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EU Competition Legislation

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TITLE VI

COMMON RULES ON COMPETITION, TAXATION AND APPROXIMATION OF LAWS

CHAPTER 1

RULES ON COMPETITION

SECTION 1

RULES APPLYING TO UNDERTAKINGS

Article 81

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

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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

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

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

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

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 82

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

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 83

1. The appropriate regulations or directives to give effect to the principles set out in Articles 81 and 82 shall be laid down by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament.

2. The regulations or directives referred to in paragraph 1 shall be designed in particular:

(a) to ensure compliance with the prohibitions laid down in Article 81(1) and in Article 82 by making provision for fines and periodic penalty payments;

(b) to lay down detailed rules for the application of Article 81(3), taking into account the need to

(c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 81 and 82;

(d) to define the respective functions of the Commission and of the Court of Justice in applying the provisions laid down in this paragraph;

(e) to determine the relationship between national laws and the provisions contained in this section or adopted pursuant to this article.

Article 84

Until the entry into force of the provisions adopted in pursuance of Article 83, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the common market in accordance with the law of their country and with the provisions of Article 81, in particular paragraph 3, and of Article 82.

Article 85

1. Without prejudice to Article 84, the Commission shall ensure the application of the principles laid down in Articles 81 and 82. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.
2. If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision. The Commission may publish its decision and authorise Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation.

Article 86

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.
2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.
3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

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)

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 Community. Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 81 and 82(4) of the Treaty(5), has allowed a Community competition policy to develop that has helped to disseminate a competition culture within the Community. In the light of experience, however, that Regulation should now be replaced by legislation designed to meet the challenges of an integrated market and a future enlargement of the Community.

(2) In particular, there is a need to rethink the arrangements for applying the exception from the prohibition on agreements, which restrict competition, laid down in Article 81(3) of the Treaty. Under Article 83(2)(b) of the Treaty, account must be taken in this regard of the need to ensure effective supervision, on the one hand, and to simplify administration to the greatest possible extent, on the other.

(3) The centralised scheme set up by Regulation No 17 no longer secures a balance between those two objectives. It hampers application of the Community competition rules by the courts and competition authorities of the Member States, and the system of notification it involves prevents the Commission from concentrating its resources on curbing the most serious infringements. It also imposes considerable costs on undertakings.

(4) The present system should therefore be replaced by a directly applicable exception system in which the competition authorities and courts of the Member States have the power to apply not only Article 81(1) and Article 82 of the Treaty, which have direct applicability by virtue of the case-law of the Court of Justice of the European Communities, but also Article 81(3) of the Treaty.

(5) In order to ensure an effective enforcement of the Community competition rules and at the same time the respect of fundamental rights of defence, this Regulation should regulate the burden of proof under Articles 81 and 82 of the Treaty. It should be for the party or the authority alleging an infringement of Article 81(1) and Article 82 of the Treaty to prove the existence thereof to the required legal standard. It should be for the undertaking or association of undertakings invoking the benefit of a defence against a finding of an infringement to demonstrate to the

required legal standard that the conditions for applying such defence are satisfied. This Regulation affects neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Community law.

(6) In order to ensure that the Community competition rules are applied effectively, the competition authorities of the Member States should be associated more closely with their application. To this end, they should be empowered to apply Community law.

(7) National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States. They should therefore be allowed to apply Articles 81 and 82 of the Treaty in full.

(8) In order to ensure the effective enforcement of the Community competition rules and the proper functioning of the cooperation mechanisms contained in this Regulation, it is necessary to oblige the competition authorities and courts of the Member States to also apply Articles 81 and 82 of the Treaty where they apply national competition law to agreements and practices which may affect trade between Member States. In order to create a level playing field for agreements, decisions by associations of undertakings and concerted practices within the internal market, it is also necessary to determine pursuant to Article 83(2)(e) of the Treaty the relationship between national laws and Community competition law. To that effect it is necessary to provide that the application of national competition laws to agreements, decisions or concerted practices within the meaning of Article 81(1) of the Treaty may not lead to the prohibition of such agreements, decisions and concerted practices if they are not also prohibited under Community competition law. The notions of agreements, decisions and concerted practices are autonomous concepts of Community competition law covering the coordination of behaviour of undertakings on the market as interpreted by the Community Courts. Member States should not under this Regulation be precluded from adopting and applying on their territory stricter national competition laws which prohibit or impose sanctions on unilateral conduct engaged in by undertakings. These stricter national laws may include provisions which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings. Furthermore, this Regulation does not apply to national laws which impose criminal sanctions on natural persons except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced.

(9) Articles 81 and 82 of the Treaty have as their objective the protection of competition on the market. This Regulation, which is adopted for the implementation of these Treaty provisions, does not preclude Member States from implementing on their territory national legislation, which protects other legitimate interests provided that such legislation is compatible with general principles and other provisions of Community law. In so far as such national legislation pursues predominantly an objective different from that of protecting competition on the market, the competition authorities and courts of the Member States may apply such legislation on their territory. Accordingly, Member States may under this Regulation implement on their territory national legislation that prohibits or imposes sanctions on acts of unfair trading practice, be they unilateral or contractual. Such legislation pursues a specific objective, irrespective of the actual or presumed effects of such acts on competition on the market. This is particularly the case of legislation which prohibits undertakings from imposing on their trading partners, obtaining or attempting to obtain from them terms and conditions that are unjustified, disproportionate or without consideration.

(10) Regulations such as 19/65/EEC(6), (EEC) No 2821/71(7), (EEC) No 3976/87(8), (EEC) No 1534/91(9), or (EEC) No 479/92(10) empower the Commission to apply Article 81(3) of the Treaty

by Regulation to certain categories of agreements, decisions by associations of undertakings and concerted practices. In the areas defined by such Regulations, the Commission has adopted and may continue to adopt so called "block" exemption Regulations by which it declares Article 81(1) of the Treaty inapplicable to categories of agreements, decisions and concerted practices. Where agreements, decisions and concerted practices to which such Regulations apply nonetheless have effects that are incompatible with Article 81(3) of the Treaty, the Commission and the competition authorities of the Member States should have the power to withdraw in a particular case the benefit of the block exemption Regulation.

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

(12) This Regulation should make explicit provision for the Commission's power to impose any remedy, whether behavioural or structural, which is necessary to bring the infringement effectively to an end, having regard to the principle of proportionality. Structural remedies should only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. Changes to the structure of an undertaking as it existed before the infringement was committed would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking.

(13) Where, in the course of proceedings which might lead to an agreement or practice being prohibited, undertakings offer the Commission commitments such as to meet its concerns, the Commission should be able to adopt decisions which make those commitments binding on the undertakings concerned. Commitment decisions should find that there are no longer grounds for action by the Commission without concluding whether or not there has been or still is an infringement. Commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case. Commitment decisions are not appropriate in cases where the Commission intends to impose a fine.

(14) In exceptional cases where the public interest of the Community so requires, it may also be expedient for the Commission to adopt a decision of a declaratory nature finding that the prohibition in Article 81 or Article 82 of the Treaty does not apply, with a view to clarifying the law and ensuring its consistent application throughout the Community, in particular with regard to new types of agreements or practices that have not been settled in the existing case-law and administrative practice.

(15) The Commission and the competition authorities of the Member States should form together a network of public authorities applying the Community competition rules in close cooperation. For that purpose it is necessary to set up arrangements for information and consultation. Further modalities for the cooperation within the network will be laid down and revised by the Commission, in close cooperation with the Member States.

(16) Notwithstanding any national provision to the contrary, the exchange of information and the use of such information in evidence should be allowed between the members of the network even where the information is confidential. This information may be used for the application of Articles 81 and 82 of the Treaty as well as for the parallel application of national competition law, provided that the latter application relates to the same case and does not lead to a different

outcome. When the information exchanged is used by the receiving authority to impose sanctions on undertakings, there should be no other limit to the use of the information than the obligation to use it for the purpose for which it was collected given the fact that the sanctions imposed on undertakings are of the same type in all systems. The rights of defence enjoyed by undertakings in the various systems can be considered as sufficiently equivalent. However, as regards natural persons, they may be subject to substantially different types of sanctions across the various systems. Where that is the case, it is necessary to ensure that information can only be used if it has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority.

(17) If the competition rules are to be applied consistently and, at the same time, the network is to be managed in the best possible way, it is essential to retain the rule that the competition authorities of the Member States are automatically relieved of their competence if the Commission initiates its own proceedings. Where a competition authority of a Member State is already acting on a case and the Commission intends to initiate proceedings, it should endeavour to do so as soon as possible. Before initiating proceedings, the Commission should consult the national authority concerned.

(18) To ensure that cases are dealt with by the most appropriate authorities within the network, a general provision should be laid down allowing a competition authority to suspend or close a case on the ground that another authority is dealing with it or has already dealt with it, the objective being that each case should be handled by a single authority. This provision should not prevent the Commission from rejecting a complaint for lack of Community interest, as the case-law of the Court of Justice has acknowledged it may do, even if no other competition authority has indicated its intention of dealing with the case.

(19) The Advisory Committee on Restrictive Practices and Dominant Positions set up by Regulation No 17 has functioned in a very satisfactory manner. It will fit well into the new system of decentralised application. It is necessary, therefore, to build upon the rules laid down by Regulation No 17, while improving the effectiveness of the organisational arrangements. To this end, it would be expedient to allow opinions to be delivered by written procedure. The Advisory Committee should also be able to act as a forum for discussing cases that are being handled by the competition authorities of the Member States, so as to help safeguard the consistent application of the Community competition rules.

(20) The Advisory Committee should be composed of representatives of the competition authorities of the Member States. For meetings in which general issues are being discussed, Member States should be able to appoint an additional representative. This is without prejudice to members of the Committee being assisted by other experts from the Member States.

(21) Consistency in the application of the competition rules also requires that arrangements be established for cooperation between the courts of the Member States and the Commission. This is relevant for all courts of the Member States that apply Articles 81 and 82 of the Treaty, whether applying these rules in lawsuits between private parties, acting as public enforcers or as review courts. In particular, national courts should be able to ask the Commission for information or for its opinion on points concerning the application of Community competition law. The Commission and the competition authorities of the Member States should also be able to submit written or oral observations to courts called upon to apply Article 81 or Article 82 of the Treaty. These observations should be submitted within the framework of national procedural rules and practices including those safeguarding the rights of the parties. Steps should therefore be taken to ensure that the Commission and the competition authorities of the Member States are kept sufficiently well informed of proceedings before national courts.

(22) In order to ensure compliance with the principles of legal certainty and the uniform application of the Community competition rules in a system of parallel powers, conflicting decisions must be avoided. It is therefore necessary to clarify, in accordance with the case-law of the Court of Justice, the effects of Commission decisions and proceedings on courts and competition authorities of the Member States. Commitment decisions adopted by the Commission do not affect the power of the courts and the competition authorities of the Member States to apply Articles 81 and 82 of the Treaty.

(23) The Commission should be empowered throughout the Community to require such information to be supplied as is necessary to detect any agreement, decision or concerted practice prohibited by Article 81 of the Treaty or any abuse of a dominant position prohibited by Article 82 of the Treaty. When complying with a decision of the Commission, undertakings cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement.

(24) The Commission should also be empowered to undertake such inspections as are necessary to detect any agreement, decision or concerted practice prohibited by Article 81 of the Treaty or any abuse of a dominant position prohibited by Article 82 of the Treaty. The competition authorities of the Member States should cooperate actively in the exercise of these powers.

(25) The detection of infringements of the competition rules is growing ever more difficult, and, in order to protect competition effectively, the Commission's powers of investigation need to be supplemented. The Commission should in particular be empowered to interview any persons who may be in possession of useful information and to record the statements made. In the course of an inspection, officials authorised by the Commission should be empowered to affix seals for the period of time necessary for the inspection. Seals should normally not be affixed for more than 72 hours. Officials authorised by the Commission should also be empowered to ask for any information relevant to the subject matter and purpose of the inspection.

(26) Experience has shown that there are cases where business records are kept in the homes of directors or other people working for an undertaking. In order to safeguard the effectiveness of inspections, therefore, officials and other persons authorised by the Commission should be empowered to enter any premises where business records may be kept, including private homes. However, the exercise of this latter power should be subject to the authorisation of the judicial authority.

(27) Without prejudice to the case-law of the Court of Justice, it is useful to set out the scope of the control that the national judicial authority may carry out when it authorises, as foreseen by national law including as a precautionary measure, assistance from law enforcement authorities in order to overcome possible opposition on the part of the undertaking or the execution of the decision to carry out inspections in non-business premises. It results from the case-law that the national judicial authority may in particular ask the Commission for further information which it needs to carry out its control and in the absence of which it could refuse the authorisation. The case-law also confirms the competence of the national courts to control the application of national rules governing the implementation of coercive measures.

(28) In order to help the competition authorities of the Member States to apply Articles 81 and 82 of the Treaty effectively, it is expedient to enable them to assist one another by carrying out inspections and other fact-finding measures.

(29) Compliance with Articles 81 and 82 of the Treaty and the fulfilment of the obligations imposed on undertakings and associations of undertakings under this Regulation should be enforceable

by means of fines and periodic penalty payments. To that end, appropriate levels of fine should also be laid down for infringements of the procedural rules.

(30) In order to ensure effective recovery of fines imposed on associations of undertakings for infringements that they have committed, it is necessary to lay down the conditions on which the Commission may require payment of the fine from the members of the association where the association is not solvent. In doing so, the Commission should have regard to the relative size of the undertakings belonging to the association and in particular to the situation of small and medium-sized enterprises. Payment of the fine by one or several members of an association is without prejudice to rules of national law that provide for recovery of the amount paid from other members of the association.

(31) The rules on periods of limitation for the imposition of fines and periodic penalty payments were laid down in Council Regulation (EEC) No 2988/74(11), which also concerns penalties in the field of transport. In a system of parallel powers, the acts, which may interrupt a limitation period, should include procedural steps taken independently by the competition authority of a Member State. To clarify the legal framework, Regulation (EEC) No 2988/74 should therefore be amended to prevent it applying to matters covered by this Regulation, and this Regulation should include provisions on periods of limitation.

(32) The undertakings concerned should be accorded the right to be heard by the Commission, third parties whose interests may be affected by a decision should be given the opportunity of submitting their observations beforehand, and the decisions taken should be widely publicised. While ensuring the rights of defence of the undertakings concerned, in particular, the right of access to the file, it is essential that business secrets be protected. The confidentiality of information exchanged in the network should likewise be safeguarded.

(33) Since all decisions taken by the Commission under this Regulation are subject to review by the Court of Justice in accordance with the Treaty, the Court of Justice should, in accordance with Article 229 thereof be given unlimited jurisdiction in respect of decisions by which the Commission imposes fines or periodic penalty payments.

(34) The principles laid down in Articles 81 and 82 of the Treaty, as they have been applied by Regulation No 17, have given a central role to the Community bodies. This central role should be retained, whilst associating the Member States more closely with the application of the Community competition rules. In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, this Regulation does not go beyond what is necessary in order to achieve its objective, which is to allow the Community competition rules to be applied effectively.

(35) In order to attain a proper enforcement of Community competition law, Member States should designate and empower authorities to apply Articles 81 and 82 of the Treaty as public enforcers. They should be able to designate administrative as well as judicial authorities to carry out the various functions conferred upon competition authorities in this Regulation. This Regulation recognises the wide variation which exists in the public enforcement systems of Member States. The effects of Article 11(6) of this Regulation should apply to all competition authorities. As an exception to this general rule, where a prosecuting authority brings a case before a separate judicial authority, Article 11(6) should apply to the prosecuting authority subject to the conditions in Article 35(4) of this Regulation. Where these conditions are not fulfilled, the general rule should apply. In any case, Article 11(6) should not apply to courts insofar as they are acting as review courts.

(36) As the case-law has made it clear that the competition rules apply to transport, that sector should be made subject to the procedural provisions of this Regulation. Council Regulation No 141 of 26 November 1962 exempting transport from the application of Regulation No 17(12) should

therefore be repealed and Regulations (EEC) No 1017/68(13), (EEC) No 4056/86(14) and (EEC) No 3975/87(15) 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.

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(16)."

Article 38

Amendment of Regulation (EEC) No 4056/86

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

1. Article 7 is amended as follows:

(a) Paragraph 1 is replaced by the following:

"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(17) 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."

(b) Paragraph 2 is amended as follows:

(i) In point (a), the words "under the conditions laid down in Section II" are replaced by the words "under the conditions laid down in Regulation (EC) No 1/2003";

(ii) The second sentence of the second subparagraph of point (c)(i) is replaced by the following:

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

2. Article 8 is amended as follows:

(a) Paragraph 1 is deleted.

(b) In paragraph 2 the words "pursuant to Article 10" are replaced by the words "pursuant to Regulation (EC) No 1/2003".

(c) Paragraph 3 is deleted;

3. Article 9 is amended as follows:

(a) In paragraph 1, the words "Advisory Committee referred to in Article 15" are replaced by the words "Advisory Committee referred to in Article 14 of Regulation (EC) No 1/2003";

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

4. Articles 10 to 25 are repealed with the exception of Article 13(3) which continues to apply to decisions adopted pursuant to Article 81(3) of the Treaty prior to the date of application of this Regulation until the date of expiration of those decisions;

5. in Article 26, the words "the form, content and other details of complaints pursuant to Article 10, applications pursuant to Article 12 and the hearings provided for in Article 23(1) and (2)" are deleted.

Article 39

Amendment of Regulation (EEC) No 3975/87

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

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(18) before publishing a draft Regulation and before adopting a Regulation."

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(19)."

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

(1) OJ C 365 E, 19.12.2000, p. 284.

(2) OJ C 72 E, 21.3.2002, p. 305.

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

(4) 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.

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

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

(7) Council Regulation (EEC) No 2821/71 of 20 December 1971 on the application of Article 81(3) (The titles of the Regulations have been adjusted to take account of the renumbering of the Articles of the EC Treaty, in accordance with Article 12 of the Treaty of Amsterdam; the original

reference was to Article 85(3) of the Treaty) of the Treaty to categories of agreements, decisions and concerted practices (OJ L 285, 29.12.1971, p. 46). Regulation as last amended by the Act of Accession of 1994.

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

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

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

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

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

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

(14) 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.

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

(16) OJ L 1, 4.1.2003, p. 1.

(17) OJ L 1, 4.1.2003, p. 1.

(18) OJ L 1, 4.1.2003, p. 1.

(19) OJ L 1, 4.1.2003, p. 1.

Citizen's Guide to Competition Policy - Antitrust and Cartels

Overview:
introduction
dominance
mergers
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ANTITRUST AND CARTELS: controlling cartels and other anticompetitive agreements between companies

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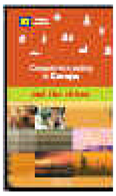
European Competition Policy in Action!



actual competition decisions and their benefits for consumers.

Competition Policy in Europe and the citizen

Collusion between companies : restrictive agreements which are a threat to fair competition

To be effective, competition assumes that the market is made up of suppliers, who are independent of each other. However, if certain companies agree among themselves to collude, rather than compete, such agreements impair competition. The most familiar example is an agreement on prices, or a cartel, where firms fix price levels jointly so that consumers are unable to take advantage of competition between suppliers to obtain competitive prices. Other types of agreements have the object or effect of fixing other conditions for the operation of markets: for example, they may allocate production quotas to firms or share markets between them.

Agreements of this type are prohibited in the European Union under Article 81of the EC Treaty. The European Commission has been entrusted by Member States with the responsibility of enforcing this prohibition.

Role of the European Commission in controlling restrictive agreements

- The Commission has power to prohibit restrictive agreements and impose fines on the offending firms.
- The Commission can carry out investigations on its own initiative into the behaviour of certain companies or into specific market sectors when it suspects possible restrictions of competition. Complaints from competitors or customers of the companies involved or of consumer groups can play a role in bringing such competition problems to the attention of the Commission.

- The European Commission may certify that agreements which have been notified to it by the enterprises concerned are not contrary to European competition law (often called "negative clearance"). This gives a degree of certainty to firms that their business agreements are in accord with European competition law.
- The Commission can also, in certain limited circumstances, exempt some anticompetitive agreements between companies from the general prohibition on restrictive agreements. The Commission can grant such an "exemption" if the overall benefits of the agreement outweigh its anticompetitive aspects.

Restrictive agreements which may ultimately encourage competition: "exemptions" from the prohibition on restrictive agreements

Some agreements that restrict competition in one way may still encourage competition in another way, for example, if they promote technical progress or improve distribution. Those agreements can be exempted by the Commission from the prohibition in Article 81 because they ultimately have a beneficial effect on the market. At present only the European Commission has the power to exempt a restrictive agreement. To obtain an individual exemption, firms must notify their agreements to the European Commission.

"Block exemptions"

An individual agreement between firms can be exempted only by the Commission. However, categories of agreements of the same nature, such as, for example, distribution agreements, may benefit from group exemptions. Such group exemptions are often called "block exemptions". Agreements which fall under block exemptions need not be notified to the Commission, as exemption is granted automatically. Block exemptions are laid down in a series of Community regulations. (See: Antitrust Legislation, III Block exemptions)

Radical reform of antitrust competition procedures proposed by the Commission

In 1999, the Commission suggested a radical reform of the existing procedural system, which is laid down principally in Council Regulation no.17 of 1962. The reform proposal involves the termination of the centralised system of notification to the Commission of agreements between enterprises. The reform proposal is based on the fact that many notified agreements do not involve serious problems for competition. The Commission therefore hopes to concentrate more on investigating agreements that seriously harm competition in the common market, particularly cartels. It also hopes to involve the competition authorities and courts of the Member States more directly in the application of the Community competition rules.

The Council adopted this proposal as Council Regulation (EC) No 1/2003 of 16 December 2002. This regulation will replace Regulation 17/62 when it comes into force on 1.5.2004. Until then, Regulation 17/62 remains in force

More information:
Reform of Regulation 17/1962

See also:
Dominant positions: what can the Commission do about abuse of a dominant market position by companies?

Opinion of the Economic and Social Committee on the "Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articlesá81 andá82 of the Treaty and amending Regulations (EEC) Noá1017/68, (EEC) Noá2988/74, (EEC) Noá4056/86 and (EEC) Noá3975/87 (Regulation implementing Articlesá81 andá82 of the Treaty)"

Opinion of the Economic and Social Committee on the "Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 ('Regulation implementing Articles 81 and 82 of the Treaty')"

(2001/C 155/14)

On 17 October 2000, the Council decided to consult the Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the above-mentioned proposal.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 14 March 2001. The rapporteur was Mr Bagliano.

At its 380th plenary session (meeting of 29 March 2001), the Economic and Social Committee adopted the following opinion with 83 votes in favour and one abstention.

1. Introduction

1.1. In April 1999, the Commission published a White Paper on the "Modernisation of the rules implementing Articles 81 and 82 of the EC Treaty"(1), setting out the reasons for a radical reform. It went on to initiate a broad debate, in which all the interested parties - companies, associations, jurists, economists, lawyers, members of the judiciary and national governments - were offered an opportunity to express their views, both positive and negative, to make proposals, and to look further into the issues at stake.

1.2. Brief summary

1.2.1. The reform does away with the compulsory notification of restrictive agreements [prohibited under Article 81(1)], which was necessary (under paragraph 3 of the same Article) in order to secure exemption from the prohibition (paragraph 1). At present, this procedure is managed by the Commission, which has exclusive power to grant exemptions (the current system is therefore known as the "exemption system"). The Commission is thus giving up its exclusive power to grant exemptions [under Article 81(3)], in order to give more time and resources to the most serious problems, namely large monopolies and international cartels.

1.2.2. The Commission will be decentralising the whole Article 81 system (i.e. including paragraph 3, with no compulsory notification) to the national competition authorities and courts, which may intervene only ex-post, in the event of a dispute.

1.2.3. It will be up to companies to interpret Article 81 (including paragraph 3) in order to assess the legitimacy of their agreements.

1.2.4. The Commission:

- will retain a guiding and monitoring role, not least through its notices, regulations, and decisions on specific cases, and

- will have responsibility for coordinating the national competition authorities, with the understanding that all parties (authorities and courts) will have to cooperate.

1.3. The Committee opinion on the White Paper

1.3.1. The Economic and Social Committee was consulted by the Commission, under Article 262 of the Treaty establishing the European Community, and adopted an opinion almost unanimously (only two abstentions)(2) on 8 December 1999. The Committee opinion defined the White Paper reform of the system for applying Articles 81 and 82 as "courageous and ground-breaking".

1.3.2. However, while stating that the reform was "both justified and valid", the Committee also stressed the "difficulties and dangers" that only a "programme of preliminary and accompanying measures" could overcome. The opinion defined these measures as essential and necessary.

1.3.3. The opinion was welcomed for its essentially positive and constructive approach, and the ideas and suggestions it raised were referred to in numerous fora.

1.3.4. The Committee's main concerns were:

- legal certainty (paragraph 2.3.6 contains a number of important practical suggestions and proposals),

- the right to a defence (2.3.5.7),

- uniformity of interpretation (2.3.5.10),

- the precedence of Community law (1.5.5),

- preservation of the unity and coherence of the system (2.3.5),

- insufficient measures to prevent forum shopping (2.3.2.8),

- and the need to involve the national authorities and courts in the debate (2.3.2 and 2.3.3).

2. Comments

2.1. The Regulation proposed by the Commission is a first step in the right direction as regards implementing the reform. The Committee obviously supports the Commission in this bold and innovative undertaking.

2.2. It should however be stated at the outset that although the Commission's proposal contains the basic principles underpinning the reform, it does not provide a complete legislative framework and no proper and effective global assessment can therefore be made. Certain major elements of the reform are missing. The text of the articles and the Explanatory Memorandum contain numerous references to future Commission documents (regulations, notices, guidelines etc.) on key aspects, but without providing sufficient indication of content, criteria, limits or time-scales.

2.3. As regards the Committee's concerns (see 1.3.4 above), the proposal does not take into account certain basic observations made by the Committee, in particular regarding legal certainty (points 2.3.6.3 to 2.3.6.8 of the 1999 opinion) and the need to preserve the unity of the Community competition system (see the 13 subparagraphs in point 2.3.5 of the 1999 opinion).

2.4. Moreover, the proposal

- neither contains nor makes provision for any of the accompanying measures that the Committee believes to be an essential preliminary step (see point 3 - Conclusions of the 1999 opinion);

- does not provide for the additional measures that are made necessary by the rules stipulated in the proposal itself (for instance, notices on the burden of proof and on the law applicable).

2.5. The Committee nevertheless welcomes the Commission's work to date following the wide-ranging debate on the White Paper, and in particular welcomes this initial legislative initiative.

2.6. Article 1 states the principle of the direct applicability of Articles 81 and 82 - "no prior decision to that effect being required" - and as such defines the reform, i.e. the transition from the notification and authorisation system to the directly applicable exception system.

2.6.1. Article 3 - Relationship between Articles 81 and 82 and national competition laws - is clear and remarkably bold in its concision and brevity, and it should remove one of the main causes for concern.

2.6.2. In its opinion of December 1999(3), the Committee highlighted the importance of this issue, which "cannot fall solely to the discretion of the [national] courts and authorities responsible" (point 2.3.5.12). Article 83 of the Treaty of Rome - in other words, from the EU's inception - explicitly includes among the "appropriate regulations or directives to give effect to the principles set out in Articles 81 and 82" [Article 83(1)] those designed "to determine the relationship between national laws" and Community law [Article 83(2)(e)].

2.6.3. The Committee agrees that mandatory application of Community law (provided for under Article 3) - when the facts or practices "may affect trade between Member States" - is the most appropriate response to concerns about the renationalisation of competition rules. Once the regulation enters into force, however, the importance of this rule will require the immediate adoption of an interpretive notice to clarify when trade is affected.

2.7. Under Article 2, the burden of proof is shared between the prosecution [infringement of Article 81(1)] and the defence [fulfilment of the conditions set out in Article 81(3)].

2.7.1. However, to enable this principle to be applied, the Commission must provide further guidelines regarding the real content of Article 81(1) and (3), because, as the Commission itself accepts in the White Paper (points 56 and 57) there have been various interpretations (by both the Commission and the Court of Justice) of the relationship between Article 81(1) and Article 81(3).

2.8. Commission powers

2.8.1. In some detail (albeit quite inadequate), Article 4(2) (Chapter II - powers) grants the Commission the specific power to determine, by regulation, the "types of agreements, decisions of associations of undertakings and concerted practices... which must be registered". The types of agreement, the "procedures for such registration and the penalties applicable" are also to be determined by a specific regulation (see also Article 34(a) of the regulation).

2.8.1.1. This compulsory registration certainly constitutes a novel element, and at first sight would appear to be in contradiction with the ending of notification (which is crucial to the reform). Since the idea of the reform is to reduce, remove and simplify red tape, the potential administrative cost and burden should not be underestimated. It will obviously be necessary to avoid overlaps in those cases where Member States already have registers.

2.8.1.2. The Commission considers such registration to be "expedient, in order to improve transparency" (10th recital), although it "shall confer no entitlement on the (...) undertakings". With no knowledge of the future regulation, a provision introducing an obligation (with penalties for non-compliance) without any corresponding right seems on the face of it unacceptable. Admittedly, Article 4(2) does begin with the words "The Commission may", but even if this is strictly speaking only a potential provision, a Council regulation couched in such terms would nevertheless hand the Commission almost unlimited powers (including penalties). With no knowledge of the implementing provisions that the Commission will adopt in order to exercise this power, it is impossible and would be irresponsible to attempt a conclusive assessment.

2.8.2. The powers attributed to the Commission also include that of imposing "any obligations necessary, including remedies of a structural nature" [Article 7(1)], in order to bring an identified infringement to an end.

2.8.2.1. Although the relevant recital (11) adds nothing in this respect, the commentary on this article in the Explanatory Memorandum that precedes the text of the regulation is quite clear:

"Structural remedies can be necessary in order to bring an infringement effectively to an end. This may in particular be the case with regard to cooperation agreements and abuses of a dominant position, where divestiture of certain assets may be necessary".

2.8.2.2. The White Paper made no reference to such a remedy. If it is designed to address existing situations, it seems completely incompatible with the machinery and the spirit of both existing Community competition law and the planned reform, and would introduce a new policy instrument without sufficient preliminary debate or the necessary clarifications from the Commission.

2.8.2.3. In this respect, the Committee would stress that structural remedies are by their very nature extremely costly - both economically and socially - difficult to implement, and often of uncertain and limited success regarding competitiveness and overall economic efficiency. The experience acquired by the Commission and economic and social operators in the application of the merger control rules has clearly demonstrated that proper preventive procedures are the best means of solving structural competition problems. For these reasons, the White Paper (point 79) stated that it would be "desirable to maintain the prior authorisation requirement for partial-function production joint ventures". In its opinion of December 1999 (points 2.3.6.3 to 2.6.3.7), the Committee hoped that the prior authorisation system would be extended to other cases as well.

The Regulation makes no provisions on this matter. The Commission makes just one reference - and then only to partial-function production joint ventures - in the last sentence of the Explanatory Memorandum's brief first section, postponing the issue to be dealt with "in the context of forthcoming reflections on the revision of that regulation" (on mergers).

2.8.2.4. Experience in implementing Community competition rules over the last forty years has shown that - aside from the application of the merger Regulation - a number of extremely important initiatives have been judged by the interested parties to be unfeasible in the absence of formal or informal authorisation from the Commission. In point 2.3.6.9 of its 1999 opinion, the Committee stated that "in any event, it must be made clear and a guarantee given that the abolition of the prior notification system shall not in any way prevent - but rather should encourage - prior dialogue between the companies, the Commission and the national authorities, should the companies so wish. Obviously, this dialogue will not replace the 'decision' or offer legal certainty, but it could provide an indispensable, preliminary, informal and non-binding indication for important cases, and as such could become a routine means of operating in mutual trust and openness". The Commission itself, when commenting on Article 4 (Powers of the Commission) admits that "in the new system (...) undertakings must, as a general rule, assess for themselves whether their behaviour complies with the law". (fourth paragraph of comments on Article 4).

2.8.2.5. Whilst the "general rule" will obviously remain so, the concept of the "reasoned opinion", appears to give proper recognition to company rights, although it is only mentioned in the Explanatory Memorandum (at the end of section II) in the following terms:

> "Finally, the Commission will remain open to discuss specific cases with the undertakings where appropriate. In particular, it will provide guidance regarding agreements, decisions or concerted practices that raise an unresolved, genuinely new question of interpretation. To that effect, the Commission will publish a notice in which it will set out the conditions under which it may issue reasoned opinions. Any such system of opinions must not, however, lead to companies being entitled to obtain an opinion, as this would reintroduce a kind of notification system."

The end of point 3 (last indent) of the Impact Assessment Form is possibly more precise inasmuch as it makes reference to "rare cases" that "raise new or unresolved questions". The Commission must at all events be ready to give an opinion not only in rare cases, but also in the event of major investments and major or irreversible structural changes.

2.8.3. Chapter III assigns a number of other powers to the Commission which, by means of decisions, thus retains a highly effective practical role:

- in bringing infringements to an end [Article 7(1)];

- in ordering interim measures [Article 8(1)];

- in cases where undertakings offer commitments "such as to meet the Commission's objections", the Commission may make such commitments binding [Article 9(1)];

- where appropriate, the Commission may reopen proceedings by means of a decision [Article 9(3)];

- in establishing whether Article 81 (and Article 82) is inapplicable to a particular agreement (Article 10).

2.8.3.1. On the subject of Article 10, the legal certainty offered to companies would be significantly greater if the Commission were to decide that Article 81 can be inapplicable not only for reasons of public interest but also when this is in the legitimate interest of the companies concerned, particularly in the event of major investments or structural changes.

2.8.3.2. The Commission may deploy the wide-ranging practical powers provided by Article 7 "acting on a complaint or on its own initiative" [Article 7(1) and Article 10(1)], and may adopt interim measures "in cases of urgency" [Article 8(1)]. Further hypotheses should be added, along the lines proposed in point 2.8.3.1.

2.8.4. In its opinion on the White Paper, the Committee approved the guiding and monitoring role which the Commission should also retain in a decentralised system, with a view to ensuring the uniform application of Community competition law and providing companies with legal certainty. The Committee therefore believes that further clarification is needed to give a clearer understanding of the powers of the Commission.

2.8.5. For both the adoption of decisions (Chapter III) and the conduct of investigations (Chapter V), the proposal accords the Commission more wide-ranging and stronger powers than at present, stating that:

> "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" (21st recital).

In particular, this concerns:

- the conduct of inquiries into sectors of the economy (Article 17);

- requests for information (Article 18);

- the taking of statements (Article 19);

- the conduct of inspections (Article 20).

Here too, the Committee thinks that the Regulation should clearly spell out the limits of these powers.

2.8.5.1. The Committee has taken due note of the 29th recital, which states that "In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, this Regulation confines itself to the minimum required in order to achieve its objective, which is to allow the Community competition rules to be applied effectively, and does not go beyond what is necessary for that purpose." However, the Committee is firmly convinced that this principle should be binding not only in theory. For this reason, it calls on the Commission to give it practical application in the many executive acts it is to adopt when implementing this radical reform regulation.

2.9. Block exemptions

In its opinion of December 1999 the Committee "accepts the role given by the White Paper to interpretative notices and block exemption regulations" (2.3.4.1), which the Commission reserved the right to adopt "in order to enable it to adapt and clarify the legislative framework" (9th recital), also in the new decentralised system. These Community regulations create "safe harbours for defined categories of agreements" [Explanatory Memorandum, first paragraph of 2.C.2(b)].

2.9.1. The Commission also states in the Explanatory Memorandum (fifth paragraph of 2.C.3): "In the field of Community competition law, companies' task of assessing their behaviour is facilitated by block exemptions and Commission notices and guidelines clarifying the application of the rules. As a complementary element of the current reform, the Commission commits itself to an even greater effort in this area. Article 28 of the proposed Regulation confers on the Commission a general power to adopt block exemption rules. This power will ensure that it is in a position to react with sufficient speed to new developments and changing market conditions."

2.9.2. This general power gives the Commission an instrument with which it can simplify procedures and improve transparency, as well as shape and direct Community competition policy in the new, decentralised system. The Committee supports this proposal, but stresses that this "general power" should be subject to certain conditions.

2.10. Cooperation with national authorities and courts

2.10.1. Chapter IV of the Regulation is crucial to the new system because it concerns cooperation:

- between the Commission and the competition authorities of the Member States, and

- between the Commission and the courts of the Member States.

2.10.1.1. Article 11(1) provides for "close cooperation" with the competition authorities of the Member States so as to establish a network that will form the essential infrastructure for exchanging information and providing assistance. This principle of a network, of information and consultation mechanisms, of transferring files and even cases, is certainly a move in the right direction, but it should be complemented by the principle of protecting the rights of those affected by the new, decentralised system (businesses and consumers).

2.10.1.2. The Explanatory Memorandum (comments on Article 11, first paragraph) explicitly states that:

> "... the detailed rules will be laid down in an implementing Commission regulation in accordance with Article 34 and in a notice on cooperation between competition authorities".

This clarification goes only some of the way towards addressing the ESC's comment that while these mechanisms for cooperation between the Commission and the national authorities (vertical cooperation) are to be welcomed, nothing is said about cooperation between the national authorities themselves (horizontal cooperation), which is just as essential and requires clear and binding rules. Article 13 provides for a (partial) cooperation mechanism between the national authorities (right to suspend proceedings if the same case has been dealt with by another authority), but this is optional. Article 11 seems to be more binding than Article 13, and than Article 12.

2.10.1.3. Article 11 should determine the system of responsibilities and the assignment of cases, as provided under Article 5. Individual cases can be assigned to a national authority if the restriction on competition principally affects that particular Member State. The Commission may also decide, on the basis of specific criteria, which national authority should be responsible for assessing an agreement that has an impact on competition. It is important to ensure that powers and responsibilities are not confused within the network but are clearly determined and understood by companies. The aim is to create an instrument that can ensure - in combination with other instruments and mechanisms - the uniform application of Community competition law in a network of competition authorities.

2.10.2. Cooperation with national courts certainly raises awkward questions that are in any case difficult to regulate with binding provisions. Article 15 is virtually optional (for both national courts and the Commission), with the exception of point 2, which provides an essentially "binding", though not categorical, requirement that:

"Courts of the Member States shall send the Commission copies of any judgements applying Article 81 or Article 82 of the Treaty within one month of the date on which the judgement is delivered."

2.10.2.1. The Commission [Article 15(3)] may also ask the national courts to transmit to it "any documents necessary". In addition, it may submit observations and have itself represented. However, nothing is said in this article about the rights of the businesses concerned (to be informed of their rights, raise objections, etc.).

2.10.2.2. In cases where Community competition law applies and a complaint has been brought before a court, the parties should have the right to request the opinion of a validating competition authority. The submission of observations for reasons of the public interest [Article 15(3)] is not enough. Only the right of parties to the opinion of the validating competition authorities will confirm the jurisdiction of those authorities over the markets concerned and ensure Community competition law is applied in legal proceedings. This would significantly reduce the risk of contradictory decisions by national courts.

2.10.3. Cooperation between the Commission and the competition authorities of the Member States, and cooperation between the Commission and the national courts, was addressed in two notices which appeared in 1996 and 1993.

2.10.3.1. In its opinion(4) on the more recent of these notices (1996), the Committee concluded:

"The notice is undoubtedly well intentioned. It has been under discussion for many years. The result, however, seems inadequate and unconvincing, its only likely benefit being to improve relations between the Commission and national authorities, and it is to be hoped that the speed of the procedure will improve rather than worsen. An efficient and workable decentralisation would require more incisive action, such as:

- a revision of Regulation (EEC) No 17/62; and

- harmonisation of national competition law, with the early adoption of procedural rules".

2.10.4. Things are moving in the direction the Committee had hoped for, except however with respect to aligning national competition legislation with Community competition legislation. In its Explanatory Memorandum [second paragraph of 2.C.2(a)], the Commission recognises that although "several national systems of competition law have been modelled on Articles 81 and 82... no formal harmonisation is in place, and differences remain both in law and practice" and that "such differences lead to different treatment of agreements and practices that affect trade between Member States". But it also believes that Article 3 "ensures in a simple and effective way that all transactions with a cross-border effect are subject to a single body of law".

2.10.5. The importance of procedural provisions cannot be ignored, however, and the Committee cannot support the Commission's position on this matter. The last paragraph of point 3 of the Explanatory Memorandum reads:

"Thus, the proposal does not purport to harmonise national procedural law, except that it grants the Commission and the national competition authorities the power to make submissions on their own initiative."

2.10.6. The Committee can only reiterate its concern that consistent application of the principles, which all parties agreed on, will be compromised owing to the wide discrepancies in practice between the Member States. Procedures (or, at least, administrative procedures) should to a certain extent reflect the unity of the principles. In this regard the Committee would also recommend that the Commission bear in mind that Article 83 of the Treaty also provides for directives to be used as an instrument "to give effect to the principles set out in Articles 81 and 82". A directive is a more flexible instrument because it generally offers the choice of different options and allows a suitable period of time for provisions to be implemented. It is thus an instrument which can be adopted in order to start taking practical legislative steps - albeit only prospective ones - to harmonise complex fields such as procedures.

2.11. Advisory Committee

2.11.1. Article 14 makes the Advisory Committee pivotal to the cooperation mechanism (Chapter IV) and strengthens its role by providing for both a written procedure and the option of discussing cases being dealt with by the national authorities. In its opinion on the White Paper, the Economic and Social Committee expressed its full approval of the Advisory Committee's strengthened role with a view to "coordinating the decisions of the Commission and the competition authorities" (point 1.5.4.2).

