

## II

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## EUROPEAN COMMISSION

## COMMUNICATION FROM THE COMMISSION

**Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements**

(2023/C 259/01)

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## 1. INTRODUCTION

### 1.1. Purpose and structure of these Guidelines

1. These Guidelines replace the 2011 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements <sup>(1)</sup>. They are intended to provide legal certainty by assisting undertakings to assess the compatibility of their horizontal cooperation agreements with Union competition rules while ensuring effective protection of competition. They also aim to make it easier for undertakings to cooperate in ways which are economically desirable, thereby contributing, for example, to the green and digital transitions and to promoting the resilience of the internal market <sup>(2)</sup>.
2. These Guidelines set out principles for the assessment of horizontal cooperation agreements and concerted practices under Article 101 of the Treaty on the Functioning of the European Union ('Article 101') and provide an analytical framework to facilitate the self-assessment of the most common types of horizontal cooperation agreements:
  - Chapter 1 contains an introduction, which sets out the context in which Article 101 applies to horizontal cooperation agreements. This Chapter also explains the relationship between these Guidelines and other guidance, legislation and case-law affecting horizontal cooperation agreements. The guidance in Chapters 2 to 9 relating to specific types of horizontal agreements complements the more general guidance given in this introductory Chapter. It is therefore recommended to always read this Chapter first before referring to those other Chapters;
  - Chapter 2 concerns research and development ('R&D') agreements, including guidance on the application of Commission Regulation (EU) 2023/1066 ('R&D BER') <sup>(3)</sup>;
  - Chapter 3 concerns production agreements, including guidance on the application of Commission Regulation (EU) 2023/1067 ('Specialisation BER') <sup>(4)</sup>;
  - Chapter 4 concerns purchasing agreements;
  - Chapter 5 concerns commercialisation agreements;
  - Chapter 6 concerns information exchange;
  - Chapter 7 concerns standardisation agreements;
  - Chapter 8 concerns standard terms.
3. In addition, as the Commission is committed to the attainment of the objectives of the Green Deal for the European Union <sup>(5)</sup>, Chapter 9 provides guidance on how the most common types of horizontal cooperation agreements will be assessed under Article 101 when they pursue sustainability objectives.
4. Given the large number of possible types and combinations of horizontal cooperation, and the wide range of market contexts in which they may occur, it is difficult to provide specific guidance for every possible scenario. These Guidelines therefore do not constitute a 'checklist' which can be applied mechanically. Each case must be assessed on the basis of its own facts.
5. The guidance contained in these Guidelines applies to horizontal cooperation agreements concerning goods, services and technologies.

<sup>(1)</sup> OJ C 11, 14.1.2011, p. 1.

<sup>(2)</sup> See also the Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions 'Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery, COM (2021) 350 final.

<sup>(3)</sup> Commission Regulation (EU) 2023/1066 of 1 June 2023 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements (OJ L 143, 2.6.2023, p. 9).

<sup>(4)</sup> Commission Regulation (EU) 2023/1067 of 1 June 2023 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements (OJ L 143, 2.6.2023, p. 20).

<sup>(5)</sup> Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, 'the European Green Deal', COM (2019) 640 final.

6. Horizontal cooperation agreements may combine various stages of cooperation, for example R&D and the production or commercialisation of R&D results. Such combined cooperation agreements are also covered by these Guidelines. When using these Guidelines to assess such combined agreements, as a general rule, all the Chapters pertaining to the different stages of the cooperation will be relevant. However, for the assessment of whether a particular conduct constitutes a restriction of competition by object or by effect, the guidance provided in the Chapter relating to the part of the combined cooperation that can be considered as its 'centre of gravity' prevails for the entire cooperation.
7. Two factors are particularly relevant for determining the centre of gravity of such combined cooperation agreements: first, the starting point of the cooperation, and, second, the degree of integration of the various functions that are combined. Although it is not possible to provide a precise and definite rule that is valid for all cases and all possible combinations, the following applies in general:
  - (a) the centre of gravity of a horizontal cooperation agreement involving both joint R&D and joint production (or joint distribution) of the results is generally the joint R&D, on condition that the joint production (or joint distribution) only takes place if the joint R&D is successful. Where the results of the joint R&D are decisive for the subsequent joint production (or joint distribution), the guidance in the Chapter on R&D agreements prevails. The centre of gravity of the cooperation would be different if the parties would have engaged in the joint production (or joint distribution) in any event, that is to say, irrespective of the joint R&D. In that case, the cooperation should instead be assessed as a joint production (or joint commercialisation) agreement, and the guidance in the Chapter on production (or joint commercialisation) agreements prevails. If the agreement provides for full integration of the parties' activities in the area of production and only a partial integration of some R&D activities, the centre of gravity of the cooperation would be the joint production;
  - (b) the centre of gravity of a horizontal cooperation agreement involving both specialisation in production and joint commercialisation of the resulting products is generally the specialisation, as the joint commercialisation generally only takes place as a consequence of the specialisation;
  - (c) the centre of gravity of a horizontal cooperation agreement involving joint production and joint commercialisation of the resulting products is generally the joint production, as the joint commercialisation generally only takes place as a consequence of the joint production.
8. The centre of gravity test applies only to the relationship between the Chapters of these Guidelines, not to the relationship between block exemption regulations. The scope of a block exemption regulation is defined by its provisions (see Chapter 2 for the R&D BER and Chapter 3 for the Specialisation BER). While the examples in paragraph 7 give a general indication of where the centre of gravity of a combined horizontal cooperation agreement may lie, a case by case analysis based on the specific legal and economic context of each agreement is necessary in practice.

## 1.2. Applicability of Article 101 to horizontal cooperation agreements

### 1.2.1. Introduction

9. Article 101 aims to ensure that undertakings do not use horizontal cooperation agreements to prevent, restrict or distort competition in the internal market to the ultimate detriment of consumers.
10. Article 101 applies to undertakings and associations of undertakings. An undertaking is any entity of personal, tangible and intangible elements, engaged in an economic activity, irrespective of its legal status and the way in which it is financed<sup>(6)</sup>. An association of undertakings is a body through which undertakings of the same general type coordinate their conduct on the market<sup>(7)</sup>. These Guidelines apply to horizontal cooperation agreements between undertakings and decisions of associations of undertakings.

