuant to Article 11 of the Merger Regulation.

(1) Cf. Article 11(b) of the Merger Implementing Regulation.
(2) Cf. Article 16(2) of the Implementing Regulation and Article 18(2) of the Merger Implementing Regulation.
(3) pursuant to Article 10(2) of the Implementing Regulation.
(4) pursuant to Article 6(1) of the Implementing Regulation.
(5) pursuant to Article 13(1) and (3) of the Implementing Regulation.
(6) pursuant to Article 7(1) of the Implementing Regulation.
(7) Article 12 of the Merger Implementing Regulation.
(8) Article 13 of the Merger Implementing Regulation.
(9) pursuant to Article 16 of the Merger Implementing Regulation.
36. Moreover, the Commission may require undertakings (1), 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 (2).

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 (3). In antitrust proceedings the undertakings in question shall also provide within the said time-limit a concise description of each piece of deleted information (4).

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 (5). 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 (6).

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(1) 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.

(2) 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.

(3) Cf. Article 16(3) of the Implementing Regulation.

(4) Cf. Article 16 of the Implementing Regulation.


(7) Cf. Article of the Merger Implementing Regulation.

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 (\(^1\)), the Commission will protect the anonymity of the authors by providing access to a non-confidential version or summary of the responses in question (\(^2\)). 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 (\(^3\)) 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 (\(^4\)).

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 (\(^5\)).

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 (\(^6\)). 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).

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\(^1\) Cf. paragraph 19 above.
\(^3\) 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.
\(^4\) Cf. Case T-25/95 et al. Ciments, paragraph 635.
\(^6\) Cf. Articles 15(4) and 8(2) of the Implementing Regulation, respectively, and Article 17(4) of the Merger Implementing Regulation.
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 (1).

(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 interests of companies that will continue to operate without being subject to effective competition 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.

(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. (2)

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...
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 (\(^1\)); 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 (\(^2\)) 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.

(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 (\(^3\)), 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;

(\(^1\)) 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.

(\(^2\)) Corporate statements may take the form of written documents signed by or on behalf of the undertaking or be made orally.

(\(^3\)) 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-203/02 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 fulfills the relevant requirements and meets all the conditions therefor.

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 of 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:

(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.

(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.
The Commission will determine in any final decision — 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.

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 %,

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 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.

— subsequent undertakings that provide significant added value: a reduction of up to 20 %.

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.
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

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.

Upon the applicant's request, the Commission may accept corporate statements made to qualify under the present Notice. 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.

The Commission will not take a position 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.

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.

In accordance with the Commission Notice on rules for access to the Commission file, 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.

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 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

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.

(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 (1), even after the decision has been taken.

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 (1), 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 (2) 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 (3). 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 (4). For this purpose, the Commission must ensure that its action has the necessary deterrent effect (5). 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.

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(2) 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.
(3) 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).
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 (1) 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.

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 (2), 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.

(1) 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.

(2) 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. (1)

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.

(1) This is without prejudice to any action that may be taken against the Member State concerned.
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 (1).