2.11.2. However, the Committee considers that the Advisory Committee's role would still be inadequate in the regulatory framework provided by the new Council Regulation. It hopes that the Advisory Committee's opinions will be publicised more widely and promptly, and that its remit will be broadened to include notices and guidelines and perhaps also regulations, while avoiding procedural red tape or delays.

2.12. Rights of defence

2.12.1. Article 26(1) only partly satisfies concerns about rights of defence. Thus "the Commission shall give the undertakings or associations of undertakings which are the subject of the proceedings the opportunity of being heard on the matters to which the Commission has taken objection", but this is limited to decisions related to finding and terminating infringements (Article 7) and interim measures (Article 8), as well as fines (Article 22) and penalty payments (Article 23). Article 26(2) also refers back to these articles, although it is worded in general terms: "The rights of defence of the parties concerned shall be fully respected in the proceedings."

2.12.2. The Committee believes that this principle - which in essence is a guarantee of cross examination - is a general principle and should therefore be given explicit recognition of a general nature in the regulation.

2.12.3. This guarantee should also be offered in national proceedings associated with Community proceedings. For instance, before proceedings are suspended or transferred from one authority to another, undertakings must at least be heard and they must have an opportunity to express their own views on the suspension or transfer.

2.13. Decentralisation, coherence of legal proceedings and appeal procedures

2.13.1. Appeals pose another basic problem, because in a decentralised system without a single appeal authority it is difficult to guarantee not only the right of defence, but also coherent and consistent application of Community competition rules across the EU. The Commission's powers under its close cooperation with national authorities and courts are definitely not great enough to reach this objective.

2.13.2. In its 1999 opinion on the White Paper (2.3.5.11), the Committee stressed that to give the best guarantees of consistent decisions and evaluations and a unified system, the instrument should be based on a Community appeal system. The Commission's powers of coordination (including that of issuing opinions) and management, and the power to refer a matter to the Court of Justice, are not sufficient to resolve these issues.

2.13.3. The Committee appreciates the complexity and difficulty of this problem in relation to both Community and national law, but it believes that, given the far-reaching nature of this reform decentralising the application of the competition rules, the issue must be addressed. What is needed is a "legislative perspective" which, over the medium to long term, also considers further revisions of the Treaty. In the meantime, and partly by means of small steps, the Community legislator must seek and find appropriate solutions which are consistent with the spirit and purpose of the reform.

2.13.4. Naturally, any Community appeal system would have to have appropriate parameters and, in principle, concern national decisions taken at the highest level. The body responsible for appeals should be the Court of Justice, or the Court of First Instance, subject to the necessary changes to their respective remits.

2.14. The current authority of the Court of Justice to give a preliminary ruling is considerable, but not sufficient. With decentralisation, many cases which previously went before the Court of First Instance (because the decision had been taken by the Commission) may now only be contested before the national authorities (as the decision will have been taken by those authorities); it is inconceivable that problems arising, including matters of substance, could be settled solely through preliminary rulings.

2.14.1. Article 32 of the new regulation simply proposes review by the Court of Justice using the exact text of Article 17 of Regulation 17/62. Substantive review by the Court of Justice thus remains limited to "decisions whereby the Commission has fixed a fine or periodic penalty payment".

2.14.2. The question of establishing a European appeal level is unavoidable; it is in any case imperative to address the issue of the necessary adjustments in the Court of Justice's remit.

3. Conclusion

3.1. The Committee wholeheartedly supports the reform of the system for applying competition rules. This initial legislative instrument establishes essential machinery, and the Committee appreciates the clear and bold wording used.

3.2. However, in view of the complexity of the topic, and also in order to match the laudable commitment shown by the Commission, the Committee cannot hide the fact that it would have liked further clarifications and information, in the form of official accompanying measures, as stated in its December 1999 opinion.

3.3. The Committee will follow the Commission's future work with keen interest, particularly as regards the important additional measures announced. The Committee promises to offer the Commission its usual constructive collaboration.

Brussels, 29 March 2001.

The President

of the Economic and Social Committee

Göke Frerichs

(1) COM(1999) 101 final - OJ C 132, 12.5.1999.

(2) OJ C 51, 23.2.2000, p. 55.

(3) OJ C 51, 23.2.2000, p. 55.

(4) CES 1510/96 of 19.12.1996, point 11, OJ C 75, 10.3.1997, p. 22.

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Commission reforms competition rules for CO-OPERATION between COMPANIES

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Brussels, 29 November 2000

Commission reforms competition rules for CO-OPERATION between COMPANIES

The European Commission today adopted new competition rules concerning so-called horizontal co-operation agreements, i.e. co-operation agreements between competitors. They consist of revised block exemption Regulations on Research and Development agreements and Specialisation agreements and guidelines on various types of co-operation agreements. The new rules reform a key area of competition policy; they are part of a wider review undertaken by the Commission to streamline and adapt EC competition law. As co-operation between competitors becomes increasingly important in today's economy, clear rules are an important contribution to Europe's competitiveness.

Following adoption of the texts, Mario Monti, the Commissioner in charge of competition policy, stated: "This reform is another milestone in our efforts to modernise EC competition rules. A more efficient policy towards horizontal co-operation will reduce the regulatory burden for companies, while ensuring an effective control of agreements between companies holding market power. This will benefit consumers, companies and the Commission alike."

Horizontal co-operation agreements are potentially distortive of competition and are liable to fall under EC competition rules (Article 81 of the Treaty).

Guidance for the assessment of horizontal co-operation is currently provided by two 'block exemption' Regulations (on research and development (R&D) agreements and specialisation agreements) and two interpretative Notices (dealing with particular issues such as co-operative joint ventures). As the block exemption Regulations will expire on 31 December 2000, and as the existing Notices needed revision, the Commission, over the last three years, carried out a wide-ranging reflection on the future assessment of horizontal co-operation.

As a result, the Commission has today adopted

- a block exemption Regulation on the application of Article 81(3) of the Treaty to categories of research and development (R&D) agreements,
- a block exemption Regulation on the application of Article 81(3) of the Treaty to categories of specialisation agreements,
- Guidelines on the applicability of Article 81 to horizontal co-operation agreements. These guidelines cover agreements on R&D, production, marketing, purchasing, as well as standardisation and environmental agreements.

The new rules embody a shift from the formalistic regulatory approach underlying the current legislation towards a more economic approach in the assessment of horizontal co-operation agreements. The basic aim of this new approach is to allow competitor collaboration where it contributes to economic welfare without creating a risk for competition.

The new rules will enter into effect on 1 January 2001. Existing agreements will continue to be covered by the current block exemption Regulations until 30 June 2001.

Background

The review of the competition rules applicable to horizontal co-operation agreements started in late 1997 with a wide-ranging consultation of European companies. It showed that industry regards the existing block exemption Regulations as too focused on legal clauses, and that there is a need for clearer guidance on the assessment of those categories of co-operation which are not covered by any block exemption.

The new documents thus give better guidance to market participants. They replace the fragmented and partly outdated notices and regulations in this area. The approach is very similar to that of the new Regulation setting out the rules for the distribution sector ("vertical co-operation agreements") which the Commission adopted on 22 December 1999.

The two block exemption Regulations adopted today replace the existing Regulations on Specialisation (Commission Regulation (EEC) No. 417/85) and R&D (Commission Regulation (EEC) No. 418/85). In comparison to the existing Regulations the new texts are designed to be more user-friendly, with greater clarity and an increased scope of application. The new block exemptions replace the existing system of specifically exempted 'white list' clauses by a general exemption of all conditions under which undertakings pursue R&D and specialisation agreements. This move away from a clause-based approach gives greater contractual freedom to the parties of such agreements and removes the "strait-jacket" imposed by the old Regulations. The market share threshold for exemption of all parties to an agreement combined is set at 20% for specialisation agreements, and at 25% for R&D agreements. Beyond these market shares, R&D or specialisation agreements will not automatically be prohibited but will have to be assessed individually. However, 'hardcore' restrictions (price-fixing, output limitation or allocation of markets or customers) will generally remain prohibited irrespective of the parties' market power.

The guidelines complement the block exemption Regulations. They are applicable to R&D and production agreements not covered by the block exemptions as well as to certain other types of competitor collaboration (e.g. joint purchasing, joint commercialisation). The guidelines describe the general approach which should be followed when assessing horizontal co-operation agreements and set out a common analytical framework. This helps companies to assess with greater certainty whether or not an agreement is restrictive of competition and, if so, whether it would qualify for an exemption.

A first draft of the new texts was approved by the Commission on 18 January. Since then they have been discussed with the Member States and interested third parties. On 20 & 21 June a public hearing took place which showed strong support expressed by European industry for this reform.

The two block exemption Regulations and the guidelines will be published in the Official Journal shortly. They will also be made available on the Competition DG's web site at:

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

31971R2821

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

Official Journal L 285 , 29/12/1971 P. 0046 - 0048
Finnish special edition: Chapter 8 Volume 1 P. 0043
DA.ES Series I Chapter 1971(III) P. 0896
Swedish special edition: Chapter 8 Volume 1 P. 0043
English special edition: Series I Chapter 1971(III) P. 1032
Greek special edition: Chapter 08 Volume 1 P. 0088
Spanish special edition: Chapter 08 Volume 2 P. 0014
Portuguese special edition Chapter 08 Volume 2 P. 0014

REGULATION (EEC) No 2821/71 OF THE COUNCIL of 20 December 1971 on application of Article 85 (3) of the Treaty to categories of agreements, decisions and concerted practices

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 87 thereof;

Having regard to the proposal from the Commission;

Having regard to the Opinion of the European Parliament;

Having regard to the Opinion of the Economic and Social Committee;

Whereas Article 85 (1) of the Treaty may in accordance with Article 85 (3) be declared inapplicable to categories of agreements, decisions and concerted practices which fulfil the conditions contained in Article 85 (3);

Whereas the provisions for implementation of Article 85 (3) must be adopted by way of regulation pursuant to Article 87;

Whereas the creation of a common market requires that undertakings be adapted to the conditions of the enlarged market and whereas co-operation between undertakings can be a suitable means of achieving this;

Whereas agreements, decisions and concerted practices for co-operation between undertakings which enable the undertakings to work more rationally and adapt their productivity and competitiveness to the enlarged market may, in so far as they fall within the prohibition contained in Article 85 (1), be exempted therefrom under certain conditions ; whereas this measure is necessary in particular as regards agreements, decisions and concerted practices relating to the application of standards and types, research and development of products or processes up to the stage of industrial application, exploitation of the results thereof and specialisation;

Whereas it is desirable that the Commission be enabled to declare by way of regulation that the provisions of Article 85 (1) do not apply to those categories of agreements, decisions and concerted practices, in order to make it easier for undertakings to co-operate in ways which are economically desirable and without adverse effect from the point of view of competition policy;

Whereas it should be laid down under what conditions the Commission, in close and constant liaison with the competent authorities of the Member States, may exercise such powers;

Whereas under Article 6 of Regulation No 17 1 the Commission may provide that a decision taken in accordance with Article 85 (3) of the Treaty shall apply with retroactive effect ; whereas it is desirable that the Commission be empowered to issue regulations whose provisions are to the like effect;
Whereas under Article 7 of Regulation No 17 agreements, decisions and concerted practices may by decision of the Commission be exempted from prohibition, in particular if they are modified in such manner that Article 85 (3) applies to them ; whereas it is desirable that the Commission be enabled to grant by regulation like exemption to such agreements, decisions and concerted practices if they are modified in such manner as to fall within a category defined in an exempting regulation;
Whereas the possibility cannot be excluded that, in a specific case, the conditions set out in Article 85 (3) may not be fulfilled ; whereas the Commission must have power to regulate such a case in pursuance of Regulation No 17 by way of decision having effect for the future; 1OJ No 13, 21.2.1962, p. 204/62.
HAS ADOPTED THIS REGULATION:

Article 1
1. Without prejudice to the application of Regulation No 17 the Commission may, by regulation and in accordance with Article 85 (3) of the Treaty, declare that Article 85 (1) shall not apply to categories of agreements between undertakings, decisions of associations of undertakings and concerted practices which have as their object: (a) the application of standards or types;
(b) the research and development of products or processes up to the stage of industrial application, and exploitation of the results, including provisions regarding industrial property rights and confidential technical knowledge;
(c) specialisation, including agreements necessary for achieving it.

2. Such regulation shall define the categories of agreements, decisions and concerted practices to which it applies and shall specify in particular: (a) the restrictions or clauses which may, or may not, appear in the agreements, decisions and concerted practices;
(b) the clauses which must be contained in the agreements, decisions and concerted practices or the other conditions which must be satisfied.

Article 2
1. Any regulation pursuant to Article 1 shall be made for a specified period.
2. It may be repealed or amended where circumstances have changed with respect to any of the facts which were basic to its being made ; in such case, a period shall be fixed for modification of the agreements, decisions and concerted practices to which the earlier regulation applies.

Article 3
A regulation pursuant to Article 1 may provide that it shall apply with retroactive effect to agreements, decisions and concerted practices to which, at the date of entry into force of that regulation, a decision issued with retroactive effect in pursuance of Article 6 of Regulation No 17 would have applied.

Article 4
1. A regulation pursuant to Article 1 may provide that the prohibition contained in Article 85 (1) of the Treaty shall not apply, for such period as shall be fixed by that regulation, to agreements, decisions and concerted practices already in

existence on 13 March 1962 which do not satisfy the conditions of Article 85 (3), where: - within six months from the entry into force of the regulation, they are so modified as to satisfy the said conditions in accordance with the provisions of the regulation ; and
- the modifications are brought to the notice of the Commission within the time limit fixed by the regulation.

2. Paragraph 1 shall apply to agreements, decisions and concerted practices which had to be notified before 1 February 1963, in accordance with Article 5 of Regulation No 17, only where they have been so notified before that date.
3. The benefit of the provisions laid down pursuant to paragraph 1 may not be claimed in actions pending at the date of entry into force of a regulation adopted pursuant to Article 1 ; neither may it be relied on as grounds for claims for damages against third parties.

Article 5
Before making a regulation, the Commission shall publish a draft thereof to enable all persons and organisations concerned to submit their comments within such time limit, being not less than one month, as the Commission shall fix.

Article 6
1. The Commission shall consult the Advisory Committee on Restrictive Practices and Monopolies: (a) before publishing a draft regulation;
(b) before making a regulation.

2. Paragraphs 5 and 6 of Article 10 of Regulation No 17, relating to consultation with the Advisory Committee, shall apply by analogy, it being understood that joint meetings with the Commission shall take place not earlier than one month after dispatch of the notice convening them,

Article 7
Where the Commission, either on its own initiative or at the request of a Member State or of natural or legal persons claiming a legitimate interest, finds that in any particular case agreements, decisions or concerted practices to which a regulation made pursuant to Article 1 of this Regulation applies have nevertheless certain effects which are incompatible with the conditions laid down in Article 85 (3) of the Treaty, it may withdraw the benefit of application of that regulation and take a decision in accordance with Articles 6 and 8 of Regulation No 17, without any notification under Article 4 (1) of Regulation No 17 being required.

This Regulation shall be binding in its entirety and directly applicable in all Member States.
Done at Brussels, 20 December 1971.
For the Council
The President
M. PEDINI

32000R2658
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 (Text with EEA relevance)
Official Journal L 304 , 05/12/2000 P. 0003 - 0006

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
(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Community,
Having regard to Council Regulation (EEC) No 2821/71 of 20 December 1971 on the application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices(1), as last amended by the Act of Accession of Austria, Finland and Sweden, and in particular Article 1(1)(c) thereof,
Having published a draft of this Regulation(2),
Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,
Whereas:
(1) Regulation (EEC) No 2821/71 empowers the Commission to apply Article 81 (3) (formerly Article 85(3)) of the Treaty by regulation to certain categories of agreements, decisions and concerted practices falling within the scope of Article 81(1) which have as their object specialisation, including agreements necessary for achieving it.
(2) Pursuant to Regulation (EEC) No 2821/71, in particular, the Commission has adopted Regulation (EEC) No 417/85 of 19 December 1984 on the application of Article 85(3) of the Treaty to categories of specialisation agreements(3), as last amended by Regulation (EC) No 2236/97(4). Regulation (EEC) No 417/85 expires on 31 December 2000.
(3) A new regulation should meet the two requirements of ensuring effective protection of competition and providing adequate legal security for undertakings. The pursuit of these 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, for the application of Article 81(3), in general be presumed that the positive effects of specialisation agreements will outweigh any negative effects on competition.
(4) Regulation (EEC) No 2821/71 requires the exempting regulation of the Commission to define the categories of agreements, decisions and concerted practices to which it applies, to specify the restrictions or clauses which may, or may not, appear in the agreements, decisions and concerted practices, and to specify the clauses which must be contained in the agreements, decisions and concerted practices or the other conditions which must be satisfied.

(5) It is appropriate to move away from the approach of listing exempted clauses and to place greater emphasis on defining the categories of agreements which are exempted up to a certain level of market power and on specifying the restrictions or clauses which are not to be contained in such agreements. This is consistent with an economics-based approach which assesses the impact of agreements on the relevant market.
(6) For the application of Article 81(3) by regulation, it is not necessary to define those agreements which are capable of falling within Article 81(1). In the individual assessment of agreements under Article 81(1), account has to be taken of several factors, and in particular the market structure on the relevant market.
(7) The benefit of the block exemption should be limited to those agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 81(3).
(8) Agreements on specialisation in production generally contribute to improving the production or distribution of goods, because the undertakings concerned can concentrate on the manufacture of certain products and thus operate more efficiently and supply the products more cheaply. Agreements on specialisation in the provision of services can also be said to generally give rise to similar improvements. It is likely that, given effective competition, consumers will receive a fair share of the resulting benefit.
(9) Such advantages can arise equally from agreements whereby one participant gives up the manufacture of certain products or provision of certain services in favour of another participant ("unilateral specialisation"), from agreements whereby each participant gives up the manufacture of certain products or provision of certain services in favour of another participant ("reciprocal specialisation") and from agreements whereby the participants undertake to jointly manufacture certain products or provide certain services ("joint production").
(10) As unilateral specialisation agreements between non-competitors may benefit from the block exemption provided by 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(5), the application of the present Regulation to unilateral specialisation agreements should be limited to agreements between competitors.
(11) All other agreements entered into between undertakings relating to the conditions under which they specialise in the production of goods and/or services should fall within the scope of this Regulation. The block exemption should also apply to provisions contained in specialisation agreements which do not constitute the primary object of such agreements, but are directly related to and necessary for their implementation, and to certain related purchasing and marketing arrangements.
(12) To ensure that the benefits of specialisation will materialise without one party leaving the market downstream of production, unilateral and reciprocal specialisation agreements should only be covered by this Regulation where they provide for supply and purchase obligations. These obligations may, but do not have to, be of an exclusive nature.
(13) It can be presumed that, where the participating undertakings' share of the relevant market does not exceed 20 %, specialisation agreements as defined in this Regulation 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.
(14) This Regulation should not exempt agreements containing restrictions which are not indispensable to attain the positive effects mentioned above. In principle certain severe anti-competitive restraints 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 block exemption established by this

Regulation irrespective of the market share of the undertakings concerned.
(15) 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 participating undertakings to eliminate competition in respect of a substantial part of the products or services in question.
(16) In particular cases in which the agreements falling under this Regulation nevertheless have effects incompatible with Article 81(3) of the Treaty, the Commission may withdraw the benefit of the block exemption.
(17) In order to facilitate the conclusion of specialisation agreements, which can have a bearing on the structure of the participating undertakings, the period of validity of this Regulation should be fixed at 10 years.
(18) This Regulation is without prejudice to the application of Article 82 of the Treaty.
(19) In accordance with the principle of the primacy of Community law, no measure taken pursuant to national laws on competition should prejudice the uniform application throughout the common market of the Community competition rules or the full effect of any measures adopted in implementation of those rules, including this Regulation,
HAS ADOPTED THIS REGULATION:

Article 1
Exemption
1. Pursuant to Article 81(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 81(1) shall not apply to the following agreements entered into between two or more undertakings (hereinafter referred to as "the parties") which relate to the conditions under which those undertakings specialise in the production of products (hereinafter referred to as "specialisation agreements"):
(a) unilateral specialisation agreements, by virtue of which one party agrees to cease production of certain products or to refrain from producing those products and to purchase them from a competing undertaking, while the competing undertaking agrees to produce and supply those products; or
(b) reciprocal specialisation agreements, by virtue of which two or more parties on a reciprocal basis agree to cease or refrain from producing certain but different products and to purchase these products from the other parties, who agree to supply them; or
(c) joint production agreements, by virtue of which two or more parties agree to produce certain products jointly.
This exemption shall apply to the extent that such specialisation agreements contain restrictions of competition falling within the scope of Article 81(1) of the Treaty.
2. The exemption provided for in paragraph 1 shall also apply to provisions contained in specialisation agreements, which do not constitute the primary object of such agreements, but are directly related to and necessary for their implementation, such as those concerning the assignment or use of intellectual property rights.
The first subparagraph does, however, not apply to provisions which have the same object as the restrictions of competition enumerated in Article 5(1).

Article 2
Definitions
For the purposes of this Regulation:
1. "Agreement" means an agreement, a decision of an association of undertakings or a concerted practice.

2. "Participating undertakings" means undertakings party to the agreement and their respective connected undertakings.
3. "Connected undertakings" means:
(a) undertakings in which a party to the agreement, directly or indirectly:
(i) has the power to exercise more than half the voting rights, or
(ii) has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or
(iii) has the right to manage the undertaking's affairs;
(b) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in (a);
(c) undertakings in which an undertaking referred to in (b) has, directly or indirectly, the rights or powers listed in (a);
(d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in (a);
(e) undertakings in which the rights or the powers listed in (a) are jointly held by:
(i) parties to the agreement or their respective connected undertakings referred to in (a) to (d), or
(ii) one or more of the parties to the agreement or one or more of their connected undertakings referred to in (a) to (d) and one or more third parties.
4. "Product" means a good and/or a service, including both intermediary goods and/or services and final goods and/or services, with the exception of distribution and rental services.
5. "Production" means the manufacture of goods or the provision of services and includes production by way of subcontracting.
6. "Relevant market" means the relevant product and geographic market(s) to which the products, which are the subject matter of a specialisation agreement, belong.
7. "Competing undertaking" means an undertaking that is active on the relevant market (an actual competitor) or an undertaking that would, on realistic grounds, 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 (a potential competitor).
8. "Exclusive supply obligation" means an obligation not to supply a competing undertaking other than a party to the agreement with the product to which the specialisation agreement relates.
9. "Exclusive purchase obligation" means an obligation to purchase the product to which the specialisation agreement relates only from the party which agrees to supply it.

Article 3
Purchasing and marketing arrangements
The exemption provided for in Article 1 shall also apply where:
(a) the parties accept an exclusive purchase and/or exclusive supply obligation in the context of a unilateral or reciprocal specialisation agreement or a joint production agreement, or
(b) the parties do not sell the products which are the object of the specialisation agreement independently but provide for joint distribution or agree to appoint a third party distributor on an exclusive or non-exclusive basis in the context of a joint production agreement provided that the third party is not a competing undertaking.

Article 4
Market share threshold
The exemption provided for in Article 1 shall apply on condition that the

combined market share of the participating undertakings does not exceed 20 % of the relevant market.

Article 5
Agreements not covered by the exemption
1. The exemption provided for in Article 1 shall not apply to agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:
(a) the fixing of prices when selling the products to third parties;
(b) the limitation of output or sales; or
(c) the allocation of markets or customers.
2. Paragraph 1 shall not apply to:
(a) 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 of a production joint venture in the context of a joint production agreement;
(b) the setting of sales targets and the fixing of prices that a production joint venture charges to its immediate customers in the context of point (b) of Article 3.

Article 6
Application of the market share threshold
1. 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 undertaking concerned;
(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 3(e) of Article 2 shall be apportioned equally to each undertaking having the rights or the powers listed in point 3(a) of Article 2.
2. If the market share referred to in Article 4 is initially not more than 20 % but subsequently rises above this level without exceeding 25 %, the exemption provided for in Article 1 shall continue to apply for a period of two consecutive calendar years following the year in which the 20 % threshold was first exceeded.
3. If the market share referred to in Article 4 is initially not more than 20 % but subsequently rises above 25 %, the exemption provided for in Article 1 shall continue to apply for one calendar year following the year in which the level of 25 % was first exceeded.
4. The benefit of paragraphs 2 and 3 may not be combined so as to exceed a period of two calendar years.

Article 7
Withdrawal
The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Regulation (EEC) No 2821/71, where, either on its own initiative or at the request of a Member State or of a natural or legal person claiming a legitimate interest, it finds in a particular case that an agreement to which the exemption provided for in Article 1 applies nevertheless has effects which are incompatible with the conditions laid down in Article 81(3) of the Treaty, and in particular where:
(a) the agreement is not yielding significant results in terms of rationalisation or consumers are not receiving a fair share of the resulting benefit, or
(b) the products which are the subject of the specialisation are not subject in the

common market or a substantial part thereof to effective competition from identical products or products considered by users to be equivalent in view of their characteristics, price and intended use.

Article 8
Transitional period
The prohibition laid down in Article 81(1) of the Treaty shall not apply during the period from 1 January 2001 to 30 June 2002 in respect of agreements already in force on 31 December 2000 which do not satisfy the conditions for exemption provided for in this Regulation but which satisfy the conditions for exemption provided for in Regulation (EEC) No 417/85.

Article 9
Period of validity
This Regulation shall enter into force on 1 January 2001.
It shall expire on 31 December 2010.

This Regulation shall be binding in its entirety and directly applicable in all Member States.
Done at Brussels, 29 November 2000.

For the Commission
Mario Monti
Member of the Commission

(1) OJ L 285, 29.12.1971, p. 46.
(2) OJ C 118, 27.4.2000, p. 3.
(3) OJ L 53, 22.2.1985, p. 1.
(4) OJ L 306, 11.11.1997, p. 12.
(5) OJ L 336, 29.12.1999, p. 21.

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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 (Text with EEA relevance)

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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
(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Community,
Having regard to Council Regulation (EEC) No 2821/71 of 20 December 1971 on application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices(1), as last amended by the Act of Accession of Austria, Finland and Sweden, and in particular Article 1(1)(b) thereof,
Having published a draft of this Regulation(2),
Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,
Whereas:
(1) Regulation (EEC) No 2821/71 empowers the Commission to apply Article 81(3) (formerly Article 85(3)) of the Treaty by regulation to certain categories of agreements, decisions and concerted practices falling within the scope of Article 81(1) which have as their object the research and development of products or processes up to the stage of industrial application, and exploitation of the results, including provisions regarding intellectual property rights.
(2) Article 163(2) of the Treaty calls upon the Community 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. Pursuant to Council Decision 1999/65/EC of 22 December 1998 concerning the rules for the participation of undertakings, research centres and universities and for the dissemination of research results for the implementation of the fifth framework programme of the European Community (1998-2002)(3) and Commission Regulation (EC) No 996/1999(4) on the implementation of Decision 1999/65/EC, indirect research and technological development (RTD) actions supported under the fifth framework programme of the Community are required to be carried out cooperatively.
(3) 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 81(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 81(1) and should therefore be included within the scope of this Regulation.

(4) Pursuant to Regulation (EEC) No 2821/71, the Commission has, in particular, adopted Regulation (EEC) No 418/85 of 19 December 1984 on the application of Article 85(3) of the Treaty to categories of research and development agreements (5), as last amended by Regulation (EC) No 2236/97(6). Regulation (EEC) No 418/85 expires on 31 December 2000.

(5) A new regulation should meet the two requirements of ensuring effective protection of competition and providing adequate legal security for undertakings. The pursuit of these objectives should take account of the need to simplify administrative supervision and the legislative framework to as great an extent possible. Below a certain level of market power it can, for the application of Article 81(3), in general be presumed that the positive effects of research and development agreements will outweigh any negative effects on competition.

(6) Regulation (EEC) No 2821/71 requires the exempting regulation of the Commission to define the categories of agreements, decisions and concerted practices to which it applies, to specify the restrictions or clauses which may, or may not, appear in the agreements, decisions and concerted practices, and to specify the clauses which must be contained in the agreements, decisions and concerted practices or the other conditions which must be satisfied.

(7) It is appropriate to move away from the approach of listing exempted clauses and to place greater emphasis on defining the categories of agreements which are exempted up to a certain level of market power and on specifying the restrictions or clauses which are not to be contained in such agreements. This is consistent with an economics based approach which assesses the impact of agreements on the relevant market.

(8) For the application of Article 81(3) by regulation, it is not necessary to define those agreements which are capable of falling within Article 81(1). In the individual assessment of agreements under Article 81(1), account has to be taken of several factors, and in particular the market structure on the relevant market.

(9) The benefit of the block exemption should be limited to those agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 81(3).

(10) Cooperation in research and development and in the exploitation of the results generally promotes technical and economic progress by increasing the dissemination of know-how between the parties and avoiding duplication of research and development work, by stimulating new advances through the exchange of complementary know-how, and by rationalising the manufacture of the products or application of the processes arising out of the research and development.

(11) 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.

(12) 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 or the reduction of prices brought about by new or improved processes.

(13) In order to attain the benefits and objectives of joint research and development the benefit of this Regulation should also apply to provisions contained in research and development agreements which do not constitute the primary object of such agreements, but are directly related to and necessary for their implementation.

(14) In order to justify the exemption, the joint exploitation should relate to products or processes for which the use of the results of the research and

development is decisive, and each of the parties is given the opportunity of exploiting any results that interest it. However, 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. Similarly, non-competitors may agree to limit their right to exploitation to one or more technical fields of application to facilitate cooperation between parties with complementary skills.

(15) The exemption granted under 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 or services in question. It is necessary to exclude from the block exemption agreements between competitors whose combined share of the market for products or services 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.

(16) In order to guarantee 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 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.

(17) This Regulation should not exempt agreements containing restrictions which are not indispensable to attain the positive effects mentioned above. In principle certain severe anti-competitive restraints 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, allocation of markets or customers, and limitations on effecting passive sales for the contract products in territories reserved for other parties should be excluded from the benefit of the block exemption established by this Regulation irrespective of the market share of the undertakings concerned.

(18) 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 participating undertakings to eliminate competition in respect of a substantial part of the products or services in question.

(19) In particular cases in which the agreements falling under this Regulation nevertheless have effects incompatible with Article 81(3) of the Treaty, the Commission may withdraw the benefit of the block exemption.

(20) Agreements between undertakings which are not competing manufacturers of products capable of being improved 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 block exemption irrespective of market share and to address such exceptional cases by way of withdrawal of its benefit.

(21) 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 10 years.

(22) This Regulation is without prejudice to the application of Article 82 of the Treaty.

(23) In accordance with the principle of the primacy of Community law, no measure taken pursuant to national laws on competition should prejudice the

uniform application throughout the common market of the Community competition rules or the full effect of any measures adopted in implementation of those rules, including this Regulation,
HAS ADOPTED THIS REGULATION:

Article 1
Exemption
1. Pursuant to Article 81(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 81(1) shall not apply to agreements entered into between two or more undertakings (hereinafter referred to as "the parties") which relate to the conditions under which those undertakings pursue:
(a) joint research and development of products or processes and joint exploitation of the results of that research and development;
(b) joint exploitation of the results of research and development of products or processes jointly carried out pursuant to a prior agreement between the same parties; or
(c) joint research and development of products or processes excluding joint exploitation of the results.
This exemption shall apply to the extent that such agreements (hereinafter referred to as "research and development agreements") contain restrictions of competition falling within the scope of Article 81(1).
2. The exemption provided for in paragraph 1 shall also apply to provisions contained in research and development agreements which do not constitute the primary object of such agreements, but are directly related to and necessary for their implementation, such as an obligation not to carry out, independently or together with third parties, research and development in the field to which the agreement relates or in a closely connected field during the execution of the agreement.
The first subparagraph does, however, not apply to provisions which have the same object as the restrictions of competition enumerated in Article 5(1).

Article 2
Definitions
For the purposes of this Regulation:
1. "agreement" means an agreement, a decision of an association of undertakings or a concerted practice;
2. "participating undertakings" means undertakings party to the research and development agreement and their respective connected undertakings;
3. "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 (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 research and development agreement together with one or more of the undertakings referred to in (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in (a);
(e) undertakings in which the rights or the powers listed in (a) are jointly held by:
(i) parties to the research and development agreement or their respective

connected undertakings referred to in (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 (a) to (d) and one or more third parties;
4. "research and development" means the acquisition of know-how relating to products 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;
5. "product" means a good and/or a service, including both intermediary goods and/or services and final goods and/or services;
6. "contract process" means a technology or process arising out of the joint research and development;
7. "contract product" means a product arising out of the joint research and development or manufactured or provided applying the contract processes;
8. "exploitation of the results" means the production or distribution of the contract products or the application of the contract processes or the assignment or licensing of intellectual property rights or the communication of know-how required for such manufacture or application;
9. "intellectual property rights" includes industrial property rights, copyright and neighbouring rights;
10. "know-how" means a package of non-patented practical information, resulting from experience and testing, 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 includes information which is indispensable for the manufacture of the contract products or the application of the contract processes; "identified" means that the know-how is described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;
11. research and development, or exploitation of the results, are carried out "jointly" where the work involved is:
(a) carried out by a joint team, organisation or undertaking,
(b) jointly entrusted to a third party, or
(c) allocated between the parties by way of specialisation in research, development, production or distribution;
12. "competing undertaking" means an undertaking that is supplying a product capable of being improved or replaced by the contract product (an actual competitor) or an undertaking that would, on realistic grounds, undertake the necessary additional investments or other necessary switching costs so that it could supply such a product in response to a small and permanent increase in relative prices (a potential competitor);
13. "relevant market for the contract products" means the relevant product and geographic market(s) to which the contract products belong.

Article 3
Conditions for exemption
1. The exemption provided for in Article 1 shall apply subject to the conditions set out in paragraphs 2 to 5.
2. All the parties must have access to the results of the joint research and development for the purposes of further research or exploitation. However, 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.
3. Without prejudice to paragraph 2, where the research and development

agreement provides only for joint research and development, each party must be free independently to exploit the results of the joint research and development and any pre-existing know-how necessary for the purposes of such exploitation. Such right to exploitation may be limited to one or more technical fields of application, where the parties are not competing undertakings at the time the research and development agreement is entered into.
4. Any joint exploitation must relate to results which are protected by intellectual property rights or constitute know-how, which substantially contribute to technical or economic progress and the results must be decisive for the manufacture of the contract products or the application of the contract processes.
5. Undertakings charged with manufacture by way of specialisation in production must be required to fulfil orders for supplies from all the parties, except where the research and development agreement also provides for joint distribution.

Article 4
Market share threshold and duration of exemption
1. Where the participating undertakings are not competing undertakings, the exemption provided for in Article 1 shall apply for the duration of the research and development. Where the results are jointly exploited, the exemption shall continue to apply for seven years from the time the contract products are first put on the market within the common market.
2. Where two or more of the participating undertakings are competing undertakings, the exemption provided for in Article 1 shall apply for the period referred to in paragraph 1 only if, at the time the research and development agreement is entered into, the combined market share of the participating undertakings does not exceed 25 % of the relevant market for the products capable of being improved or replaced by the contract products.
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 participating undertakings does not exceed 25 % of the relevant market for the contract products.

Article 5
Agreements not covered by the exemption
1. The exemption provided for in Article 1 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:
(a) the restriction of the freedom of the participating undertakings 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 relates or, after its completion, in the field to which it relates or in a connected field;
(b) the prohibition to challenge after completion of the research and development the validity of intellectual property rights which the parties hold in the common 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 common market and which protect the results of the research and development, without prejudice to the possibilty 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;
(c) the limitation of output or sales;
(d) the fixing of prices when selling the contract product to third parties;
(e) the restriction of the customers that the participating undertakings may serve, after the end of seven years from the time the contract products are first put on the market within the common market;

(f) the prohibition to make passive sales of the contract products in territories reserved for other parties;
(g) the prohibition to put the contract products on the market or to pursue an active sales policy for them in territories within the common market that are reserved for other parties after the end of seven years from the time the contract products are first put on the market within the common market;
(h) the requirement not to grant licences to third parties to manufacture the contract products or to apply the contract processes where the exploitation by at least one of the parties of the results of the joint research and development is not provided for or does not take place;
(i) the requirement to refuse to meet demand from users or resellers in their respective territories who would market the contract products in other territories within the common market; or
(j) the requirement to make it difficult for users or resellers to obtain the contract products from other resellers within the common market, and in particular to exercise intellectual property rights or take measures so as to prevent users or resellers from obtaining, or from putting on the market within the common market, products which have been lawfully put on the market within the Community by another party or with its consent.
2. Paragraph 1 shall not apply to:
(a) the setting of production targets where the exploitation of the results includes the joint production of the contract products;
(b) the setting of sales targets and the fixing of prices charged to immediate customers where the exploitation of the results includes the joint distribution of the contract products.

Article 6
Application of the market share threshold
1. 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 undertaking concerned;
(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 3(e) of Article 2 shall be apportioned equally to each undertaking having the rights or the powers listed in point 3(a) of Article 2.
2. If the market share referred to in Article 4(3) is initially not more than 25 % but subsequently rises above this level without exceeding 30 %, the exemption provided for in Article 1 shall continue to apply for a period of two consecutive calendar years following the year in which the 25 % threshold was first exceeded.
3. 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 1 shall continue to apply for one calendar year following the year in which the level of 30 % was first exceeded.
4. The benefit of paragraphs 2 and 3 may not be combined so as to exceed a period of two calendar years.

Article 7
Withdrawal
The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Regulation (EEC) No 2821/71, where, either on its own initiative or at the request of a Member State or of a natural or legal person claiming a legitimate

interest, it finds in a particular case that a research and development agreement to which the exemption provided for in Article 1 applies nevertheless has effects which are incompatible with the conditions laid down in Article 81(3) of the Treaty, and in particular where:
(a) the existence of the 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;
(b) 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;
(c) without any objectively valid reason, the parties do not exploit the results of the joint research and development;
(d) the contract products are not subject in the whole or a substantial part of the common market to effective competition from identical products or products considered by users as equivalent in view of their characteristics, price and intended use;
(e) the existence of the research and development agreement would eliminate effective competition in research and development on a particular market.

Article 8
Transitional period
The prohibition laid down in Article 81(1) of the Treaty shall not apply during the period from 1 January 2001 to 30 June 2002 in respect of agreements already in force on 31 December 2000 which do not satisfy the conditions for exemption provided for in this Regulation but which satisfy the conditions for exemption provided for in Regulation (EEC) No 418/85.

Article 9
Period of validity
This Regulation shall enter into force on 1 January 2001.
It shall expire on 31 December 2010.

This Regulation shall be binding in its entirety and directly applicable in all Member States.
Done at Brussels, 29 November 2000.

For the Commission
Mario Monti
Member of the Commission

(1) OJ L 285, 29.12.1971, p. 46.
(2) OJ C 118, 27.4.2000, p. 3.
(3) OJ L 26, 1.2.1999, p. 46.
(4) OJ L 122, 12.5.1999, p. 9.
(5) OJ L 53, 22.2.1985, p. 5.
(6) OJ L 306, 11.11.1997, p. 12.

COMMISSION NOTICE

Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements

(2001/C 3/02)

(Text with EEA relevance)

1. INTRODUCTION

1.1. Purpose

1. These guidelines set out the principles for the assessment of horizontal cooperation agreements under Article 81 of the Treaty. A cooperation is of a 'horizontal nature' if an agreement or concerted practice is entered into between companies operating at the same level(s) in the market. In most instances, horizontal cooperation amounts to cooperation between competitors. It covers for example areas such as research and development (R & D), production, purchasing or commercialisation.

2. Horizontal cooperation may lead to competition problems. This is for example the case if the parties to a cooperation agree to fix prices or output, to share markets, or if the cooperation enables the parties to maintain, gain or increase market power and thereby causes negative market effects with respect to prices, output, innovation or the variety and quality of products.

3. On the other hand, horizontal cooperation can lead to substantial economic benefits. Companies need to respond to increasing competitive pressure and a changing market place driven by globalisation, the speed of technological progress and the generally more dynamic nature of markets. Cooperation can be a means to share risk, save costs, pool know-how and launch innovation faster. In particular for small and medium-sized enterprises cooperation is an important means to adapt to the changing market place.

4. The Commission, while recognising the economic benefits that can be generated by cooperation, has to ensure that effective competition is maintained. Article 81 provides the legal framework for a balanced assessment taking into account both anti-competitive effects as well as economic benefits.

5. In the past, two Commission notices and two block exemption regulations provided guidance for the assessment of horizontal cooperation under Article 81. Commission Regulation (EEC) No 417/85 [1], as last amended by Regulation (EC) No 2236/97 [2] and Commission Regulation (EEC) No 418/85 [3], as last amended by Regulation (EC) No 2236/97, provided for the exemption of certain forms of specialisation agreement and research and development agreement (R & D) respectively. Those two Regulations have now been replaced by 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 [4] ('the Specialisation block exemption Regulation') and Commission Regulation (EC) No 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements [5] ('the R & D block exemption Regulation'). The two notices provided guidance in respect of certain types of cooperation agreement falling outside Article 81 [6] and the assessement of cooperative joint ventures [7].

6. Changing markets have generated an increasing variety and use of horizontal cooperation. More complete and updated guidance is needed to improve clarity and transparency regarding the applicability of Article 81 in this area. Within the assessment greater emphasis has to be put on economic criteria to better reflect recent developments in enforcement practice and the case law of the Court of Justice and Court of First Instance of the European Communities.