<sup>(6)</sup> See, for example, judgment of 25 March 2021, *Deutsche Telekom v Commission*, C-152/19 P, EU:C:2021:238, paragraph 72 and the case-law cited there.

<sup>(7)</sup> In the sense of the judgment of 11 September 2014, *MasterCard v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 76, and the Opinion of Advocate General Léger of 10 July 2001, *Wouters*, C-309/99, EU:C:2001:390, paragraph 61.



11. When a company exercises decisive influence over another company, they form a single economic entity and, hence, are part of the same undertaking <sup>(8)</sup>. Companies that form part of the same undertaking are not considered to be competitors for the purposes of these Guidelines, even if they are both active on the same relevant product and geographic market(s).
12. For the purpose of establishing liability for infringements of Article 101, the Court of Justice has held that parent companies and their joint venture form a single economic unit and, therefore, a single undertaking as regards competition law and the relevant market(s), in so far as it is demonstrated that the parent companies exercise decisive influence over the joint venture <sup>(9)</sup>. In light of this case-law, the Commission will, in general, not apply Article 101 to agreements or concerted practices between parent companies and their joint venture to the extent that they concern conduct that occurs in relevant market(s) where the joint venture is active and in periods during which the parent companies exercise decisive influence over the joint venture. However, the Commission will generally apply Article 101 to the following categories of agreements:
  - (a) agreements between parent companies to create a joint venture;
  - (b) agreements between parent companies to modify the scope of their joint venture;
  - (c) agreements between parent companies and their joint venture concerning products or geographies in which the joint venture is not active; and
  - (d) agreements between parent companies not involving their joint venture, even if the agreement concerns products or geographies in which the joint venture is active.
13. The fact that a joint venture and its parent companies are considered to form part of the same undertaking on a particular market does not preclude the parent companies from being considered as independent on other markets <sup>(10)</sup>.
14. In order for Article 101 to apply to a horizontal cooperation, there must be a form of coordination between competitors, namely an agreement between undertakings, a decision by an association of undertakings or a concerted practice.

*For the purposes of Article 101 and these Guidelines, an agreement refers to two or more undertakings having expressed a concurrence of wills to cooperate <sup>(11)</sup>. A concerted practice is a form of coordination between undertakings in which they have not reached an agreement but they knowingly substitute practical cooperation between them for the risks of competition <sup>(12)</sup>. The concept of a concerted practice implies, in addition to the participating undertakings concerting with each other, subsequent conduct on the market and a relationship of cause and effect between the two <sup>(13)</sup>.*

15. The existence of an agreement, concerted practice or decision by an association of undertakings does not in itself indicate that there is a restriction of competition within the meaning of Article 101(1). For ease of reference, unless otherwise stated, in these Guidelines the term 'agreement' also covers concerted practices and decisions of associations of undertakings.
16. Horizontal cooperation agreements can be entered into between actual or potential competitors. Two undertakings are treated as actual competitors if they are active on the same product market and geographical market. An undertaking is considered as a potential competitor of another undertaking if, in the absence of the

<sup>(8)</sup> See, for example, judgment of 24 October 1996, *Viho*, C-73/95 P, EU:C:1996:405, paragraph 51. The exercise of decisive influence by the parent company over the conduct of a subsidiary can be presumed in the case of wholly-owned subsidiaries, or where the parent holds all the voting rights associated with its subsidiaries' shares; see, for example, judgment of 10 September 2009, *Akzo*, C-97/08 P, EU:C:2009:536, paragraphs 60 and further, judgment of 27 January 2021, *The Goldman Sachs Group Inc v Commission*, C-595/18 P, EU:C:2021:73, paragraph 36.

<sup>(9)</sup> Judgment of 26 September 2013, *El du Pont de Nemours and Company*, C-172/12 P, EU:C:2013:601, paragraph 47 and judgment of 14 September 2017, *LG Electronics Inc. and Koninklijke Philips Electronics NV*, C-588/15 P and C-622/15 P, EU:C:2017:679, paragraphs 71 and 76.

<sup>(10)</sup> Judgment of 14 September 2017, *LG Electronics Inc. and Koninklijke Philips Electronics NV*, C-588/15 P and C-622/15 P, EU:C:2017:679, paragraph 79.

<sup>(11)</sup> See, for example, judgment of 13 July 2006, *Commission v Volkswagen*, C-74/04 P, EU:C:2006:460, paragraph 37.

<sup>(12)</sup> See, for example, judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 26; judgment of 31 March 1993, *Wood Pulp*, C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, EU:C:1993:120, paragraph 63.

<sup>(13)</sup> Judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 126 and the case-law cited therein.

agreement, it is likely that the former, within a short period of time<sup>(14)</sup>, would undertake the necessary additional investments or other necessary switching costs to enter the relevant market on which the latter is active. This assessment has to be based on realistic grounds; the mere theoretical possibility to enter a market is not sufficient<sup>(15)</sup>. References in these Guidelines to competitors include both actual and potential competitors, unless indicated otherwise.

*For the assessment of whether an undertaking can be considered as a potential competitor of another undertaking, the following considerations may be relevant:*

- (a) if the undertaking has a firm intention and an inherent ability to enter the market within a short period of time and does not face barriers to entry that are insurmountable<sup>(16)</sup>;*
- (b) whether the undertaking has taken sufficient preparatory steps to enable it to enter the market concerned;*
- (c) the real and concrete possibilities of the undertaking that is not yet active to enter that market and compete with one or more of the other undertakings - the purely hypothetical possibility to enter a market or even the mere wish or desire are not sufficient;*
- (d) the structure of the market and the economic and legal context within which it operates<sup>(17)</sup>;*
- (e) the perception of an undertaking that is established on the market is a factor that is relevant to the assessment of the existence of a competitive relationship between that party and an undertaking outside the market since, if the latter is perceived as a potential entrant to the market, it may, by reason merely that it exists, exert competitive pressure on the undertaking that is established in the market.*

#### 1.2.2. Analytical framework

17. The assessment under Article 101 consists of two steps. The first step, under Article 101(1), is to assess whether an agreement between undertakings that is capable of affecting trade between Member States has an anti-competitive object or actual or potential<sup>(18)</sup> restrictive effects on competition.
18. The second step, under Article 101(3), which only becomes relevant when an agreement is found to restrict competition within the meaning of Article 101(1), is to determine the advantages produced by the agreement and to assess whether those advantages offset the disadvantages for competition<sup>(19)</sup>. The balancing of these restrictive and pro-competitive effects is conducted exclusively within the framework laid down by Article 101(3)<sup>(20)</sup>. If the advantages to consumers in the relevant market do not outweigh the restriction of competition, Article 101(2) provides that the agreement is automatically void.
19. Article 101 does not apply where the anti-competitive conduct of undertakings is required either by national legislation, or by a national legal framework which precludes all scope for competitive activity for the

<sup>(14)</sup> What constitutes a 'short period of time' depends on the legal and economic context and the facts of the case at hand and, in particular, on whether the undertaking in question is a party to a horizontal cooperation agreement or a third party. When it applies the notion of a 'short period of time' for the purpose of assessing whether a party to an agreement should be considered a potential competitor of another party, the Commission will normally consider a longer period than it does when it applies that notion for the purpose of assessing the capacity of a third party to act as a competitive constraint on the parties to an agreement. For a third party to be considered a potential competitor, market entry would need to take place sufficiently fast so that the threat of potential entry is a constraint on the parties' and other market participants' behaviour. For these reasons, both the R&D and the Specialisation Block Exemption Regulations consider a period of not more than three years a 'short period of time'.

<sup>(15)</sup> Judgment of 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paragraphs 37 and 38.

<sup>(16)</sup> The existence of a patent cannot, as such, be regarded as such an insurmountable barrier. See judgment of 25 March 2021, *Lundbeck*, C-591/16 P, EU:C:2021:243, paragraphs 38 and 58-59.

<sup>(17)</sup> See for example, judgment of 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paragraphs 36-58.

<sup>(18)</sup> Article 101(1) prohibits both actual and potential anti-competitive effects; see for example judgment of 28 May 1998, *John Deere*, C-7/95 P, EU:C:1998:256, paragraph 77; judgment of 23 November 2006, *Asnef-Equifax*, C-238/05, EU:C:2006:734, paragraph 50.

<sup>(19)</sup> See judgment of 6 October 2009, *GlaxoSmithKline*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 95.

<sup>(20)</sup> See judgment of 23 October 2003, *Van den Bergh Foods v Commission*, T-65/98, EU:T:2003:281, paragraph 107; judgment of 18 September 2001, *Métropole télévision (M6) and others v Commission*, Case T-112/99, EU:T:2001:215, paragraph 74; judgment of 2 May 2006, *O2 v Commission*, T-328/03, EU:T:2006:116, paragraph 69 and further. Taking into account the pro-competitive effects allows to appreciate the objective seriousness of a practice. It is not intended as a 'rule of reason', by virtue of which there should be a weighing of the pro- and anticompetitive effects of an agreement when it is to be characterised as a 'restriction of competition' under Article 101(1), see judgment of 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paragraph 104.

undertakings involved<sup>(21)</sup>. In such situations, undertakings are precluded from engaging in autonomous conduct which might prevent, restrict or distort competition<sup>(22)</sup>. The fact that public authorities encourage a horizontal cooperation agreement does not mean that it is permitted under Article 101<sup>(23)</sup>. Undertakings remain subject to Article 101 if a national law merely encourages or makes it easier for them to engage in autonomous anti-competitive conduct, for example if undertakings are encouraged by public authorities to enter into horizontal cooperation agreements in order to attain a public policy objective by way of self-regulation.

### 1.2.3. Assessment under Article 101(1)

#### 1.2.3.1. Advantages of horizontal cooperation

20. Horizontal cooperation agreements can lead to substantial economic benefits, including sustainability benefits, in particular where they combine complementary activities, skills or assets. Horizontal cooperation can be a means to share risk, save costs, increase investments, pool know-how, enhance product quality and variety and launch innovation faster. Similarly, horizontal cooperation can be a means to address shortages and disruptions in supply chains or reduce dependencies on particular products, services and technologies.

#### 1.2.3.2. Concerns arising from horizontal cooperation

21. Horizontal cooperation agreements may, however, limit competition on the relevant market in several ways. Such agreements may, for instance, lead to collusion between the parties or to anti-competitive foreclosure.

*A horizontal cooperation agreement may decrease the parties' decision-making independence and, as a result, increase the likelihood that they will coordinate their behaviour in order to reach a collusive outcome. It may also make coordination easier, more stable or more effective for parties that were already coordinating before, either by making the coordination more robust or by enabling them to charge higher prices. Horizontal cooperation can, for instance, lead to the disclosure of commercially sensitive information, thereby increasing the likelihood of coordination between the parties within or outside the field of the cooperation. Moreover, parties may achieve significant commonality of costs (that is to say, the proportion of variable costs that the parties have in common), allowing them to more easily coordinate market prices and output. A loss of competition can also have negative consequences for the quality or variety of products, for innovation and for other parameters of competition.*

*Some horizontal cooperation agreements, for example, production and standardisation agreements, may give rise to anti-competitive foreclosure. The agreement may prevent or restrict the parties' competitors from competing effectively, for example by denying them access to an important input or by blocking an important route to the market. An exchange of commercially sensitive information may also place unaffiliated competitors at a significant competitive disadvantage as compared to the undertakings that participate in the exchange.*

### 1.2.4. Restrictions of competition by object

22. Certain types of cooperation between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition<sup>(24)</sup>. In such cases, it is not necessary to examine the actual or potential effects of the behaviour on the market, once its anti-competitive object has been established<sup>(25)</sup>.