7. The purpose of these guidelines is to provide an analytical framework for the most common types of horizontal cooperation. This framework is primarily based on criteria that help to analyse the economic context of a cooperation agreement. 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 cooperation and therefore for the assessment under Article 81. Given the enormous variety in types and combinations of horizontal cooperation and market circumstances in which they operate, it is impossible to provide specific answers for every possible scenario. The present analytical framework based on economic criteria will nevertheless assist businesses in assessing the compatibility of an individual cooperation agreement with Article 81.

8. The guidelines not only replace the Notices referred to in paragraph 5, but also cover a wider range of the most common types of horizontal agreements. They complement the R & D block exemption Regulation and the Specialisation block exemption Regulation.

1.2. **Scope of the guidelines**

9. These guidelines cover agreements or concerted practices (hereinafter referred to as 'agreements') entered into between two or more companies operating at the same level(s) in the market, e.g. at the same level of production or distribution. Within this context the focus is an cooperation between competitors. The term 'competitors' as used in these guidelines includes both actual (8) and potential (9).

10. The present guidelines do not, however, address all possible horizontal agreements. They are only concerned with those types of cooperation which potentially generate efficiency gains, namely agreements on R & D, production, purchasing, commercialisation, standardisation, and environmental agreements. Other types of horizontal agreements between competitors, for example on the exchange of information or on minority shareholdings, are to be addressed separately.

11. Agreements that are entered into between companies operating at a different level of the production or distribution chain, that is to say vertical agreements, are in principle excluded from these guidelines and dealt with in Commission Regulation (EC) No 2790/1999 (10) (the 'Block Exemption Regulation on Vertical Restraints') and the Guidelines on vertical restraints (11). However, to the extent that vertical agreements, e.g. 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, these agreements have to be assessed according to the principles described in the present guidelines. This does not exclude the additional application of the Guidelines on Vertical Restraints to these agreements to assess the vertical restraints included in such agreements (12).

12. Agreements may combine different stages of cooperation, for example R & D and the production of its results. Unless they fall under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (13), as last amended by Regulation (EC) No 1310/97 (14) ('the Merger Regulation'), these agreements are covered by the guidelines. The centre of gravity of the cooperation determines which section of the present guidelines applies to the agreement in question. In the determination of the centre of gravity, account is taken in particular of two factors: firstly, the starting point of the cooperation, and, secondly, the degree of integration of the different functions which are being combined. A cooperation involving both joint R & D and joint production of the results would thus normally be covered in the section on 'Agreements on Research and Development', 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 production. The R & D agreement can thus be regarded as the starting point of the cooperation. This assessment would change if the agreement foresaw a full integration in the area of production and only a partial integration of some R & D activities. In this case, the possible anti-competitive effects and economic benefits of the cooperation would largely relate to the joint production, and the agreement would therefore be examined according to the principles set out in the section on 'Production Agreements'. More complex arrangements such as strategic alliances that combine a number of different areas and instruments of cooperation in varying ways are not covered by the guidelines. The assessment of each individual area of cooperation within an alliance may be carried out with the help of the corresponding chapter in the guidelines. However, complex arrangements must also be analysed in their totality. Due to the variety of areas an alliance may combine, it is impossible to give general guidance for such an overall assessment. Alliances or other forms of cooperation that primarily declare intentions are impossible to assess under the competition rules as long as they lack a precise scope.

13. The criteria set out in these guidelines apply to cooperation concerning both goods and services, collectively referred to as 'products'. However, the guidelines do not apply to the extent that sector-specific rules apply, as is the case for agriculture, transport or insurance (15). Operations that come under the Merger Regulation are also not the subject of the present guidelines.

14. Article 81 only applies to those horizontal cooperation agreements which may affect trade between Member States. These guidelines are not concerned with the analysis of the capability of a given agreement to affect trade. The following principles on the applicability of Article 81 are therefore based on the assumption that trade between Member States is affected. In practice, however, this issue needs to be examined on a case-by-case basis.

15. Article 81 does not apply to agreements which are of minor importance because they are not capable of appreciably restricting competition by object or effect. These guidelines are without prejudice to the application of the present or any future 'de minimis' notice (16).

16. The assessment under Article 81 as described in these guidelines is without prejudice to the possible parallel application of Article 82 of the Treaty to horizontal cooperation agreements. Furthermore, 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 horizontal cooperation agreements.

1.3. **Basic principles for the assessment under Article 81**

1.3.1. *Article 81(1)*

17. Article 81(1) applies to horizontal cooperation agreements which have as their object or effect the prevention, restriction or distortion of competition (hereinafter referred to as 'restrictions of competition').

18. In some cases the nature of a cooperation indicates from the outset the applicability of Article 81(1). This is the case for agreements that have as their object a restriction of competition by means of price fixing, output limitation or sharing of markets or customers. These agreements are presumed to have negative market effects. It is therefore not necessary to examine their actual effects on competition and the market in order to establish that they fall within Article 81(1).

19. Many horizontal cooperation agreements, however, do not have as their object a restriction of competition. Therefore, an analysis of the effects of the agreement is necessary. For this analysis it is not sufficient that the agreement limits competition between the parties. It must also be likely to affect competition in the market to such an extent that negative market effects as to prices, output, innovation or the variety or quality of goods and services can be expected.

20. Whether the agreement is able to cause such negative market effects depends on the economic context taking into account both the nature of the agreement and the parties' combined market power which determines — together with other structural factors — the capability of the cooperation to affect overall competition to such a significant extent.

Nature of the agreement

21. The nature of an agreement relates to factors such as the area and objective of the cooperation, the competitive relationship between the parties and the extent to which they combine their activities. These factors indicate the likelihood of the parties coordinating their behaviour in the market.

22. Certain types of agreement, for instance most R & D agreements or cooperation to set standards or improve environmental conditions, are less likely to include restrictions with respect to prices and output. If these types of agreements have negative effects at all these are likely to be on innovation or the variety of products. They may also give rise to foreclosure problems.

23. Other types of cooperation such as agreements on production or purchasing typically cause a certain degree of commonality in (total) costs. If this degree is significant, the parties may more easily coordinate market prices and output. A significant degree of commonality in costs can only be achieved under certain conditions: First, the area of cooperation, e.g. production and purchasing, has to account for a high proportion of the total costs in a given market. Secondly, the parties need to combine their activities in the area of cooperation to a significant extent. This is, for instance, the case, where they jointly manufacture or purchase an important intermediate product or a high proportion of their total output of a final product.

Agreements that do not fall under Article 81(1)

24. Some categories of agreements do not fall under Article 81(1) because of their very nature. This is normally true for cooperation that does not imply a coordination of the parties' competitive behaviour in the market such as

— cooperation between non-competitors,

— cooperation between competing companies that cannot independently carry out the project or activity covered by the cooperation,

— cooperation concerning an activity which does not influence the relevant parameters of competition.

These categories of cooperation could only come under Article 81(1) if they involve firms with significant market power [17] and are likely to cause foreclosure problems *vi-à-vis* third parties.

Agreements that almost always fall under Article 81(1)

25. Another category of agreements can be assessed from the outset as normally falling under Article 81(1). This concerns cooperation agreements that have the object to restrict competition by means of price fixing, output limitation or sharing of markets or customers. These restrictions are considered to be the most harmful, because they directly interfere with the outcome of the competitive process. Price fixing and output limitation directly lead to customers paying higher prices or not receiving the desired quantities. The sharing of markets or customers reduces the choice available to customers and therefore also leads to higher prices or reduced output. It can therefore be presumed that these restrictions have negative market effects. They are therefore almost always prohibited [18].

Agreements that may fall under Article 81(1)

26. Agreements that do not belong to the above-mentioned categories need further analysis in order to decide whether they fall under Article 81(I). The analysis has to include market-related criteria such as the market position of the parties and other structural factors.

Market power and market structure

27. The starting point for the analysis is the position of the parties in the markets affected by the cooperation. This determines whether or not they are likely to maintain, gain or increase market power through the cooperation, i.e. have the ability to cause negative market effects as to prices, output, innovation or the variety or quality of goods and services. To carry out this analysis the relevant market(s) have to be defined by using the methodology of the Commission's market definition notice [19]. Where specific types of markets are concerned such as purchasing or technology markets, these guidelines will provide additional guidance.

28. If the parties together have a low combined market share [20], a restrictive effect of the cooperation is unlikely and no further analysis normally is required. 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 restrictive effect on competition in the market [21]. Given the variety of cooperation types and the different effects they may cause in different market situations, it is impossible to give a general market share threshold above which sufficient market power for causing restrictive effects can be assumed.

29. In addition to the market position of the parties and the addition of market shares, the market concentration, i.e. the position and number of competitors, may have to be taken into account as an additional factor to assess the impact of the cooperation on market competition. As an indicator the Herfindahl-Hirshman Index ('HHI'), which sums up the squares of the individual market shares of all competitors [22], can be used: With an HHI below 1 000 the market concentration can be characterised as low, between 1 000 and 1 800 as moderate and above 1 800 as high. Another possible indicator would be the leading firm concentration ratio, which sums up the individual market shares of the leading competitors [23].

30. 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, the countervailing power of buyers/suppliers or the nature of the products (e.g. homogeneity, maturity) have to be considered as well. Where an impact on competition in innovation is likely and can not be assessed adequately on the basis of existing markets, specific factors to analyse these impacts may have to be taken into account (see Chapter 2, R & D agreements).

1.3.2. *Article 81(3)*

31. Agreements that come under Article 81(1) may be exempted provided the conditions of Article 81(3) are fulfilled. This is the case if the agreement

— contributes to improving the production or distribution of products or to promoting technical or economic progress

— allows consumers a fair share of the resulting benefit

and does not

— impose restrictions which are not indispensable to the attainment of the above listed objectives

— afford the possibility of eliminating competition in respect of a substantial part of the products in question.

Economic benefits

32. The first condition requires that the agreement contributes to improving the production or distribution of products or to promoting technical or economic progress. As these benefits relate to static or dynamic efficiencies, they can be referred to as 'economic benefits'. Economic benefits may outweigh restrictive effects on: competition. For instance, a cooperation may enable firms to offer goods or services at lower prices, better quality or to launch innovation more quickly. Most efficiencies stem from the combination and integration of different skills or resources. The parties must demonstrate that the efficiencies are likely to be caused by the cooperation and cannot be achieved by less restrictive means (see also below). Efficiency claims must be substantiated. Speculations or general statements on cost savings are not sufficient.

33. The Commission does not take into account cost savings that arise from output reduction, market sharing, or from the mere exercise of market power.

Fair share for the consumers

34. Economic benefits have to favour not only the parties to the agreement, but also the consumers. Generally, the transmission of the benefits to the consumers will depend on the intensity of competition within 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 the consumers receive a fair share of the economic benefits.

Indispensability

35. The restriction of competition must be necessary to achieve the economic benefits. If there are less restrictive means to achieve similar benefits, the claimed efficiencies cannot be used to justify the restrictions of competition. Whether or not individual restrictions are necessary depends on market circumstances and on the duration of the agreement. For instance, exclusivity agreements may prevent a participating party from free riding and may therefore be acceptable. Under certain circumstances they may, however, not be necessary and worsen a restrictive effect.

No elimination of competition

36. 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 a horizontal agreement, an agreement which produces anti-competitive effects in the meaning of Article 81 can in principle not be exempted.

Block Exemption Regulations for R & D and Specialisation

37. Under certain conditions the criteria of Article 81(3) can be assumed to be fulfilled for specified categories of agreements. This is in particular the case for R & D and production agreements where the combination of complementary skills or assets can be the source of substantial efficiencies. These guidelines should be seen as a complement to the R & D and Specialisation block exemption Regulations. Those block exemption Regulations exempt most common forms of agreements in the fields of production/specialisation up to a market share threshold of 20 % and in the field of R & D up to a market share threshold of 25 % provided that the agreements fulfil the conditions for application of the block exemption and do not contain 'hard core' restrictions ('black clauses') that render the block exemption inapplicable. The block exemption Regulations do not provide severability for hardcore restrictions. If there are one or more hardcore restrictions, the benefit of the block exemption Regulation is lost for the entire agreement.

1.4. Structure of the following chapters on types of cooperation

38. The guidelines are divided into chapters relating to certain types of agreements. Each chapter is structured according to the analytical framework described above under point 1.3. Where necessary, specific guidance on the definition of relevant markets is given (e.g. in the field of R & D or with respect to purchasing markets).

2. AGREEMENTS ON RESEARCH AND DEVELOPMENT

2.1. Definition

39. R & D agreements may vary in form and scope. They range from outsourcing certain R & D activities to the joint improvement of existing technologies or to a cooperation concerning the research, development and marketing of completely new products. They may take the form of a cooperation 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 provided that the cooperation's centre of gravity lies in R & D, with the exception of mergers and joint ventures falling under the Merger Regulation.

40. Cooperation in R & D may reduce duplicative, unnecessary costs, lead to significant cross fertilisation of ideas and experience and thus result in products and technologies being developed more rapidly than would otherwise be the case. As a general rule, R & D cooperation tends to increase overall R & D activities.

41. Small and medium-sized enterprises (SMEs) form a dynamic and heterogeneous community which is confronted by many challenges, including the growing demands of larger companies for which they often work as sub-contractors. In R & D intensive sectors, fast growing SMEs, more often called 'start-up companies', also aim at becoming a leader in fast-developing market segments. To meet those challenges and to remain competitive, SMEs need constantly to innovate. Through R & D cooperation there is a likelihood that overall R & D by SMEs will increase and that they will be able to compete more vigorously with stronger market players.

42. Under certain circumstances, however, R & D agreements may cause competition problems such as restrictive effects on prices, output, innovation, or variety or quality of products.

2.2. **Relevant markets**

43. 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 a competitive constraint on the parties. At one end of the spectrum of possible situations, the innovation may result in a product (or technology) which competes in an existing product (or technology) market. This is 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, innovation may result in an entirely new product which creates its own new market (e.g. of the spectrum of a new vaccine for a previously incurable disease). In such a case, existing markets are only relevant if they are somehow related to the innovation in question. Consequently, and if possible, the effects of the cooperation on innovation have to be assessed. However, most of the cases probably concern situations in between these two extremes, i.e. situations in which innovation efforts may create products (or technology) which, over time, replace existing ones (e.g. 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 markets

(a) *Product markets*

44. When the cooperation concerns R & D for the improvement of existing products, these existing products including its close substitutes form the relevant market concerned by the cooperation [24].

45. If the R & D efforts aim at a significant change of an existing product or even at a new product replacing existing ones, substitution with the existing products may be imperfect or long-term. Consequently, the old and the potentially emerging new products are not likely to belong to the same relevant market. 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. An exploitation of power in the existing market, however, is only possible if the parties together have a strong position with respect to both the existing product market and R & D efforts.

46. If the R & D concerns an important component of a final product, not only the market for this component may be relevant for the assessment, but the existing market for the final product as well. For instance, if car manufacturers cooperate in R & D related to a new type of engine, the car market may be affected by this R & D cooperation. 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 these final products and if the parties to the R & D agreement are important competitors with respect to the final products.

(b) *Technology markets*

47. R & D cooperation may not only concern products but also technology. When rights to intellectual property are marketed separately from the products concerned 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, i.e. other technologies which customers could use as a substitute.

48. The methodology for defining technology markets follows the same principles as product market definition [25]. Starting from the technology which is marketed by the parties, one needs to identify those other technologies to which customers could switch in response to a small but permanent increase in relative prices. Once these technologies are identified, one can calculate market shares by dividing the licensing income generated by the parties with the total licensing income of all sellers of substitutable technologies.

49. The parties' position in the market for existing technology is a relevant assessment criterion where the R & D cooperation concerns the significant improvement of existing technology or a new technology that is likely to replace the existing technology. The parties' market share can however only be taken as a starting point for this analysis. In technology markets, particular emphasis must be put on potential competition. If companies, who do not currently license their technology, are potential entrants on the technology market they could constrain the ability of the parties to raise the price for their technology (see Example 3 below).

Competition in innovation (R & D efforts)

50. R & D cooperation may not — or not only — affect competition in existing markets, but competition in innovation. This is the case where cooperation concerns the development of new products/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.

51. 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 R & D poles. R & D poles are R & D efforts directed towards a certain new product or technology, and the substitutes for that R & D, i.e. R & D aimed at developing substitutable products or technology for those developed by the cooperation and having comparable access to resources as well as a similar timing. In this case, it can be analysed if after the agreement there will be a sufficient number of R & D poles left. 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 possible 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 can not be regarded as a close substitute for the parties' R & D effort from the viewpoint of, for instance, access to resources or timing.

52. 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, the Commission would, absent exceptional circumstances, not try to assess the impact of a given R & D cooperation on innovation, but would limit its assessment to product and/or technology markets which are related to the R & D cooperation in question.

Calculation of market shares

53. 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 a cooperation the reference point is the market for products capable of being improved or replaced by the products under development. If the R & D agreement only aims at improving or refining existing products, this 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. If the R & D aims at replacing an existing product, the new product will, if succesful, become a substitute to 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 these situations on the market share in 'the relevant market for the products capable of being improved or replaced by the contract products'. For an automatic exemption, this market share may not exceed 25 % ([26]).

54. If the R & D aims at developing a product which will create a complete 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 exempts these agreements irrespective of market share for a period of seven years after the product is first put on the market ([27]). However, the benefit of the block exemption may be withdrawn if the agreement would eliminate effective competition in innovation ([28]). After the seven year period, market shares based on sales value can be calculated, and the market share threshold of 25 % applies ([29]).

2.3. **Assessment under Article 81(1)**

2.3.1. *Nature of the agreement*

2.3.1.1. Agreements that do not fall under Article 81(1)

55. Most R & D agreements do not fall under Article 81(1). First, this can be said for agreements relating to cooperation in R & D at a rather theoretical stage, far removed from the exploitation of possible results.

56. Moreover, R & D cooperation between non-competitors does generally not restrict competition ([30]). The competitive relationship between the parties has to be analysed in the context of affected existing markets and/or innovation. If the parties are not able to carry out the necessary R & D independently, there is no competition to be restricted. This can apply, for example, to firms 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 cooperation enables them to carry out the R & D activities. The decisive question is whether each party independently has the necessary means as to assets, know-how and other resources.

57. R & D cooperation by means of outsourcing of previously captive R & D is often carried out by specialised companies, research institutes or academic bodies which are not active in the exploitation of the results. Typically such agreements are combined with a transfer of know-how and/or an exclusive supply clause concerning possible results. Due to the complementary nature of the cooperating parties in these scenarios, Article 81(1) does not apply.

58. R & D cooperation which does not include the joint exploitation of possible results by means of licensing, production and/or marketing rarely falls under Article 81(1). Those 'pure' R & D agreements can only cause a competition problem, if effective competition with respect to innovation is significantly reduced.

2.3.1.2. Agreements that almost always fall under Article 81(1)

59. If the true object of an agreement is not R & D but the creation of a disguised cartel, i.e. otherwise prohibited price fixing, output limitation or market allocation, it falls under Article 81(1). However, an R & D agreement which includes the joint exploitation of possible future results is not necessarily restrictive of competition.

2.3.1.3. Agreements that may fall under Article 81(1)

60. R & D agreements that cannot be assessed from the outset as clearly non-restrictive may fall under Article 81(1) ([31]) and have to be analysed in their economic context. This applies to R & D cooperation which is set up at a stage rather close to the market launch and which is agreed between companies that are competitors on either existing product/technology markets or on innovation markets.

2.3.2. *Market power and market structures*

61. R & D cooperation can cause negative market effects in three respects: First, it may restrict innovation, secondly it may cause the coordination of the parties' behaviour in existing markets and thirdly, foreclosure problems may occur at the level of the exploitation of possible results. These types of negative market effects, however, are only likely to emerge when the parties to the cooperation have significant power on the existing markets and/or competition with respect to innovation is significantly reduced. Without market power there is no incentive to coordinate behaviour on existing markets or to reduce or slow down innovation. A foreclosure problem may only arise in the context of cooperation involving at least one player with significant market power for a key technology and the exclusive exploitation of results.

62. There is no absolute market share threshold which indicates that an R & D agreement creates some degree of market power and thus falls under Article 81(1). However, R & D agreements are exempted provided that they are concluded between parties with a combined market share not exceeding 25 % and that the other conditions for the application of the R & D Block Exemption Regulation are fulfilled. Therefore, for most R & D agreements, restrictive effects only have to be analysed if the parties' combined market share exceeds 25 %.

63. Agreements falling outside the R & D Block Exemption Regulation due to a stronger market position of the parties do not necessarily restrict competition. However, the stronger the combined position of the parties on existing markets and/or the more competition in innovation is restricted, the more likely is the application of Article 81(1) and the assessment requires a more detailed analysis.

64. If the R & D is directed at the improvement or refinement of existing products/technology possible effects concern the relevant market(s) for these existing products/technology. Effects on prices, output and/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 as to competition in these final products are, if invariably, very limited. In general, a distinction has to be made between pure R & D agreements and more comprehensive cooperation involving different stages of the exploitation of results (i.e. licensing, production, marketing). As said above, pure R & D agreements rarely come under Article 81(1). This is in particular true for R & D directed towards a limited improvement of existing products/technology. If, in such a scenario, the R & D cooperation includes joint exploitation only by means of licensing, restrictive effects such as foreclosure problems are unlikely. If, however, joint production and/or marketing of the slightly improved products/technology are included, the cooperation has to be examined more closely. First, negative effects as to prices and output in existing markets are more likely if strong competitors are involved in such a situation. Secondly, the cooperation may come closer to a production agreement because the R & D activities may de facto not form the centre of gravity of such a collaboration.

65. 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/technology or the speed of innovation. Those restrictive effects can arise where two or more of the few firms engaged in the development of such a new product, start to cooperate at a stage where

they are each independently rather near to the launch of the product. In such a case, innovation may be restricted even by a pure R & D agreement. In general, however, R & D cooperation concerning entirely new products is pro-competitive. This principle does not change significantly if the joint exploitation of the results, even joint marketing, is involved. Indeed, the issue of joint exploitation in these situations is only relevant where foreclosure from key technologies plays a role. Those problems would, however, not arise where the parties grant licences to third parties.

66. Most R & D agreements will lie somewhere in between the two situations described above. 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/innovators and entry conditions. In some cases there can be restrictive price/output effects on existing markets and a negative impact on innovation by means of slowing down the speed of development. For instance, if significant competitors on an existing technology market cooperate to develop a new technology which may one day replace existing products, this cooperation is likely to have restrictive effects if the parties have significant market power on the existing market (which would give an incentive to exploit it), and if they also have a strong position with respect to R & D. A similar effect can occur, if the major player in an existing market cooperates with a much smaller or even potential competitor who is just about to emerge with a new product/technology which may endanger the incumbent's position.

67. Agreements may also fall outside the block exemption irrespective of the market power of the parties. This applies for instance to agreements which restrict access of a party to the results of the work because they do not, as a general rule, promote technical and economic progress by increasing the dissemination of technical knowledge between the parties [32]. The Block exemption provides for a specific exception to this general rule in the case of academic bodies, research Regulation institutes or specialised companies which provide R & D as a service and which are not active in the industrial exploitation of the results of research and development [33]. Nevertheless, it should be noted that agreements containing exclusive access rights may, where they fall under Article 81(1), meet the criteria for exemption under Article 81(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.

2.4. **Assessment under Article 81(3)**

2.4.1. *Economic benefits*

68. Most R & D agreements — with or without joint exploitation of possible results — bring about economic benefits by means of cost savings and cross fertilisation of ideas and experience, thus resulting in improved or new products and technologies being developed more rapidly than would otherwise be the case. Under these conditions it appears reasonable to provide for the exemption of such agreements which result in a restriction of competition up to a market share threshold below which it can, for the application of Article 81(3), in general, be presumed that the positive effects of research and development agreements will outweigh any negative effects on competition. Therefore, the R & D Block Exemption Regulation exempts those R & D agreements which fulfill certain conditions (see Article 3) and which do not include hard core restrictions (see Article 5), provided that the combined market share of the parties in the affected existing market(s) does not exceed 25 %.

69. If considerable market power is created or increased by the cooperation, the parties have to demonstrate significant benefits in carrying out R & D, a quicker launch of new products/technology or other efficiencies.

2.4.2. *Indispensability*

70. An R & D agreement can not be exempted if it imposes restrictions that are not indispensable to the attainment of the above-mentioned benefits. The individual clauses listed in Article 5 of the R & D block exemption Regulation will in most cases render an exemption impossible following an individual assessment too, and can therefore be regarded as a good indication of restrictions that are not indispensable to the cooperation.

2.4.3. *No elimination of competition*

71. No exemption will be possible, if the parties are afforded the possibility of eliminating competition in respect of a substantial part of the products (or technologies) in question. Where as a consequence of a R & D agreement an undertaking is dominant or becoming dominant either on an existing markets or with respect to innovation, such an agreement which produces anti-competitive effects in the meaning of Article 81 can in principle not be exempted. For innovation this is the case, for example, if the agreement combines the only two existing poles of research.

Time of the assessment and duration of the exemption

72. R & D agreements extending to the joint production and marketing of new products/technology require particular attention as to the time of the assessment.

73. At the beginning of an R & D cooperation, its success and factors such as the parties' future market position as well as the development of future product or technology markets are often not known. Consequently, the assessment at the point in time when the cooperation is formed is limited to the (then) existing product or technology markets and/or innovation markets as described in this chapter. If, on the basis of this analysis, competition is not likely to be eliminated, the R & D agreement can benefit from an exemption. This will normally cover the duration of the R & D phase plus, in as far as the joint production and marketing of the possible results is concerned, an additional phase for a possible launch and market introduction. The reason for this additional exemption phase is that the first companies to reach the market with a new product/technology will often enjoy very high initial market shares and successful R & D is also often rewarded by intellectual property protection. A strong market position due to this 'first mover advantage' cannot normally be interpreted as elimination of competition. Therefore, the block exemption covers R & D agreements for an additional period of seven years (i.e. beyond the R & D phase) irrespective of whether or not the parties obtain with their new products/technology a high share within this period. This also applies to the individual assessment of cases falling outside the block exemption provided that the criteria of Article 81(3) as to the other aspects of the agreement are fulfilled. This does not exclude the possibility that a period of more than 7 years also meets the criteria of Article 81(3) if it can be shown to be the minimum period of time necessary to guarantee an adequate return on the investment involved.

74. If a new assessment of an R & D cooperation is made after that period — for instance, following a complaint — the analysis has to be based on the (then) existing market situation. The block exemption still continues to apply if the parties' share on the (then) relevant market does not exceed 25 %. Similarly, Article 81(3) continues to apply to R & D agreements falling outside the block exemption provided that the criteria for an exemption are fulfilled.

2.5. **Examples**

75. Example 1

Situation: There are two major companies on the European market for the manufacture of existing electronic components: A (30 %) and B (30 %). They have each made significant investment in the R & D necessary to develop miniaturised electronic components and have developed early prototypes. They now agree to pool these R & D efforts by setting up a JV 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 firms 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 this future market. If the JV 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. While the agreement could have advantages in bringing a new technology forward quicker, it also reduces variety and creates a commonality of costs between the parties. Furthermore, the possibility for the parties to exploit their strong position on the existing market must be taken into account. Since they would face no competition at the R & D level, their incentives to pursue the new technology at a high pace could be severely reduced. Although some of these concerns could be remedied by requiring the parties to license key know-how for manufacturing miniature components to third parties on reasonable terms, it may not be possible to remedy all concerns and fulfil the conditions for an exemption.

76. Example 2

Situation: A small research 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 B of products that have so far been used for treating the disease. Company B lacks any similar R & D programme. For the existing products company B has a market share of around 75 % in all Member States, but patents are expiring over the next five-year period. There exist two other poles of research 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 license for the exclusive production and distribution of the resulting product for the duration of the patent. It is expected that the parties could jointly bring the product 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 cooperation, 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, this power will be decreasing shortly 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 own marketing resources. The agreement is therefore unlikely to restrict competition.

77. Example 3

Situation: Two engineering companies that produce vehicle components, agree to set up a JV to combine their R & D efforts to improve the production and performance of an existing component. They also pool their existing technology licensing businesses in this area, but will continue to manufacture separately. The two companies have market shares in Europe of 15 % and 20 % on the 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 these products they 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 firms 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 for the existing components and for the licensing of relevant technology. Although their existing R & D programmes broadly overlap, the reduced duplication through the cooperation could allow them to spend more on R & D than individually. Several other technologies exist and the parties' combined market share on the OEM market does not bring them into a dominant position. Although their market share on the technology market, at 45 %, is very high, there are competing technologies. In addition, the vehicle manufacturers, who do not currently licence their technology, are also potential entrants on this market thus constraining the ability of the parties to raise price. As described, the JV is likely to benefit from an exemption.

3. PRODUCTION AGREEMENTS (INCLUDING SPECIALISATION AGREEMENTS)

3.1. Definition

78. Production agreements may vary in form and scope. They may take the form of joint production through a joint venture [34], i.e. a jointly controlled company that runs one or several production facilities, or can be carried out by means of specialisation or subcontracting agreements whereby one party agrees to carry out the production of a certain product.

79. Generally, one can distinguish three categories of production agreements: Joint production agreements, whereby the parties agree to produce certain products jointly, (unilateral or reciprocal) specialisation agreements, whereby the parties agree unilaterally or reciprocally to cease production of a product and to purchase it from the other party, and subcontracting agreements whereby one party (the ‘contractor’) entrusts to another party (the ‘subcontractor’) the production of a product.

80. Subcontracting agreements are vertical agreements. They are therefore, to the extent that they contain restrictions of competition, covered by the Block Exemption Regulation and the Guidelines on Vertical Restraints. There are however two exceptions to this rule: Subcontracting agreements between competitors [35], and subcontracting agreements between non-competitors involving the transfer of know-how to the subcontractor [36].

81. Subcontracting agreements between competitors are covered by these guidelines [37]. Guidance for the assessment of subcontracting agreements between non-competitors involving the transfer of know-how to the subcontractor is given in a separate Notice [38].

3.2. Relevant markets

82. In order to assess the competitive relationship between the cooperating parties, the relevant product and geographic market(s) directly concerned by the cooperation (i.e. the market(s) to which products subject to the agreement belong) must first be defined. Secondly, a production agreement in one market may also affect the competitive behaviour of the parties in a market which is downstream or upstream or a neighbouring market closely related to the market directly concerned by the cooperation [39] (so-called ‘spill-over markets’). However, spill-over effects only occur if the cooperation in one market necessarily results in the coordination of competitive behaviour in another market, i.e. if the markets are linked by interdependencies, and if the parties are in a strong position on the spill-over market.

3.3. **Assessment under Article 81 (1)**

3.3.1. *Nature of the agreement*

83. The main source of competition problems that may arise from production agreements is the coordination of the parties' competitive behaviour as suppliers. This type of competition problem arises where the cooperating parties are actual or potential competitors on at least one of these relevant market(s), i.e. on the markets directly concerned by the cooperation and/or on possible spill-over markets.

84. The fact that the parties are competitors does not automatically cause the coordination of their behaviour. In addition, the parties normally need to cooperate with regard to a significant part of their activities in order to achieve a substantial degree of commonality of costs. The higher the degree of commonality of costs, the greater the potential for a limitation of price competition, especially in the case of homogenous products.

85. In addition to coordination concerns, production agreements may also create foreclosure problems and other negative effects towards third parties. They are not caused by a competitive relationship between the parties, but by a strong market position of at least one of the parties (e.g. on an upstream market for a key component, which enables the parties to raise the costs of their rivals in a downstream market) in the context of a more vertical or complementary relationship between the cooperating parties. Therefore, the possibilty of foreclosure mainly needs to be examined in the case of joint production of an important component and of subcontracting agreements (see below).

3.3.1.1. Agreements that do not fall under Article 81(1)

86. Unless foreclosure problems arise, production agreements between non-competitors are not normally caught by Article 81(1). This is also true for agreements whereby inputs or components which have so far been manufactured for own consumption (captive production) are purchased from a third party by way of subcontracting or unilateral specialisation, unless there are indications that the company which so far has only produced for own consumption could have entered the merchant market for sales to third parties without incurring significant additional costs or risks in response to small, permanent changes in relative market prices.

87. Even production agreements between competitors do not necessarily come under Article 81(1). First, cooperation between firms which compete on markets closely related to the market directly concerned by the cooperation, cannot be defined as restricting competition, if the cooperation is the only commercially justifiable possible way to enter a new market, to launch a new product or service or to carry out a specific project.

88. Secondly, an effect on the parties' competitive behaviour as market suppliers is highly unlikely if the parties have a small proportion of their total costs in common. For instance, a low degree of commonality in total costs can be assumed where two or more companies agree on specialisation/joint production of an intermediate product which only accounts for a small proportion of the production costs of the final product and, consequently, the total costs. The same applies to a subcontracting agreement between competitors where the input which one competitor purchases from another only accounts for a small proportion of the production costs of the final product. A low degree of commonality of total costs can also be assumed where the parties jointly manufacture a final product, but only a small proportion as compared to their total output of the final product. Even if a significant proportion is jointly manufactured, the degree of commonality of total costs may nevertheless be low or moderate, if the cooperation concerns heterogeneous products which require costly marketing.

89. Thirdly, subcontracting agreements between competitors do not fall under Article 81(1) if they are limited to individual sales and purchases on the merchant market without any further obligations and without forming part of a wider commercial relationship between the parties [40].

3.3.1.2. Agreements that almost always fall under Article 81(1)

90. Agreements which fix the prices for market supplies of the parties, limit output or share markets or customer groups have the object of restricting competition and almost always fall under Article 81(1). This does, however, not apply to cases

— where the parties agree on the output directly concerned by the production agreement (e.g. the capacity and production volume of a joint venture or the agreed amount of outsourced products), or

— where a production joint venture that also carries out the distribution of the manufactured products sets the sales prices for these products, provided that the price fixing by the joint venture is the effect of integrating the various functions [41].

In both scenarios the agreement on output or prices will not be assessed separately, but in light of the overall effects of the joint venture on the market in order to determine the applicability of Article 81(1).

3.3.1.3. Agreements that may fall under Article 81(1)

91. Production agreements that cannot be characterised as clearly restrictive or non-restrictive on the basis of the above factors may fall under Article 81(1) ([42]) and have to be analysed in their economic context. This applies to cooperation agreements between competitors which create a significant degree of commonality of costs, but do not involve hard core restrictions as described above.

3.3.2. *Market power and market structures*

92. The starting point for the analysis is the position of the parties in the market(s) concerned. This is due to the fact that without market power the parties to a production agreement do not have an incentive to coordinate their competitive behaviour as suppliers. Secondly, there is no effect on competition in the market without market power of the parties, even if the parties would coordinate their behaviour.

93. There is no absolute market share threshold which indicates that a production agreement creates some degree of market power and thus falls under Article 81(1). However, agreements concerning unilateral or reciprocal specialisation as well as joint production are block exempted provided that they are concluded between parties with a combined market share not exceeding 20 % in the relevant market(s) and that the other conditions for the application of the Specialisation block exemption Regulation are fulfilled. Therefore, for agreements covered by the block exemption, restrictive effects only have to be analysed if the parties combined market share exceeds 20 %.

94. Agreements which are not covered by the block exemption Regulation require a more detailed analysis. The starting point is the market position of the parties. This will normally be followed by the concentration ratio and the number of players as well as by other factors as described in Chapter 1.

95. Usually the analysis will only involve the relevant market(s) with which the cooperation is directly concerned. Under certain circumstances, e.g. if the parties have a very strong combined position on up- or downstream markets or on markets otherwise closely related to the markets with which the cooperation is directly concerned, these spill-over markets may however have to be analysed as well. This applies in particular to cooperation in upstream markets by firms which also enjoy a strong combined market position further downstream. Similarly, problems of foreclosure may need to be examined if the parties individually have a strong position as either suppliers or buyers of an input.

Market position of the parties, concentration ratio, number of players and other structural factors

96. If the parties' combined market share is larger than 20 %, the likely impact of the production agreement on the market must be assessed. In this respect market concentration as well as market shares will be a significant factor. The higher the combined market share of the parties, the higher the concentration in the market concerned. However, a moderately higher market share than allowed for in the block exemption does not necessarily imply a high concentration ratio. Far instance, a combined market share of the parties of slightly more than 20 % may occur in a market with a moderate concentration (HHI below 1800). In such a scenario a restrictive effect is unlikely. In a more concentrated market, however, a market share of more than 20 % may, alongside other elements, lead to a restriction of competition (see also example 1 below). The picture may nevertheless change, if the market is very dynamic with new participants entering the market and market positions changing frequently.

97. For joint production, network effects, i.e. links between a significant number of competitors, can also play an important role. In a concentrated market the creation of an additional link may tip the balance and make collusion in this market likely, even if the parties have a significant, but still moderate, combined market share (see example 2 below).

98. Under specific circumstances a cooperation between potential competitors may also raise competition concerns. This is, however, limited to cases where a strong player in one market cooperates with a realistic potential entrant, for instance, with a strong supplier of the same product or service in a neighbouring geographic market. The reduction of potential competition creates particular problems if actual competition is already weak and threat of entry is a major source of competition.

Cooperation in upstream markets

99. Joint production of an important component or other input to the parties' final product can cause negative market effects under certain circumstances:

— Foreclosure problems (see example 3 below) provided that the parties have a strong position on the relevant input market (non-captive use) and that switching between captive and non-captive use would not occur in the presence of a small but permanent relative price increase for the product in question.

— Spill-over effects (see example 4 below) provided that the input is an important component of costs and that the parties have a strong position in the downstream market for the final product.

Subcontracting agreements between competitors

100. Similar problems can arise if a competitor subcontracts an important component or other input to its final product from a competitor. This can also lead to:

— Foreclosure problems provided that the parties have a strong position as either suppliers or buyers on the relevant input market (non-captive use). Subcontracting could then either lead to other competitors not being able to obtain this input at a competitive price or to other suppliers not being able to supply the input competitively if they will be losing a large part of their demand.

— Spill-over effects provided that the input is an important component of costs and that the parties have a strong position in the downstream market for the final product.

Specialisation agreements

101. Reciprocal specialisation agreements with market shares beyond the threshold of the block exemption will almost always fall under Article 81(1) and have to be examined carefully because of the risk of market partitioning (see example 5 below).

3.4. **Assessment under Article 81(3)**

3.4.1. *Economic benefits*

102. Most common types of production agreements can be assumed to cause some economic benefits in the form of economies of scale or scope or better production technologies unless they are an instrument for price fixing, output restriction or market and customer allocation. Under these conditions it appears reasonable to provide for the exemption of such agreements which result in a restriction of competition up to a market share threshold below which it can, for the application of Article 81(3), in general, be presumed that the positive effects of production agreements will outweigh any negative effects on competition. Therefore, agreements concerning unilateral or reciprocal specialisation as well as joint production are block exempted (Specialisation block exemption Regulation) provided that they do not contain hard core restrictions (see Article 5) and that they are concluded between parties with a combined market share not exceeding 20 % in the relevant market(s).

103. For those agreements not covered by the block exemption the parties have to demonstrate improvements of production or other efficiencies. Efficiencies that only benefit the parties or cost savings that are caused by output reduction or market allocation cannot be taken into account.

3.4.2. *Indispensability*

104. Restrictions that go beyond what is necessary to achieve the economic benefits described above will not be accepted. For instance, parties should not be restricted in their competitive behaviour on output outside the cooperation.

3.4.3. *No elimination of competition*

105. No exemption will be possible, if the parties are afforded the possibility of eliminating competition in respect of a substantial part of the products in question. Where as a consequence of a production agreement an undertaking is dominant or becoming dominant, such an agreement which produces anti-competitive effects in the meaning of Article 81 can in principle not be exempted. This has to be analysed on the relevant market to which the products subject to the cooperation belong and on possible spill-over markets.

3.5. **Examples**

Joint production

106. The following two examples concern hypothetical cases causing competition problems on the relevant market to which the jointly manufactured products belong.

107. Example 1

Situation: Two suppliers, A and B, of the basic chemical product X decide to build a new production plant controlled by a joint venture. This plant will produce roughly 50 % of their total output. X is a homogeneous product and is not substitutable with other products, i.e. forms a relevant market on its own. The market is rather stagnant. The parties will not significantly increase total output, but close down two old factories and shift capacity to the new plant. A and B each have a market share of 20 %. There are three other significant suppliers each with 10-15 % market share and several smaller players.

Analysis: It is likely that this joint venture would have an effect on the competitive behaviour of the parties because coordination would give them considerable market power, if not even a dominant position. Severe restrictive effects in the market are probable. High efficiency gains which may outweigh these effects are unlikely in such a scenario where a significant increase in output cannot be expected.

108. Example 2

Situation: Two suppliers, A and B, form a production joint venture on the same relevant market as in example 1. The joint venture also produces 50 % of the parties' total output. A and B each have 15 % market share. There are 3 other players: C with a market share of 30 %, D with 25 % and E with 15 %. B already has a joint production plant with E.

Analysis: Here the market is characterised by very few players and rather symmetric structures. The joint venture creates an additional link between the players. Coordination between A and B would de facto further increase concentration and also link E to A and B. This cooperation is likely to cause a severe restrictive effect, and — as in example 1 — high efficiency gains cannot be expected.

109. Example 3 also concerns the relevant market to which the jointly manufactured products belong, but demonstrates the importance of criteria other than market share (here: switching between captive and non-captive production).

110. Example 3

Situation: A and B set up a production joint venture for an intermediate product X through restructuring current plants. The joint venture sells X exclusively to A and B. It produces 40 % of A's total output of X and 50 % of B's total output. A and B are captive users of X and are also suppliers of the non-captive market. A's share of total industry output of X is 10 %, B's share amounts to 20 % and the share of the joint venture to 14 %. On the non-captive market, however, A and B have respectively 25 % and 35 % market share.