23. The concept of restrictions of competition 'by object' is to be interpreted strictly and can only be applied to certain agreements between undertakings which reveal, in themselves and having regard to the content of their

<sup>(21)</sup> See judgment of 14 October 2010, *Deutsche Telekom*, C-280/08 P, EU:C:2010:603, paragraphs 80-81. This possibility has been interpreted narrowly; see, for example, judgment of 29 October 1980, *Van Landewyck*, joined cases 209 to 215 and 218/78, EU:C:1980:248, paragraphs 130-134; judgment of 11 November 1997, *Ladbroke Racing*, C-359/95 P and C-379/95 P, EU:C:1997:531, paragraph 33 and further.

<sup>(22)</sup> Judgment of 9 September 2003, *CIF*, C-198/01, EU:C:2003:430, paragraph 54 and further.

<sup>(23)</sup> See, for example, judgment of 13 December 2006, *FNCBV and Others v Commission (French Beef)*, T-217/03 and T-245/03, EU:T:2006:391, paragraph 92.

<sup>(24)</sup> See, for example, judgment of 11 September 2014, *CB v Commission*, C-67/13 P, EU:C:2014:2204, paragraphs 49-50.

<sup>(25)</sup> See, for example, judgment of 6 October 2009, *GlaxoSmithKline*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 55; judgment of 20 November 2008, *BIDS*, C-209/07, EU:C:2008:643, paragraph 16; judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 29 and further; judgment of 28 May 1998, *John Deere*, C-7/95 P, EU:C:1998:256, paragraph 77.

provisions, their objectives and the economic and legal context of which they form part, a sufficient degree of harm to competition for the view to be taken that it is not necessary to assess their effects <sup>(26)</sup>.

24. According to the case-law, restrictions can be categorised as restrictions ‘by object’ on the basis of sufficiently reliable and robust experience for the view to be taken that the agreement in question is, by its very nature, harmful to the proper functioning of competition <sup>(27)</sup>, or on the basis of the specific characteristics of the agreement, from which it is possible to infer its particular harmfulness for competition, where appropriate as a result of a detailed analysis of the agreement, its objectives and its economic and legal context <sup>(28)</sup>.
25. To establish a restriction ‘by object’, there does not need to be a direct link between the agreement and consumer prices <sup>(29)</sup>. Article 101 is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such <sup>(30)</sup>.
26. In order to assess whether an agreement has an anti-competitive object <sup>(31)</sup>, the following elements are taken into account:
  - (a) the content of the agreement,
  - (b) the objectives it seeks to attain, and
  - (c) the economic and legal context of which it forms part.
27. When assessing that legal and economic context, it is also necessary to take into consideration <sup>(32)</sup>:
  - (a) the nature of the goods or services affected, and
  - (b) the real conditions of the functioning and structure of the market or markets in question <sup>(33)</sup>.
28. Where the parties raise the possible pro-competitive effects of an agreement, those effects must be duly taken into account as elements of context for the purposes of categorising the agreement as a restriction by object, in so far as they are capable of calling into question the overall assessment of whether the agreement is sufficiently harmful to competition <sup>(34)</sup>. However, for these purposes, such pro-competitive effects should not only be demonstrated and relevant, but also specifically related to the agreement concerned and sufficiently significant <sup>(35)</sup>.
29. The intention of the parties is not a necessary factor in determining whether an agreement has an anti-competitive object, but it may be taken into account <sup>(36)</sup>.

#### 1.2.5. Restrictive effects on competition

30. A horizontal cooperation agreement that does not in itself reveal a sufficient degree of harm to competition may still have restrictive effects on competition. For a horizontal cooperation agreement to have restrictive effects on competition, it must have, or be likely to have, an appreciable adverse impact on at least one of the

<sup>(26)</sup> Judgment of 30 January 2020, *Generics (UK) Ltd and Others*, C-307/18, EU:C:2020:52, paragraph 67 and the case-law cited therein.

<sup>(27)</sup> Judgment of 2 April 2020, *Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others*, C-228/18, EU:C:2020:265, paragraphs 76 and 79.

<sup>(28)</sup> See judgment of 25 March 2021, *Lundbeck*, C-591/16 P, EU:C:2021:243, paragraphs 130-131, and judgment of 25 March 2021, *Sun v Commission*, C-586/16 P, EU:C:2021:241, paragraph 86. The fact that the Commission has not previously considered that an agreement similar to the agreement in question was restrictive ‘by object’ does not, in itself, prevent it from doing so in the future.

<sup>(29)</sup> Price is one of the parameters of competition, in addition to parameters such as output, product quality, product variety or innovation.

<sup>(30)</sup> Judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraphs 38-39; judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 125. Judgment of 12 January 2023, *HSBC v Commission*, C-883/19 P, EU:C:2023:11, paragraph 121.

<sup>(31)</sup> Restrictions that are identified as hard-core restrictions in block exemption regulations, guidelines and notices are considered by the Commission to generally constitute restrictions by object.

<sup>(32)</sup> For agreements for which the Court of Justice of the European Union has already held that they constitute particularly serious breaches of the competition rules, the analysis of the legal and economic context may be limited to what is strictly necessary in order to establish the existence of a restriction by object, see judgment of 20 January 2016, *Toshiba*, C-373/14 P, EU:C:2016:26, paragraph 29.

<sup>(33)</sup> See judgment of 11 September 2014, *CB v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 53; judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 117 and judgment of 2 April 2020, *Budapest Bank and Others*, C-228/18, EU:C:2020:265, paragraph 51.

<sup>(34)</sup> Judgment of 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paragraphs 103-107 and judgment of 12 January 2023, *HSBC v Commission*, C-883/19 P, EU:C:2023:11, paragraph 139.

<sup>(35)</sup> Judgment of 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paragraph 107.

<sup>(36)</sup> See, for example, judgment of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 37; judgment of 11 September 2014, *CB v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 54; and judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 118.

parameters of competition on the market, such as price, output, product quality, product variety or innovation. To establish whether this is the case, it is necessary to assess competition within the actual context in which it would occur if the agreement had not existed <sup>(37)</sup>.

31. Agreements can have restrictive effects by appreciably reducing competition between the undertakings that are parties to the agreement or between any one of them and a third party. This means that the agreement must reduce the parties' decision-making independence <sup>(38)</sup>, either due to obligations contained in the agreement which regulate the market conduct of at least one of the parties or by influencing the market conduct of at least one of the parties, for example by causing a change in its incentives.
32. In order to assess whether an agreement has restrictive effects, the following factors are relevant:
  - (a) the nature and content of the agreement;
  - (b) the actual context in which the cooperation occurs, in particular the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected, and the real conditions of the functioning and the structure of the market or markets in question <sup>(39)</sup>;
  - (c) the extent to which the parties individually or jointly have or obtain some degree of market power <sup>(40)</sup> and the extent to which the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power;
  - (d) the restrictive effects on competition may be actual and potential, but they must, in any event, be sufficiently appreciable <sup>(41)</sup>.
33. In some cases, undertakings enter into horizontal cooperation agreements because, on the basis of objective factors, they would not be able to carry out the project or activity covered by the cooperation independently, for instance, due to their limited technical capabilities. Such horizontal cooperation agreements will generally not give rise to restrictive effects on competition within the meaning of Article 101(1), unless the parties could have carried out the project with less stringent restrictions <sup>(42)</sup>.

#### 1.2.6. Ancillary restraints

34. Where undertakings engage in cooperation that does not fall within the Article 101(1) prohibition because it has neutral or positive effects on competition, a restriction of the commercial autonomy of one or more of the participating undertakings does not fall within that prohibition either provided that that restriction is objectively necessary to implement the cooperation and is proportionate to the objectives of the cooperation (so-called '*ancillary restraints*') <sup>(43)</sup>. To determine whether a restriction constitutes an ancillary restraint, it is necessary to examine whether the cooperation would be impossible to carry out in the absence of the restriction in question. The fact that the cooperation is simply more difficult to implement, or less profitable without the restriction concerned, does not make that restriction 'objectively necessary' and thus ancillary <sup>(44)</sup>.

<sup>(37)</sup> Judgment of 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paragraph 118; judgment of 12 December 2018, *Krka v Commission*, T-684/14, EU:T:2018:918, paragraph 315; and judgment of 11 September 2014, *MasterCard v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 166.

<sup>(38)</sup> Judgment of 28 May 1998, *John Deere*, C-7/95 P, EU:C:1998:256, paragraph 88; judgment of 23 November 2006, *Asnef-Equifax*, C-238/05, EU:C:2006:734, paragraph 51.

<sup>(39)</sup> Judgment of 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paragraph 116, and the case-law cited there. The actual context of the cooperation may include factors such as the presence of sufficient possibilities for customers to switch supplier; the likelihood that competitors increase supply if prices increase; whether the market characteristics are conducive to coordination; whether the activities covered by the cooperation account for a high proportion of the parties' variable costs in the relevant market; etc. It may also be relevant to assess whether the parties combine their activities covered by the cooperation to a significant extent. This could be the case, for instance, where they jointly manufacture or purchase an intermediate product which is an important input for their production of downstream products, or where they jointly manufacture or distribute a large proportion of their total output of a final product.

<sup>(40)</sup> Market power is the ability to profitably maintain prices above competitive levels for a period of time or to profitably maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a period of time. The degree of market power normally required for a finding of an infringement under Article 101(1) is less than the degree of market power required for a finding of dominance under Article 102.

<sup>(41)</sup> Judgment of 11 September 2014, *CB v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 52.

<sup>(42)</sup> See also paragraph 18 of the Commission Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004 p. 97) ('Article 101(3) Guidelines').

<sup>(43)</sup> Judgment of 11 September 2014, *MasterCard v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 89; judgment of 11 July 1985, *Remia and Others v Commission*, Case 42/84, EU:C:1985:327, paragraphs 19-20; judgment of 28 January 1986, *Pronuptia*, Case 161/84, EU:C:1986:41, paragraphs 15-17; judgment of 15 December 1994, *Gøttrup-Klim*, C-250/92, EU:C:1994:413, paragraph 35, and judgment of 12 December 1995, *Oude Luttikhuis and Others*, C-399/93, EU:C:1995:434, paragraphs 12-15.

<sup>(44)</sup> Judgment of 11 September 2014, *MasterCard v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 91.



### 1.2.7. Assessment under Article 101(3)

35. The assessment of restrictions of competition by object or effect under Article 101(1) is only one side of the analysis under Article 101. The other side is the assessment of whether a restrictive agreement meets the conditions of Article 101(3) <sup>(45)</sup>. Where it is established that an agreement restricts competition by object or by effect within the meaning of Article 101(1), Article 101(3) can be invoked as a defence. The burden of proof under Article 101(3) rests on the undertaking(s) invoking the benefit of that provision <sup>(46)</sup>. In other words, it is for the undertaking(s) to prove that the agreement in question is likely to give rise to pro-competitive effects <sup>(47)</sup>.
36. The application of the exception rule of Article 101(3) is subject to four cumulative conditions, two positive ones and two negative ones:
- (a) the agreement must lead to efficiency gains, that is to say, it must contribute to improving the production or distribution of products or contribute to promoting technical or economic progress;
  - (b) the restrictions must be indispensable to the attainment of those objectives, that is to say, of those efficiency gains;
  - (c) consumers must receive a fair share of the resulting benefits, that is to say, the efficiency gains, including qualitative efficiency gains, attained by the indispensable restrictions must be sufficiently passed on to consumers such that the consumers are at least compensated for the restrictive effects of the agreement. Hence, efficiencies only accruing to the parties to the agreement will not suffice. For the purposes of these Guidelines, 'consumers' are the customers of the parties to the agreement and subsequent purchasers <sup>(48)</sup>;
  - (d) the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.
37. The R&D BER and Specialisation BER are based on the premise that the combination of complementary skills or assets can be a source of substantial efficiencies in R&D and specialisation agreements. Other types of horizontal cooperation may similarly combine skills and assets to produce substantial efficiencies. The analysis of the efficiencies generated by a cooperation agreement under Article 101(3) is therefore to a large extent a question of identifying the complementary skills and resources that each of the parties brings to the cooperation and evaluating whether the resulting efficiencies are such that the conditions of Article 101(3) are fulfilled.