Analysis: Despite the parties' strong position on the non-captive market the cooperation may not eliminate effective competition in the market for X, if switching costs between captive and non-captive use are small. However, only very rapid switching would counteract the high market share of 60 %. Otherwise this production venture raises serious competition concerns which cannot be outweighed even by significant economic benefits.

111. Example 4 concerns cooperation regarding an important intermediate product with spill-over effects on a downstream market.

112. Example 4

Situation: A and B set up a production joint venture for an intermediate product X. They will close their own factories, which have been manufacturing X, and will cover their needs of X exclusively from the joint venture. The intermediate product accounts for 50 % of the total costs of the final product Y. A and B each have a share of 20 % in the market for Y. There are two other significant suppliers of Y each with 15 % market share and several smaller competitors.

Analysis: Here the commonality of costs is high; furthermore, the parties would gain market power through coordination of their behaviour on the market Y. The case raises competition problems and the assessment is almost identical to example 1 although here the cooperation is taking place in an upstream market.

Reciprocal specialisation

113. Example 5

Situation: A and B each manufacture and supply the homogeneous products X and Y, which belong to different markets. A's market share of X is 28 % and of Y it is 10 %. B's share of X is 10 % and of Y it is 30 %. Because of scale economies they conclude a reciprocal specialisation agreement according to which A will in future only produce X and B will produce only Y. Both agree on cross-supplies so that they will both remain in the markets as suppliers. Due to the homogeneous nature of the products, distribution costs are minor. There are two other manufacturing suppliers of X and Y with market shares of roughly 15 % each, the remaining suppliers have 5-10 % shares.

Analysis: The degree of commonality of costs is extremely high, only the relatively minor distribution costs remain separate. Consequently, there is very little room for competition left. The parties would gain market power through coordination of their behaviour on the markets for X and Y. Furthermore, it is likely that the market supplies of Y from A and X from B will diminish over time. The case raises competition problems which the economies of scale are unlikely to outweigh.

The scenario may change if X and Y were heterogeneous products with a very high proportion of marketing and distribution costs (e.g. 65-70 % of total costs). Furthermore, if the offer of a complete range of the differentiated products was a condition for competing successfully, the withdrawal of one or more parties as suppliers of X and/or Y would be unlikely. In such a scenario the criteria for exemption may be fulfilled (provided that the economies are significant), despite the high market shares.

Subcontracting between competitors

114. Example 6

Situation: A and B are competitors in the market for the final product X. A has a market share of 15 %, B of 20 %. Both also produce the intermediate product Y, which is an input into the production of X, but is also used to produce other products. It accounts for 10 % of the cost of X. A only produces Y for internal consumption, while B is also selling Y to third party customers. Its market share for Y is 10 %. A and B agree on a subcontracting agreement, whereby A will purchase 60 % of its requirements of Y from B. It will continue to produce 40 % of its requirements internally to not lose the know-how related to the production of Y.

Analysis: As A has only produced Y for internal consumption, it first needs to be analysed if A is a realistic potential entrant into the merchant market for sales of Y to third parties. If this is not the case, then the agreement does not restrict competition with respect to Y. Spill-over effects into the market for X are also unlikely in view of the low degree of commonality of costs created by the agreement.

If A were to be regarded a realistic potential entrant into the merchant market for sales of Y to third parties, the market position of B in the market for Y would need to be taken into account. As B's market share is rather low, the result of the analysis would not change.

4. PURCHASING AGREEMENTS

4.1. Definition

115. This chapter focuses on agreements concerning the joint buying of products. Joint buying can be carried out by a jointly controlled company, by a company in which many firms hold a small stake, by a contractual arrangement or even looser form of cooperation.

116. Purchasing agreements are often concluded by small and medium-sized enterprises to achieve volumes and discounts similar to their bigger competitors. These agreements between small and medium-sized enterprises are therefore normally pro-competitive. Even if a moderate degree of market power is created, this may be outweighed by economies of scale provided the parties actually bundle volume.

117. Joint purchasing may involve both horizontal and vertical agreements. In these cases a two-step analysis is necessary. First, the horizontal agreements have to be assessed according to the principles described in the present guidelines. If this assessment leads to the conclusion that a cooperation between competitors in the area of purchasing is acceptable, a further assessment will be necessary to examine the vertical agreements concluded with suppliers or individual sellers. The latter assessment will follow the rules of the Block Exemption Regulation and the Guidelines on Vertical Restraints ([43]).

118. An example would be an association formed by a group of retailers for the joint purchasing of products. Horizontal agreements concluded between the members of the association or decisions adopted by the association have to be assessed first as a horizontal agreement according to the present guidelines. Only if this assessment is positive does it become relevant to assess the resulting vertical agreements between the association and an individual members or between the association and suppliers. These agreements are covered — up to a certain limit — by the block exemption for vertical restraints ([44]). Those agreements falling outside the vertical block exemption will not be presumed to be illegal but may need individual examination.

4.2. Relevant markets

119. There are two markets which may be affected by joint buying: First, the market(s) with which the cooperation is directly concerned, i.e. the relevant purchasing market(s). Secondly, the selling market(s), i.e. the market(s) downstream where the participants of the joint purchasing arrangement are active as sellers.

120. The definition of relevant purchasing markets follows the principles described in the Commission Notice on the definition of the relevant market and is based on the concept of substitutability to identify competitive constraints. The only difference to 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. These could be analysed for instance by examining the suppliers' reaction to a small but lasting price *decrease*. If the market is defined, the market share can be calculated as the percentage for which the purchases by the parties concerned account out of the total sales of the purchased product or service in the relevant market.

121. Example 1

A group of car manufacturers agree to buy product X jointly. Their combined purchases of X account for 15 units. All the sales of X to car manufacturers account for 50 units. However, X is also sold to manufacturers of products other than cars. All sales of X account for 100 units. Thus, the (purchasing) market share of the group is 15 %.

122. If the parties are in addition competitors on one or more selling markets, these markets are also relevant for the assessment. Restrictions of competition on these markets are more likely if the parties will achieve market power by coordinating their behaviour and if the parties have a significant proportion of their total costs in common. This is, for instance, the case if retailers which are active in the same relevant retail market(s) 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. The selling markets have to be defined by applying the methodology described in the Commission Notice on the definition of the relevant market.

4.3. **Assessment under Article 81(1)**

4.3.1. *Nature of the agreement*

4.3.1.1. Agreements that do not fall under Article 81(1)

123. By their very nature joint buying agreements will be concluded between companies that are at least competitors on the purchasing markets. If, however, competing purchasers cooperate who are not active on the same relevant market further downstream (e.g. retailers which are active in different geographic markets and cannot be regarded as realistic potential competitors), Article 81(1) will rarely apply unless the parties have a very strong position in the buying markets, which could be used to harm the competitive position of other players in their respective selling markets.

4.3.1.2. Agreements that almost always fall under Article 81(1)

124. Purchasing agreements only come under Article 81(1) by their nature if the cooperation does not truly concern joint buying, but serves as a tool to engage in a disguised cartel, i.e. otherwise prohibited price fixing, output limitation or market allocation.

4.3.1.3. Agreements that may fall under Article 81(1)

125. Most purchasing agreements have to be analysed in their legal and economic context. The analysis has to cover both the purchasing and the selling markets.

4.3.2. *Market power and market structures*

126. The starting point for the analysis is the examination of the parties' buying power. Buying power can be assumed if a purchasing agreement accounts for a sufficiently large proportion of the total volume of a purchasing market so that prices can be driven down below the competitive level or access to the market can be foreclosed to competing buyers. A high degree of buying power over the suppliers of a market may bring about inefficiencies such as quality reductions, lessening of innovation efforts, or ultimately sub-optimal supply. However, the primary concerns in the context of buying power are that lower prices may not be passed on to customers further downstream and that it may cause cost increases for the purchasers' competitors on the selling markets because either suppliers will try to recover price reductions for one group of customers by increasing prices for other customers or competitors have less access to efficient suppliers. Consequently, purchasing markets and selling markets are characterised by interdependencies as set out below.

Interdependencies between purchasing and selling market(s)

127. The cooperation of competing purchasers can appreciably restrict competition by means of creating buying power. Whilst the creation of buying power can lead to lower prices for consumers, buying power is not always pro-competitive and may even, under certain circumstances, cause severe negative effects on competition.

128. First, lower purchasing costs resulting from the exercise of buying power cannot be seen as pro-competitive, if the purchasers together have power on the selling markets. In this case, the cost savings are probably not passed on to consumers. The more combined power the parties have on their selling markets, the higher is the incentive for the parties to coordinate their behaviour as sellers. This may be facilitated if the parties achieve a high degree of commonality of costs through joint purchasing. For instance, if a group of large retailers buys a high proportion of their products together, they will have a high proportion of their total cost in common. The negative effects of joint buying can therefore be rather similar to joint production.

129. Secondly, power on the selling markets may be created or increased through buying power which is used to foreclose competitors or to raise rivals' costs. Significant buying power by one group of customers may lead to foreclosure of competing buyers by limiting their access to efficient suppliers. It can also cause cost increases for its competitors because suppliers will try to recover price reductions for one group of customers by increasing prices for other customers (e.g. rebate discrimination by suppliers of retailers). This is only possible if the suppliers of the purchasing markets also have a certain degree of market power. In both cases, competition in the selling markets can be further restricted by buying power.

130. There is no absolute threshold which indicates that a buying cooperation creates some degree of market power and thus falls under Article 81(1). However, in most cases, it is unlikely that market power exists if the parties to the agreement have a combined market share of below 15 % on the purchasing market(s) as well as a combined market share of below 15 % on the selling market(s). In any event, at that level of market share it is likely that the conditions of Article 81(3) explained below are fulfilled by the agreement in question.

131. A market share above this threshold does not automatically indicate that a negative market effect is caused by the cooperation but requires a more detailed assessment of the impact of a joint buying agreement on the market, involving factors such as the market concentration and possible countervailing power of strong suppliers. Joint buying that involves parties with a combined market share significantly above 15 % in a concentrated market is likely to come under Article 81(1), and efficiencies that may outweigh the restrictive effect have to be shown by the parties.

4.4. **Assessment under Article 81(3)**

4.4.1. *Economic benefits*

132. Purchasing agreements can bring about economic benefits such as economies of scale in ordering or transportation which may outweigh restrictive effects. If the parties together have significant buying or selling power, the issue of efficiencies has to be examined carefully. Cost savings that are caused by the mere exercise of power and which do not benefit consumers cannot be taken into account.

4.4.2. *Indispensability*

133. Purchasing agreements cannot be exempted if they impose restrictions that are not indispensable to the attainment of the above mentioned benefits. An obligation to buy exclusively through the cooperation can 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.

4.4.3. *No elimination of competition*

134. No exemption will be possible, if the parties are afforded the possibility of eliminating competition in respect of a substantial part of the products in question. This assessment has to cover buying and selling markets. The combined market shares of the parties can be regarded as a starting point. It then needs to be evaluated whether these market shares are indicative of a dominant position, and whether there are any mitigating factors, such as countervailing power of suppliers on the purchasing markets or potential for market entry in the selling markets. Where as a consequence of a purchasing agreement an undertaking is dominant or becoming dominant on either the buying or selling market, such an agreement which produces anti-competitive effects in the meaning of Article 81 can in principle not be exempted.

4.5. **Examples**

135. Example 2

Situation: Two manufacturers, A and B, decide to jointly buy component X. They are competitors on their selling market. Together their purchases represent 35 % of the total sales of X in the EEA, which is assumed to be the relevant geographic market. There are 6 other manufacturers (competitors of A and B on their selling market) accounting for the remaining 65 % of the purchasing market; one having 25 %, the others accounting for significantly less. The supply side is rather concentrated with 6 suppliers of component X, two with 30 % market share each, and the rest with between 10 and 15 % (HHI of 2300-2500). On their selling market, A and B achieve a combined market share of 35 %.

Analysis: Due to the parties' market power in their selling market, the benefits of possible cost savings may not be passed on to final consumers. Furthermore, the joint buying is likely to increase the costs of the parties' smaller competitors because the two powerful suppliers probably recover price reductions for the group by increasing smaller customers' prices. Increasing concentration in the downstream market may be the result. In addition, the cooperation may lead to further concentration among suppliers because smaller ones, which may already work near or below minimum optimal scale, may be driven out of business if they cannot reduce prices further. Such a case probably causes a significant restriction of competition which may not be outweighed by possible efficiency gains from bundling volume.

136. Example 3

Situation: 150 small retailers conclude an agreement to form a joint buying organisation. They are obliged to buy a minimum volume through the organisation which accounts for roughly 50 % of each retailer's total costs. The retailers can buy more than the minimum volume through the organisation, and they may also buy outside the cooperation. They have a combined market share of 20 % on each of the purchasing and the selling market(s). A and B are their two large competitors, A has a 25 % share on each of the markets concerned, B 35 %. The remaining smaller competitors have also formed a buying group. The 150 retailers achieve economies by combining a significant amount of volume and buying tasks.

Analysis: The retailers may achieve a high degree of commonality of costs if they ultimately buy more than the agreed minimum volume together. However, together they only have a moderate market position on the buying and the selling market. Furthermore, the cooperation brings about some economies of scale. This cooperation is likely to be exempted.

137. Example 4

Situation: Two supermarket chains conclude an agreement to jointly buy products which account for roughly 50 % of their total costs. On the relevant buying markets for the different categories of products the parties have shares between 25 % and 40 %, on the relevant selling market (assuming there is only one geographic market concerned) they achieve 40 %. There are five other significant retailers each with 10-15 % market share. Market entry is not likely.

Analysis: It is likely that this joint buying arrangement would have an effect on the competitive behaviour of the parties because coordination would give them significant market power. This is particularly the case if entry is weak. The incentive to coordinate behaviour is higher if the costs are similar. Similar margins of the parties would add an incentive to have the same prices. Even if efficiencies are caused by the cooperation, it is not likely to be exempted due to the high degree of market power.

138. Example 5

Situation: small cooperatives conclude an agreement to form a joint buying organisation. They are obliged to buy a minimum volume through the organisation. The parties can buy more than the minimum volume through the organisation, but they may also buy outside the cooperation. Each of the parties has a total market share of 5 % on each of the purchasing and selling markets, giving a combined market share of 25 %. There are two other significant retailers each with 20-25 % market share and a number of smaller retailers with market shares below 5 %.

Analysis: The setting up of the joint buying organisation is likely to give the parties a market position on both the purchasing and selling markets of a degree which enables them to compete with the two largest retailers. Moreover, the presence of these two other players with similar levels of market position is likely to result in the efficiencies of the agreement being passed on to consumers. In such a scenario the agreement is likely to be exempted.

5. COMMERCIALISATION AGREEMENTS

5.1. Definition

139. The agreements covered in this section involve cooperation between competitors in the selling, distribution or promotion of their products. These agreements can have a widely varying scope, depending on the marketing functions which are being covered by the cooperation. At one end of the spectrum, there is joint selling that leads 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 marketing function, such as distribution, service, or advertising.

140. The most important of these more limited agreements would seem to be distribution agreements. These agreements are generally covered by the Block Exemption Regulation and Guidelines on Vertical Restraints unless the parties are actual or potential competitors. In this case, the Block Exemption Regulation only covers non-reciprocal vertical agreements between competitors, if (a) the buyer, together with its connected undertakings, has an annual turnover not exceeding EUR 100 million, or (b) the supplier is a manufacturer and a distributor of products and the buyer is a distributor who is not also a manufacturer of products competing with the contract products, or (c) the supplier is a provider of services at several levels of trade, while the buyer does not provide competing services at the level of trade where it purchases the contract services [45]. If competitors agree to distribute their products on a reciprocal basis 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 collusion. The same is true for non-reciprocal agreements between competitors exceeding a certain size. These agreements have thus first to be assessed according to the principles set out below. If this assessment leads to the conclusion that a cooperation 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. This assessment should be based on the principles set out in the Guidelines on Vertical Restraints.

141. 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 cooperation. This can be for instance the case as regards joint production or joint purchasing. These agreements will be dealt with as in the assessment of those types of cooperation.

5.2. **Relevant markets**

142. To assess the competitive relationship between the cooperating parties, first the relevant product and geographic market(s) directly concerned by the cooperation (i.e. the market(s) to which products subject to the agreement belong) have to be defined. Secondly, a commercialisation agreement in one market may also affect the competitive behaviour of the parties in a neighbouring market closely related to the market directly concerned by the cooperation.

5.3. **Assessment under Article 81(1)**

5.3.1. *Nature of the agreement*

5.3.1.1. Agreements that do not fall under Article 81(1)

143. The commercialisation agreements covered by this section only fall under the competition rules if the parties to the agreements are competitors. If the parties clearly do not compete with regard to the products or services covered by the agreement, the agreement cannot create competition problems of a horizontal nature. However, the agreement can fall under Article 81(1) if it contains vertical restraints, such as restrictions on passive sales, resale price maintenance, etc. This also applies if a cooperation in commercialisation is objectively necessary to allow one party to enter a market it could not have entered individually, for example because of the costs involved. A specific application of this principle would be consortia arrangements that allow the companies involved to mount a credible tender for projects that they would not be able to fulfil, or would not have bid for, individually. As they are therefore not potential competitors for the tender, there is no restriction of competition.

5.3.1.2. Agreements that almost always fall under Article 81(1)

144. The principal competition concern about a commercialisation agreement between competitors is price fixing. Agreements limited to joint selling have as a rule the object and effect of coordinating the pricing policy of competing manufacturers. In this case they not only eliminate price competition between the parties but also restrict the volume of products to be delivered by the participants within the framework of the system for allocating orders. They therefore restrict competition between the parties on the supply side and limit the choice of purchasers and fall under Article 81(1).

145. This appreciation does not change if the agreement is non-exclusive. Article 81(1) continues to apply even where the parties are free to sell outside the agreement, as long as it can be presumed that the agreement will lead to an overall coordination of the prices charged by the parties.

5.3.1.3. Agreements that may fall under Article 81(1)

146. For commercialisation arrangements that fall short of joint selling there will be two major concerns. The first is that the joint commercialisation provides a clear opportunity for exchanges of sensitive commercial information particularly on marketing strategy and pricing. The second is that, depending on the cost

structure of the commercialisation, a significant input to the parties' final costs may be common. As a result the actual scope for price competition at the final sales level may be limited. Joint commercialisation agreements therefore can fall under Article 81(1) if they either allow the exchange of sensitive commercial information, or if they influence a significant part of the parties' final cost.

147. A specific concern related to distribution arrangements between competitors which are active in different geographic markets is that they can lead to or be an instrument of market partitioning. In the case of reciprocal agreements to distribute each other's products, the parties to the agreement allocate markets or customers and eliminate competition between themselves. The key question in assessing an agreement of this type is if the agreement in question is objectively necessary for the parties to enter each other's market. If it is, the agreement does not create competition problems of a horizontal nature. However, the distribution agreement can fall under Article 81(1) if it contains vertical restraints, such as restrictions on passive sales, resale price maintenance, etc. If the agreement is not objectively necessary for the parties to enter each other's market, it falls under 81(1). If the agreement is not reciprocal, the risk of market partitioning is less pronounced. It needs however to be assessed if the non-reciprocal agreement constitutes the basis for a mutual understanding to not enter each other's market or is a means to control access to or competition on the ‘importing’ market.

5.3.2. *Market power and market structure*

148. As indicated above, agreements that involve price fixing will always fall under Article 81(1) irrespective of the market power of the parties. They may, however, be exemptable under Article 81(3) under the conditions described below.

149. Commercialisation agreements between competitors which do not involve price fixing are only subject to Article 81(1) if the parties to the agreement 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 of below 15 %. In any event, at that level of market share it is likely that the conditions of Article 81(3) explained below are fulfilled by the agreement in question.

150. If the parties' combined market share is greater than 15 %, the likely impact of the joint commercialisation agreement on the market must be assessed. In this respect market concentration, as well as market shares will be a significant factor. The more concentrated the market the more useful information about prices or marketing strategy to reduce uncertainty and the greater the incentive for the parties to exchange such information ([46]).

5.4. **Assessment under Article 81(3)**

5.4.1. *Economic benefits*

151. The efficiencies to be taken into account when assessing whether a joint commercialisation agreement can be exempted will depend upon the nature of the activity. 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. The size of the efficiencies generated depends *inter alia* on the importance of the joint marketing activities for the overall cost structure of the product in question. Joint distribution is thus more likely to generate significant efficiencies for producers of widely distributed consumer products than for producers of industrial products which are only bought by a limited number of users.

152. In addition, the claimed efficiencies should 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 that would make an agreement exemptable.

153. Claimed efficiency benefits must be demonstrated. An important element in this respect would be the contribution by both parties of significant capital, technology, or other assets. Cost savings through reduced duplication of resources and facilities can also be accepted. If, on the other hand, the joint commercialisation represents no more than a sales agency with no investment, it is likely to be a disguised cartel and as such cannot fulfil the conditions of Article 81(3).

5.4.2. *Indispensability*

154. A commercialisation agreement cannot be exempted if it imposes restrictions that are not indispensable to the attainment of the abovementioned benefits. As discussed above, the question of indispensability is especially important for those agreements involving price fixing or the allocation of markets.

5.4.3. *No elimination of competition*

155. No exemption will be possible, if the parties are afforded the possibility of eliminating competition in respect of a substantial part of the products in question. In making this assessment, the combined market shares of the parties can be regarded as a starting point. One then needs to evaluate whether these market shares are indicative of a dominant position, and whether there are any mitigating factors, such as the potential for market entry. Where as a consequence of a commercialisation agreement an undertaking is dominant or becoming dominant, such an agreement which produces anti-competitive effects in the meaning of Article 81 can in principle not be exempted.

5.5. **Examples**

156. Example 1

Situation: 5 small food producers, each with 2 % market share of the overall food market, agree to: combine their distribution facilities; market under a common brand name; and sell their products at a common price. This involves significant investment in warehousing, transport, advertising, marketing and a sales force. It significantly reduces their cost base, representing typically 50 % of the price at which they sell, and allows them to offer a quicker, more efficient distribution system. The customers of the food producers are large retail chains.

Three large multinational food groups dominate the market, each with 20 % market share. The rest of the market is made up of small independent producers. The product ranges of the parties to this agreement overlap in some significant areas, but in no product market does their combined market share exceed 15 %.

Analysis: The agreement involves price fixing and thus falls under Article 81(1), even though the parties to the agreement cannot be considered as having market power. However, the integration of the marketing and distribution appears to provide significant efficiencies which are of benefit to customers both in terms of improved service, and lower costs. The question is therefore whether the agreement is exemptable under Article 81(3). To answer this question it must be established whether the price fixing is indispensable for the integration of the other marketing functions and the attainment of the economic benefits. In this case, the price fixing can be regarded as indispensable, as the clients — large retail chains — do not want to deal with a multitude of prices. It is also indispensable, as the aim — a common brand — can only be credibly achieved if all aspects of marketing, including price, are standardised. As the parties do not have market power and the agreement creates significant efficiencies it is compatible with Article 81.

157. Example 2

Situation: 2 producers of ball bearings, each having a market share of 5 %, create a sales joint venture which will market the products, determine the prices and allocate orders to the parent companies. They retain the right to sell outside this structure. Deliveries to customers continue to be made directly from the parents' factories. They claim that this will create efficiencies as the joint sales force can demonstrate the parties' products at the same time to the same client thus eliminating a wasteful duplication of sales efforts. In addition, the joint venture would, wherever possible, allocate orders to the closest factory possible, thus reducing transport costs.

Analysis: The agreement involves price fixing and thus falls under Article 81(1), even though the parties to the agreement cannot be considered as having market power. It is not exemptable under Article 81(3), as the claimed efficiencies are only cost reductions derived from the elimination of competition between the parties.

158. Example 3

Situation: 2 producers of soft drinks are active in 2 different, neighbouring Member States. Both have a market share of 20 % in their home market. They agree to reciprocally distribute each other's product in their respective geographic market.

Both markets are dominated by a large multi-national soft drink producer, having a market share of 50 % in each market.

Analysis: The agreement falls under Article 81(1) if the parties can be presumed to be potential competitors. Answering this question would thus require an analysis of the barriers to entry into the respective geographic markets. If the parties could have entered each other's market independently, then their agreement eliminates competition between them. However, even though the market shares of the parties indicate that they could have some market power, an analysis of the market structure indicates that this is not the case. In addition, the reciprocal distribution agreement benefits customers as it increases the available choice in each geographic market. The agreement would thus be exemptable even if it were considered to be restrictive of competition.

6. AGREEMENT ON STANDARDS

6.1. Definition

159. Standardisation agreements have as their primary objective the definition of technical or quality requirements with which current or future products, production processes or methods may comply [47]. Standardisation agreements can cover various issues, such as standardisation of different grades or sizes of a particular product or technical specifications in 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.

160. Standards related to the provision of professional services, such as rules of admission to a liberal profession, are not covered by these guidelines.

6.2. Relevant markets

161. Standardisation agreements produce their effects on three possible markets, which will be defined according to the Commission notice on market definition. First, the product market(s) to which the standard(s) relates. Standards on entirely new products may raise issues similar to those raised for R & D agreements, as far as market definition is concerned (see Point 2.2). Second, the service market for standard setting, if different standard setting bodies or agreements exist. Third, where relevant, the distinct market for testing and certification.

6.3. Assessment under Article 81(1)

162. Agreements to set standards [48] may be either concluded between private undertakings or set under the aegis of public bodies or bodies entrusted with the operation of services of general economic interest, such as the standards bodies recognised under Directive 98/34/EC [49]. The involvement of such bodies is subject to the obligations of Member States regarding the preservation of non-distorted competition in the Community.

6.3.1. *Nature of the agreement*

6.3.1.1. Agreements that do not fall under Article 81(1)

163. Where participation in standard setting is unrestricted and transparent, standardisation agreements as defined above, which set no obligation to comply with the standard or which are parts of a wider agreement to ensure compatibility of products, do not restrict competition. This normally applies to standards adopted by the recognised standards bodies which are based on non-discriminatory, open and transparent procedures.

164. No appreciable restriction exists for those standards that have a negligible coverage of the relevant market, as long as it remains so. No appreciable restriction is found either in agreements which pool together SMEs to standardise access forms or conditions to collective tenders or those that standardise aspects such as minor product characteristics, forms and reports, which have an insignificant effect on the main factors affecting competition in the relevant markets.

6.3.1.2. Agreements that almost always fall under Article 81(1)

165. Agreements that use a standard as a means amongst other parts of a broader restrictive agreement aimed at excluding actual or potential competitors will almost always be caught by Article 81(1). For instance, an agreement whereby a national association of manufacturers set a standard and put pressure on third parties not to market products that did not comply with the standard would be in this category.

6.3.1.3. Agreements that may fall under Article 81(1)

166. Standardisation agreements may be caught by Article 81(1) insofar as they grant the parties joint control over production and/or innovation, thereby restricting their ability to compete on product characteristics, while affecting third parties like suppliers or purchasers of the standardised products. The assessment of each agreement must take into account the nature of the standard and its likely effect on the markets concerned, on the one hand, and the scope of possible restrictions that go beyond the primary objective of standardisation, as defined above, on the other.

167. The existence of a restriction of competition in standardisation agreements depends upon the extent to which the parties remain free to develop alternative standards or products that do not comply with the agreed standard. Standardisation agreements may restrict competition where they prevent the parties from either developing alternative standards or commercialising products that do not comply with the standard. 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. Agreements that impose restrictions on marking of conformity with standards, unless imposed by regulatory provisions, may also restrict competition.

6.3.2. *Market power and market structures*

168. High market shares held by the parties in the market(s) affected will not necessarily be a concern for standardisation agreements. Their effectiveness is often proportional to the share of the industry involved in setting and/or applying the standard. On the other hand, standards that are not accessible to third parties may discriminate or foreclose third parties or segment markets according to their geographic scope of application. Thus, the assessment whether the agreement restricts competition will focus, necessarily on an individual basis, on the extent to which such barriers to entry are likely to be overcome.

6.4. **Assessment under Article 81(3)**

6.4.1. *Economic benefits*

169. The Commission generally takes a positive approach towards agreements that promote economic interpenetration in the common market or encourage the development of new markets and improved supply conditions. To materialise those economic benefits, the necessary information to apply the standard must be available to those wishing to enter the market and an appreciable proportion of the industry must be involved in the setting of the standard in a transparent manner. It will be for the parties to demonstrate that any restrictions on the setting, use or access to the standard provide economic benefits.

170. In order to reap technical or economic benefits, standards should not limit innovation. This will depend primarily on the lifetime of the associated products, in connection with the market development stage (fast growing, growing, stagnant . . .). The effects on innovation must be analysed on a case-by-case basis. The parties may also have to provide evidence that collective standardisation is efficiency-enhancing for the consumer when a new standard may trigger unduly rapid obsolescence of existing products, without objective additional benefits.

6.4.2. *Indispensability*

171. By their nature, standards will not include all possible specifications or technologies. In some cases, it would be necessary for the benefit of the consumers or the economy at large to have only one technological solution. However, this standard must be set on a non-discriminatory basis. Ideally, standards should be technology neutral. In any event, it must be justifiable why one standard is chosen over another.

172. All competitors in the market(s) affected by the standard should have the possibility of being involved in discussions. Therefore, participation in standard setting should be open to all, unless the parties demonstrate important inefficiencies in such participation or unless recognised procedures are foreseen for the collective representation of interests, as in formal standards bodies.

173. As a general rule there should be a clear distinction between the setting of a standard and, where necessary, the related R & D, and the commercial exploitation of that standard. Agreements on standards should cover no more than what is necessary to ensure their aims, whether this is technical compatibility or a certain level of quality. For instance, it should be very clearly demonstrated why it is indispensable to the emergence of the economic benefits that an agreement to disseminate a standard in an industry where only one competitor offers an alternative should oblige the parties to the agreement to boycott the alternative.

6.4.3. *No elimination of competition*

174. There will clearly be a point at which the specification of a private standard by a group of firms that are jointly dominant is likely to lead to the creation of a de facto industry standard. The main concern will then be to ensure that these standards are as open as possible and applied in a clear non-discriminatory manner. To avoid elimination of competition in the relevant market(s), access to the standard must be possible for third parties on fair, reasonable and non-discriminatory terms.

175. To the extent that private organisations or groups of companies set a standard or their proprietary technology becomes a de facto standard, then competition will be eliminated if third parties are foreclosed from access to this standard.

6.5. **Examples**

176. Example 1

Situation: EN 60603-7:1993 defines the requirements to connect television receivers to video-generating accessories such as video recorders and video games. Although the standard is not legally binding, in practice manufacturers both of television receivers and of video games use the standard, as the market requires so.

Analysis: Article 81(1) is not infringed. The standard has been adopted by recognised standards bodies, at national, European and international level, through open and transparent procedures, and is based on national consensus reflecting the position of manufacturers and consumers. All manufacturers are allowed to use the standard.

177. Example 2

Situation: A number of videocassette manufacturers agree to develop a quality mark or standard to denote the fact that the videocassette meets certain minimum technical specifications. The manufacturers are free to produce videocassettes which do not conform to the standard and the standard is freely available to other developers.

Analysis: Provided that the agreement does not otherwise restrict competition, Article 81(1) is not infringed, as participation in standard setting is unrestricted and transparent, and the standardisation agreement does not set an obligation to comply with the standard. If the parties. agreed only to produce videocassettes which conform to the new standard, the agreement would limit technical development and prevent the parties from selling different products, which would infringe Article 81(1).

178. Example 3

Situation: A group of competitors active in various markets which are interdependent with products that must be compatible, and with over 80 % of the relevant markets, agree to jointly develop a new standard that will be introduced in competition with other standards already present in the market, widely applied by their competitors. The various products complying with the new standard will not be compatible with existing standards. Because of the significant investment needed to shift and to maintain production under the new standard, the parties agree to commit a certain volume of sales to products complying with the new standard so as to create a 'critical mass' in the market. They also agree to limit their individual production volume of products not complying with the standard to the level attained last year.

Analysis: This agreement, owing to the parties' market power and the restrictions on production, falls under Article 81(1) while not being likely to fulfil the conditions of paragraph 3, unless access to technical information were provided on a non-discriminatory basis and reasonable terms to other suppliers wishing to compete.

7. ENVIRONMENTAL AGREEMENTS

7.1. Definition

179. Environmental agreements ([50]) are those by which the parties undertake to achieve pollution abatement, as defined in environmental law, or environmental objectives, in particular, those set out in Article 174 of the Treaty. Therefore, the target or the measures agreed need to be directly linked to the reduction of a pollutant or a type of waste identified as such in relevant regulations ([51]). This excludes agreements that trigger pollution abatement as a by-product of other measures.

180. Environmental agreements may set out standards on the environmental performance of products (inputs or outputs) or production processes ([52]). Other possible categories may include agreements at the same level of trade, whereby the parties provide for the common attainment of an environmental target such as recycling of certain materials, emission reductions, or the improvement of energy-efficiency.

181. Comprehensive, industry-wide schemes are set up in many Member States for complying with environmental obligations on take-back or recycling. Such schemes usually comprise a complex set of arrangements, some of which are horizontal, while others are vertical in character. To the extent that these arrangements contain vertical restraints they are not subject to these guidelines.

7.2. Relevant markets

182. The effects are to be assessed on the markets to which the agreement relates, which will be defined according to the Notice on the definition of the relevant market for the purposes of Community competition law. When the pollutant is not itself a product, the relevant market encompasses that of the product into which the pollutant is incorporated. As for collection/recycling agreements, in addition to their effects on the market(s) on which the parties are active as producers or distributors, the effects on the market of collection services potentially covering the good in question must be assessed as well.

7.3. Assessment under Article 81(1)

183. Some environmental agreements may be encouraged or made necessary by State authorities in the exercise of their public prerogatives. The present guidelines do not deal with the question of whether such State intervention is in conformity with the Member State's obligations under the Treaty. They only address the assessment that must be made as to the compatibility of the agreement with Article 81.

7.3.1. *Nature of the agreement*

7.3.1.1. Agreements that do not fall under Article 81(1)

184. Some environmental agreements are not likely to fall within the scope of the prohibition of Article 81(1), irrespective of the aggregated market share of the parties.

185. This may arise if no precise individual obligation is placed upon the parties or if they are loosely committed to contributing to the attainment of a sector-wide environmental target. In this latter case, the assessment will focus on the discretion left to the parties as to the means that are technically and economically available in order to attain the environmental objective agreed upon. The more varied such means, the less appreciable the potential restrictive effects.

186. Similarly, agreements setting the environmental performance of products or processes that do not appreciably affect product and production diversity in the relevant market or whose importance is marginal for influencing purchase decisions do not fall under Article 81(1). Where some categories of a product are banned or phased out from the market, restrictions cannot be deemed appreciable in so far as their share is minor in the relevant geographic market or, in the case of Community-wide markets, in all Member States.

187. Finally, agreements which give rise to genuine market creation, for instance recycling agreements, will not generally restrict competition, provided that and for as long as, the parties would not be capable of conducting the activities in isolation, whilst other alternatives and/or competitors do not exist.

7.3.1.2. Agreements that almost always come under Article 81(1)

188. Environmental agreements come under Article 81(1) by their nature if the cooperation does not truly concern environmental objectives, but serves as a tool to engage in a disguised cartel, i.e. otherwise prohibited price fixing, output limitation or market allocation, or if the cooperation is used as a means amongst other parts of a broader restrictive agreement which aims at excluding actual or potential competitors.

7.3.1.3. Agreements that may fall under Article 81(1)

189. Environmental agreements covering a major share of an industry at national or EC level are likely to be caught by Article 81(1) where they appreciably restrict the parties' ability to devise the characteristics of their products or the way in which they produce them, thereby granting them influence over each other's production or sales. In addition to restrictions between the parties, an environmental agreement may also reduce or substantially affect the output of third parties, either as suppliers or as purchasers.

190. For instance, environmental agreements, which may phase out or significantly affect an important proportion of the parties' sales as regards their products or production processes, may fall under Article 81(1) when the parties hold a significant proportion of the market. The same applies to agreements whereby the parties allocate individual pollution quotas.

191. Similarly, agreements whereby parties holding significant market shares in a substantial part of the common market appoint an undertaking as exclusive provider of collection and/or recycling services for their products, may also appreciably restrict competition, provided other actual or realistic potential providers exist.

7.4. **Assessment under Article 81(3)**

7.4.1. *Economic benefits*

192. The Commission takes a positive stance on the use of environmental agreements as a policy instrument to achieve the goals enshrined in Article 2 and Article 174 of the Treaty as well as in Community environmental action plans ([53]), provided such agreements are compatible with competition rules ([54]).

193. Environmental agreements caught by Article 81(1) may attain economic benefits which, either at individual or aggregate consumer level, outweigh their negative effects on competition. To fulfil this condition, there must be net benefits in terms of reduced environmental pressure resulting from the agreement, as compared to a baseline where no action is taken. In other words, the expected economic benefits must outweigh the costs ([55]).

194. Such costs include the effects of lessened competition along with compliance costs for economic operators and/or effects on third parties. The benefits might be assessed in two stages. Where consumers individually have a positive rate of return from the agreement under reasonable payback periods, there is no need for the aggregate environmental benefits to be objectively established. Otherwise, a cost-benefit analysis may be necessary to assess whether net benefits for consumers in general are likely under reasonable assumptions.

7.4.2. *Indispensability*

195. The more objectively the economic efficiency of an environmental agreement is demonstrated, the more clearly each provision might be deemed indispensable to the attainment of the environmental goal within its economic context.

196. An objective evaluation of provisions which might 'prima facie' be deemed not to be indispensable must be supported with a cost-effectiveness analysis showing that alternative means of attaining the expected environmental benefits, would be more economically or financially costly, under reasonable assumptions. For instance, it should be very clearly demonstrated that a uniform fee, charged irrespective of individual costs for waste collection, is indispensable for the functioning of an industry-wide collection system.

7.4.3. *No elimination of competition*

197. Whatever the environmental and economic gains and the necessity of the intended provisions, the agreement must not eliminate competition in terms of product or process differentiation, technological innovation or market entry in the short or, where relevant, medium run. For instance, in the case of exclusive collection rights granted to a collection/recycling operator who has potential competitors, the duration of such rights should take into account the possible emergence of an alternative to the operator.

7.5. Examples

198. Example

Situation: Almost all Community producers and importers of a given domestic appliance (e.g. washing machines) agree, with the encouragement of a public body, to no longer manufacture and import into the Community products which do not comply with certain environmental criteria (e.g. energy efficiency). Together, the parties hold 90 % of the Community market. The products which will be thus phased out of the market account for a significant proportion of total sales. They will be replaced with more environmentally friendly, but also more expensive products. Furthermore, the agreement indirectly reduces the output of third parties (e.g. electric utilities, suppliers of components incorporated in the products phased out).

Analysis: The agreement grants the parties control of individual production and imports and concerns an appreciable proportion of their sales and total output, whilst also reducing third parties' output. Consumer choice, which is partly focused on the environmental characteristics of the product, is reduced and prices will probably rise. Therefore, the agreement is caught by Article 81(1). The involvement of the public authority is irrelevant for this assessment.

However, newer products are more technically advanced and by reducing the environmental problem indirectly aimed at (emissions from electricity generation), they will not inevitably create or increase another environmental problem (e.g. water consumption, detergent use). The net contribution to the improvement of the environmental situation overall outweighs increased costs. Furthermore, individual purchasers of more expensive products will also rapidly recoup the cost increase as the more environmentally friendly products have lower running costs. Other alternatives to the agreement are shown to be less certain and less cost-effective in delivering the same net benefits. Varied technical means are economically available to the parties in order to manufacture products which do comply with the environmental characteristics agreed upon and competition will still take place for other product characteristics. Therefore, the conditions for an exemption under Article 81(3) are fulfilled.

(1) OJ L 53, 22.2.1985, p. 1.

(2) OJ L 306, 11.11.1997, p. 12.

(3) OJ L 53, 22.2.1985, p. 5.

(4) OJ L 304, 5.12.2000, p. 3.

(5) OJ L 304, 5.12.2000, p. 7.

(6) OJ C 75, 29.7.1968, p. 3.

(7) OJ C 43, 16.2.1993, p. 2.

(8) 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). The same reasoning may lead to the grouping of different geographic areas. However, when supply-side substitutability would entail the need to adjust significantly existing tangible and intangible assets, to make additional investments, to take strategic decisions or to incur time delays, a company will not be treated as a competitor but as a potential competitor (see below). See Commission Notice on the definition of the relevant market for the purposes of Community competition law (OJ C372, 9.12.1997, p. 5, paragraphs 20-23).

(9) 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. 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 (paragraph 24); see also the Commission's Thirteenth Report on Competition Policy, point 55 and Commission Decision 90/410/EEC in case Elopak/Metal Box-Odin (OJ L 209, 8.8.1990, p. 15). Market entry needs to take place sufficiently fast so that the threat of potential entry is a constraint on the market participants' behaviour. Normally, this means that entry has to occur within a short period. The Guidelines on Vertical Restraints (OJ C 291, 13.10.2000, p. 1, paragraph 26, consider a period of maximum 1 year for the purposes of application of the Block Exemption Regulation on Vertical Restraints (see footnote 11). However, in individual cases longer time periods can be taken into account. The time period needed by companies already active on the market to adjust their capacities can be used as a yardstick to determine this period.

(10) OJ L 336, 29.12.1999, p. 21.

(11) OJ C 291, 13.10.2000, p. 1.

(12) The delineation between horizontal and vertical agreements will be further developed in the chapters on joint purchasing (Chapter 4) and joint commercialisation (Chapter 5). See also the Guidelines on Vertical Restraints, paragraph 26 and 29.