*Complementarities may arise from horizontal cooperation agreements in various ways. An R&D agreement may bring together different research capabilities and combine complementary skills and assets that may result in the development and marketing of new or improved products and technologies that would not otherwise have existed. Other horizontal cooperation agreements may allow parties to combine forces to design, produce and commercialise products or to jointly purchase products or services that they need for their activities.*

38. Horizontal cooperation agreements that do not involve the combination of complementary skills or assets are less likely to lead to efficiency gains that benefit consumers.

### 1.2.8. Horizontal cooperation agreements that generally fall outside the scope of Article 101(1)

39. Agreements that are not capable of appreciably affecting trade between Member States (lack of effect on trade) or which do not appreciably restrict competition (agreements of minor importance) fall outside the scope of Article 101(1) <sup>(49)</sup>. The Commission has provided guidance on the lack of effect on trade in the Commission

<sup>(45)</sup> The general approach when applying Article 101(3) is presented in the Article 101(3) Guidelines.

<sup>(46)</sup> See Article 2 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).

<sup>(47)</sup> See paragraphs 51-58 of the Article 101(3) Guidelines.

<sup>(48)</sup> More detail on the concept of consumers is provided in paragraph 84 of the Article 101(3) Guidelines.

<sup>(49)</sup> See judgment of 13 December 2012, *Expedia*, C-226/11, EU:C:2012:795, paragraphs 16-17 and the case-law cited therein.

Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty <sup>(50)</sup> (*Effect on Trade Guidelines*), and on agreements of minor importance in the Commission Notice on agreements of minor importance which do not appreciably restrict competition under 101(1) of the Treaty on the Functioning of the European Union <sup>(51)</sup> (*De Minimis Notice*). Both the *Effect on Trade Guidelines* and the *De Minimis Notice* are particularly relevant for the assessment of horizontal cooperation agreements between small and medium-sized enterprises ('SMEs') <sup>(52)</sup>. These Guidelines do not affect the *Effect on Trade Guidelines* and the *De Minimis Notice*, nor any future Commission guidance in this respect.

40. The *Effect on Trade Guidelines* set out the principles developed by the Court of Justice of the European Union to interpret the concept of effect on trade and indicate when agreements are unlikely to be capable of appreciably affecting trade between Member States. They include a negative rebuttable presumption that applies to all agreements within the meaning of Article 101(1), irrespective of the nature of the restrictions included in such agreements, thus applying also to agreements containing hardcore restrictions <sup>(53)</sup>. According to this presumption, horizontal cooperation agreements are in principle not capable of appreciably affecting trade between Member States where:
- (a) the aggregate market share of the parties on any relevant market within the Union affected by the agreement does not exceed 5 %, and
  - (b) the aggregate annual Union turnover of the undertakings concerned in the products covered by the agreement does not exceed EUR 40 million <sup>(54)</sup>. In the case of agreements concerning the joint buying of products, the relevant turnover is the parties' combined purchases of the products covered by the agreement.
41. As set out in the *De Minimis Notice*, horizontal cooperation agreements entered into by actual or potential competitors do not appreciably restrict competition within the meaning of Article 101(1) if the aggregate market share held by the parties to the agreement does not exceed 10 % on any of the relevant markets affected by the agreement <sup>(55)</sup>. This general rule is subject to two exceptions. First, as regards by object restrictions, Article 101(1) applies irrespective of the parties' market shares. This is because an agreement that may affect trade between Member States and which has an anti-competitive object may by its nature and independently of any concrete effect constitute an appreciable restriction of competition <sup>(56)</sup>. Second, the 10 % market share threshold is reduced to 5 % where, in a relevant market, competition is restricted by the cumulative effect of parallel networks of agreements <sup>(57)</sup>.
42. Furthermore, there is no presumption that horizontal agreements concluded by undertakings which have an aggregate market share exceeding 10 % automatically fall within the scope of Article 101(1). Such agreements may still lack an appreciable effect on trade between Member States, or they may not constitute an appreciable restriction of competition <sup>(58)</sup>. They therefore need to be assessed in their legal and economic context. These Guidelines include criteria for the individual assessment of such agreements.

### 1.3. Relationship to other guidance, legislation and case-law

43. Agreements entered into between undertakings operating at different levels of the production or distribution chain, that is to say, vertical agreements, are generally covered by Commission Regulation (EU) 2022/720 <sup>(59)</sup> ('VBER') and the Communication from the Commission – Commission Notice – Guidelines on Vertical Restraints <sup>(60)</sup> (*Vertical Guidelines*). However, where vertical agreements are entered into between competitors,

<sup>(50)</sup> OJ C 101, 27.4.2004, p. 81.

<sup>(51)</sup> OJ C 291, 30.8.2014, p. 1.

<sup>(52)</sup> As defined in the Annex to Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

<sup>(53)</sup> *Effect on Trade Guidelines*, paragraph 50.

<sup>(54)</sup> *Effect on Trade Guidelines*, paragraph 52.

<sup>(55)</sup> *De Minimis Notice*, paragraph 8.

<sup>(56)</sup> Judgment of 13 December 2012, *Expedia*, C-226/11, EU:C:2012:795, paragraph 37.

<sup>(57)</sup> *De Minimis Notice*, paragraph 10.

<sup>(58)</sup> See judgment of 8 June 1995, *Langnese-Iglo v Commission*, T-7/93, EU:T:1995:98, paragraph 98.

<sup>(59)</sup> Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ L 134, 11.5.2022, p. 4).

<sup>(60)</sup> OJ C 248, 30.6.2022, p. 1.

they may raise competition concerns that are similar to those raised by horizontal agreements. For that reason, vertical agreements between competitors cannot, in general, benefit from the VBER<sup>(61)</sup> and should first be assessed using these Guidelines. Where that assessment leads to the conclusion that the agreement does not raise horizontal concerns, any vertical restraints in the agreement should, in addition, be assessed using the Vertical Guidelines.

44. Where these Guidelines refer to the relevant market, the Commission Notice on the definition of relevant market for the purposes of Union competition law<sup>(62)</sup> (*Market Definition Notice*) provides guidance on the rules, criteria and evidence that the Commission uses for the purpose of defining relevant markets. That Notice and any future Commission guidance relating to the definition of relevant markets for the purposes of Union competition law should therefore be taken into account for the assessment of horizontal cooperation agreements under Article 101.
45. Although these Guidelines contain references to cartels, they are not intended to provide guidance as to what does or does not constitute a cartel as defined by the case-law of the Court of Justice of the European Union and the decisional practice of the Commission.
46. These Guidelines apply to the most common types of horizontal cooperation agreements, irrespective of the level of integration they entail, with the exception of operations constituting a concentration within the meaning of Article 3 of Council Regulation (EC) No 139/2004<sup>(63)</sup> (*Merger Regulation*). The Merger Regulation applies, for example, to the creation of joint ventures performing on a lasting basis all the functions of an autonomous economic entity ('full-function joint ventures')<sup>(64)</sup>.
47. These Guidelines do not apply to agreements, decisions of associations or concerted practices of producers of agricultural products that relate to the production of or trade in agricultural products and that aim to apply a sustainability standard higher than mandated by Union or national law and that are excluded from the application of Article 101(1) pursuant to Article 210a of Regulation (EU) No 1308/2013 of the European Parliament and of the Council<sup>(65)</sup>. These Guidelines are without prejudice to the Guidelines that the Commission may issue pursuant to Article 210a(5) of Regulation (EU) No 1308/2013. However, agreements, decisions of associations and concerted practices by producers of agricultural products that relate to the production of or trade in agricultural products and that do not meet the conditions of Article 210a of Regulation (EU) No 1308/2013 are subject to Article 101(1).
48. The assessment under Article 101 as described in these Guidelines is without prejudice to the possible parallel application of Article 102 of the Treaty to horizontal cooperation agreements<sup>(66)</sup>.

<sup>(61)</sup> As an exception to this rule, vertical agreements between competitors can benefit from the VBER where the agreement is non-reciprocal and either (i) the supplier is active at an upstream level as a manufacturer, importer, or wholesaler and at a downstream level as an importer, wholesaler, or retailer of goods, while the buyer is an importer, wholesaler, or retailer at the downstream level and not a competing undertaking at the upstream level where it buys the contract goods, or (ii) the supplier is a provider of services at several levels of trade, while the buyer provides its services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services (see VBER, Article 2(4)).

<sup>(62)</sup> Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).

<sup>(63)</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p. 1).

<sup>(64)</sup> See Article 3(4) of the Merger Regulation. In assessing whether there is a full-function joint venture, the Commission examines whether the joint venture is autonomous in an operational sense. This does not mean that it enjoys autonomy from its parent companies as regards the adoption of its strategic decisions (see Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ C 95, 16.4.2008, p. 1), paragraphs 91–109 ('Consolidated Jurisdictional Notice')). It should also be recalled that if the creation of a joint venture constituting a concentration under Article 3 of the Merger Regulation has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, then that coordination is to be assessed under Article 101 of the Treaty (see Article 2(4) of the Merger Regulation).

<sup>(65)</sup> Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007, (OJ L 347, 20.12.2013, p. 671). See for the common organisation of the markets in fisheries Article 41 of Regulation (EU) No 1379/2013 of the European Parliament and of the Council of 11 December 2013 on the common organisation of the markets in fishery and aquaculture products, amending Council Regulations (EC) No 1184/2006 and (EC) No 1224/2009 and repealing Council Regulation (EC) No 104/2000 (OJ L 354, 28.12.2013, p. 1).

<sup>(66)</sup> See judgment of 10 July 1990, *Tetra Pak I*, T-51/89, EU:T:1990:41, paragraph 25 and further.



49. These Guidelines are without prejudice to the interpretation that the Court of Justice of the European Union may give to the application of Article 101 to horizontal cooperation agreements.
50. These Guidelines do not apply to the extent that sector-specific rules apply, as is the case for certain agreements in the field of agriculture <sup>(67)</sup> or transport <sup>(68)</sup>. The Commission will continue to monitor the operation of the R&D BER and Specialisation BER and these Guidelines based on market information from stakeholders and national competition authorities and may revise these Guidelines in the light of future developments and of evolving insight.

## 2. RESEARCH AND DEVELOPMENT AGREEMENTS

### 2.1. Introduction

51. This Chapter provides guidance on the competitive assessment of research and development ('R&D') agreements relating to products, technologies or processes <sup>(69)</sup>.
52. R&D agreements vary in form and scope. They include agreements under which one party finances R&D carried out by another party ('paid-for' R&D); agreements covering the joint improvement of existing products and technologies, and agreements concerning the development of products and technologies that would create an entirely new demand. The R&D cooperation may take the form of a cooperation agreement or a joint venture, namely a jointly controlled company <sup>(70)</sup>. Undertakings may also cooperate in looser forms, such as technical cooperation in working groups.
53. R&D agreements may be entered into by large undertakings, SMEs <sup>(71)</sup>, start-ups, academic bodies or research institutes, or any combination of these.
54. R&D cooperation agreements often have pro-competitive effects, in particular where they bring together undertakings with complementary skills and assets and allow them to develop and market new and improved products and technologies more quickly than would otherwise be the case. However, R&D agreements can also restrict competition in various ways. First, they may reduce or slow down innovation, leading to fewer or worse quality products coming to the market, or leading to new products coming to the market later than they otherwise would. This may occur even where the cooperation concerns the development of products or technologies that would create an entirely new demand or concerns early innovation efforts that are not closely related to a specific product or technology, but are directed towards a particular application or use. Second, R&D agreements may lead to a reduction of competition between the parties outside the scope of the cooperation agreement and/or, in cases where one or more of the parties has market power, to anti-competitive foreclosure of third parties.
55. This Chapter is structured as follows:
- (a) Section 2.2 provides guidance on the application of the R&D BER, including the conditions for exempting R&D agreements, the thresholds, and the hardcore and excluded restrictions;
  - (b) Section 2.3 provides guidance on the individual assessment of R&D agreements under Article 101(1);
  - (c) Section 2.4 provides guidance on the individual assessment of R&D agreements under Article 101(3);
  - (d) Section 2.5 provides guidance on the relevant time period for the assessment of R&D agreements;
  - (e) Section 2.6 provides examples of hypothetical R&D agreements, together with guidance on their competitive assessment.