(13) OJ L 395, 30.12.1989, p. 1. Corrected version OJ L 257, 21.9.1990, p. 13.

(14) OJ L 180, 9.7.1997, p. 1.

(15) Council Regulation 26/62 (OJ 30, 20.4.1962, p. 993) (agriculture).
Council Regulation (EEC) No 1017/68, (OJ L 175, 23.7.1968, p. 1) (transport by rail road and inland waterway);
Council Regulation (EEC) No 4056/86, (OJ L 378, 31.12.1986, p. 4) (maritime transport);
Council Regulation (EEC) No 3975/87, (OJ L 374, 31.12.1987, p. 1) (air transport);
Council Regulation (EEC) No 3976/87, (OJ L 374, 31.12.1987, p. 9) (air transport);
Commission Regulation (EEC) No 1617/93, (OJ L 155, 26.6.1993, p. 18) (Block exemption concerning joint planning and coordination of schedules, joint operations, consultation on passenger and cargo tariffs on scheduled air services and slot allocation at airports);
Council Regulation (EEC) No 479/92, (OJ L 55, 29.2.1992 p. 3) (Liner shipping companies);
Commission Regulation (EC) No 870/95, (OJ L 89, 21.4.1995, p. 7) (Block exemption covering certain agreements between liner shipping companies);
Council Regulation (EEC) No 1534/91, (OJ L 143, 7.6.1991, p. 1) (insurance sector);
Commission Regulation (EEC) No 3932/92, (OJ L 398, 31.12.1992, p. 7) (Block exemption covering certain agreements in the insurance sector).

(16) See Notice on agreements of minor importance (OJ C 372, 9.12.1997, p. 13).

(17) Companies may have significant market power below the level of market dominance, which is the threshold for the application of Article 82.

(18) This does, however, exceptionally not apply to a production joint venture. It is inherent to the functioning of such a joint venture that decisions on output are taken jointly by the parties. If the joint venture also markets the jointly manufactured goods, then decisions on prices need to be taken jointly by the parties to such an agreement. In this case, the inclusion of provisions on prices or output does not automatically cause the agreement to fall under Article 81(1). The provisions on prices or output will have to be assessed together with the other effects of the joint venture on the market to determine the applicability of Article 81(1) (see paragraph 90).

(19) See Commission Notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).

(20) Market shares should normally be calculated on the basis of the market sales value (see Article 6 of the R & D Block Exemption Regulation and Article 6 of the Specialisation Block Exemption Regulation). In determining the market share of a party in a given market, account must be taken of the undertakings which are connected to the parties (see point 2 of Article 2 of the R & D Block Exemption Regulation and point 2 of Article 2 of the Specialisation Block Exemption Regulation).

(21) If there are more than two parties, then the collective share of all cooperating competitors has to be significantly greater than the share of the largest single participating competitor.

(22) A market consisting of four firms with shares of 30 %, 25 %, 25 % and 20 %, has a HHI of 2550 (900+625+625+400) pre-cooperation. If the first two market leaders would cooperate, the HHI would change to 4050 (3025+625+400) post-cooperation. The HHI post-cooperation is relevant for the assessment of the possible market effects of a cooperation.

([23]) E.g. the three-firm concentration ratio CR3 is the sum of the market shares of the leading three competitors in a market.

([24]) For market definition see the Commission Notice on the definition of the relevant market.

([25]) See Commission Notice on the definition of the relevant market; see also, for example, Commission Decision 94/811/EC of 8 June 1994 in Case No IV/M269 — Shell/Montecatini (OJ L 332, 22.12.1994, p. 48).

([26]) Article 4(2) of the R & D Block Exemption Regulation.

([27]) Article 4(1) of the R & D Block Exemption Regulation.

([28]) Article 7(e) of the R & D Block Exemption Regulation.

([29]) Article 4(3) of the R & D Block Exemption Regulation.

([30]) An R & D cooperation between non-competitors can however produce foreclosure effects under Article 81(1) if it relates to an exclusive exploitation of results and if it is concluded between firms, one of which has significant market power with respect to key technology.

([31]) Pursuant to Article 4(2)(3) of Regulation No 17, agreements which have as their sole object joint research and development need not to, but may, be notified to the Commission.

([32]) See Art. 3(2) of the R & D Block Exemption Regulation.

([33]) See Art. 3(2) of the R & D Block Exemption Regulation.

([34]) As indicated above, joint ventures which fall under the Merger Regulation are not the subject of these guidelines. Full-function joint ventures below Community dimension are normally dealt with by the competition authorities of the Member States. The application of Regulation No 17 could be relevant only where such a full-function joint venture would lead to a restriction of competition resulting from the coordination of the parent companies outside the joint venture ('spill-over effect'). In this respect, the Commission has declared that it will leave the assessment of such operations to the Member States as far as possible (see Statement for the Council Minutes on Regulation (EC) No 1310/97, pt. 4).

([35]) Article 2(4) of the Block Exemption Regulation on Vertical Restraints.

([36]) Article 2(3) of the Block Exemption Regulation on Vertical Restraints. See also Guidelines on Vertical Restraints, paragraph 33, which notes that subcontracting arrangements between non-competitors 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 on Vertical Restraints.

([37]) If a subcontracting agreement between competitors stipulates that the contractor will cease production of the product to which the agreement relates, the agreement constitutes a unilateral specialisation agreement which is covered, subject to certain conditions, by the Specialisation Block Exemption Regulation.

([38]) Notice concerning the assessment of certain subcontracting agreements in relation to Article 85(1) of the EEC Treaty, OJ C 1, 3.1.1979, p. 2.

([39]) As also referred to in Article 2(4) of the Merger Regulation.

([40]) As any subcontracting agreement such an agreement can however fall under Article 81(1) if it contains vertical restraints, such as restrictions on passive sales, resale price maintenance, etc.

([41]) A production joint venture which also carries out joint distribution is, however, in most of the cases a full-function joint venture.

([42]) Pursuant to Article 4(2)(3) of Council Regulation No 17, agreements which have as their sole object specialisation in the manufacture of products need, under certain conditions, not to be notified to the Commission. They may, however, be notified.

([43]) See Guidelines on Vertical Restraints, paragraph 29.

([44]) Article 2(2) of Block Exemption Regulation on Vertical Restraints.

([45]) Article 2(4) of Block Exemption Regulation on Vertical Restraints.

([46]) The exchange of sensitive and detailed information which takes place in an oligopolistic market might as such be caught by Article 81(1). The judgments of 28 May 1998 in the 'Tractor' cases (C-8/958 P: New Holland Ford and C-7/95 P: John Deere) and of 11 March 1999 in the 'Steel Beams' cases (T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94) provide useful clarification in this respect.

([47]) Standardisation can take different forms, ranging from the adoption of national consensus based standards by the recognised European or national standards bodies, through consortia and fora, to agreements between single companies. Although Community law defines standards in a narrow way, these guidelines qualify as standards all agreements as defined in this paragraph.

([48]) Pursuant to Article 4(2)(3) of Regulation No 17, agreements which have as their sole object the development or the uniform application of standards and types need not to, but may, be notified to the Commission.

([49]) Directive 98/34/EC of the European Parliament and of the Council on 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ L 204, 21.7.1998, p. 37).

([50]) The term 'agreement' is used in the sense defined by the Court of Justice and the Court of First Instance in the case law on Article 81. It does not necessarily correspond to the definition of an 'agreement' in Commission documents dealing with environmental issues such as the Communication on environmental agreements COM(96) 561 final of 27.11.1996.

([51]) For instance, a national agreement phasing out a pollutant or waste identified as such in relevant Community directives may not be assimilated to a collective boycott on a product which circulates freely in the Community.

([52]) To the extent that some environmental agreements could be assimilated to standardisation, the same assessment principles for standardisation apply to them.

([53]) Vth Environmental Action Programme (OJ C 138, 17.5.1993), p. 1; European Parliament and Council Decision No 2179/98/EC of 24 September 1998 (OJ L 275, 10.10.1998, p. 1).

([54]) Communication on environmental agreements COM(96) 561 final of 27.11.1996, paragraphs 27-29 and Article 3(1)f of EP and Council Decision *ut supra*. The communication includes a 'Checklist for Environmental Agreements' identifying the elements that should generally be included in such an agreement.

([55]) This is consistent with the requirement to take account of the potential benefits and costs of action or lack of action set forth in Article 174(3) of the Treaty and Article 7(d) of European Parliament and Council Decision *ut supra*.

Commission finalises new competition rules for distribution

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Brussels, 24 May 2000

Commission finalises new competition rules for distribution

The European Commission has put into place today the last building block of its new competition rules concerning supply and distribution agreements. It approved a set of Guidelines on "Vertical Restraints" which complement the new Block Exemption Regulation decided in December 1999. (1) ***Guidelines and Block Exemption Regulation together form the basis for a more economic and less regulatory competition policy towards "vertical agreements". These are agreements for the sale or purchase of goods or services between companies operating at different levels of the production or distribution chain. The reform mainly concerns industrial supply agreements, exclusive and selective distribution agreements, franchising agreements and single branding agreements in, for instance, the beer and petrol sectors. Such agreements are vital to the functioning of the economy. This reform of a key area of competition policy is part of the wider review undertaken by the Commission to modernise its rules on competition.*** (2)

"This important reform confirms the commitment of the Commission to review and modernise the Community rules on competition", Commissioner Mario Monti stated. "The aim is to simplify our rules and reduce the regulatory burden for companies, while ensuring a more effective control of vertical restraints implemented by companies holding significant market power. This will allow the Commission to concentrate in the future on important cases, in co-operation with the Member States, who will play an increased role in the application of Community competition rules".

The new rules will apply from 1 June 2000 and replace three old Block Exemption Regulations applicable to exclusive distribution, exclusive purchasing and franchising agreements respectively (3). Existing agreements will continue to benefit from the old Block Exemption Regulations until the end of 2001. The block exemption regulation for motor vehicle distribution and servicing agreements which expires in September 2002 is not affected by the new rules.

"Vertical agreements" may contain certain restrictions to competition which, in the absence of significant market power by the companies involved, nevertheless generally improve production and distribution of the goods and services concerned. However, such agreements can also have negative effects on the market, in particular by partitioning markets or by foreclosing markets.

The new rules embody a shift from the formalistic regulatory approach underlying the old legislation towards a more economic approach in the assessment of vertical agreements under the EU competition rules. The basic aim of this new approach is to simplify the rules applicable to supply and distribution agreements and to reduce the regulatory burden, especially for companies lacking market power like SMEs, while ensuring a more effective control of agreements entered into by companies holding significant market power. The new policy is based on a single Regulation with a wide scope of application, which block-exempts supply and distribution agreements concerning final and intermediary goods as well as services. The new Block Exemption Regulation allows companies whose market share is below 30% to benefit from a so-called safe harbour under the Community competition rules.

The safe harbour below 30% market share offers companies the freedom to create supply and distribution arrangements best suited to their individual commercial interests and to adapt to the changing economic conditions. However, the Block Exemption Regulation does not apply to two sets of restrictions.

The first set concerns the so-called hard-core restrictions. Companies are not allowed to use these restrictions in their agreements. In particular:

- a producer may not impose on its distributors at which price to resell its products. However, maximum and recommended prices are normally permissible.
- a producer may not restrict its distributors selling to any customer if it is an unsolicited order (passive sales). This means that each distributor must be free to respond to a request for the product or service made by any customer inside the Community. Distributors must be left free to also use the Internet to respond to such requests.
- a producer applying a selective distribution system, for instance in the field of cosmetics, may neither restrict active nor restrict passive selling by the authorised distributors to end-users or other authorised distributors.
- a producer buying components for incorporation in its own products, for instance a component for the manufacture of a household appliance, may not prevent the supplier of the components from selling these as spare parts to end-users or independent repairers.

These restrictions are prohibited in order to maintain free price competition between distributors for the benefit of consumers and to guarantee the consumers' right to purchase goods and services wherever they want inside the Community. The Commission will strictly enforce these prohibition rules that can also be applied directly by national competition authorities and national courts. Violations of these rules can be fined and give rise to claims of damages.

The second set of restrictions not covered by the new Regulation concerns certain restrictions which are not exempted but which may under certain circumstances nonetheless be compatible with the EC competition rules. The most important concerns non-compete obligations - requiring distributors to resell only the brands of one supplier - when their duration exceeds five years. Such agreements are not covered by the new Block Exemption Regulation as they may have a strong foreclosing effect on the market. In the Guidelines it is described under which circumstances long-term investments may justify a longer duration of non-compete obligations.

Above the 30% market share threshold, vertical agreements will not be covered by the new Block Exemption Regulation, but are not automatically presumed to be illegal either. They may require an individual examination under Article 81 of the Treaty which spells out the conditions under which agreements between companies may be exempted from EC competition rules. Companies in that situation are asked to do a self-assessment of the possible consequences of their vertical agreements under the law. The Guidelines assist them in carrying out such an assessment under the EC competition rules.

Background

It should be recalled that the new competition rules are the result of an in-depth policy review the main steps of which were the publication of a Green Paper in January 1997 and the publication, in September 1998, of a Communication on the application of EC competition rules to vertical restraints. (4) The wide ranging consultation assisted the Commission to set out in the latter document the framework for the proposed policy reform.

The Guidelines assist companies in carrying out their own assessment under the EC competition rules by explaining:

- which vertical agreements generally do not distort competition and therefore fall outside Article 81(1). This concerns in particular agreements between SMEs, true agency agreements and agreements where neither the supplier nor the buyer holds a significant degree of market power;

- which vertical agreements benefit from the safe harbour created by the Block Exemption Regulation. This is achieved by describing the conditions for application of the Block Exemption Regulation;

- which circumstances may require the benefit of the Block Exemption Regulation to be withdrawn by the Commission or Member States authorities;

- a number of market definition and market share calculation issues that may arise when companies apply the 30% market share threshold for application of the Block Exemption Regulation;

- the enforcement policy of the Commission in cases not covered by the Block Exemption Regulation. A general framework of analysis is provided and this framework of analysis is applied to the most important specific vertical restraints, such as single branding, exclusive distribution and selective distribution.

The new policy will increase the freedom to contract, especially for small and medium sized companies and generally for companies without market power. It will take away the strait-jacket imposed by the old Block Exemption Regulations.

The guidelines will be revised in four years time in view of market developments and experience gathered by the Commission in applying the new policy.

As regards the automobile sector, it should be recalled that, at the time when this policy review exercise was launched in 1997, the Block Exemption Regulation No 1475/95 concerning car distribution had been in force for only two years. Furthermore, the car Regulation expires on the 30.09.2002, i.e. later than the old Block Exemption Regulations on exclusive distribution, exclusive purchasing and franchising. The Commission decided therefore to exclude this sector from the current policy review. During the discussions before the Council on the Commission's proposals in the field of vertical restraints, Member States were concerned not to prejudge the choice of the future exemption regime for car distribution. Thus, the Commission formally undertook to consult the Advisory Committee and industry immediately after having established an ad hoc report pursuant to Article 11 of Regulation n° 1475/95 (which is due by the end of 2000) and before deciding on the future exemption regime for the car sector.

The texts of the new Block Exemption Regulation and of the Guidelines are available on the internet at the following address:

http://europa.eu.int/comm/dg04/lawenten/en/entente3.htm#iii_1

(1) **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. 21-25.**

(2) **See in particular the plans of the Commission to modernize the procedural aspects of EC competition policy (Commission White Paper) and its review of EC competition policy towards horizontal agreements (OJ C 118, 27.4.2000).**

(3) **Commission Regulations (EEC) No 1983/83, OJ L 173, 30.6.1983, p. 1, (EEC) No 1984/83, OJ L 173, 30.6.1983, p. 5, and (EEC) No 4087/88, OJ L 359, 28.12.1988, p. 46.**

(4) **Respectively published as documents COM (96) 721 final and COM (98) 544 final.**

European
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Competition policy in Europe

The competition rules for supply and distribution agreements

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European Commission

A great deal of additional information on the European Union is available on the Internet. It can be accessed through the Europa server (http://europa.eu.int).

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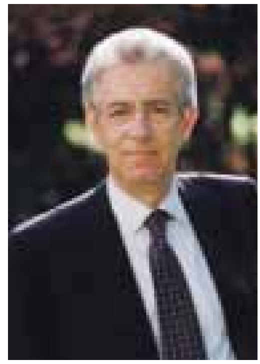

Foreword by Mario Monti

Member of the European Commission
in charge of competition policy

Distribution is a crucial sector of the European economy, not only because of its size and the number of people that it employs, but also because of its relevance for other sectors (i.e. almost all goods reach the final consumer via a distribution channel). Keeping distribution markets open and competitive, therefore, is essential to the welfare of Europe.

On 1 June 2000, new European competition rules on distribution and supply agreements — known as 'vertical agreements' in competition jargon — entered into force. These rules brought a clear economic approach to this area of competition law. They allow companies a large freedom to choose their preferred distribution format but, at the same time, they make it clear that certain practices that hinder access to markets or restrict competition will not be allowed. It is also ensured that the Commission and national competition authorities can take effective action to prevent these restrictive practices.

This guide has two objectives: to inform the public about the European competition rules for vertical agreements and, at the same time, to increase compliance with these rules. By summarising the rules, this guide should help businessmen, lawyers and consumers understand the application of EC competition law in this important field and, therefore, to respect it. A better understanding will also enable consumers and companies to identify illegal practices and to inform the Commission and national competition authorities about them via complaints or other informal contacts. Such information is of great help to combat illegal practices that distort competition.

Introduction

The goal of the Community's competition policy is to protect and develop effective competition in the common market. Competition is a basic mechanism of the market economy involving supply and demand. Suppliers (producers, traders) offer goods or services on the market in an endeavour to meet demand (from intermediate customers or consumers). Demand seeks the best combination of quality and price for the products it requires. Rivalry between suppliers (i.e. competition) leads to the most efficient response to demand. In addition to being a simple and efficient means of guaranteeing consumers the best choice in terms of quality and price of goods and services, it also forces firms to strive for competitiveness and economic efficiency.

The legislative framework of European competition policy is provided by the EC Treaty (Articles 81–89). Further rules are provided by Council and Commission regulations. European competition policy comprises five main areas of action:

1) the prohibition of agreements which restrict competition (Article 81)
2) the prohibition of abuses of a dominant position (Article 82)
3) the prohibition of mergers which create or strengthen a dominant position (merger regulation)
4) the liberalisation of monopolistic sectors (Article 86)
5) the prohibition of State aid (Articles 87 and 88).

Vertical agreements

Article 81 of the EC Treaty applies to agreements that may affect trade between Member States and which prevent, restrict or distort competition. The first condition for Article 81 to apply is that the agreements in question are capable of having an appreciable effect on trade between Member States. The Commission considers that agreements between small and medium-sized enterprises (SMEs) are rarely capable of appreciably affecting trade between Member States ([1]). Therefore, such agreements generally do not need to comply with the European competition rules. Where the first condition is met, Article 81(1) prohibits agreements which appreciably restrict or distort competition. Article 81(3) renders this prohibition inapplicable for those agreements which create sufficient benefits to outweigh the anti-competitive effects. Such agreements are said to be exempted under Article 81(3).

Article 81

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

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

([1]) See the Commission Notice on agreements of minor importance (*Official Journal of the European Communities*, C 368, 22.12.2001, p. 13). In the Annex to Commission Recommendation 96/280/EC (*Official Journal of the European Communities*, L 107, 30.4.1996, p. 4), SMEs are defined as companies 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. This recommendation is to be revised. It is envisaged to increase the annual turnover threshold to EUR 50 million and the annual balance sheet total threshold to EUR 43 million.

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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

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

– any agreement or category of agreements between undertakings;

– any decision or category of decisions by associations of undertakings;

– any concerted practice or category of concerted practices;

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

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Vertical agreements are agreements for the sale and purchase of goods or services which are entered into between companies operating at different levels of the production or distribution chain. Distribution agreements between manufacturers and wholesalers or retailers are typical examples of vertical agreements. However, an industrial supply agreement between a manufacturer of a component and a producer of a product using that component is also a vertical agreement.

Vertical agreements which simply determine the price and quantity for a specific sale and purchase transaction do not normally restrict competition. However, a restriction of competition may occur if the agreement contains restraints on the supplier or the buyer (hereinafter referred to as 'vertical restraints'). Examples of such vertical restraints are an obligation on the buyer not to purchase competing brands (i.e. non-compete obligation) or an obligation on the supplier to only supply a particular buyer (i.e. exclusive supply).

Vertical restraints may not only have negative effects but also positive effects. They may for instance help a manufacturer to enter a new market, or avoid the situation whereby one distributor 'free rides' on the promotional efforts of another distributor, or allow a supplier to depreciate an investment made for a particular client.

Whether a vertical agreement actually restricts competition and whether in that case the benefits outweigh the anti-competitive effects will often depend on the market structure. In principle, this requires an individual assessment. However,

the Commission has adopted Regulation (EC) No 2790/1999, 'the Block Exemption Regulation' (the BER) ([2]), which entered into force on 1 June 2000 and which provides a safe harbour for most vertical agreements. **The BER renders by block exemption the prohibition of Article 81(1) inapplicable to vertical agreements entered into by companies with market shares not exceeding 30 %.** The Commission has also published 'Guidelines on vertical restraints' (the Guidelines) ([3]). These describe the approach taken towards vertical agreements not covered by the BER. This guide sets out the key features of these new rules for vertical agreements. The flow chart at the end of this guide may also help to apply the rules and will facilitate reading this guide.

(2) *Official Journal of the European Communities*, L 336, 29.12.1999. You can also find the text on Competition DG's web site (http://europa.eu.int/comm/competition/antitrust/legislation/entente3_en.html#iii_1).

(3) *Official Journal of the European Communities*, C 291, 13.10.2000. You can also find the text on Competition DG's web site, see the address in footnote 2.

Agency agreements

The Guidelines set out criteria for the assessment of **agency agreements** ([4]). Genuine agency agreements do not fall within the scope of Article 81(1). The determining factor in assessing whether Article 81(1) is applicable to an agency agreement 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.

Two types of financial or commercial risk are material to this assessment. 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 a particular type of contract. Such investments (for example, the petrol storage tank in the case of petrol retailing) are usually irrecoverable costs, because upon leaving the particular field of activity the investment cannot be sold or used for other activities, other than at a significant loss.

The agency agreement is considered a genuine agency agreement falling outside Article 81(1) if the agent does not bear any of these two types of risk. 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.

([4]) Guidelines, paragraphs 12–22.

The **Block Exemption** Regulation

Scope of application of the Block Exemption Regulation

The Block Exemption Regulation (BER) applies in principle to all vertical agreements concerning the sale of goods or services ([5]). It does not apply to rent and lease agreements, as no sale takes place. For the same reason, the BER does not apply to agreements concerning the assignment or licensing of intellectual property rights like patents. Provisions relating to intellectual property rights are, however, covered by the BER if they are ancillary to a vertical agreement and facilitate the purchase, sale or resale of the contract goods or services by the buyer ([6]). An example would be a manufacturer who facilitates the marketing of its products by licensing the use of its trade mark to the distributor of its products.

Although the BER applies in principle to all vertical agreements, it does not apply to vertical agreements concluded between competitors. For instance, an agreement between two brewers active in different countries, where each brewer becomes the exclusive importer and distributor of the other brewer's beer in his home market, is not covered. The competition concern in such cases is a possible restriction of competition between two competitors. This issue is dealt with in the Commission's 'Guidelines on horizontal cooperation agreements' ([7]). Vertical agreements between competitors are, however, covered by the BER if the agreement is non-reciprocal and the buyer has a turnover not

([5]) The only exception concerns the sale of cars, trucks and buses, covered by a sector-specific block exemption granted by Commission Regulation (EC) No 1475/95 (*Official Journal of the European Communities*, L 145, 29.6.1995). This sector-specific regulation is currently being reviewed by the Commission.

([6]) See the Guidelines, paragraphs 30–44.

([7]) 'Guidelines on the applicability of Article 81 to horizontal cooperation agreements' (*Official Journal of the European Communities*, C 3, 6.1.2001). These guidelines are also available on Competition DG's web site (http://europa.eu.int/comm/competition/antitrust/legislation/entente3_en.html#spec).

exceeding EUR 100 million or the buyer is not a competing manufacturer but only a competitor of the supplier at the distribution level (i.e. a manufacturer sells his products directly and via distributors) ([8]).

Requirements for application of the Block Exemption Regulation

The BER contains certain requirements that have to be fulfilled before it renders the prohibition of Article 81(1) inapplicable for a particular vertical agreement. The first requirement is that the agreement does not contain any of the hardcore restrictions set out in the BER. The second requirement concerns the market share cap of 30 %. Thirdly, the BER contains conditions relating to three specific restrictions.

The hardcore restrictions

The BER contains five hardcore restrictions that lead to the exclusion of the whole agreement from the benefit of the BER, even if the market share of the supplier or buyer is below 30 %. Individual exemption of vertical agreements containing such hardcore restrictions is unlikely. Hardcore restrictions are considered to be so serious that they are almost always prohibited.

The first hardcore restriction concerns **resale price maintenance**: a supplier is not allowed to fix the price at which distributors can resell his products. However, the imposition of maximum resale prices or the recommendation of resale prices is normally not prohibited ([9]).

The second hardcore restriction concerns **restrictions concerning the territory into which or the customers to whom the buyer may sell**. This hardcore restriction relates to market partitioning by territory or by customer. Distributors must remain free to decide where and to whom they sell. The BER contains exceptions to this rule, which, for instance, enable companies to operate an exclusive distribution system or a selective distribution system. However, passive

([8]) Guidelines, paragraphs 26 and 27. Non-reciprocal agreement means that one manufacturer becomes the distributor of the products of another manufacturer but the latter does not become the distributor of the products of the first manufacturer.
([9]) Guidelines, paragraphs 47 and 48.

sales, i.e. sales in response to unsolicited orders including general advertising and sales over the Internet, must always remain free ([10]).

The third and fourth hardcore restrictions concern **selective distribution**. Firstly, selected distributors can in no way be restricted in the end-users to whom they may sell. Selective distribution therefore can not be combined with exclusive distribution, with the exception that it is allowed to apply a location clause: the supplier may commit himself to supply only one distributor in a given territory and can require the distributor to sell only from a given location. Secondly, the appointed distributors must remain free to sell or purchase the contract goods to or from other appointed distributors within the network. This means that appointed distributors cannot be forced to purchase the contract goods exclusively from the supplier ([11]).

The fifth hardcore restriction concerns agreements that prevent or restrict end-users, independent repairers and service providers from obtaining **spare parts** directly from the manufacturer of the spare parts. An agreement between a manufacturer of spare parts and a buyer which incorporates these parts into its own products (original equipment manufacturer) may not prevent or restrict sales by the manufacturer of these spare parts to end users, independent repairers or service providers ([12]).

The 30 % market share cap

A vertical agreement is covered by the BER if the supplier of the goods or services does not have a market share exceeding 30 %. It is the market share of the supplier on the relevant supply market that is decisive for the application of the block exemption. However, there is one exception. Where the supplier enters into an obligation to supply only one buyer throughout the Community, it is the market share of the buyer on the relevant purchase market, and only that market share, which is decisive for the application of the BER. Thus in the latter case, the agreement is covered if the buyer of the products does not purchase more than 30 % of the relevant purchase market.

([10]) Guidelines, paragraphs 49–52.
([11]) Guidelines, paragraphs 53–55.
([12]) Guidelines, paragraph 56.

In order to calculate the market share, it is necessary to determine the relevant product market and the relevant geographic market ([13]). On the relevant market, the supplier calculates its market share by comparing its turnover achieved on that market with the total value of sales on that market. A buyer calculates its market share by comparing its purchases on the relevant market with the total purchases on that market.

In addition to the BER and the Guidelines the Commission has adopted a 'Notice on agreements of minor importance' ([14]). Whereas the BER provides an exemption from the Article 81(1) prohibition because the positive effects of the agreement outweigh the negative effects, this notice quantifies, with the help of lower market share thresholds, what is not an appreciable restriction of competition in the first place and for that reason not prohibited by Article 81(1). A vertical agreement between companies whose market share on the relevant market does not exceed 15 % ('de minimis' threshold) is generally considered not to have appreciable anti-competitive effects, unless the agreement contains a hardcore restriction. Where the market is foreclosed by the application of parallel networks of similar vertical agreements by several companies, the 'de minimis' threshold is set at 5 %. These 'de minimis' thresholds are important in relation to the conditions described below. These conditions do not apply to agreements below the 'de minimis' thresholds. This is especially relevant for small and medium-sized enterprises.

The conditions

The BER applies to all vertical restraints other than the abovementioned hardcore restraints. However, it imposes specific conditions on three vertical restraints: non-compete obligations during the contract; non-compete obligations after termination of the contract and the exclusion of specific brands in a selective distribution system. When the conditions are not fulfilled, these vertical restraints are excluded from the exemption by the BER. However, the BER

([13]) For guidance, see the Commission Notice on definition of the relevant market (*Official Journal of the European Communities*, C 372, 9.12.1997). This notice is also available on Competition DG's web site (http://europa.eu.int/comm/competition/antitrust/relevma_en.html). See also paragraphs 88–99 of the Guidelines.

([14]) See the Commission Notice on agreements of minor importance (*Official Journal of the European Communities*, C 368, 22.12.2001, p. 13). This notice is also available on Competition DG's web site (http://europa.eu.int/comm/competition/antitrust/deminimis/).

continues to apply to the rest of the vertical agreement if that part is severable (i.e. can operate independently) from the non-exempted vertical restraints.

The first exclusion from exemption concerns **non-compete obligations** of indefinite duration or which exceed five years ([15]). Non-compete obligations are defined in the BER as obligations that require the buyer to purchase from the supplier or from an undertaking designated by the supplier all or more than 80 % of the buyer's total requirements. Such obligations prevent the buyer from purchasing and selling competing goods or services or limit such purchases or sales to less than 20 % of its total purchases. Such non-compete obligations are not covered by the BER 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. However, non-compete obligations are covered by the BER when their duration is limited to five years or less, or when renewal beyond five years requires the 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.

The five-year limit for non-compete obligations 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.

The second exclusion concerns **post term non-compete obligations**, i.e. non-compete obligations imposed on the buyer for a period after the termination of his contract ([16]). Such non-compete obligations are excluded from the exemption of the BER, 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 after termination of the contract.

The third exclusion concerns **the sale of competing brands in a selective distribution system** ([17]). If the supplier prevents his appointed dealers from selling specific competing brands, such a restriction does not enjoy the exemption of the BER.

([15]) Guidelines, paragraphs 58 and 59.
([16]) Guidelines, paragraph 60.
([17]) Guidelines, paragraph 61.

Withdrawal of the Block Exemption Regulation

The BER confers a presumption of legality. Vertical agreements that meet its requirements normally do not contravene the competition rules. In the exceptional cases where an agreement does restrict competition and the positive effects do not outweigh the negative effects, the benefits of the block exemption can be withdrawn. The Commission and, where the relevant geographic market is not wider than its territory, the competition authority of a Member State can take such a withdrawal decision. A withdrawal decision has only effects for the future and does not have retroactive effects.

In particular, withdrawal may be necessary for parallel networks of similar vertical agreements operated by several suppliers on the same market, such as the widespread use of non-compete agreements or selective distribution. Withdrawal may also be necessary in situations where the buyer has significant market power and imposes exclusive supply obligations on its suppliers.

The Guidelines

Purpose of the Guidelines

Above the market share threshold of 30 %, the BER does not apply. However, exceeding the market share threshold of 30 % does not create a presumption of illegality. This threshold serves only to distinguish those agreements which benefit from a presumption of legality from those which require individual examination. To assist firms in carrying out such an examination the Commission adopted the 'Guidelines on vertical restraints'.

The Guidelines set out general rules for the assessment of vertical restraints and provide criteria for the assessment of the most common types of vertical restraints: single branding (non-compete obligations), exclusive distribution, customer allocation, selective distribution, franchising, exclusive supply, tying and recommended and maximum resale prices. This should enable firms to carry out their own assessment of their vertical agreements under Article 81(1) and (3).

General rules for the assessment of vertical restraints

The Commission applies the following 10 general rules for the assessment of vertical restraints in situations where the BER does not apply or where the benefit of the BER may have to be withdrawn.

1. For most vertical restraints, competition concerns can only arise if there is insufficient competition between brands (called '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. 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 on competition.

2. Vertical restraints which reduce inter-brand competition are generally more harmful than vertical restraints that reduce competition between distributors of the same brand (called 'intra-brand' competition). Hence, non-compete obligations are likely to have more negative effects on competition than exclusive distribution agreements which are not combined with non-compete obligations.
3. However, in the absence of sufficient inter-brand competition, restrictions on intra-brand competition may significantly restrict the choice available to consumers. They are particularly harmful when more efficient distributors or distributors with a different distribution format are foreclosed (kept out of the market).
4. Exclusive dealing arrangements are generally worse for competition than non-exclusive arrangements. For instance, under a non-compete obligation the buyer may only purchase and sell one brand, whereas a minimum quantity requirement leaves the buyer some scope to purchase competing goods.
5. Vertical restraints are in general more harmful in relation to branded products than in relation to non-branded products. The distinction between branded and non-branded products will often coincide with the distinction between intermediate products and final products.
6. Negative anti-competitive effects of vertical restraints can be reinforced when several suppliers organise their distribution on the same market in a similar way (parallel networks of similar agreements). In particular, single branding (non-compete obligations) or selective distribution can create a cumulative foreclosure effect.
7. The more the vertical agreement involves transfer of know-how to the buyer, the more reason there is 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.
8. The more the vertical agreement involves relationship-specific investments, i.e. investments made in connection with the agreement and which lose their value upon termination of the agreement, the more justification there is for vertical restraints. For instance, relationship-specific investments by the supplier generally justify a non-compete obligation for the duration necessary to depreciate the investments ([18]).

([18]) Guidelines, in particular paragraphs 116 (point 4) and 155.

9. Vertical restraints required to open up new product or geographic markets generally do not restrict competition. This holds for two years after the first putting on the market of the product. This rule only applies to non-hardcore vertical restraints, except in the case of a new geographic market where it also applies to restrictions on active and passive selling to intermediaries in the new market when such restrictions are imposed on the direct buyers of the supplier located in other markets.
10. In the case of genuine testing of a new product in a particular territory or with a particular 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 one year without infringing Article 81(1).

Criteria for the assessment of **the most common vertical restraints**

Single branding

(paragraphs 138–160 of the Guidelines)

Non-compete obligations (often called ‘ties’) are agreements where the buyer is induced or obliged to concentrate 80 % or more of his purchases of a particular type of product on the brand of one supplier. Such agreements may lead to foreclosure of other suppliers who may have difficulties expanding or entering the same market. The foreclosure effect may be considerably increased if several suppliers apply non-compete obligations on the same market. This may make the market more rigid and also facilitate horizontal collusion between competitors.

- The higher the share of the total market covered by a single branding obligation and the longer the duration of the obligation, the more significant foreclosure is likely to be.
- Non-compete obligations shorter than one year entered into by non-dominant companies are generally not considered to give rise to appreciable anti-competitive effects.
- Non-compete obligations between one and five years entered into by non-dominant companies usually require a 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 the foreclosure effect.
- Foreclosure is less likely in the case of intermediate products and more likely in the case of final consumer products.
- For intermediate products on a market where no company is dominant, an appreciable foreclosure effect is unlikely to arise if more than 50 % of market sales are not tied.

- For final products at the retail level, appreciable foreclosure effects may arise if a non-dominant supplier ties more than 30 % of the market.
- For final products at the wholesale level, the risk of foreclosure depends on the type of wholesaling and the entry barriers at the wholesale level. There is no risk of foreclosure if competing manufacturers can easily establish their own wholesale outlets.
- In the case of a relationship-specific investment made by the supplier, a non-compete or minimum purchase obligation for the period of depreciation of the investment will generally fulfil the conditions of Article 81(3) ([19]).
- 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 transfer of substantial know-how, as for example in the case of franchising, usually justifies a non-compete obligation for the whole duration of the supply agreement.
- Below the level of dominance, the combination of a non-compete obligation with exclusive distribution may also justify the non-compete obligation for 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.
- Dominant companies may not impose non-compete obligations or otherwise tie their buyers unless they can objectively justify such commercial practice within the context of Article 82. For a dominant company, even a modest tied market share may lead to significant foreclosure. The stronger its dominance, the higher the risk of foreclosure of other competitors.

Exclusive distribution and exclusive customer allocation

(paragraphs 161–183 of the Guidelines)

Exclusive distribution/exclusive customer allocations are agreements whereby the supplier agrees to sell his products only to one distributor for resale in a particular territory or for resale to a particular class of customers. In those agreements, the distributor is usually also limited in his active selling into other exclusively allocated territories or classes of customers. Such agreements may reduce intra-brand competition and lead to market partitioning, which may facilitate price discrimination between different territories or between different customers. When applied by several suppliers on the same market, such agreements may also facilitate horizontal collusion, both at the level of suppliers and at the level of distributors.

- The stronger the position of the supplier, the more problematic is the loss of intra-brand competition. Exclusive customer allocation is particularly unlikely

(19) See footnote 18.

to be exempted above the 30 % market share threshold, unless it leads to clear and substantial efficiencies.

- When several suppliers appoint the same exclusive distributor in a given territory or for a given customer class, such multiple exclusive dealerships may increase the risk of horizontal collusion, in particular in highly concentrated markets.
- Where the exclusive distributor has buying power, if for instance at the retail level he becomes the exclusive distributor for the whole or a substantial part of the market, the foreclosure of other distributors may have a serious anti-competitive effect. This could be a case for withdrawal of the BER to the extent that it was applicable.
- Exclusive distribution at the retail level is more likely to lead to anti-competitive effects than exclusive distribution at the wholesale level. This is especially so when retail territories are large and final consumers have little possibility of choosing between high-price/high-service and low-price/low-service distributors.
- At the wholesale level, appreciable anti-competitive effects are unlikely when the manufacturer is not dominant and the exclusive wholesaler is not restricted in his sales to retailers.
- The combination of exclusive distribution or exclusive customer allocation with exclusive purchasing increases the competition risks of market partitioning and price discrimination. Exclusive distribution/exclusive customer allocation makes it more difficult for customers to take advantage of possible price differences for a certain brand. The combination with exclusive purchasing also hinders the distributors from taking advantage of price differences. Requiring the exclusive distributor to buy its supplies of a particular brand directly from the manufacturer eliminates the possibility for the distributor to buy the goods from other exclusive distributors. This combination is therefore unlikely to be exempted unless there are clear and substantial efficiencies leading to lower prices for all final consumers.
- Exclusive distribution normally leads to efficiencies where investments by distributors are required to protect or build up the brand image. This applies in particular for new products, complex products and products the qualities of which are difficult to assess. In addition, in such cases, a combination of exclusive distribution and a non-compete obligation may help the distributor to focus on the particular brand. If such combination does not lead to foreclosure (see the single branding section), it is exempted for the whole duration of the agreement.
- Exclusive customer allocation normally leads to efficiencies where the distributors are required to make investments in specific equipment, skills or know-how to adapt to the requirements of their customers. The depreciation period of these specific 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. Efficiencies are more likely for intermediate products, i.e. when the products are sold to different types of professional buyers. Allocation of final consumers is unlikely to lead to efficiencies and is therefore unlikely to be exempted.

Selective distribution

(paragraphs 184–198 of the Guidelines)

Selective distribution agreements restrict the number of distributors by applying selection criteria for admission as an authorised distributor. In addition, the authorised distributors are restricted in their sales possibilities, as they are not allowed to sell to non-authorised distributors, leaving them only free to sell to other authorised distributors and final customers. Such agreements may reduce intra-brand competition and, in particular where several suppliers apply selective distribution, foreclose certain forms of distribution and facilitate horizontal collusion between suppliers or buyers.

- Selective distribution agreements which are based on purely **qualitative selection criteria**, i.e. where distributors are selected only on the basis of objective criteria required by the nature of the product, such as training of sales personnel, are generally considered to fall outside Article 81(1). The selection criteria should be applied uniformly and without discrimination and accordingly no advance limit should be put on the number of authorised distributors.
- Selective distribution agreements which are based on **quantitative selection criteria** which have the effect of limiting the number of authorised distributors beyond qualitative criteria are assessed under the following rules.
  - In general, the stronger the position of the supplier, the more serious is the loss of intra-brand competition. However, where a non-dominant supplier is the only one in the market applying selective distribution, the agreements are normally exempted on condition that the nature of the products in question require selective distribution to ensure efficient distribution.
  - When the main suppliers all apply selective distribution there may be a significant risk of anti-competitive effects resulting from the cumulative effect of all such systems. Such a cumulative effect problem is unlikely to arise as long as less than half of the market is covered by selective distribution. Also, no problem is likely to arise where the coverage rate exceeds half of the market, but the aggregate market share of the five largest suppliers is below 50 %. Where the coverage rate exceeds half of the market and the five largest suppliers hold more than 50 % of the market, serious competition concerns may arise if the five largest suppliers all apply selective distribution. Exemption under Article 81(3) is unlikely if new distributors capable of adequately selling the products in question, especially price discounters, are prevented from accessing to the market.

- Foreclosure of more efficient distributors may also become a problem when there is buying power, in particular where a strong dealer organisation imposes strict selection criteria on the supplier.
- Where the aggregate market share of the five largest suppliers exceeds 50 %, they should not impose on their appointed distributors conditions which seek to ensure that the latter will not sell the brands of other specific competitors.
- Selective distribution normally leads to efficiencies where investments by the distributors are required to protect or build up the brand image or to provide pre-sales services. In general, efficiencies are strongest for new products, complex products and products the qualities of which are difficult to assess.

Franchising

(paragraphs 42–45 and 199–201 of the Guidelines)

Franchise agreements are vertical agreements containing licences of intellectual property rights, in particular trade marks and know-how for the use and distribution of goods or services. In addition to the licence, the franchiser 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. In addition to the provision of the business method, franchise agreements may contain a combination of vertical restraints concerning the sale of the products concerned, such as selective distribution, non-compete obligations, exclusive distribution or weaker forms thereof. The guidance provided in the previous chapters in respect of these types of restraints also applies to franchising, subject to the following specific rules.

- The more important the transfer of know-how, the more likely it is that the vertical restraints will fulfil the conditions for exemption under Article 81(3).
- An obligation not to sell competing goods or services falls outside Article 81(1) if the obligation is necessary to maintain the common identity and reputation of the franchised network. In such cases, the non-compete obligation may last for the whole duration of the franchise agreement.
- The following obligations are in general considered to be necessary to protect the franchiser's intellectual property rights and are usually considered to fall outside Article 81(1):
  (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 if such acquisition would give the franchisee the power to influence the economic conduct of the competing undertaking;

(c) an obligation on the franchisee not to disclose to third parties the know-how provided by the franchiser as long as this know-how is not in the public domain;

(d) an obligation on the franchisee to communicate to the franchiser 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 franchiser of infringements of licensed intellectual property rights, to take legal action against infringers or to assist the franchiser in any legal actions against infringers;

(f) an obligation on the franchisee not to use know-how licensed by the franchiser 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 franchiser's consent.

Exclusive supply

(paragraphs 202–214 of the Guidelines)

Exclusive supply agreements oblige or induce the supplier to sell a particular good or service to only one buyer inside the European Community for the purposes of a specific use or for resale. It generally concerns industrial supply agreements for intermediate products. Such exclusive supply agreements may lead to foreclosure of other buyers in the Community.

- If the buyer has no market power on his downstream sales market, then normally no appreciable negative effects on competition can be expected.
- Negative effects can, however, be expected when the buyer holds a market share of more than 30 % on the downstream sales market and on the upstream purchase market.
- The higher the share of the market sold under an exclusive supply agreement and the longer the duration of the exclusive supply agreement, the more significant foreclosure is likely to be.
- Exclusive supply agreements shorter than five years entered into by non-dominant companies usually require a balancing of pro- and anti-competitive effects, while agreements 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 in general not impose exclusive supply obligations on their suppliers.
- Foreclosure of competing buyers is not very likely where these competitors have similar buying power. In such a case foreclosure could only occur for potential entrants, especially when major incumbent buyers enter into exclusive supply contracts with the majority of suppliers on the market (cumulative effect problem).

- Where a supplier and a buyer which are not in a dominant position both have to make relationship-specific investments, the combination of non-compete and exclusive supply is usually justified.
- Foreclosure is less likely in case of homogeneous and intermediate products and more likely in case of heterogeneous and final products. Exclusive supply agreements for homogeneous intermediate products are likely to be exempted as long as neither the supplier nor the buyer is in a dominant position.
- Exclusive supply normally leads to efficiencies where the buyer is required to make relationship-specific investments.

Tying

(paragraphs 215–224 of the Guidelines)

Tying exists where a supplier makes the sale of one product conditional upon the purchase of another distinct product from the supplier or someone designated by him. The first product is referred to as the 'tying' product and the second as the 'tied' product. Tying agreements may lead to foreclosure on the market of the tied product. Tying may also lead to supra-competitive prices and to higher entry barriers both on the market of the tying and on the market of the tied product.

- The market position of the supplier on the market of the tying product is of main importance to assess possible anti-competitive effects. Tying by a supplier with more than 30 % market share on the market of the tying product or the market of the tied product is unlikely to be exempted unless there are clear efficiencies and a fair share of these efficiencies is passed on to consumers.
- Where tying is combined with a non-compete obligation for the tying product, this considerably strengthens the position of the supplier and increases the likelihood of appreciable anti-competitive effects of tying.
- As long as the competitors of the tying supplier are sufficiently numerous and strong, no appreciable anti-competitive effects can be expected, as buyers have sufficient alternatives to purchase the tying product without the tied product, unless other suppliers are also applying tying.
- Withdrawal of the BER is likely where a majority of the suppliers apply similar tying arrangements (cumulative effect) and where the efficiencies are not passed on to the consumer.
- Anti-competitive effects of tying are less likely where buyers have significant buying power.
- Tying obligations may produce efficiencies arising from joint production or joint distribution or from the fact that the supplier can purchase the tied product in large quantities. For tying to be exempted it must, however, be shown that a fair share of these cost reductions are passed on to the consumer. Tying is therefore normally not exemptable where 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.

- Tying may also help to ensure a certain uniformity and quality standardisation. However, the supplier of the tying product needs to demonstrate that these positive effects cannot be realised equally efficiently simply by requiring the buyer to purchase products satisfying minimum quality standards.

Recommended and maximum resale prices

(paragraphs 225–228 of the Guidelines)

The practice of recommending a resale price to distributors or imposing a maximum resale price on distributors may have the effect that such a price will work as a focal point for the distributors and may be followed by most or all of them. In addition, maximum or recommended resale prices may facilitate horizontal collusion between suppliers.

- The market position of the supplier is the main factor in assessing possible anti-competitive effects of recommended or maximum resale prices. The stronger the supplier's position, the higher the risk that a recommended resale price or a maximum resale price is followed by most or all distributors.
- In a narrow oligopoly where there are few suppliers on the market, the practice of using or publishing recommended or maximum prices may facilitate horizontal collusion between the suppliers by exchanging information on the preferred price level and by reducing the likelihood of lower resale prices.

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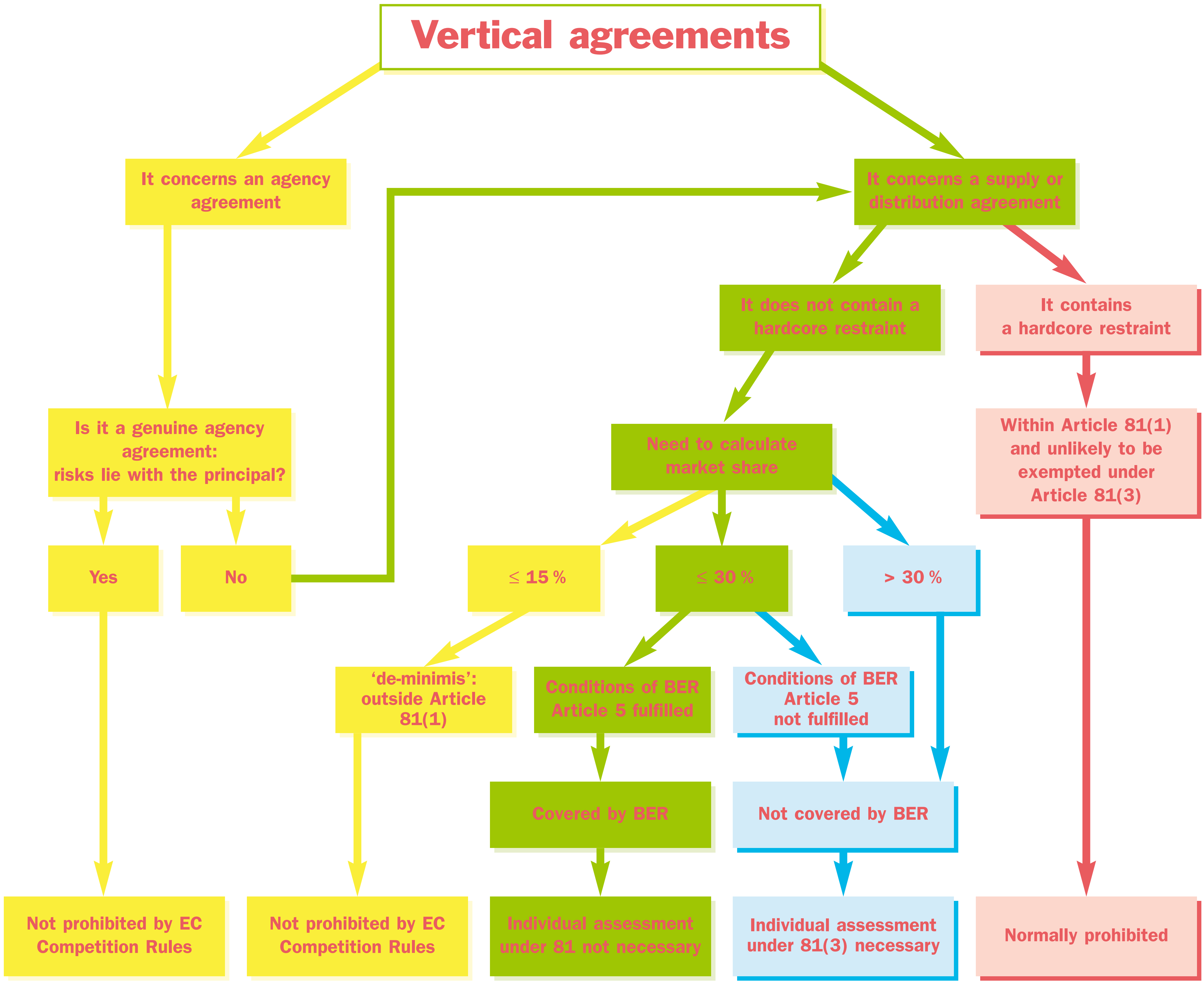
Flow chart



Vertical agreements
It concerns an agency agreement
It concerns a supply or distribution agreement
It does not contain a hardcore restraint
It contains a hardcore restraint
Is it a genuine agency agreement: risks lie with the principal?
Need to calculate market share
Within Article 81(1) and unlikely to be exempted under Article 81(3)
Yes
No
≤ 15 %
≤ 30 %
> 30 %
'de-minimis': outside Article 81(1)
Conditions of BER Article 5 fulfilled
Conditions of BER Article 5 not fulfilled
Covered by BER
Not covered by BER
Not prohibited by EC Competition Rules
Not prohibited by EC Competition Rules
Individual assessment under 81 not necessary
Individual assessment under 81(3) necessary
Normally prohibited

8

KD-42-02-997-EN-C

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31965R0019

Regulation No 19/65/EEC of 2 March of the Council on application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices

Official Journal P 036 , 06/03/1965 P. 0533 - 0535
Finnish special edition: Chapter 8 Volume 1 P. 0036
DA.ES Series I Chapter 1965-1966 P. 0031
Swedish special edition: Chapter 8 Volume 1 P. 0036
English special edition: Series I Chapter 1965-1966 P. 0035
Greek special edition: Chapter 08 Volume 1 P. 0059
Spanish special edition: Chapter 08 Volume 1 P. 0085
Portuguese special edition Chapter 08 Volume 1 P. 0085

REGULATION No 19/65/EEC OF THE COUNCIL of 2 March 1965 on application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices

THE COUNCIL OF THE EUROPEAN ECONOMIC COMMUNITY,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 87 thereof;

Having regard to the proposal from the Commission;

Having regard to the Opinion of the European Parliament (1);

Having regard to the Opinion of the Economic and Social Committee (2);

Whereas Article 85 (1) of the Treaty may in accordance with Article 85 (3) be declared inapplicable to certain categories of agreements, decisions and concerted practices which fulfil the conditions contained in Article 85 (3);

Whereas the provisions for implementation of Article 85 (3) must be adopted by way of regulation pursuant to Article 87;

Whereas in view of the large number of notifications submitted in pursuance of Regulation No 17(3) it is desirable that in order to facilitate the task of the Commission it should be enabled to declare by way of regulation that the provisions of Article 85 (1) do not apply to certain categories of agreements and concerted practices;

Whereas it should be laid down under what conditions the Commission, in close and constant liaison with the competent authorities of the Member States, may exercise such powers after sufficient experience has been gained in the light of individual decisions and it becomes possible to define categories of agreements and concerted practices in respect of which the conditions of Article 85 (3) may be considered as being fulfilled;

Whereas the Commission has indicated by the action it has taken, in particular by Regulation No 153, (4) that there can be no easing of the procedures prescribed by Regulation No 17 in respect of certain types of agreements and concerted practices that are particularly liable to distort competition in the common market;

Whereas under Article 6 of Regulation No 17 the Commission may provide that a decision taken pursuant to Article 85 (3) of the Treaty shall apply with retroactive effect ; whereas it is desirable that the Commission be also empowered to adopt, by regulation, provisions to the like effect;

Whereas under Article 7 of Regulation No 17 agreements, decisions and concerted practices may, by decision of the Commission, be exempted from prohibition in

particular if they are modified in such manner that they statisfy the requirements of Article 85 (3) ; whereas it is desirable that the Commission be enabled to grant like exemption by regulation to such agreements and concerted practices if they are modified in such manner as to fall within a category defined in an exempting regulation;
Whereas, since there can be no exemption if the conditions set out in Article 85 (3) are not satisfied, the Commission must have power to lay down by decision the conditions that must be satisfied by an agreement or concerted practice which owing to special circumstances has certain effects incompatible with Article 85 (3); (1) OJ No 81, 27.5.1964, p. 1275/64. (2) OJ No 197, 30.11.1964, p. 3320/64. (3) OJ No 13, 21.2.1962, p. 204/62 (Regulation No 17 as amended by Regulation No 59 - OJ No 58, 10.7.1962, p. 1655/62 - and Regulation No 118/63/EEC - OJ No 162, 7.11.1963, p. 2696/63. (4) OJ No 139, 24.12.1962, p. 2918/62.
HAS ADOPTED THIS REGULATION:
Article 1
1. Without prejudice to the application of Council Regulation No 17 and in accordance with Article 85 (3) of the Treaty the Commission may by regulation declare that Article 85 (1) shall not apply to categories of agreements to which only two undertakings are party and: (a) - whereby one party agrees with the other to supply only to that other certain goods for resale within a defined area of the common market ; or
- whereby one party agrees with the other to purchase only from that other certain goods for resale ; or
- whereby the two undertakings have entered into obligations, as in the two preceding subparagraphs, with each other in respect of exclusive supply and purchase for resale;

(b) which include restrictions imposed in relation to the acquisition or use of industrial property rights-in particular of patents, utility models, designs or trade marks-or to the rights arising out of contracts for assignment of, or the right to use, a method of manufacture or knowledge relating to the use or to the application of industrial processes.

2. The regulation shall define the categories of agreements to which it applies and shall specify in particular: (a) the restrictions or clauses which must not be contained in the agreements;
(b) the clauses which must be contained in the agreements, or the other conditions which must be satisfied.

3. Paragraphs 1 and 2 shall apply by analogy to categories of concerted practices to which only two undertakings are party.

Article 2
1. A regulation pursuant to Article 1 shall be made for a specified period.
2. It may be repealed or amended where circumstances have changed with respect to any factor which was basic to its being made ; in such case, a period shall be fixed for modification of the agreements and concerted practices to which the earlier regulation applies.
Article 3
A regulation pursuant to Article 1 may stipulate that it shall apply with retroactive effect to agreements and concerted practices to which, at the date of entry into force of that regulation, a decision issued with retroactive effect in pursuance of

Article 6 of Regulation No 17 would have applied.

Article 4

1. A regulation pursuant to Article 1 may stipulate that the prohibition contained in Article 85 (1) of the Treaty shall not apply, for such period as shall be fixed by that regulation, to agreements and concerted practices already in existence on 13 March 1962 which do not satisfy the conditions of Article 85 (3), where: - within three months from the entry into force of the Regulation, they are so modified as to satisfy the said conditions in accordance with the provisions of the regulation ; and

- the modifications are brought to the notice of the Commission within the time limit fixed by the regulation.

2. Paragraph 1 shall apply to agreements and concerted practices which had to be notified before 1 February 1963, in accordance with Article 5 of Regulation No 17, only where they have been so notified before that date.

3. The benefit of the provisions laid down pursuant to paragraph 1 may not be claimed in actions pending at the date of entry into force of a regulation adopted pursuant to Article 1 ; neither may it be relied on as grounds for claims for damages against third parties.

Article 5

Before adopting a regulation, the Commission shall publish a draft thereof and invite all persons concerned to submit their comments within such time limit, being not less than one month, as the Commission shall fix.

Article 6

1. The Commission shall consult the Adivsory Committee on Restrictive Practices and Monopolies: (a) before publishing a draft regulation;

(b) before adopting a regulation.

2. Article 10 (5) and (6) of Regulation No 17, relating to consultation with the Advisory Committee, shall apply by analogy, it being understood that joint meetings with the Commission shall take place not earlier than one month after dispatch of the notice convening them.

Article 7

Where the Commission, either on its own initiative or at the request of a Member State or of natural or legal persons claiming a legitimate interest, finds that in any particular case agreements or concerted practices to which a regulation adopted pursuant to Article 1 of this Regulation applies have nevertheless certain effects which are incompatible with the conditions laid down in Article 85 (3) of the Treaty, it may withdraw the benefit of application of that regulation and issue a decision in accordance with Articles 6 and 8 of Regulation No 17, without any notification under Article 4 (1) of Regulation No 17 being required.

Article 8

The Commission shall, before 1 January 1970, submit to the Council a proposal for a Regulation for such amendment of this Regulation as may prove necessary in the light of experience.

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

Done at Brussels, 2 March 1965.

For the Council

The President

M. COUVE DE MURVILLE

31999R1215

Council Regulation (EC) No 1215/1999 of 10 June 1999 amending Regulation No 19/65/EEC on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices

Official Journal L 148 , 15/06/1999 P. 0001 - 0004

COUNCIL REGULATION (EC) No 1215/1999
of 10 June 1999
amending Regulation No 19/65/EEC on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices(1)

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(2),
Having regard to the opinion of the European Parliament(3),
Having regard to the opinion of the Economic and Social Committee(4),
(1) Whereas by Regulation No 19/65/EEC(5), the Council empowered the Commission, without prejudice to the application of Council Regulation No 17: first Regulation implementing Articles 81 and 82 of the Treaty(6), and in accordance with Article 81(3) of the Treaty, to adopt regulations declaring that Article 81(1) does not apply to certain categories of agreements, and in particular to categories of agreements to which only two undertakings are party and whereby one party agrees with the other to supply only to that other certain goods for resale within a defined area of the common market, or whereby one party agrees with the other to purchase only from that other certain goods for resale, or whereby the two undertakings enter into into such obligations with each other in respect of exclusive supply and purchase for resale;
(2) Whereas, pursuant to Regulation No 19/65/EEC, the Commission has in particular adopted Regulation (EEC) No 1983/83 of 22 June 1983 on the application of Article 81(3) of the Treaty to categories of exclusive distribution agreements(7), Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 81(3) of the Treaty to categories of exclusive purchasing agreements(8) and Regulation (EEC) No 4087/88 of 30 November 1988 on the application of Article 81(3) of the Treaty to categories of franchise agreements(9) (exemption regulations);
(3) Whereas on 22 January 1997 the Commission published a Green Paper on Vertical Restraints in EC Competition Policy, which generated a wide-ranging public debate on the application of Article 81(1) and (3) of the Treaty to vertical agreements or concerted practices;
(4) Whereas the response to the Green Paper from the Member States, the European Parliament, the Economic and Social Committee, the Committee of the Regions and interested parties has been generally in favour of reform of Community competition policy on vertical agreements; whereas the block exemption regulations already referred to should accordingly be revised;

(5) Whereas any such reform must meet the two requirements of ensuring effective protection of competition and providing adequate legal certainty for firms; whereas the pursuit of those objectives should take account of the need as far as possible to simplify administrative supervision and the legislative framework; whereas at the same level of market power vertical restraints are generally considered less harmful to competition than horizontal restraints;
(6) Whereas the exemption regulations referred to do not confine themselves to defining the categories of agreements to which they apply and to specifying the restrictions or clauses which are not to be contained in the agreements, but they also list the exempted clauses; whereas this legislative approach to contractual relations is generally perceived to be over rigid in an economic context where distribution structures and techniques are rapidly changing;
(7) Whereas the said exemption regulations cover only those categories of bilateral exclusive agreements entered into with a view to resale which are concerned with the exclusive distribution or purchase of goods, or both, or which include restrictions imposed in relation to the assignment or use of industrial property rights; whereas they exclude from their scope, inter alia, vertical agreements between more thn two undertakings, selective distribution agreements, agreements concerning services, and agreements concerning the supply or purchase, or both, of goods or services intended for processing or incorporation; whereas a substantial number of vertical agreements consequently cannot qualify for exemption under Article 81(3) of the Treaty until they have been examined individually by the Commission, which may reduce the legal certainty available to the undertakings concerned and make administrative supervision unnecessarily burdensome;
(8) Whereas the debate which followed the publication of the Green Paper also drew attention to the fact that in determining the manner in which Article 81(1) and (3) are to apply proper account needs to be taken of the economic effects of vertical agreements; whereas any economic criteria limiting the scope of a block exemption by reason of the anticompetitive effects which an agreement may produce should take into account the share of the relevant market accounted for by the undertaking concerned;
(9) Whereas, therefore, the Commission should be empowered to replace the existing legislation with legislation which is simpler, more flexible and better targeted, and which may cover all types of vertical agreements; whereas if the scope of the exemption regulation covering such agreements is to be broadened in this way, there should be criteria such as market-share thresholds to specify the circumstances where, in view of the possible economic effects of the agreements, the regulation ceases to be applicable; whereas the setting of such market share thresholds should take account of the market power of the undertaking concerned; whereas certain severe anticompetitive vertical restraints like minium and fixed resale prices and certain types of territorial protection should be excluded from the application of the regulation irrespective of the market share of the undertaking concerned;
(10) Whereas the powers conferred on the Commission by Regulation No 19/65/EEC do not allow it to conduct a reform of the rules currently in force which would cover all types of vertical agreements; whereas the scope of Article 1 (1)(a) and (2)(b) thereof should consequently be broadened to cover all agreements caught by Article 81(1) of the Treaty which are entered into by two or more undertakings, each operating, for the purposes of the agreement, at a different level of the production or distribution chain and which relate to the conditions under which the parties may purchase, sell or resell certain goods or services (vertical agreements), including exclusive distribution agreements, exclusive purchasing agreements, franchising agreements and selective distribution agreements, or any combination of these, and certain non-reciprocal

vertical agreements entered into between competing undertakings, as well as vertical agreements between an association of small and medium-sized retailers and its members or between such an association and its suppliers;
(11) Whereas the exemption regulations referred to empower the Commission, in accordance with Article 7 of Regulation No 19/65/EEC, to withdraw the benefit of application of those regulations wherever, in a particular case, an agreement or a network of similar agreements has certain effects which are incompatible with the conditions laid down in Article 81(3); whereas in order to ensure effective supervision of markets and greater decentralisation in the application of the Community competition rules, it is appropriate to provide that where the effects of such an agreement are felt in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct market the competent authority in that Member State may withdraw the benefit of the block exemption in its territory and adopt a decision aime at eliminating those effects; whereas the said Article 7 should accordingly be supplemented so as to specify the circumstances in which the competent authorities in the Member States can withdraw the benefit of application of the block-exemption regulation;
(12) Whereas, in order to guarantee an effective control of the effects arising in a given market from the existence of parallel networks of similar agreements, a block-exemption regulation may establish the conditions under which those networks of agreements may be excluded from its application by means of regulation; whereas such conditions may be based on criteria such as the market coverage rate of these networks of agreements; whereas the Commission will accordingly be empowered to establish by means of regulation that in a given market the relevant agreements fulfil the said conditions; whereas in such a case, the Commission will have to fix a transitional period of not less than six months, at the expiry of which the block exemption will cease to be applicable to the relevant agreements on that market; whereas this regulation establishing the non-application of the block-exemption regulation for the relevant agreements on a particular market has as effect the application of Article 81 of the Treaty by individual examination; whereas the Commission will consult the Advisory Committee before the adoption of such a regulation and, on request of a Member State, also before the publication of the draft regulation,
HAS ADOPTED THIS REGULATION:

Article 1
Regulation No 19/65/EEC is hereby amended as follows:
1. Article 1 shall be amended as follows:
(a) paragraph 1 shall be replaced by the following: "1. Without prejudice to the application of Regulation No 17 and in accordance with Article 81(3) of the Treaty the Commission may by regulation declare that Article 81(1) shall not apply to:
(a) categories of agreements which are entered into by two or more undertakings, each operating, for the purposes of the agreement, at a different level of the production or distribution chain, and which relate to the conditions under which the parties may purchase, sell or resell certain goods or services,
(b) categories of agreements to which only two undertakings are party and which include restrictions imposed in relation to the acquisition or use of industrial property rights, in particular of patents, utility models, designs or trade marks, or to the rights arising out of contracts for assignment of, or the right to use, a method of manufacture or knowledge relating to the use or to the application of indutrial processes";
(b) in paragraph 2(b), the words "the clauses which must be contained in the agreements, or" shall be deleted;
(c) paragraph 3 shall be replace by the following: "3. Paragraphs 1 and 2 shall

apply by analogy to categories of concerted practices".
2. The following Article shall be inserted: "Article 1a
A regulation pursuant to Article 1 may stipulate the conditions which may lead to the exclusion from its application of certain parallel networks of similar agreements or concerted practices operating on particular market; when these circumstances are fulfilled the Commission may establish this by means of regulation and fix a period at the expiry of which the Regulation pursuant to Article 1 would no longer be applicable in respect of the relevant agreements or concerted practices on that market; such period must not be shorter than six months".
3. Article 6(1) shall be replaced by the following: "1. The Commission shall consult the Advisory Committee on Restrictive Practices and Monopolies:
(a) with regard to a regulation pursuant to Article 1 before publishing a draft regulation and before adopting a regulation;
(b) with regard to a regulation pursuant to Article 1a before publishing a draft regulation if requested by a Member State, and before adopting a regulation".
4. In Article 7 the existing paragraph shall become paragraph 1 and the following paragraph shall be added: "2. When in any particular case agreements or concerted practices to which a regulation adopted pursuant to Article 1 applies have certain effects which are incompatible with the conditions laid down in Article 81(3) of the Treaty in the territory of a Member State, or in part thereof, which has all the characteristics of a distinct market, the competent authority in that Member State may on its own initiative or at the request of the Commission or of natural or legal persons claiming a legitimate interest withdraw the benefit of application of that regulation".

Article 2
This Regulation shall enter into force on the third day following its publication in the Official Journal of the European Communities.

This Regulation shall be binding in its entirety and directly applicable in all Member States.
Done at Luxembourg, 10 June 1999.

For the Council
The President
K.-H. FUNKE

(1) Editorial Note: The title of Regulation No 19/65/EEC has been adjusted to take account of the renumbering of the Articles of the Treaty establishing the European Community in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 85(3) of the Treaty.
(2) OJ C 365, 26.11.1998, p. 27.
(3) Opinion delivered on 15 April 1999 (not yet published in the Official Journal).
(4) OJ C 116, 28.4.1999.
(5) OJ 36, 6.3.1965, p. 533/65. Regulation as last amended by the 1994 Act of Accession.
(6) OJ 13, 21.2.1962, p. 204/62. Regulation as last amended by the 1994 Act of Accession.
(7) OJ L 173, 30.6.1983, p. 1. Regulation as last amended by Regulation (EC) No 1582/97 (OJ L 214, 6.8.1997, p. 27).
(8) OJ L 173, 30.6.1983, p. 5. Regulation as last amended by Regulation (EC) No 1582/97.
(9) OJ L 359, 28.12.1988, p. 46. Regulation as amended by the 1994 Act of Accession.

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31999R2790
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 (Text with EEA relevance)
Official Journal L 336 , 29/12/1999 P. 0021 - 0025

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
(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Community,
Having regard to Council Regulation No 19/65/EEC of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices (1), as last amended by Regulation (EC) No 1215/1999(2), and in particular Article 1 thereof,
Having published a draft of this Regulation(3),
Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,
Whereas:
(1) Regulation No 19/65/EEC empowers the Commission to apply Article 81(3) of the Treaty (formerly Article 85(3)) by regulation to certain categories of vertical agreements and corresponding concerted practices falling within Article 81(1).
(2) Experience acquired to date makes it possible to define a category of vertical agreements which can be regarded as normally satisfying the conditions laid down in Article 81(3).
(3) This category includes vertical agreements for the purchase or sale of goods or services where these 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; for the purposes of this Regulation, the term "vertical agreements" includes the corresponding concerted practices.
(4) For the application of Article 81(3) by regulation, it is not necessary to define those vertical agreements which are capable of falling within Article 81(1); in the individual assessment of agreements under Article 81(1), 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 should be limited to vertical agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 81(3).
(6) Vertical agreements of the category defined in this Regulation 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 undertakings concerned and, therefore, on the extent to which those undertakings face competition from other suppliers of goods or services regarded by the buyer 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 share of the relevant market accounted for by the supplier does not exceed 30 %, vertical agreements which do not contain certain types of severely anti-competitive restraints generally lead to an improvement in production or distribution and allow consumers a fair share of the resulting benefits; in the case of vertical agreements containing exclusive supply obligations, it is the market share of the buyer which is relevant in determining the overall effects of such vertical agreements on the market.

(9) Above the market share threshold of 30 %, there can be no presumption that vertical agreements falling within the scope of Article 81(1) will usually give rise to objective advantages of such a character and size as to compensate for the disadvantages which they create for competition.

(10) This Regulation should not exempt vertical agreements containing restrictions which are not indispensable to the attainment of the positive effects mentioned above; in particular, vertical agreements containing certain types of severely anti-competitive restraints such as minimum and fixed resale-prices, as well as certain types of territorial protection, should be excluded from the benefit of the block exemption established by this Regulation irrespective of the market share of the undertakings concerned.

(11) In order to ensure access to or to prevent collusion on the relevant market, certain conditions are to 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 definite 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) In particular cases in which the agreements falling under this Regulation nevertheless have effects incompatible with Article 81(3), the Commission may withdraw the benefit of the block exemption; this may occur in particular where the buyer has significant market power in the relevant market in which it resells the goods or provides the services or where parallel networks of vertical agreements have similar effects which significantly restrict access to a relevant market or competition therein; such cumulative effects may for example arise in the case of selective distribution or non-compete obligations.

(14) Regulation No 19/65/EEC empowers the competent authorities of Member States to withdraw the benefit of the block exemption in respect of vertical agreements having effects incompatible with the conditions laid down in Article 81(3), where such effects are felt in their respective territory, or in a part thereof, and where such territory has the characteristics of a distinct geographic market; Member States should ensure that the exercise of this power of withdrawal does not prejudice the uniform application throughout the common market of the Community competition rules or the full effect of the measures adopted in implementation of those rules.

(15) In order to strengthen supervision of parallel networks of vertical agreements which have similar restrictive effects and which cover more than 50 % of a given market, the Commission may declare this Regulation inapplicable to vertical agreements containing specific restraints relating to the market concerned, thereby restoring the full application of Article 81 to such agreements.

(16) This Regulation is without prejudice to the application of Article 82.

(17) In accordance with the principle of the primacy of Community law, no measure

taken pursuant to national laws on competition should prejudice the uniform application throughout the common market of the Community competition rules or the full effect of any measures adopted in implementation of those rules, including this Regulation,
HAS ADOPTED THIS REGULATION:

Article 1
For the purposes of this Regulation:
(a) "competing undertakings" means actual or potential suppliers in the same product market; the, product market includes goods or services which are regarded by the buyer as interchangeable with or substitutable for the contract goods or services, by reason of the products' characteristics, their prices and their intended use;
(b) "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 of its purchases in the preceding calendar year;
(c) "exclusive supply obligation" means any direct or indirect obligation causing the supplier to sell the goods or services specified in the agreement only to one buyer inside the Community for the purposes of a specific use or for resale;
(d) "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;
(e) "intellectual property rights" includes industrial property rights, copyright and neighbouring rights;
(f) "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, as a body or in the precise configuration and assembly of its components, is not generally known or easily accessible; "substantial" means that the know-how includes information which is indispensable to the buyer for the use, sale or resale of the contract goods or services; "identified" means that the know-how must be described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;
(g) "buyer" includes an undertaking which, under an agreement falling within Article 81 (1) of the Treaty, sells goods or services on behalf of another undertaking.

Article 2
1. Pursuant to Article 81(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 81(1) shall not apply to 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 ("vertical agreements").
This exemption shall apply to the extent that such agreements contain restrictions of competition falling within the scope of Article 81(1) ("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 81 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 or effect 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 buyer has a total annual turnover not exceeding EUR 100 million, or
(b) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor not manufacturing goods competing with the contract goods, or
(c) the supplier is a provider of services at several levels of trade, while the buyer does not provide competing services 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.

Article 3
1. Subject to paragraph 2 of this Article, 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.
2. In the case of vertical agreements containing exclusive supply obligations, the exemption provided for in Article 2 shall apply on condition that the market share held by the buyer does not exceed 30 % of the relevant market on which it purchases the contract goods or services.

Article 4
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's 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 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 level of trade;
(e) the restriction agreed between a supplier of components and a buyer who incorporates

those components, which limits the supplier to selling 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

The exemption provided for in Article 2 shall not apply to any of 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. A non-compete obligation which is tacitly renewable beyond a period of five years is to be deemed to have been concluded for an indefinite duration. However, 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;

(b) any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services, unless such obligation:

- relates to goods or services which compete with the contract goods or services, and
- is limited to the premises and land from which the buyer has operated during the contract period, and
- is indispensable to protect know-how transferred by the supplier to the buyer,

and provided that the duration of such non-compete obligation is limited to a period of one year after termination of the agreement; this obligation 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;

(c) any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers.

Article 6

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7(1) of Regulation No 19/65/EEC, where it finds in any particular case that vertical agreements to which this Regulation applies nevertheless have effects which are incompatible with the conditions laid down in Article 81(3) of the Treaty, and in particular where access to the relevant market or competition therein is significantly restricted by the cumulative effect of parallel networks of similar vertical restraints implemented by competing suppliers or buyers.

Article 7

Where in any particular case vertical agreements to which the exemption provided for in Article 2 applies have effects incompatible with the conditions laid down in 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 competent authority of that Member State may withdraw the benefit of application of this Regulation in respect of that territory, under the same conditions as provided in Article 6.

Article 8

1. Pursuant to Article 1 a 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.

2. A regulation pursuant to paragraph 1 shall not become applicable earlier than six months following its adoption.

Article 9

1. The market share of 30 % provided for in Article 3(1) shall be calculated on the basis

of the market sales value of the contract goods or services and other goods or services sold by the supplier, which are regarded as interchangeable or substitutable by the buyer, by reason of the products' characteristics, their prices and their intended use; if market sales value data are not available, estimates based on other reliable market information, including market sales volumes, may be used to establish the market share of the undertaking concerned. For the purposes of Article 3(2), it is either the market purchase value or estimates thereof which shall be used to calculate the market share.
2. 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 data relating to the preceding calendar year;
(b) the market share shall include any goods or services supplied to integrated distributors for the purposes of sale;
(c) if the 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;
(d) if the 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;
(e) the benefit of points (c) and (d) may not be combined so as to exceed a period of two calendar years.

Article 10
1. For the purpose of calculating total annual turnover within the meaning of Article 2(2) and (4), 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 11
1. For the purposes of this Regulation, the terms "undertaking", "supplier" and "buyer" shall include their respective connected undertakings.
2. "Connected undertakings" are:
(a) undertakings in which a party to the agreement, directly or indirectly:
- has the power to exercise more than half the voting rights, or
- has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or
- has the right to manage the undertaking's affairs;
(b) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in (a);
(c) undertakings in which an undertaking referred to in (b) has, directly or indirectly, the rights or powers listed in (a);
(d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in (a);
(e) undertakings in which the rights or the powers listed in (a) are jointly held by:
- parties to the agreement or their respective connected undertakings referred to in (a) to (d), or
- one or more of the parties to the agreement or one or more of their connected undertakings referred to in (a) to (d) and one or more third parties.

3. For the purposes of Article 3, the market share held by the undertakings referred to in paragraph 2(e) of this Article shall be apportioned equally to each undertaking having the rights or the powers listed in paragraph 2(a).

Article 12
1. The exemptions provided for in Commission Regulations (EEC) No 1983/83(4), (EEC) No 1984/83(5) and (EEC) No 4087/88(6) shall continue to apply until 31 May 2000.
2. The prohibition laid down in Article 81(1) of the EC Treaty shall not apply during the period from 1 June 2000 to 31 December 2001 in respect of agreements already in force on 31 May 2000 which do not satisfy the conditions for exemption provided for in this Regulation but which satisfy the conditions for exemption provided for in Regulations (EEC) No 1983/83, (EEC) No 1984/83 or (EEC) No 4087/88.

Article 13
This Regulation shall enter into force on 1 January 2000.
It shall apply from 1 June 2000, except for Article 12(1) which shall apply from 1 January 2000.
This Regulation shall expire on 31 May 2010.

This Regulation shall be binding in its entirety and directly applicable in all Member States.
Done at Brussels, 22 December 1999.

For the Commission
Mario MONTI
Member of the Commission

(1) OJ 36, 6.3.1965, p. 533/65.
(2) OJ L 148, 15.6.1999, p. 1.
(3) OJ C 270, 24.9.1999, p. 7.
(4) OJ L 173, 30.6.1983, p. 1.
(5) OJ L 173, 30.6.1983, p. 5.
(6) OJ L 359, 28.12.1988, p. 46.

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(Information)

COMMISSION

COMMISSION NOTICE

Guidelines on Vertical Restraints

(2000/C 291/01)

(Text with EEA relevance)

CONTENTS

I. INTRODUCTION

1. Purpose of the Guidelines

(1) 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] (Block Exemption Regulation) (see paragraphs 23 to 45). 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.

(2) Throughout these Guidelines the analysis applies to both goods and services, although certain vertical restraints are mainly used in the distribution of goods. Similarly, vertical agreements can be concluded for intermediate and final goods and services. Unless otherwise stated, the analysis and arguments in 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.

(3) 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.

(4) 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

(5) 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.

(6) 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.

(7) 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.

(1) OJ L 336, 29.12.1999, p. 21.

(2) See *inter alia* judgment of the Court of Justice of the European Communities in Joined Cases 56/64 and 58/64 Grundig-Consten v Commission [1966] ECR 299; Case 56/65 Technique Minière v Machinenbau Ulm [1966] ECR 235; and of the Court of First Instance of the European Communities in Case T-77/92 Parker Pen v Commission [1994] ECR II 549.

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

(12) Paragraphs 12 to 20 replace the Notice on exclusive dealing contracts with commercial agents of 1962 [5]. They must be read in conjunction with Council Directive 86/653/EEC [6].

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.

(1) See Notice on agreements of minor importance of 9 December 1997, OJ C 372, 9.12.1997, p. 13.
(2) See judgment of the Court of First Instance in Case T-7/93 Langnese-Iglo v Commission [1995] ECR II-1533, paragraph 98.
(3) See judgment of the Court of Justice in Case 5/69 Völk v Vervaecke [1969] ECR 295; Case 1/71 Cadillon v Höss [1971] ECR 351 and Case C-306/96 Javico v Yves Saint Laurent [1998] ECR I-1983, paragraphs 16 and 17.
(4) OJ L 107, 30.4.1996, p. 4.
(5) OJ 139, 24.12.1962, p. 2921/62.
(6) OJ L 382, 31.12.1986, p. 17.

(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.

(18) 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:

— limitations on the territory in which the agent may sell these goods or services;

— limitations on the customers to whom the agent may sell these goods or services;

— the prices and conditions at which the agent must sell or purchase these goods or services.

(19) In addition to governing the conditions of sale or purchase of the contract goods or services by the agent on behalf of the principal, agency agreements often contain provisions which concern the relationship between the agent and the principal. In particular, they may contain a provision preventing the principal from appointing other agents in respect of a given type of transaction, customer or territory (exclusive agency provisions) and/or a provision preventing the agent from acting as an agent or distributor of undertakings which compete with the principal (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).

(20) 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.

III. APPLICATION OF THE BLOCK EXEMPTION REGULATION

1. Safe harbour created by the Block Exemption Regulation

(21) 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).

(22) 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*

(23) 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

(1) OJ L 145, 29.6.1995, p. 25.

(2) Draft text published in OJ C 118, 27.4.2000, p. 14.

(3) See Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5, at paras. 20-24, the Commission's Thirteenth Report on Competition Policy, point 55, and Commission Decision 90/410/EEC in Case No IV/32.009 — Elopak/Metal Box-Odin, OJ L 209, 8.8.1990, p. 15.

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 to 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.

(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:

— 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.

(33) 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.

(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.

Trade mark

(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.

Copyright

(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.

(v) *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 1475/1995 [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.

(1) OJ L 31, 9.2.1996, p. 2.
(2) OJ L 145, 29.6.1995, p. 25.
(3) OJ L 53, 22.2.1985, p. 1.
(4) OJ L 53, 22.2.1985, p. 5.
(5) OJ L 306, 11.11.1997, p. 12.

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 [1].

(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 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.

(1) See, for instance, Commission Decision 91/562/EEC in Case No IV/32.737 — Eirpage, OJ L 306, 7.11.1991, p. 22, in particular point (6).

(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.

(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. 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

(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.

(1) An example of indirect measures having such exclusionary effects can be found in Commission Decision 92/428/EEC in Case No IV/33.542 — Parfum Givenchy (OJ L 236, 19.8.1992, p. 11).

(2) OJ 13, 21.2.1962, p. 204/62.

(3) OJ L 148, 15.6.1999, p. 5.

(64) 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) ([1]).

(65) 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.

7. Severability

(66) 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.

(67) 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.

([1]) Case C-234/89 Delimitis v Henninger Bräu [1991] ECR I-935, at paragraph 52.

8. Portfolio of products distributed through the same distribution system

(68) 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.

(69) 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.

9. Transitional period

(70) 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) [1] 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.

(1) Judgment in the Delimitis Case.

(78) 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 [1]. 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.

(79) The Commission considers that the consultation mechanisms provided for in the Notice on cooperation between national competition authorities and the Commission [2] should be used to avert the risk of conflicting decisions and duplication of procedures.

2. Disapplication of the Block Exemption Regulation

(80) 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.

(81) 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.

(82) 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.

(83) 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.

(84) 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.

(85) 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.

[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.

(86) 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.

(87) 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

(88) The Commission Notice on definition of the relevant market for the purposes of Community competition law [1] 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

(89) 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.

(90) 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.

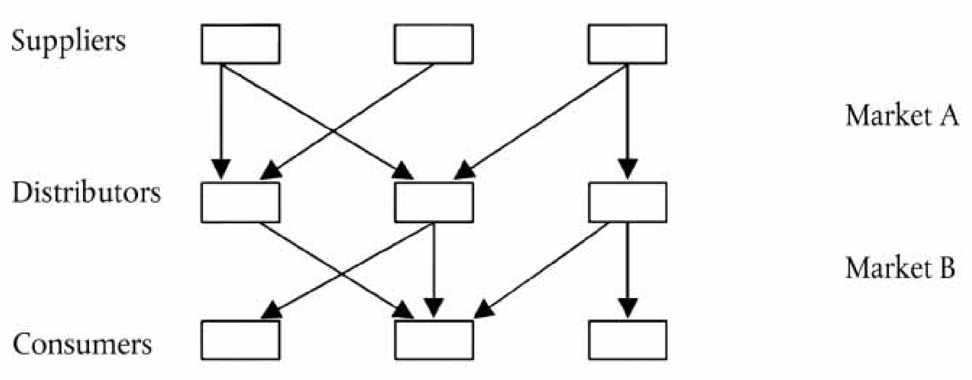
(91) For the application of the Block Exemption Regulation, the market share of the supplier is his share on the relevant product and geographic market on which he sells to his buyers. [2] In the example given in paragraph 92, this is market A. The product market depends in the first place on substitutability 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.

(92) In the case of exclusive supply, the buyer's market share is his share of all purchases on the relevant purchase market. [3] In the example below, this is also market A.

[1] OJ C 372, 9.12.1997, p. 5.

[2] For example, the Dutch market for new replacement truck and bus tyres in the Michelin case (Case 322/81 Nederlandsche Banden-Industrie Michelinv Commission [1983] ECR 3461), the various meat markets in the Danish slaughter-house case: Commission Decision 2000/42/EC in Case No IV/M.1313 — Danish Crown/Vestjyske Slagterier, OJ L 20, 25.1.2000, p. 1.

[3] For an example of purchase markets, see Commission Decision 1999/674/EC in Case No IV/M.1221 — Rewe/Meinl, OJ L 274, 23.10.1999, p. 1.



(93) 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.

(94) 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].

(95) 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.

3. The relevant market for individual assessment

(96) 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:

[1] See for example Pelikan/Kyocera in XXV Report on Competition Policy, point 87, and Commission Decision 91/595/EEC in Case No IV/M.12 — Varta/Bosch, OJ L 320, 22.11.1991, p. 26, Commission Decision in Case No IV/M.1094 — Caterpillar/Perkins Engines, OJ C 94, 28.3.1998, p. 23, and Commission Decision in Case No IV/M.768 — Lucas/Varity, OJ C 266, 13.9.1996, p. 6. See also Eastman Kodak Co v Image Technical Services, Inc et al, Supreme Court of the United States, No 90 1029. See also point 56 of the Commission Notice on the definition of relevant market for the purposes of Community competition law.

(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.

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.

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.

(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.

1.2. *Positive effects of vertical restraints*

(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.

(116) 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 supra-normal 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*

(120) The assessment of a vertical restraint involves in general the following four steps:

(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)*

(121) 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.

(122) 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:

Market position of the supplier

(123) 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

(124) 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 risks of entering the market and the more credibly incumbents can threaten that they will match new competition, as sunk costs make it costly for incumbents to leave the market. If, for instance, distributors are tied to a manufacturer via a non-compete obligation, the foreclosing effect will be more significant if setting up its own distributors will impose sunk costs on the potential entrant.

(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.

(1) See Commission Decision 97/26/EC (Case No IV/M.619 — Gencor/Lonrho), (OJ L 11, 14.1.1997, p. 30).

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 inparagraphs 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.

(140) 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.

(141) 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.

(142) 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.

(143) 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.

(144) '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.

(145) '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.

(146) 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.

(147) 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 foodstuffs). 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-compete 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-compete, 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-compete 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 fulfil the conditions of Article 81(3). In the case of high relationship-specific investments, a non-compete obligation exceeding five years may be justified. A relationship-specific investment could, for instance, be the installation or adaptation of equipment by the supplier when this equipment can be used afterwards only to produce components for a particular buyer. General or market-specific investments in (extra) capacity

are normally not relationship-specific investments. However, where a supplier creates new capacity specifically linked to the operations of a particular buyer, for instance a company producing metal cans which creates new capacity to produce cans on the premises of or next to the canning facility of a food producer, this new capacity may only be economically viable when producing for this particular customer, in which case the investment would be considered to be relationship-specific.

(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 in return for contracts with these resellers.

Producer X's tied market share is 24 % (0,75 × 0,80 × 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*

(161) 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.

(162) 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.

(163) 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.

(164) 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.

(165) '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.

(166) 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.

(167) '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.

(168) '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.

(169) '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.

(170) 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.

(171) 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.

(172) 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 %.

(173) 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.

(174) Exclusive distribution may lead to efficiencies, especially where investments by the distributors are required to protect or build up the brand image. In

general, the case for efficiencies is strongest for new products, 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.

(175) 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.

(176) 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 dealerships. Intra-brand competition is limited by the territorial exclusivity. Competition between the four leading brands is reduced at the retail level, since one retailer fixes the price of all four brands in each territory. The multiple dealership implies that, if one producer cuts the price for its brand, the retailer will not be eager to transmit this price cut to the final consumer as it would reduce its sales and profits made with the other brands. Hence, producers have a reduced interest in entering into price competition with one another. Inter-brand price competition exists mainly with the low brand image goods of the fringe producers. The possible efficiency arguments for (joint) exclusive distributors are limited, as the product is relatively simple, the resale does not require any specific investments or training and advertising is mainly carried out at the level of the producers.

Even though each of the market leaders has a market share below the threshold, exemption under Article 81(3) may not be justified and withdrawal of the block exemption may be necessary.

(177) 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*

(178) 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.

(179) 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.

(180) The allocation of customers normally makes arbitrage by the customers 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.

(181) 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.

(182) 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.

(183) Example of exclusive customer allocation

A company has developed a sophisticated sprinkler installation. The company has currently a market share of 40 % on the market for sprinkler installations. When it started selling the sophisticated sprinkler it had a market share of 20 % with an older product. The installation of the new type of sprinkler depends on the type of building that it is installed in and on the use of the building (office, chemical plant, hospital etc.). The company has appointed a number of distributors to sell and install the sprinkler installation. Each distributor needed to train its employees for the general and specific requirements of installing the sprinkler installation for a particular class of customers. To ensure that distributors would specialise the company assigned to each distributor an exclusive class of customers and prohibited active sales to each others' exclusive customer classes. After five years, all the exclusive distributors will be allowed to sell actively to all classes of customers, thereby ending the system of exclusive customer allocation. The supplier may then also start selling to new distributors. The market is quite dynamic, with two recent entries and a number of technological developments. Competitors, with market shares between 25 % and 5 %, are also upgrading their products.

As the exclusivity is of limited duration and helps to ensure that the distributors may recoup their investments and concentrate their sales efforts first on a certain class of customers in order to learn the trade, and as the possible anti-competitive effects seem limited in a dynamic market, the conditions for exemption are likely to be fulfilled.

2.4. *Selective distribution*

(184) 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.

(185) 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 [1]. 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 [2]. 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.

(186) 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

(1) See for example judgment of the Court of First Instance in Case T-88/92 Groupement d'achat Édouard Leclerc v Commission [1996] ECR II-1961.

(2) See judgments of the Court of Justice in Case 31/80 L'Oréal v PVBA [1980] ECR 3775, paragraphs 15 and 16; Case 26/76 Metro I [1977] ECR 1875, paragraphs 20 and 21; Case 107/82 AEG [1983] ECR 3151, paragraph 35; and of the Court of First Instance in Case T-19/91 Vichy v Commission [1992] ECR II-415, paragraph 65.

occur, the benefit of the Block Exemption Regulation is likely to be withdrawn. In addition, the following guidance is provided for the assessment of selective distribution in individual cases which are not covered by the Block Exemption Regulation or in the case of cumulative effects resulting from parallel networks of selective distribution.

(187) 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.

(188) 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.

(189) Where the Block Exemption Regulation applies to individual networks of selective distribution, withdrawal of the block exemption or disapplication of the Block Exemption Regulation may be considered in case of cumulative effects. However, a cumulative effect problem is unlikely to arise when the share of the market covered by selective distribution is below 50 %. Also, no problem is likely to arise where the market coverage ratio exceeds 50 %, but the aggregate market share of the five largest suppliers (CR5) is below 50 %. Where both the CR5 and the share of the market covered by selective distribution exceed 50 %, the assessment may vary depending on whether or not all five largest suppliers apply selective distribution. The stronger the position of the competitors 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.

(190) '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.

(191) '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.

(192) 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.

(193) 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 %.

(194) 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.

(195) 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).

(196) 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.

(197) 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[1]. 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.

(201) 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.

Sweet retailers buy their sweets on a national market from either national producers that cater for national tastes or from wholesalers which import sweets from foreign producers in addition to selling products from national producers. On this market the franchisor's products compete with other brands of sweets. The franchisor has a market share of 30 % on the market for sweets sold to retailers. Competition comes from a number of national and international brands, sometimes produced by large diversified food companies. There are many potential points of sale of sweets in the form of tobacconists, general food retailers, cafeterias and specialised sweet shops. On the market for machines for colouring food the franchisor's market share is below 10 %.

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*

(202) 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.

(203) Exclusive supply as defined in Article 1(c) of the Block Exemption Regulation is exempted by Article 2(1) read in conjunction with Article 3(2) of the Block Exemption Regulation up to 30 % market share of the buyer, even if combined with other non-hardcore vertical restraints such as non-compete. Above the market share threshold the following guidance is provided for the assessment of exclusive supply in individual cases.

(204) 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.

(205) It is not only the market position of the buyer on the upstream and downstream market that is important but also the extent to and the duration for which he applies an exclusive supply obligation. The higher the tied supply share, and the longer the duration of the exclusive supply, the more significant the foreclosure is likely to be. Exclusive supply agreements shorter than five years entered into by non-dominant companies usually require a balancing of pro- and anti-competitive effects, while agreements lasting longer than five years are for most types of investments not considered necessary to achieve the claimed efficiencies or the efficiencies are not sufficient to outweigh the foreclosure effect of such long-term exclusive supply agreements.

(206) The market position of the competing buyers on the upstream market is important as it is only likely that competing buyers will be foreclosed for anti-competitive reasons, i.e. to increase their costs, if they are significantly smaller than the foreclosing buyer. 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.

(207) 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.

(208) 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.

(209) 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.

(210) 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.

(211) 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.

(212) 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.

(213) 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 fulfil 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.

(214) 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*

(215) 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.

(216) 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.

(217) 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

(1) Judgment of the Court of Justice in Case C-333/94 P Tetrapak v Commission[1996] ECR I-5951, paragraph 37.

makes of the tying product, for example the tying of ink cartridges to the sale of photocopying machines (metering). Thirdly, when in the case of long-term contracts or in the case of after-markets with original equipment with a long replacement time, it becomes difficult for the customers to calculate the consequences of the tying. 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.

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Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector

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Commission Regulation (EC) No 1400/2002
of 31 July 2002
on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Community,
Having regard to Council Regulation No 19/65/EEC of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices(1), as last amended by Regulation (EC) No 1215/1999(2), and in particular Article 1 thereof,
Having published a draft of this Regulation(3),
Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,
Whereas:
(1) Experience acquired in the motor vehicle sector regarding the distribution of new motor vehicles, spare parts and after sales services makes it possible to define categories of vertical agreements which can be regarded as normally satisfying the conditions laid down in Article 81(3).
(2) This experience leads to the conclusion that rules stricter than those provided for by 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(4) are necessary in this sector.
(3) These stricter rules for exemption by category (the exemption) should apply to vertical agreements for the purchase or sale of new motor vehicles, vertical agreements for the purchase or sale of spare parts for motor vehicles and vertical agreements for the purchase or sale of repair and maintenance services for such vehicles where these agreements are concluded between non-competing undertakings, between certain competitors, or by certain associations of retailers or repairers. This includes vertical agreements concluded between a distributor acting at the retail level or an authorised repairer and a (sub)distributor or repairer. This Regulation should also apply to these vertical agreements when they contain ancillary provisions on the assignment or use of intellectual property rights. The term "vertical agreements" should be defined accordingly to include both such agreements and the corresponding concerted practices.
(4) The benefit of the exemption should be limited to vertical agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 81(3).
(5) Vertical agreements falling within the categories defined in this Regulation

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.
(6) 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 held by the undertakings concerned and therefore on the extent to which those undertakings face competition from other suppliers of goods or services regarded by the buyer as interchangeable or substitutable for one another, by reason of the products' characteristics, prices or intended use.
(7) Thresholds based on market share should be fixed in order to reflect suppliers' market power. Furthermore, this sector-specific Regulation should contain stricter rules than those provided for by Regulation (EC) No 2790/1999, in particular for selective distribution. The thresholds below which it can be presumed that the advantages secured by vertical agreements outweigh their restrictive effects should vary with the characteristics of different types of vertical agreement. It can therefore be presumed that in general, vertical agreements have such advantages where the supplier concerned has a market share of up to 30 % on the markets for the distribution of new motor vehicles or spare parts, or of up to 40 % where quantitative selective distribution is used for the sale of new motor vehicles. As regards after sales services it can be presumed that, in general, vertical agreements by which the supplier sets criteria on how its authorised repairers have to provide repair or maintenance services for the motor vehicles of the relevant make and provides them with equipment and training for the provision of such services have such advantages where the network of authorised repairers of the supplier concerned has a market share of up to 30 %. However, in the case of vertical agreements containing exclusive supply obligations, it is the market share of the buyer which is relevant for determining the overall effects of such vertical agreements on the market.
(8) Above those market share thresholds, there can be no presumption that vertical agreements falling within the scope of Article 81(1) will usually give rise to objective advantages of such a character and magnitude as to compensate for the disadvantages which they create for competition. However, such advantages can be anticipated in the case of qualitative selective distribution, irrespective of the supplier's market share.
(9) In order to prevent a supplier from terminating an agreement because a distributor or a repairer engages in pro-competitive behaviour, such as active or passive sales to foreign consumers, multi-branding or subcontracting of repair and maintenance services, every notice of termination must clearly set out in writing the reasons, which must be objective and transparent. Furthermore, in order to strengthen the independence of distributors and repairers from their suppliers, minimum periods of notice should be provided for the non-renewal of agreements concluded for a limited duration and for the termination of agreements of unlimited duration.
(10) In order to foster market integration and to allow distributors or authorised repairers to seize additional business opportunities, distributors or authorised repairers have to be allowed to purchase other undertakings of the same type that sell or repair the same brand of motor vehicles within the distribution system. To this end, any vertical agreement between a supplier and a distributor or authorised repairer has to provide for the latter to have the right to transfer all of its rights and obligations to any other undertaking of its choice of the same type that sell or repairs the same brand of motor vehicles within the distribution system.
(11) In order to favour the quick resolution of disputes which arise between the parties to a distribution agreement and which might otherwise hamper effective competition, agreements should only benefit from exemption if they provide for

each party to have a right of recourse to an independent expert or arbitrator, in particular where notice is given to terminate an agreement.

(12) Irrespective of the market share of the undertakings concerned, this Regulation does not cover vertical agreements containing certain types of severely anti-competitive restraints (hardcore restrictions) which in general appreciably restrict competition even at low market shares and which are not indispensable to the attainment of the positive effects mentioned above. This concerns in particular vertical agreements containing restraints such as minimum or fixed resale prices and, with certain exceptions, restrictions of the territory into which, or of the customers to whom, a distributor or repairer may sell the contract goods or services. Such agreements should not benefit from the exemption.

(13) It is necessary to ensure that effective competition within the common market and between distributors located in different Member States is not restricted if a supplier uses selective distribution in some markets and other forms of distribution in others. In particular selective distribution agreements which restrict passive sales to any end user or unauthorised distributor located in markets where exclusive territories have been allocated should be excluded from the benefit of the exemption, as should those selective distribution agreements which restrict passive sales to customer groups which have been allocated exclusively to other distributors. The benefit of the exemption should also be withheld from exclusive distribution agreements if active or passive sales to any end user or unauthorised distributor located in markets where selective distribution is used are restricted.

(14) The right of any distributor to sell new motor vehicles passively or, where relevant, actively to end users should include the right to sell such vehicles to end users who have given authorisation to an intermediary or purchasing agent to purchase, take delivery of, transport or store a new motor vehicle on their behalf.

(15) The right of any distributor to sell new motor vehicles or spare parts or of any authorised repairer to sell repair and maintenance services to any end user passively or, where relevant, actively should include the right to use the Internet or Internet referral sites.

(16) Limits placed by suppliers on their distributors' sales to any end user in other Member States, for instance where distributor remuneration or the purchase price is made dependent on the destination of the vehicles or on the place of residence of the end users, amount to an indirect restriction on sales. Other examples of indirect restrictions on sales include supply quotas based on a sales territory other than the common market, whether or not these are combined with sales targets. Bonus systems based on the destination of the vehicles or any form of discriminatory product supply to distributors, whether in the case of product shortage or otherwise, also amount to an indirect restriction on sales.

(17) Vertical agreements that do not oblige the authorised repairers within a supplier's distribution system to honour warranties, perform free servicing and carry out recall work in respect of any motor vehicle of the relevant make sold in the common market amount to an indirect restriction of sales and should not benefit from the exemption. This obligation is without prejudice to the right of a motor vehicle supplier to oblige a distributor to make sure as regards the new motor vehicles that he has sold that the warranties are honoured and that free servicing and recall work is carried out, either by the distributor itself or, in case of subcontracting, by the authorised repairer(s) to whom these services have been subcontracted. Therefore consumers should in these cases be able to turn to the distributor if the above obligations have not been properly fulfilled by the authorised repairer to whom the distributor has subcontracted these services. Furthermore, in order to allow sales by motor vehicle distributors to end users throughout the common market, the exemption should apply only to distribution agreements which require the repairers within the supplier's network to carry out repair and maintenance services for the contract goods and corresponding goods

irrespective of where these goods are sold in the common market.

(18) In markets where selective distribution is used, the exemption should apply in respect of a prohibition on a distributor from operating out of an additional place of establishment where he is a distributor of vehicles other than passenger cars or light commercial vehicles. However, this prohibition should not be exempted if it limits the expansion of the distributor's business at the authorised place of establishment by, for instance, restricting the development or acquisition of the infrastructure necessary to allow increases in sales volumes, including increases brought about by Internet sales.

(19) It would be inappropriate to exempt any vertical agreement that restricts the sale of original spare parts or spare parts of matching quality by members of the distribution system to independent repairers which use them for the provision of repair or maintenance services. Without access to such spare parts, these independent repairers would not be able to compete effectively with authorised repairers, since they could not provide consumers with good quality services which contribute to the safe and reliable functioning of motor vehicles.

(20) In order to give end users the right to purchase new motor vehicles with specifications identical to those sold in any other Member State, from any distributor selling corresponding models and established in the common market, the exemption should apply only to vertical agreements which enable a distributor to order, stock and sell any such vehicle which corresponds to a model within its contract range. Discriminatory or objectively unjustified supply conditions, in particular those regarding delivery times or prices, applied by the supplier to corresponding vehicles, are to be considered a restriction on the ability of the distributor to sell such vehicles.

(21) Motor vehicles are expensive and technically complex mobile goods which require repair and maintenance at regular and irregular intervals. However, it is not indispensable for distributors of new motor vehicles also to carry out repair and maintenance. The legitimate interests of suppliers and end users can be fully satisfied if the distributor subcontracts these services, including the honouring of warranties, free servicing and recall work, to a repairer or to a number of repairers within the supplier's distribution system. It is nevertheless appropriate to facilitate access to repair and maintenance services. Therefore, a supplier may require distributors who have subcontracted repair and maintenance services to one or more authorised repairers to give end users the name and address of the repair shop or shops in question. If any of these authorised repairers is not established in the vicinity of the sales outlet, the supplier may also require the distributor to tell end users how far the repair shop or shops in question are from the sales outlet. However, a supplier can only impose such obligations if he also imposes similar obligations on distributors whose own repair shop is not on the same premises as their sales outlet.

(22) Furthermore, it is not necessary, in order to adequately provide for repair and maintenance services, for authorised repairers to also sell new motor vehicles. The exemption should therefore not cover vertical agreements containing any direct or indirect obligation or incentive which leads to the linking of sales and servicing activities or which makes the performance of one of these activities dependent on the performance of the other; this is in particular the case where the remuneration of distributors or authorised repairers relating to the purchase or sale of goods or services necessary for one activity is made dependent on the purchase or sale of goods or services relating to the other activity, or where all such goods or services are indistinctly aggregated into a single remuneration or discount system.

(23) In order to ensure effective competition on the repair and maintenance markets and to allow repairers to offer end users competing spare parts such as original spare parts and spare parts of matching quality, the exemption should not cover vertical agreements which restrict the ability of authorised repairers within

the distribution system of a vehicle manufacturer, independent distributors of spare parts, independent repairers or end users to source spare parts from the manufacturer of such spare parts or from another third party of their choice. This does not affect spare part manufacturers' liability under civil law.

(24) Furthermore, in order to allow authorised and independent repairers and end users to identify the manufacturer of motor vehicle components or of spare parts and to choose between competing spare parts, the exemption should not cover agreements by which a manufacturer of motor vehicles limits the ability of a manufacturer of components or original spare parts to place its trade mark or logo on these parts effectively and in a visible manner. Moreover, in order to facilitate this choice and the sale of spare parts, which have been manufactured according to the specifications and production and quality standards provided by the vehicle manufacturer for the production of components or spare parts, it is presumed that spare parts constitute original spare parts, if the spare part producer issues a certificate that the parts are of the same quality as the components used for the assembly of a motor vehicle and have been manufactured according to these specifications and standards. Other spare parts for which the spare part producer can issue a certificate at any moment attesting that they match the quality of the components used for the assembly of a certain motor vehicle, may be sold as spare parts of matching quality.

(25) The exemption should not cover vertical agreements which restrict authorised repairers from using spare parts of matching quality for the repair or maintenance of a motor vehicle. However, in view of the vehicle manufacturers' direct contractual involvement in repairs under warranty, free servicing, and recall operations, agreements containing obligations on authorised repairers to use original spare parts supplied by the vehicle manufacturer for these repairs should be covered by the exemption.

(26) In order to protect effective competition on the market for repair and maintenance services and to prevent foreclosure of independent repairers, motor vehicle manufacturers must allow all interested independent operators to have full access to all technical information, diagnostic and other equipment, tools, including all relevant software, and training required for the repair and maintenance of motor vehicles. Independent operators who must be allowed such access include in particular independent repairers, manufacturers of repair equipment or tools, publishers of technical information, automobile clubs, roadside assistance operators, operators offering inspection and testing services and operators offering training for repairers. In particular, the conditions of access must not discriminate between authorised and independent operators, access must be given upon request and without undue delay, and the price charged for the information should not discourage access to it by failing to take into account the extent to which the independent operator uses it. A supplier of motor vehicles should be required to give independent operators access to technical information on new motor vehicles at the same time as such access is given to its authorised repairers and must not oblige independent operators to purchase more than the information necessary to carry out the work in question. Suppliers should be obliged to give access to the technical information necessary for re-programming electronic devices in a motor vehicle. It is, however, legitimate and proper for them to withhold access to technical information which might allow a third party to bypass or disarm on-board anti-theft devices, to recalibrate electronic devices or to tamper with devices which for instance limit the speed of a motor vehicle, unless protection against theft, re-calibration or tampering can be attained by other less restrictive means. Intellectual property rights and rights regarding know-how including those which relate to the aforementioned devices must be exercised in a manner which avoids any type of abuse.

(27) In order to ensure access to and to prevent collusion on the relevant markets

and to give distributors opportunities to sell vehicles of brands from two or more manufacturers that are not connected undertakings, certain specific conditions are attached to the exemption. To this end, the exemption should not be accorded to non-compete obligations. In particular, without prejudice to the ability of the supplier to require the distributor to display the vehicles in brand-specific areas of the showroom in order to avoid brand confusion, any prohibition on sales of competing makes should not be exempted. The same applies to an obligation to display the full range of motor vehicles if it makes the sale or display of vehicles manufactured by undertakings which are not connected impossible or unreasonably difficult. Furthermore, an obligation to have brand-specific sales personnel is considered to be an indirect non-compete obligation and therefore should not be covered by the exemption, unless the distributor decides to have brand-specific sales personnel and the supplier pays all the additional costs involved.

(28) In order to ensure that repairers are able to carry out repairs or maintenance on all motor vehicles, the exemption should not apply to any obligation limiting the ability of repairers of motor vehicles to provide repair or maintenance services for brands of competing suppliers.

(29) In addition, specific conditions are required to exclude certain restrictions, sometimes imposed in the context of a selective distribution system, from the scope of the exemption. This applies in particular to obligations which have the effect of preventing the members of a selective distribution system from selling the brands of particular competing suppliers, which could easily lead to foreclosure of certain brands. Additional conditions are necessary in order to foster intra-brand competition and market integration within the common market, to create opportunities for distributors and authorised repairers who wish to seize business opportunities outside their place of establishment, and to create conditions which allow the development of multi-brand distributors. In particular a restriction on operating out of an unauthorised place of establishment for the distribution of passenger cars and light commercial vehicles or the provision of repair and maintenance services should not be exempted. The supplier may require additional sales or delivery outlets for passenger cars and light commercial vehicles or repair shops to comply with the relevant qualitative criteria applicable for similar outlets located in the same geographic area.

(30) The exemption should not apply to restrictions limiting the ability of a distributor to sell leasing services for motor vehicles.

(31) The market share limitations, the fact that certain vertical agreements are not covered, and the conditions provided for in this Regulation, should normally ensure that the agreements to which the exemption applies do not enable the participating undertakings to eliminate competition in respect of a substantial part of the goods or services in question.

(32) In particular cases in which agreements which would otherwise benefit from the exemption nevertheless have effects incompatible with Article 81(3), the Commission is empowered to withdraw the benefit of the exemption; this may occur in particular where the buyer has significant market power on the relevant market on which it resells the goods or provides the services or where parallel networks of vertical agreements have similar effects which significantly restrict access to a relevant market or competition thereon; such cumulative effects may for example arise in the case of selective distribution. The Commission may also withdraw the benefit of the exemption if competition is significantly restricted on a market due to the presence of a supplier with market power or if prices and conditions of supply to motor vehicle distributors differ substantially between geographic markets. It may also withdraw the benefit of the exemption if discriminatory prices or sales conditions, or unjustifiably high supplements, such as those charged for right hand drive vehicles, are applied for the supply of goods

corresponding to the contract range.
(33) Regulation No 19/65/EEC empowers the national authorities of Member States to withdraw the benefit of the exemption in respect of vertical agreements having effects incompatible with the conditions laid down in Article 81(3), where such effects are felt in their territory, or in a part thereof, and where such territory has the characteristics of a distinct geographic market; the exercise of this national power of withdrawal should not prejudice the uniform application throughout the common market of the Community competition rules or the full effect of the measures adopted in implementation of those rules.
(34) In order to allow for better supervision of parallel networks of vertical agreements which have similar restrictive effects and which cover more than 50 % of a given market, the Commission should be permitted to declare the exemption inapplicable to vertical agreements containing specific restraints relating to the market concerned, thereby restoring the full application of Article 81(1) to such agreements.
(35) The exemption should be granted without prejudice to the application of the provisions of Article 82 of the Treaty on the abuse by an undertaking of a dominant position.
(36) Commission Regulation (EC) N° 1475/95 of 28 June 1995 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements(5) is applicable until 30 September 2002. In order to allow all operators time to adapt vertical agreements which are compatible with that regulation and which are still in force when the exemption provided for therein expires, it is appropriate for such agreements to benefit from a transition period until 1 October 2003, during which time they should be exempted from the prohibition laid down in Article 81(1) under this Regulation.
(37) In order to allow all operators within a quantitative selective distribution system for new passenger cars and light commercial vehicles to adapt their business strategies to the non-application of the exemption to location clauses, it is appropriate to stipulate that the condition set out in Article 5(2)(b) shall enter into force on 1 October 2005.
(38) The Commission should monitor the operation of this Regulation on a regular basis, with particular regard to its effects on competition in motor vehicle retailing and in after sales servicing in the common market or relevant parts of it. This should include monitoring the effects of this Regulation on the structure and level of concentration of motor vehicle distribution and any resulting effects on competition. The Commission should also carry out an evaluation of the operation of this Regulation and draw up a report not later than 31 May 2008.
HAS ADOPTED THIS REGULATION:

Article 1
Definitions
1. For the purposes of this Regulation:
(a) "competing undertakings" means actual or potential suppliers on the same product market; the product market includes goods or services which are regarded by the buyer as interchangeable with or substitutable for the contract goods or services, by reason of the products' characteristics, their prices and their intended use;
(b) "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 30 % of the buyer's total purchases of the contract goods, corresponding goods or services and their substitutes on the relevant market, calculated on the basis of the value of its purchases in the preceding calendar year.

An obligation that the distributor sell motor vehicles from other suppliers in separate areas of the showroom in order to avoid confusion between the makes does not constitute a non-compete obligation for the purposes of this Regulation. An obligation that the distributor have brand-specific sales personnel for different brands of motor vehicles constitutes a non-compete obligation for the purposes of this Regulation, unless the distributor decides to have brand-specific sales personnel and the supplier pays all the additional costs involved;
(c) "vertical agreements" means agreements or concerted practices entered into by two or more undertakings, each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain;
(d) "vertical restraints" means restrictions of competition falling within the scope of Article 81(1), when such restrictions are contained in a vertical agreement;
(e) "exclusive supply obligation" means any direct or indirect obligation causing the supplier to sell the contract goods or services only to one buyer inside the common market for the purposes of a specific use or for resale;
(f) "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 or repairers selected on the basis of specified criteria and where these distributors or repairers undertake not to sell such goods or services to unauthorised distributors or independent repairers, without prejudice to the ability to sell spare parts to independent repairers or the obligation to provide independent operators with all technical information, diagnostic equipment, tools and training required for the repair and maintenance of motor vehicles or for the implementation of environmental protection measures;
(g) "quantitative selective distribution system" means a selective distribution system where the supplier uses criteria for the selection of distributors or repairers which directly limit their number;
(h) "qualitative selective distribution system" means a selective distribution system where the supplier uses criteria for the selection of distributors or repairers which are only qualitative in nature, are required by the nature of the contract goods or services, are laid down uniformly for all distributors or repairers applying to join the distribution system, are not applied in a discriminatory manner, and do not directly limit the number of distributors or repairers;
(i) "intellectual property rights" includes industrial property rights, copyright and neighbouring rights;
(j) "know-how" means a package of non-patented practical information, derived from experience and testing by the supplier, which is secret, substantial and identified; in this context, "secret" means that the know-how, as a body or in the precise configuration and assembly of its components, is not generally known or easily accessible; "substantial" means that the know-how includes information which is indispensable to the buyer for the use, sale or resale of the contract goods or services; "identified" means that the know-how must be described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;
(k) "buyer", whether distributor or repairer, includes an undertaking which sells goods or services on behalf of another undertaking;
(l) "authorised repairer" means a provider of repair and maintenance services for motor vehicles operating within the distribution system set up by a supplier of motor vehicles;
(m) "independent repairer" means a provider of repair and maintenance services for motor vehicles not operating within the distribution system set up by the supplier of the motor vehicles for which it provides repair or maintenance. An authorised repairer within the distribution system of a given supplier shall be deemed to be an independent repairer for the purposes of this Regulation to the extent that he provides repair or maintenance services for motor vehicles in

respect of which he is not a member of the respective supplier's distribution system;

(n) "motor vehicle" means a self propelled vehicle intended for use on public roads and having three or more road wheels;

(o) "passenger car" means a motor vehicle intended for the carriage of passengers and comprising no more than eight seats in addition to the driver's seat;

(p) "light commercial vehicle" means a motor vehicle intended for the transport of goods or passengers with a maximum mass not exceeding 3,5 tonnes; if a certain light commercial vehicle is also sold in a version with a maximum mass above 3,5 tonnes, all versions of that vehicle are considered to be light commercial vehicles;

(q) the "contract range" means all the different models of motor vehicles available for purchase by the distributor from the supplier;

(r) a "motor vehicle which corresponds to a model within the contract range" means a vehicle which is the subject of a distribution agreement with another undertaking within the distribution system set up by the manufacturer or with his consent and which is:

- manufactured or assembled in volume by the manufacturer, and
- identical as to body style, drive-line, chassis, and type of motor to a vehicle within the contract range;

(s) "spare parts" means goods which are to be installed in or upon a motor vehicle so as to replace components of that vehicle, including goods such as lubricants which are necessary for the use of a motor vehicle, with the exception of fuel;

(t) "original spare parts" means spare parts which are of the same quality as the components used for the assembly of a motor vehicle and which are manufactured according to the specifications and production standards provided by the vehicle manufacturer for the production of components or spare parts for the motor vehicle in question. This includes spare parts which are manufactured on the same production line as these components. It is presumed, unless the contrary is proven, that parts constitute original spare parts if the part manufacturer certifies that the parts match the quality of the components used for the assembly of the vehicle in question and have been manufactured according to the specifications and production standards of the vehicle manufacturer;

(u) "spare parts of matching quality" means exclusively spare parts made by any undertaking which can certify at any moment that the parts in question match the quality of the components which are or were used for the assembly of the motor vehicles in question;

(v) "undertakings within the distribution system" means the manufacturer and undertakings which are entrusted by the manufacturer or with the manufacturer's consent with the distribution or repair or maintenance of contract goods or corresponding goods;

(w) "end user" includes leasing companies unless the leasing contracts used provide for a transfer of ownership or an option to purchase the vehicle prior to the expiry of the contract.

2. The terms "undertaking", "supplier", "buyer", "distributor" and "repairer" shall include their respective connected undertakings.

"Connected undertakings" are:

(a) undertakings in which a party to the agreement, directly or indirectly:

(i) has the power to exercise more than half the voting rights, or

(ii) has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or

(iii) has the right to manage the undertaking's affairs;

(b) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in (a);

(c) undertakings in which an undertaking referred to in (b) has, directly or indirectly, the rights or powers listed in (a);

(d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in (a);
(e) undertakings in which the rights or the powers listed in (a) are jointly held by:
(i) parties to the agreement or their respective connected undertakings referred to in (a) to (d), or
(ii) one or more of the parties to the agreement or one or more of their connected undertakings referred to in (a) to (d) and one or more third parties.

Article 2
Scope
1. Pursuant to Article 81(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that the provisions of Article 81(1) shall not apply to vertical agreements where they relate to the conditions under which the parties may purchase, sell or resell new motor vehicles, spare parts for motor vehicles or repair and maintenance services for motor vehicles.
The first subparagraph shall apply to the extent that such vertical agreements contain vertical restraints.
The exemption declared by this paragraph shall be known for the purposes of this Regulation as "the exemption".
2. The exemption shall also apply to the following categories of vertical agreements:
(a) 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 distributors of motor vehicles or spare parts for motor vehicles or repairers 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 81 to horizontal agreements concluded between the members of the association or decisions adopted by the association;
(b) 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 shall apply on condition that those provisions do not contain restrictions of competition relating to the contract goods or services which have the same object or effect as vertical restraints which are not exempted under this Regulation.
3. The exemption 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 buyer has a total annual turnover not exceeding EUR 100 million, or
(b) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor not manufacturing goods competing with the contract goods, or
(c) the supplier is a provider of services at several levels of trade, while the buyer does not provide competing services at the level of trade where it purchases the contract services.

Article 3
General conditions
1. Subject to paragraphs 2, 3, 4, 5, 6 and 7, the exemption shall apply on condition that the supplier's market share on the relevant market on which it sells the new motor vehicles, spare parts for motor vehicles or repair and maintenance services

does not exceed 30 %.
However, the market share threshold for the application of the exemption shall be 40 % for agreements establishing quantitative selective distribution systems for the sale of new motor vehicles.
Those thresholds shall not apply to agreements establishing qualitative selective distribution systems.
2. In the case of vertical agreements containing exclusive supply obligations, the exemption shall apply on condition that the market share held by the buyer does not exceed 30 % of the relevant market on which it purchases the contract goods or services.
3. The exemption shall apply on condition that the vertical agreement concluded with a distributor or repairer provides that the supplier agrees to the transfer of the rights and obligations resulting from the vertical agreement to another distributor or repairer within the distribution system and chosen by the former distributor or repairer.
4. The exemption shall apply on condition that the vertical agreement concluded with a distributor or repairer provides that a supplier who wishes to give notice of termination of an agreement must give such notice in writing and must include detailed, objective and transparent reasons for the termination, in order to prevent a supplier from ending a vertical agreement with a distributor or repairer because of practices which may not be restricted under this Regulation.
5. The exemption shall apply on condition that the vertical agreement concluded by the supplier of new motor vehicles with a distributor or authorised repairer provides
(a) that the agreement is concluded for a period of at least five years; in this case each party has to undertake to give the other party at least six months' prior notice of its intention not to renew the agreement;
(b) or that the agreement is concluded for an indefinite period; in this case the period of notice for regular termination of the agreement has to be at least two years for both parties; this period is reduced to at least one year where:
(i) the supplier is obliged by law or by special agreement to pay appropriate compensation on termination of the agreement, or
(ii) the supplier terminates the agreement where it is necessary to re-organise the whole or a substantial part of the network.
6. The exemption shall apply on condition that the vertical agreement provides for each of the parties the right to refer disputes concerning the fulfilment of their contractual obligations to an independent expert or arbitrator. Such disputes may relate, inter alia, to any of the following:
(a) supply obligations;
(b) the setting or attainment of sales targets;
(c) the implementation of stock requirements;
(d) the implementation of an obligation to provide or use demonstration vehicles;
(e) the conditions for the sale of different brands;
(f) the issue whether the prohibition to operate out of an unauthorised place of establishment limits the ability of the distributor of motor vehicles other than passenger cars or light commercial vehicles to expand its business, or
(g) the issue whether the termination of an agreement is justified by the reasons given in the notice.
The right referred to in the first sentence is without prejudice to each party's right to make an application to a national court.
7. For the purposes of this Article, the market share held by the undertakings referred to in Article 1(2)(e) shall be apportioned equally to each undertaking having the rights or the powers listed in Article 1(2)(a).

Article 4

Hardcore restrictions

(Hardcore restrictions concerning the sale of new motor vehicles, repair and maintenance services or spare parts)

1. The exemption 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 distributor's or repairer's ability to determine its sale price, without prejudice to the supplier's ability to impose a maximum sale price or to recommend a sale price, provided that this does not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;

(b) the restriction of the territory into which, or of the customers to whom, the distributor or repairer may sell the contract goods or services; however, the exemption shall apply to:

(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 distributor or repairer, where such a restriction does not limit sales by the customers of the distributor or repairer;

(ii) the restriction of sales to end users by a distributor operating at the wholesale level of trade;

(iii) the restriction of sales of new motor vehicles and spare parts to unauthorised distributors by the members of a selective distribution system in markets where selective distribution is applied, subject to the provisions of point (i);

(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 cross-supplies between distributors or repairers within a selective distribution system, including between distributors or repairers operating at different levels of trade;

(d) the restriction of active or passive sales of new passenger cars or light commercial vehicles, spare parts for any motor vehicle or repair and maintenance services for any motor vehicle to end users by members of a selective distribution system operating at the retail level of trade in markets where selective distribution is used. The exemption shall apply to agreements containing a prohibition on a member of a selective distribution system from operating out of an unauthorised place of establishment. However, the application of the exemption to such a prohibition is subject to Article 5(2)(b);

(e) the restriction of active or passive sales of new motor vehicles other than passenger cars or light commercial vehicles to end users by members of a selective distribution system operating at the retail level of trade in markets where selective distribution is used, without prejudice to the ability of the supplier to prohibit a member of that system from operating out of an unauthorised place of establishment;

(Hardcore restrictions only concerning the sale of new motor vehicles)

(f) the restriction of the distributor's ability to sell any new motor vehicle which corresponds to a model within its contract range;

(g) the restriction of the distributor's ability to subcontract the provision of repair and maintenance services to authorised repairers, without prejudice to the ability of the supplier to require the distributor to give end users the name and address of the authorised repairer or repairers in question before the conclusion of a sales contract and, if any of these authorised repairers is not in the vicinity of the sales outlet, to also tell end users how far the repair shop or repair shops in question are from the sales outlet; however, such obligations may only be imposed provided that similar obligations are imposed on distributors whose repair shop is not on the same premises as their sales outlet;

(Hardcore restrictions only concerning the sale of repair and maintenance services

and of spare parts)
(h) the restriction of the authorised repairer's ability to limit its activities to the provision of repair and maintenance services and the distribution of spare parts;
(i) the restriction of the sales of spare parts for motor vehicles by members of a selective distribution system to independent repairers which use these parts for the repair and maintenance of a motor vehicle;
(j) the restriction agreed between a supplier of original spare parts or spare parts of matching quality, repair tools or diagnostic or other equipment and a manufacturer of motor vehicles, which limits the supplier's ability to sell these goods or services to authorised or independent distributors or to authorised or independent repairers or end users;
(k) the restriction of a distributor's or authorised repairer's ability to obtain original spare parts or spare parts of matching quality from a third undertaking of its choice and to use them for the repair or maintenance of motor vehicles, without prejudice to the ability of a supplier of new motor vehicles to require the use of original spare parts supplied by it for repairs carried out under warranty, free servicing and vehicle recall work;
(l) the restriction agreed between a manufacturer of motor vehicles which uses components for the initial assembly of motor vehicles and the supplier of such components which limits the latter's ability to place its trade mark or logo effectively and in an easily visible manner on the components supplied or on spare parts.
2. The exemption shall not apply where the supplier of motor vehicles refuses to give independent operators access to any technical information, diagnostic and other equipment, tools, including any relevant software, or training required for the repair and maintenance of these motor vehicles or for the implementation of environmental protection measures.
Such access must include in particular the unrestricted use of the electronic control and diagnostic systems of a motor vehicle, the programming of these systems in accordance with the supplier's standard procedures, the repair and training instructions and the information required for the use of diagnostic and servicing tools and equipment.
Access must be given to independent operators in a non-discriminatory, prompt and proportionate way, and the information must be provided in a usable form. If the relevant item is covered by an intellectual property right or constitutes know-how, access shall not be withheld in any abusive manner.
For the purposes of this paragraph "independent operator" shall mean undertakings which are directly or indirectly involved in the repair and maintenance of motor vehicles, in particular independent repairers, manufacturers of repair equipment or tools, independent distributors of spare parts, publishers of technical information, automobile clubs, roadside assistance operators, operators offering inspection and testing services and operators offering training for repairers.

Article 5
Specific conditions
1. As regards the sale of new motor vehicles, repair and maintenance services or spare parts, the exemption shall not apply to any of the following obligations contained in vertical agreements:
(a) any direct or indirect non-compete obligation;
(b) any direct or indirect obligation limiting the ability of an authorised repairer to provide repair and maintenance services for vehicles from competing suppliers;
(c) any direct or indirect obligation causing the members of a distribution system not to sell motor vehicles or spare parts of particular competing suppliers or not to provide repair and maintenance services for motor vehicles of particular

competing suppliers;
(d) any direct or indirect obligation causing the distributor or authorised repairer, after termination of the agreement, not to manufacture, purchase, sell or resell motor vehicles or not to provide repair or maintenance services.
2. As regards the sale of new motor vehicles, the exemption shall not apply to any of the following obligations contained in vertical agreements:
(a) any direct or indirect obligation causing the retailer not to sell leasing services relating to contract goods or corresponding goods;
(b) any direct or indirect obligation on any distributor of passenger cars or light commercial vehicles within a selective distribution system, which limits its ability to establish additional sales or delivery outlets at other locations within the common market where selective distribution is applied.
3. As regards repair and maintenance services or the sale of spare parts, the exemption shall not apply to any direct or indirect obligation as to the place of establishment of an authorised repairer where selective distribution is applied.

Article 6
Withdrawal of the benefit of the Regulation
1. The Commission may withdraw the benefit of this Regulation, pursuant to Article 7(1) of Regulation No 19/65/EEC, where it finds in any particular case that vertical agreements to which this Regulation applies nevertheless have effects which are incompatible with the conditions laid down in Article 81(3) of the Treaty, and in particular:
(a) where access to the relevant market or competition therein is significantly restricted by the cumulative effect of parallel networks of similar vertical restraints implemented by competing suppliers or buyers, or
(b) where competition is restricted on a market where one supplier is not exposed to effective competition from other suppliers, or
(c) where prices or conditions of supply for contract goods or for corresponding goods differ substantially between geographic markets, or
(d) where discriminatory prices or sales conditions are applied within a geographic market.
2. Where in any particular case vertical agreements to which the exemption applies have effects incompatible with the conditions laid down in 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 relevant authority of that Member State may withdraw the benefit of application of this Regulation in respect of that territory, under the same conditions as those provided in paragraph 1.

Article 7
Non-application of the Regulation
1. 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.
2. A regulation pursuant to paragraph 1 shall not become applicable earlier than one year following its adoption.

Article 8
Market share calculation
1. The market shares provided for in this Regulation shall be calculated
(a) for the distribution of new motor vehicles on the basis of the volume of the contract goods and corresponding goods sold by the supplier, together with any other goods sold by the supplier which are regarded as interchangeable or

substitutable by the buyer, by reason of the products' characteristics, prices and intended use;
(b) for the distribution of spare parts on the basis of the value of the contract goods and other goods sold by the supplier, together with any other goods sold by the supplier which are regarded as interchangeable or substitutable by the buyer, by reason of the products' characteristics, prices and intended use;
(c) for the provision of repair and maintenance services on the basis of the value of the contract services sold by the members of the supplier's distribution network together with any other services sold by these members which are regarded as interchangeable or substitutable by the buyer, by reason of their characteristics, prices and intended use.
If the volume data required for those calculations are not available, value data may be used or vice versa. If such information is not available, estimates based on other reliable market information may be used. For the purposes of Article 3(2), the market purchase volume or the market purchase value respectively, or estimates thereof shall be used to calculate the market share.
2. For the purposes of applying the market share thresholds of 30 % and 40 % provided for in this Regulation the following rules shall apply:
(a) the market share shall be calculated on the basis of data relating to the preceding calendar year;
(b) the market share shall include any goods or services supplied to integrated distributors for the purposes of sale;
(c) if the market share is initially not more than 30 % or 40 % respectively but subsequently rises above that level without exceeding 35 % or 45 % respectively, the exemption shall continue to apply for a period of two consecutive calendar years following the year in which the market share threshold of 30 % or 40 % respectively was first exceeded;
(d) if the market share is initially not more than 30 % or 40 % respectively but subsequently rises above 35 % or 45 % respectively, the exemption shall continue to apply for one calendar year following the year in which the level of 30 % or 40 % respectively was first exceeded;
(e) the benefit of points (c) and (d) may not be combined so as to exceed a period of two calendar years.

Article 9
Turnover calculation
1. For the purposes of calculating total annual turnover figures referred to in Article 2(2)(a) and 2(3)(a) respectively, 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 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 10
Transitional period
The prohibition laid down in Article 81(1) shall not apply during the period from 1 October 2002 to 30 September 2003 in respect of agreements already in force on 30 September 2002 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 1475/95.

Article 11
Monitoring and evaluation report
1. The Commission shall monitor the operation of this Regulation on a regular basis, with particular regard to its effects on:
(a) competition in motor vehicle retailing and in after sales servicing in the common market or relevant parts of it;
(b) the structure and level of concentration of motor vehicle distribution and any resulting effects on competition.
2. The Commission shall draw up a report on this Regulation not later than 31 May 2008 having regard in particular to the conditions set out in Article 81(3).

Article 12
Entry into force and expiry
1. This Regulation shall enter into force on 1 October 2002.
2. Article 5(2)(b) shall apply from 1 October 2005.
3. This Regulation shall expire on 31 May 2010.

This Regulation shall be binding in its entirety and directly applicable in all Member States.
Done at Brussels, 31 July 2002.

For the Commission
Mario Monti
Member of the Commission

(1) OJ 36, 6.3.1965, p. 533/65.
(2) OJ L 148, 15.6.1999, p. 1.
(3) OJ C 67, 16.3.2002, p. 2.
(4) OJ L 336, 29.12.1999, p. 21.
(5) OJ L 145, 29.6.1995, p. 25.

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

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 (1) 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 (2) 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 (3) 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 (4), 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 agreements whose actual or potential effect remains limited to the territory of only one Member State or of one or more third countries. Likewise, agreements which do not have as their object or their effect an appreciable restriction of competition are not caught by the prohibition contained in Article 85 (1).

3. In this notice the Commission, by setting quantitative criteria and by explaining their application, has given a sufficiently concrete meaning to the term 'appreciable` for undertakings to be able to judge for themselves whether their agreements do not fall within the prohibition pursuant to Article 85 (1) by virtue of their minor importance. The quantitiative definition of appreciability, however, serves only as a guideline: in individual cases even agreements between undertakings which exceed the threshold set out below may still have only a negligible effect on trade between Member States or on competition within the common market and are therefore not caught by Article 85 (1). This notices does not contain an exhaustive description of restictions which fall outside Article 85 (1). It is generally recognized that even agreements which are not of minor importance can escape the prohibition on agreements on account of their exclusively favourable impact on competition.

4. The benchmarks provided by the Commission in this notice should eliminate the need to have the legal status of agreements covered by it established through individual Commission decisions; notification for this purpose will no longer be necessary for such agreements. However, if it is doubtful whether, in an individual case, an agreement is likely to affect trade between Member States or to restrict competition to any significant extent, undertakings are free to apply for negative clearance or to notify the agreement pursuant to Council Regulations No 17 (5), (EEC) No 1017/69 (6), (EEC) No 4056/86 (7) and (EEC) No 3975/87 (8).

5. In cases covered by this notice, and subject to points 11 and 20, the Commission will not institute

any proceedings either on application or on its own initiative. Where undertakings have failed to notify an agreement falling within the scope of Article 85 (1) because they assumed in good faith that the agreement was covered by this notice, the Commission will not consider imposing fines.

6. This notice is likewise applicable to decisions by associations of undertakings and to concerted practices.

7. This notice is without prejudice to the competence of national courts to apply Article 85. However, it constitutes a factor which those courts may take into account when deciding a pending case. It is also without prejudice to any interpretation of Article 85 which may be given by the Court of Justice or the Court of First Instance of the European Communities.

8. This notice is without prejudice to the application of national competition laws.

II.

9. The Commission holds the view that agreements between undertakings engaged in the production or distribution of goods or in the provision of services do not fall under the prohibition in Article 85 (1) if the aggregate market shares held by all of the participating undertakings do not exceed, on any of the relevant markets:

(a) the 5 % threshold, where the agreement is made between undertakings operating at the same level of production or of marketing ('horizontal` agreement);

(b) the 10 % threshold, where the agreement is made between undertakings operating at different economic levels ('vertical` agreement).

In the case of a mixed horizontal/vertical agreement or where it is difficult to classify the agreement as either horizontal or vertical, the 5 % threshold is applicable.

10. The Commission also holds the view that the said agreements do not fall under the prohibition of Article 85 (1) if the market shares given at point 9 are exceeded by no more than one 10th during two successive financial years.

11. With regard to:

(a) horizontal agreements which have as their object

- to fix prices or to limit production or sales, or
- to share markets or sources of supply,

(b) vertical agreements which have as their object

- to fix resale prices, or
- to confer territorial protection on the participating undertakings or third undertakings,

the applicability of Article 85 (1) cannot be ruled out even where the aggregate market shares held by all of the participating undertakings remain below the thresholds mentioned in points 9 and 10.

The Commission considers, however, that in the first instance it is for the authorities and courts of the Member States to take action on any agreements envisaged above in (a) and (b). Accordingly, it will only intervene in such cases when it considers that the interest of the Community so demands, and in particular if the agreements impair the proper functioning of the internal market.

12. For the purposes of this notice, 'participating undertakings` are:

(a) undertakings being parties to the agreement;

(b) undertakings in which a party to the agreement, directly or indirectly,

- owns more than half of the capital or business assets, or
- has the power to exercise more than half of the voting rights, or
- has the power to appoint more than half of the members of the supervisory board, board of management or bodies legally representing the undertakings, or
- has to the right to manage the undertaking's business;

(c) undertakings which directly or indirectly have over a party to the agreement the rights or powers listed in (b);

(d) undertakings over which an undertaking referred to in (c) has, directly or indirectly, the rights or powers listed in (b).

Undertakings over which several undertakings as referred to in (a) to (d) jointly have, directly or indirectly, the rights or powers set out in (b) shall also be considered to be participating undertakings.

13. 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.

14. The relevant product market comprises any products or services which are regarded as interchangeable or substitutable by the consumer, by reason of their characteristics, prices and intended use.

15. The relevant geographic market comprises the area in which the participating undertakings are involved in the supply 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.

16. When applying points 14 and 15, reference should be had to the notice (on the definition of the relevant market under Community competition law (9).

17. In the case of doubt about the delimitation of the relevant geographic market, undertakings may take the view that their agreement has no appreciable effect on intra-Community trade or on competition when the market share thresholds indicated in points 9 and 10 are not exceeded in any Member State. This view, however, does not preclude the application of national competition law to the agreements in question.

18. Chapter II of this notice shall not apply where in a relevant market competition is restricted by the cumulative effects of parallel networks of similar agreements established by several manufacturers or dealers.

III.

19. Agreements between small and medium-sized undertakings, as defined in the Annex to Commission recommendation 96/280/EC (10) are rarely capable of significantly affecting trade between Member States and competition within the common market. Consequently, as a general rule, they are not caught by the prohibition in Article 85 (1). In cases where such agreements exceptionally meet the conditions for the application of that provision, they will not be of sufficient Community interest to justify any intervention. This is why the Commission will not institute any proceedings, either on request or on its own initiative, to apply the provisions of Article 85 (1) to such agreements, even if the thresholds set out in points 9 and 10 above are exceeded.

20. The Commission nevertheless reserves the right to intervene in such agreements:

(a) where they significantly impede competition in a substantial part of the relevant market,

(b) where, in the relevant market, competition is restricted by the cumulative effect of parallel networks of similar agreements made between several producers or dealers.

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

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

(3) OJ C 43, 16. 2. 1993, p. 2.

(4) OJ C 231, 12. 9. 1986, p. 2.

(5) OJ 13, 21. 2. 1962, p. 204/62.

(6) OJ L 175, 23. 7. 1968, p. 1.

(7) OJ L 378, 31. 12. 1986, p. 4.

(8) OJ L 374, 31. 12. 1987, p. 1.

(9) OJ C 372, 9. 12. 1997, p. 5.

(10) OJ L 107, 30. 4. 1996, p. 4.

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

purposes of Community competition law (97/C 372/03)

(Text with EEA relevance)

I. INTRODUCTION

1. The purpose of this notice is to provide guidance as to how the Commission applies the concept of relevant product and geographic market in its ongoing enforcement of Community competition law, in particular the application of Council Regulation No 17 and (EEC) No 4064/89, their equivalents in other sectoral applications such as transport, coal and steel, and agriculture, and the relevant provisions of the EEA Agreement (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:

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

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

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

9. The relevant market within which to assess a given competition issue is therefore established by the combination of the product and geographic markets. The Commission interprets the definitions in paragraphs 7 an 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 (3). 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.

14. The competitive constraints arising from supply side substitutability other then 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 concentraiton 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 situaitons 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 (4) 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 into one product market, provided that most of the suppliers are able to offer and sell the various qualities immediately and without the significant increases in costs described above. In such cases, the relevant product market will encompass all products that are substitutable in demand and supply, and the current sales of those products will be aggregated so as to give the total value or volume of the market. The same reasoning may lead to group different geographic areas.

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

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

Potential competition

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

III. EVIDENCE RELIED ON TO DEFINE RELEVANT MARKETS

The process of defining the relevant market in practice

Product dimension

25. There is a range of evidence permitting an assessment of the extent to which substitution would take place. In individual cases, certain types of evidence will be determinant, depending very much on the characteristics and specificity of the industry and products or services that are being examined. The same type of evidence may be of no importance in other cases. In most cases, a decision will have to be based on the consideration of a number of criteria and different items of evidence. The Commission follows an open approach to empirical evidence, aimed at making an effective use of all available information which may be relevant in individual cases. The Commission does not follow a rigid hierarchy of different sources of information or types of evidence.

26. The process of defining relevant markets may be summarized as follows: on the basis of the preliminary information available or information submitted by the undertakings involved, the Commission will usually be in a position to broadly establish the possible relevant markets within which, for instance, a concentration or a restriction of competition has to be assessed. In general, and for all practical purposes when handling individual cases, the question will usually be to decide on a few alternative possible relevant markets. For instance, with respect to the product market, the issue will often be to establish whether product A and product B belong or do not belong to the same product market. it is often the case that the inclusion of product B would be enough to remove any competition concerns.

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

Geographic dimension

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

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

30. If necessary, a further check on supply factors will be carried out to ensure that those companies located in differing areas do not face impediments in developing their sales on competitive terms throughout the whole geographic market. This analysis will include an examination of requirements for a local presence in order to sell in that area the conditions of access to distribution channels, costs associated with setting up a distribution network, and the presence or absence of regulatory barriers arising from public procurement, price regulations, quotas and tariffs limiting trade or

production, technical standards, monopolies, freedom of establishment, requirements for administrative authorizations, packaging regulations, etc. In short, the Commission will identify possible obstacles and barriers isolating companies located in a given area from the competitive pressure of companies located outside that area, so as to determine the precise degree of market interpenetration at national, European or global level.

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

Market integration in the Community

32. Finally, the Commission also takes into account the continuing process of market integration, in particular in the Community, when defining geographic markets, especially in the area of concentrations and structural joint ventures. The measures adopted and implemented in the internal market programme to remove barriers to trade and further integrate the Community markets cannot be ignored when assessing the effects on competition of a concentration or a structural joint venture. A situation where national markets have been artifically 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 boudaries 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 determinded by other considerations as well. For example, there may be different competitive contraints 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 substituion 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 (5) for the demand of a product, tests based on similarity of price movements over time, the analysis of causality between price series and similarity of price levels and/or their convergence. The Commission takes into account the available quantitative evidence capable of withstanding rigorous scrutiny for the purposes of establishing patterns of substitution in the past.

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

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

42. Barriers and costs associated with switching demand to potential substitutes. There are a number of barriers and costs that might prevent the Commission from considering two prima facie demand substitutes as belonging to one single product market. It is not possible to provide an exhaustive

list of all the possible barriers to substitution and of switching costs. These barriers or obstacles might have a wide range of origins, and in its decisions, the Commission has been confronted with regulatory barriers or other forms of State intervention, constraints arising in downstream markets, need to incur specific capital investment or loss in current output in order to switch to alternative inputs, the location of customers, specific investment in production process, learning and human capital investment, retooling costs or other investments, uncertainty about quality and reputation of unknown suppliers, and others.

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

Evidence for defining markets - geographic dimension

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

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

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

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

48. Current geographic pattern of purchases. An examination of the customers' current geographic pattern of purchases provides useful evidence as to the possible scope of the geographic market. When customers purchase from companies located anywhere in the Community or the EEA on similar terms, or they procure their supplies through effective tendering procedures in which companies from anywhere in the Community or the EEA submit bids, usually the geographic market will be considered to be Community-wide.

49. Trade flows/pattern of shipments. When the number of customers is so large that it is not possible to obtain through them a clear picture of geographic purchasing patterns, information on trade flows might be used alternatively, provided that the trade statistics are available with a sufficient degree of detail for the relevant products. Trade flows, and above all, the rationale behind trade flows provide useful insights and information for the purpose of establishing the scope of the geographic market but are not in themselves conclusive.

50. Barriers and switching costs associated to divert orders to companies located in other areas. The absence of trans-border purchases or trade flows, for instance, does not necessarily mean that the market is at most national in scope. Still, barriers isolating the national market have to

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 susbset 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 geograhic 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, when the behaviour of undertakings at a point in time has to be analysed pursuant to Article 86. The method of defining markets in these cases is the same, i.e. assessing the responses of customers based on their purchasing decisions to relative price changes, but taking into account as well, constraints on substitution imposed by conditions in the connected markets. A narrow definition of market for secondary products, for instance, spare parts, may result when compatibility with the primary product is important. Problems of finding compatible secondary products together with the existence of high prices and a long lifetime of the primary products may render relative price increases of secondary products profitable. A different market definition may result if significant substitution between secondary products is possible or if the characteristics of the primary products make quick and direct consumer responses to relative price increases of the secondary products feasible.

57. In certain cases, the existence of chains of substitution might lead to the definition of a relevant market where products or areas at the extreme of the market are not directly substitutable. An example might be provided by the geographic dimension of a product with significant transport costs. In such cases, deliveries from a given plant are limited to a certain area around each plant by the impact of transport costs. In principle, such an area could constitute the relevant geographic market. However, if the distribution of plants is such that there are considerable overlaps between the areas around different plants, it is possible that the pricing of those products will be constrained by a chain substitution effect, and lead to the definition of a broader geographic market. The same reasoning may apply if product B is a demand substitute for products A and C. Even if products A and C are not direct demand substitutes, they might be found to be in the same relevant product market since their respective pricing might be constrained by substitution to B.

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

(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.

(3) 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.

(4) That is such a period that does not entail a significant adjustment of existing tangible and intangible assets (see paragraph 23).

(5) 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-prise elasticity between products X and Y is the responsiveness of demand for product X to percentage change in the price of product Y.

purposes of Community competition law (97/C 372/03)

(Text with EEA relevance)

I. INTRODUCTION

1. The purpose of this notice is to provide guidance as to how the Commission applies the concept of relevant product and geographic market in its ongoing enforcement of Community competition law, in particular the application of Council Regulation No 17 and (EEC) No 4064/89, their equivalents in other sectoral applications such as transport, coal and steel, and agriculture, and the relevant provisions of the EEA Agreement (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:

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

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

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

9. The relevant market within which to assess a given competition issue is therefore established by the combination of the product and geographic markets. The Commission interprets the definitions in paragraphs 7 an 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 (3). 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.

14. The competitive constraints arising from supply side substitutability other then 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 concentraiton 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 situaitons 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 (4) 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 into one product market, provided that most of the suppliers are able to offer and sell the various qualities immediately and without the significant increases in costs described above. In such cases, the relevant product market will encompass all products that are substitutable in demand and supply, and the current sales of those products will be aggregated so as to give the total value or volume of the market. The same reasoning may lead to group different geographic areas.

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

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

Potential competition

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

III. EVIDENCE RELIED ON TO DEFINE RELEVANT MARKETS

The process of defining the relevant market in practice

Product dimension

25. There is a range of evidence permitting an assessment of the extent to which substitution would take place. In individual cases, certain types of evidence will be determinant, depending very much on the characteristics and specificity of the industry and products or services that are being examined. The same type of evidence may be of no importance in other cases. In most cases, a decision will have to be based on the consideration of a number of criteria and different items of evidence. The Commission follows an open approach to empirical evidence, aimed at making an effective use of all available information which may be relevant in individual cases. The Commission does not follow a rigid hierarchy of different sources of information or types of evidence.

26. The process of defining relevant markets may be summarized as follows: on the basis of the preliminary information available or information submitted by the undertakings involved, the Commission will usually be in a position to broadly establish the possible relevant markets within which, for instance, a concentration or a restriction of competition has to be assessed. In general, and for all practical purposes when handling individual cases, the question will usually be to decide on a few alternative possible relevant markets. For instance, with respect to the product market, the issue will often be to establish whether product A and product B belong or do not belong to the same product market. it is often the case that the inclusion of product B would be enough to

remove any competition concerns.

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

Geographic dimension

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

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

30. If necessary, a further check on supply factors will be carried out to ensure that those companies located in differing areas do not face impediments in developing their sales on competitive terms throughout the whole geographic market. This analysis will include an examination of requirements for a local presence in order to sell in that area the conditions of access to distribution channels, costs associated with setting up a distribution network, and the presence or absence of regulatory barriers arising from public procurement, price regulations, quotas and tariffs limiting trade or production, technical standards, monopolies, freedom of establishment, requirements for administrative authorizations, packaging regulations, etc. In short, the Commission will identify possible obstacles and barriers isolating companies located in a given area from the competitive pressure of companies located outside that area, so as to determine the precise degree of market interpenetration at national, European or global level.

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

Market integration in the Community

32. Finally, the Commission also takes into account the continuing process of market integration, in particular in the Community, when defining geographic markets, especially in the area of concentrations and structural joint ventures. The measures adopted and implemented in the internal market programme to remove barriers to trade and further integrate the Community markets cannot be ignored when assessing the effects on competition of a concentration or a structural joint venture. A situation where national markets have been artifically 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 boudaries 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 determinded by other considerations as well. For example, there may be different competitive contraints 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 substituion 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 (5) for the demand of a product, tests based on similarity of price movements over time, the analysis of causality between price series and similarity of price levels and/or their convergence. The Commission takes into account the available quantitative evidence capable of withstanding rigorous scrutiny for the purposes of establishing patterns of substitution in the past.

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

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

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

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

Evidence for defining markets - geographic dimension

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

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

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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.

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IV. CALCULATION OF MARKET SHARE

53. The definition of the relevant market in both its product and geograhic 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, when the behaviour of undertakings at a point in time has to be analysed pursuant to Article 86. The method of defining markets in these cases is the same, i.e. assessing the responses of customers based on their purchasing decisions to relative price changes, but taking into account as well, constraints on substitution imposed by conditions in the connected markets. A narrow definition of market for secondary products, for instance, spare parts, may result when compatibility with the primary product is important. Problems of finding compatible secondary products together with the existence of high prices and a long lifetime of the primary products may render relative price increases of secondary products profitable. A different market definition may result if significant substitution between secondary products is possible or if the characteristics of the primary products make quick and direct consumer responses to relative price increases of the secondary products feasible.

57. In certain cases, the existence of chains of substitution might lead to the definition of a relevant market where products or areas at the extreme of the market are not directly substitutable. An example might be provided by the geographic dimension of a product with significant transport costs. In such cases, deliveries from a given plant are limited to a certain area around each plant by the impact of transport costs. In principle, such an area could constitute the relevant geographic market. However, if the distribution of plants is such that there are considerable overlaps between the areas around different plants, it is possible that the pricing of those products will be constrained by a chain substitution effect, and lead to the definition of a broader geographic market. The same reasoning may apply if product B is a demand substitute for products A and C. Even if products A and C are not direct demand substitutes, they might be found to be in the same relevant product market since their respective pricing might be constrained by substitution to B.

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

(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.

(3) 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.

(4) That is such a period that does not entail a significant adjustment of existing tangible and intangible assets (see paragraph 23).

(5) 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-prise elasticity between products X and Y is the responsiveness of demand for product X to percentage change in the price of product Y.

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96/280/EC: Commission Recommendation of 3 April 1996 concerning the definition of small and medium-sized enterprises (Text with EEA relevance)

COMMISSION RECOMMENDATION of 3 April 1996 concerning the definition of small and medium-sized enterprises (Text with EEA relevance) (96/280/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 155, second indent, thereof,

Whereas the implementation of the Integrated Programme in Favour of Small and Medium-Sized Enterprises (SMEs) and the Craft Sector (hereinafter referred to as 'the Integrated Programme`) (1), in accordance with the White Paper on Growth, Competitiveness and Employment, requires the establishment of a coherent, visible and effective framework within which the enterprise policy in favour of SMEs can take its place;

Whereas, well before the implementation of the Integrated Programme, various Community policies were targeted at SMEs, each policy using different criteria to define them; whereas a number of Community policies have developed gradually with no joint approach or overall consideration of what, objectively, constitutes an SME; the result being a diversity of criteria used to define an SME and thus, a multiplicity of definitions currently in use at Community level in addition to the definitions used by the European Investment Bank (EIB) and the European Investment Fund (EIF) together with a rather wide range of definitions in the Member States;

Whereas many Member States have no general definition and operate ad hoc with rules based on local practice or which apply to particular sectors; whereas others adhere rigidly to the definition contained in the Community guidelines on State aid to SMEs (2);

Whereas the existence of different definitions at Community level and at national level can create inconsistencies and can also distort competition between enterprises; whereas the Integrated Programme aims at a more forceful coordination between, on the one hand, the different Community initiatives in favour of SMEs and, on the other hand, between these and the initiatives which exist at national level; whereas these objectives cannot be realized successfully unless the question of the definition of SMEs is clarified;

Whereas the Commission's Report to the European Council meeting in Madrid on 15 and 16 December 1995 has underlined that a refocused effort in favour of SMEs is required in order to create more jobs across all sectors of the economy;

Whereas the 'Research` Council of 29 September 1994 agreed that preferential treatment for SMEs should be accompanied by a clearer definition of what was meant by a small or medium-sized enterprise; therefore it has requested the Commission to re-examine the criteria to be selected for defining SMEs;

Whereas, in a first Report presented in 1992 at the request of the 'Industry` Council held on 28 May 1990, the Commission had already proposed limiting the proliferation of definitions in use at Community level; specifically, it favoured the adoption of the following four criteria: number of persons employed, turnover, balance-sheet total and independence, while proposing thresholds of 50 and 250 employees for small and for medium-sized enterprises respectively;

Whereas this definition has been adopted in the Community guidelines on State aid for SMEs and in all the other guidelines or communications concerning State aid which have been adopted or revised since 1992 (it applies in particular to the Commission Communication to the Member States on the accelerated clearance of aid schemes for SMEs and of amendments of existing schemes (3), the guidelines on State aid for environmental protection (4) and the guidelines on State aids for rescuing and restructuring firms in difficulty (5);

Whereas other measures adopt this definition wholly or in part, notably the 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 (6), as last amended by Directive 94/8/EC (7), Council Decision 94/217/EEC of 19 April 1994 on the provision of Community interest subsidies on loans for small and medium-sized enterprises extended by the European Investment Bank under its temporary lending facility (8), and the Commission's Communication (9) on the Community SME Initiative under the Structural Funds;

Whereas, however, full convergence has not yet been achieved; some programmes still fix very varied thresholds or disregard certain criteria, such as independence;

Whereas it is appropriate that this convergence continues and is completed on the basis of the rules set out in the Community guidelines on State aids for SMEs, and that the Commission should apply, in all the policies it administers, the same criteria and the same thresholds which it requires Member States to observe;

Whereas in a single market without internal frontiers, the treatment of enterprises must be based on a set of common rules, particularly as regards State support - national or Community;

Whereas this approach is all the more necessary in view of the extensive interaction between national and Community measures assisting SMEs, for example as regards Structural Funds and research; it means that situations in which the Community targets its action on a certain category of SMEs and the Member States on another must be avoided;

Whereas application of the same definition by the Commission, the Member States, the EIB and the EIF would reinforce the consistency and effectiveness of policies targeting SMEs and would, therefore, limit the risk of distortion of competition; whereas, moreover, many programmes intended for SMEs are co-financed by the Member States and the European Community and, in some cases, by the EIB and the EIF;

Whereas before proposing thresholds for defining SMEs, it should be pointed out that this attempt to rationalize and lay down a reference standard does not mean that enterprises which exceed these thresholds do not deserve State or Community attention; however it would be more appropriate to solve this problem through specific measures in the framework of the relevant programmes, in particular international cooperation programmes, rather than by adopting or maintaining a different SME definition;

Whereas the criterion of number of persons employed is undoubtedly one of the most important and must be regarded as imperative but that introducing a financial criterion is a necessary complement in order to grasp the real importance and performance of an enterprise and its position compared to its competitors;

Whereas, however, it would not be desirable to adopt turnover as the sole financial criterion because enterprise in the trade and distribution sector have by their nature higher turnover figures than those in the manufacturing sector, thus the turnover criterion should be combined with that of the balance sheet total, a criterion which represents the overall wealth of a business, with the possibility of one of these two financial criteria being exceeded;

Whereas independence is also a basic criterion in that an SME belonging to a large group has access to funds and assistance not available to competitors of equal size; whereas there is also a need to rule out legal entities composed of SMEs which form a grouping whose actual economic power is greater than that of an SME;

Whereas, in respect of the independence criterion, the Member States, the EIB and the EIF should ensure that the definition is not circumvented by those enterprises which, whilst formally meeting this criterion, are in fact controlled by one large enterprise or jointly by several large enterprises;

Whereas stakes held by public investment corporations or venture capital companies do not normally change the character of a firm from that of an SME, and may therefore be disregarded; the same applies to stakes held by institutional investors, who usually maintain an 'arm's-length` relationship with the company in which they have invested;

Whereas a solution must be found to the problem of joint stock enterprises which, although they are SMEs, cannot state with any accuracy the composition of their share ownership due to the way in which their capital is dispersed and the anonymity of their shareholders and cannot therefore know whether they meet the condition of independence;

Whereas, therefore, fairly strict criteria must be laid down for defining SMEs if the measures aimed at them are genuinely to benefit the enterprises for which size represents a handicap;

Whereas the threshold of 500 employees is not truly selective, since it encompasses almost all enterprises (99,9 % of the 14 million enterprises) and almost three-quarters of the European economy in terms of employment and turnover; furthermore, an enterprise with 500 employees has access to human, financial and technical resources which fall well outside the framework of the medium-sized enterprise, namely ownership and management in the same hands, often family-owned, and lack of a dominant position on the market;

Whereas, not only do enterprises between 250 and 500 employees often have very strong market positions but they also possess very solid management structures in the fields of production, sales, marketing, research and personnel management, which clearly distinguish them from medium-sized enterprises with up to 250 employees; whereas in the latter group, such structures are far more fragile; whereas the threshold of 250 persons employed is therefore a more meaningful reflection of the reality of an SME;

Whereas this threshold of 250 employees is already the most prevalent among the definitions used at Community level and whereas it has been taken up in the legislation of many Member States as a result of the Community guidelines on State aid for SMEs; whereas the EIB had also decided to use this definition for a substantial part of the loans granted in the framework of the 'SME facility` provided for in Decision 94/217/EEC;

Whereas, according to Eurostat figures, the turnover of an enterprise with 250 employees does not exceed ECU 40 million (1994 figures); whereas it would therefore appear reasonable to apply a threshold for turnover of ECU 40 million; whereas recent calculations show that the average ratio between turnover and balance sheet total is 1:5 or SMEs and small enterprises (10), whereas, as a result, the threshold for the balance-sheet total should be fixed at ECU 27 million;

Whereas, however, a distinction must be drawn, within SMEs, between medium-sized enterprises, small enterprises and micro-enterprises; whereas the latter should not be confused with craft enterprises, which will continue to be defined at national level due to their specific characteristics;

Whereas thresholds for small enterprises must be fixed in the same way, meaning thresholds of ECU 7 million for turnover, and ECU 5 million for balance-sheet total;

Whereas the thresholds chosen do not necessarily reflect the average SME or small enterprise but represent ceilings designed to allow all enterprises having the characteristics of an SME or a small enterprise to be included within one or other of the categories;

Whereas the turnover and balance-sheet total thresholds laid down for defining SMEs should be revised as the need arises to take account of changing economic circumstances such as price levels and increases in the productivity of enterprises;

Whereas the Community guidelines on State aids for SMEs will be aligned by replacing the currently used definitions with a reference to those set out in this Recommendation;

Whereas it is necessary to provide that when the Fourth Council Directive 78/660/EEC, which affords Member States the right to exempt SMEs from certain obligations relating to the publication of their accounts, is next amended, the Commission will propose that the existing definition be replaced by a reference to this Recommendation;

Whereas it would also be desirable for evaluations made of measures in favour of SMEs that the Commission, the Member States, the EIB and the EIF state exactly which enterprises benefit from them, distinguishing various categories of SME according to size, as greater knowledge of the recipients makes it possible to adjust and better target the measures proposed for SMEs, and consequently renders them more effective;

Whereas, given that a certain degree of flexibility must be permitted to the Member States, the EIB and the EIF to fix thresholds lower than the Community thresholds if they wish to direct their measures towards a specific category of SME, these thresholds represent only maximum limits;

Whereas it is also possible for the Member States, the EIB and the EIF, for reasons of administrative simplification, to retain only one criterion, notably that of the number of employees, for the implementation of some of their policies. However, this flexibility does not apply to the various State aid frameworks where the financial criteria must also be respected;

Whereas this Recommendation concerns only the definition of SMEs used in Community policies applied within the Community and the European Economic Area,

MAKES THIS RECOMMENDATION:

Article 1

Member States, the European Investment Bank and the European Investment Fund are invited:

- to comply with the provisions set out in Article 1 of the Annex for their programmes directed towards 'SMEs`, 'medium-sized enterprises`, 'small enterprises` or 'micro-enterprises`,

- to comply with the ceilings chosen for the turnover and balance-sheet total where they are amended by the Commission in accordance with Article 2 of the Annex,

- to take the necessary steps with a view to using the size classes set out in Article 3 (2) of the Annex, especially where the monitoring of Community financial instruments is concerned.

Article 2

The thresholds specified in Article 1 of the Annex are to be regarded as ceilings. Member States, the European Investment Bank and the European Investment Fund may, in certain cases, choose to fix lower thresholds. In implementing certain of their policies, they may also choose to apply only the criterion of number of employees, except in fields to which the various rules on State aid apply.

Article 3

To enable the Commission to evaluate what progress has been made, Member States, the European Investment Bank and the European Investment Fund are invited to inform the Commission, before 31 December 1977, of the measures they have taken to comply with this Recommendation.

Article 4

This Recommendation concerns the definition of SMEs in Community policies applied within the Community and the European Economic Area and is addressed to the Member States, the European Investment Bank and the European Investment Fund.

Done at Brussels, 3 April 1996.

For the Commission

Christos PAPOUTSIS

Member of the Commission

(1) COM(94) 207 final.

(2) OJ No C 213, 19. 8. 1992, p. 2.

(3) OJ No C 213, 19. 8. 1992, p. 10.

(4) OJ No C 72, 10. 3. 1994, p. 3, footnote 16.

(5) OJ No C 368, 23.12. 1994, p. 12.

(6) OJ No L 222, 14. 8. 1978, p. 11.

(7) OJ No L 82, 25. 3. 1994, p. 33.

(8) OJ No L 107, 28. 4. 1994 p. 57; see Commission Report on this matter (COM(94) 434 final of 19 October 1994).

(9) OJ No C 180, 1. 7. 1994, p. 10.

(10) Source: 'BACH` (harmonized accounts) database.

ANNEX

DEFINITION OF SMALL AND MEDIUM-SIZED ENTERPRISES ADOPTED BY THE COMMISSION

Article 1

1. Small and medium-sized enterprises, hereinafter referred to as 'SMEs`, are defined as enterprises which:

- have fewer than 250 employees, and

- have either,

an annual turnover not exceeding ECU 40 million, or

an annual balance-sheet total not exceeding ECU 27 million,

- conform to the criterion of independence as defined in paragraph 3.

2. Where it is necessary to distinguish between small and medium-sized enterprises, the 'small enterprise` is defined as an enterprise which:

- has fewer than 50 employees and

- has either,

an annual turnover not exceeding ECU 7 million, or

an annual balance-sheet total not exceeding ECU 5 million,

- conforms to the criterion of independence as defined in paragraph 3.

3. Independent enterprises are those which are not owned as to 25 % or more of the capital or the voting rights by one enterprise, or jointly by several enterprises, falling outside the definition of an SME or a small enterprise, whichever may apply. This threshold may be exceeded in the following two cases:

- if the enterprise is held by public investment corporations, venture capital companies or institutional investors, provided no control is exercised either individually or jointly,

- if the capital is spread in such a way that it is not possible to determine by whom it is held and if the enterprise declares that it can legitimately presume that it is not owned as to 25 % or more by one enterprise, or jointly by several enterprises, falling outside the definitions of an SME or a small enterprise, whichever may apply.

4. In calculating the thresholds referred to in paragraphs 1 and 2, it is therefore necessary to cumulate the relevant figures for the beneficiary enterprise and for all the enterprises which it directly or indirectly controls through possession of 25 % or more of the capital or of the voting rights.

5. Where it is necessary to distinguish micro-enterprises from other SMEs, these are defined as enterprises having fewer than 10 employees.

6. Where, at the final balance sheet date, an enterprise exceeds or falls below the employee thresholds or financial ceilings, this is to result in its acquiring or losing the status of 'SME`, 'medium-sized enterprise`, 'small enterprise` or 'micro-enterprise` only if the phenomenon is repeated over two consecutive financial years.

7. The number of persons employed corresponds to the number of annual working units (AWU), that is to say, the number of full-time workers employed during one year with part-time and seasonal workers being fractions of AWU. The reference year to be considered is that of the last approved accounting period.

8. The turnover and balance sheet total thresholds are those of the last approved 12-month accounting period. In the case of newly-established enterprises whose accounts have not yet been approved, the thresholds to apply shall be derived from a reliable estimate made in the course of the financial year.

Article 2

The Commission will amend the ceilings chosen for the turnover and balance-sheet total as the need arises and normally every four years from the adoption of this Recommendation, to take account of changing economic circumstances in the Community.

Article 3

1. The Commission undertakes to adopt the appropriate measures to ensure that the definition of SMEs, as set out in Article 1, applies to all programmes managed by it in which the terms 'SME`, 'medium-sized enterprise`, 'small enterprise` or 'micro-enterprise` are mentioned.

2. The Commission undertakes to adopt the appropriate measures to adapt the statistics that it produces in line with the following size-classes:

- 0 employees,
- 1 to 9 employees,
- 10 to 49 employees,
- 50 to 249 employees,
- 250 to 499 employees,
- 500 employees plus.

3. Current Community programmes defining SMEs with criteria other than those mentioned in Article 1 will continue, during a transitional period, to be implemented to the benefit of the enterprises which were considered SMEs when these programmes were adopted. Any modification of the SME definition within these programmes can be made only by adopting the definition contained herein and by replacing the divergent definition with a reference to this Recommendation. This transitional period should in principle end at the latest on 31 December 1997. However, legally binding commitments entered into by the Commission on the basis of these programmes will remain unaffected.

4. When the Fourth Council Directive 78/660/EEC is amended, the Commission will propose that the existing criteria for defining SMEs be replaced by a reference to the definition contained in this Recommendation.

5. Any provisions adopted by the Commission which mention the terms 'SME`, 'medium-sized enterprise`, 'small enterprise` or 'micro-enterprise`, or any other such term, will refer to the definition contained in this Recommendation.

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