<sup>(67)</sup> Council Regulation (EC) No 1184/2006 of 24 July 2006 applying certain rules of competition to the production of, and trade in, agricultural products (OJ L 214, 4.8.2006, p. 7).

<sup>(68)</sup> Council Regulation (EC) No 169/2009 of 26 February 2009 applying rules of competition to transport by rail, road and inland waterway (OJ L 61, 5.3.2009, p. 1); and Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) (OJ L 256, 29.9.2009, p. 31).

<sup>(69)</sup> In this Chapter, references to 'technologies' include technologies and processes.

<sup>(70)</sup> These Guidelines apply to the most common types of horizontal cooperation agreements, irrespective of the level of integration they entail, with the exception of operations constituting a concentration within the meaning of Article 3 of Regulation (EC) No 139/2004, such as the creation of a full-function joint venture. See also paragraph 46.

<sup>(71)</sup> As defined in the Annex to Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

## 2.2. The R&D Block Exemption Regulation ('R&D BER')

56. The R&D BER <sup>(72)</sup> exempts certain R&D agreements from the prohibition laid down in Article 101(1). The exemption provided by the R&D BER is based on the assumption that – to the extent that an R&D agreement falls within the scope of Article 101(1) and fulfils the conditions set out in the R&D BER – it will generally fulfil the four cumulative conditions of Article 101(3). For expediency, undertakings that intend to enter into an R&D agreement may first wish to consider whether their agreement can benefit from the R&D BER.
57. R&D agreements that fulfil the conditions of the R&D BER are compatible with Article 101 and no further assessment is necessary <sup>(73)</sup>. Where an R&D agreement does not fulfil the conditions of the R&D BER, it is necessary to carry out an individual assessment under Article 101 in order to determine, first, whether the agreement restricts competition within the meaning of Article 101(1) <sup>(74)</sup> and, if so, whether the agreement fulfils the four cumulative conditions set out in Article 101(3).
- 2.2.1. *Definition of research and development in the R&D BER*
58. The R&D BER defines research and development as activities aimed at acquiring know-how relating to products or technologies, the carrying out of theoretical analysis, systematic study or experimentation, including experimental and demonstrator production, technical testing of products or processes, the establishment of the necessary facilities up to demonstrator scale and the obtaining of intellectual property rights for the results <sup>(75)</sup>.
- 2.2.2. *Definition of R&D agreements in the R&D BER*
59. The R&D BER covers R&D agreements entered into between two or more parties which relate to the conditions under which the parties pursue one of the following <sup>(76)</sup>:
- (a) joint R&D of contract products or contract technologies, which may or may not include joint exploitation of the results of that R&D; or
  - (b) paid-for R&D of contract products or contract technologies, which may or may not include joint exploitation of the results of that R&D; or
  - (c) joint exploitation of the results of R&D of contract products or contract technologies carried out pursuant to a prior agreement pursuing joint R&D (as defined in point (a) above) between the same parties; or
  - (d) joint exploitation of the results of R&D of contract products or contract technologies carried out pursuant to a prior agreement pursuing paid-for R&D (as defined in point (b) above) between the same parties.
60. For the purposes of the R&D BER, 'contract products' and 'contract technologies' have the following meanings:
- (a) 'contract product' <sup>(77)</sup> means a product arising out of the joint or paid-for R&D or produced by applying the contract technologies. 'Product' means a good or a service, including both intermediary goods and services as well as final goods and services <sup>(78)</sup>;
  - (b) 'contract technology' <sup>(79)</sup> means a technology or process arising out of the joint or paid-for R&D.
61. Other types of R&D cooperation agreements are not covered by the R&D BER. Such agreements always require an individual assessment under Article 101 (see Sections 2.3 and 2.4).

<sup>(72)</sup> Commission Regulation (EU) 2023/1066 of 1 June 2023 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements (OJ L 143, 2.6.2023, p. 9).

<sup>(73)</sup> Unless and until the Commission or an NCA withdraws the benefit of the block exemption in an individual case (see Section 2.2.6).

<sup>(74)</sup> For the assessment of R&D agreements under Article 101(1), see Section 2.3.

<sup>(75)</sup> See Article 1(1), point (3) of the R&D BER.

<sup>(76)</sup> See Article 1(1), point (1) of the R&D BER.

<sup>(77)</sup> See Article 1(1), point (6) of the R&D BER.

<sup>(78)</sup> See Article 1(1), point (4) of the R&D BER.

<sup>(79)</sup> See Article 1(1), point (5) of the R&D BER.

2.2.2.1. Distinction between ‘joint R&D’ and ‘paid-for R&D’ and the concept of ‘specialisation in the context of R&D’

62. ‘Joint R&D’ is defined as R&D carried out in one of the following ways <sup>(80)</sup>:

- (a) the R&D activities are carried out by a joint team, organisation or undertaking;
- (b) the parties jointly entrust a third party with the R&D activities <sup>(81)</sup>; or
- (c) the parties allocate the activities between them by way of ‘specialisation in the context of R&D’. This means that each of the parties is involved in the R&D activities and they divide the R&D work between them in any way that they consider appropriate. This does not include paid-for R&D <sup>(82)</sup>.

63. ‘Paid-for R&D’ means R&D that is carried out by at least one party whilst at least one other party finances the R&D but does not carry out any of the R&D activities itself.

64. The distinction between joint R&D and paid-for R&D is relevant for the purpose of applying the market share threshold contained in the R&D BER. For paid-for R&D, in order to calculate market shares, the parties must also take into account any R&D agreements concluded by the financing party with third parties relating to the same contract products or contract technologies (see Section 2.2.3.4).

2.2.2.2. ‘Joint exploitation’ of the R&D results and ‘specialisation in the context of joint exploitation’

65. The R&D BER covers agreements that include the joint exploitation of the R&D results. However, the block exemption of such agreements is subject to specific conditions (see Section 2.2.3.3).

66. ‘Exploitation of the results’ is a wide concept, which comprises the production or distribution of the contract products or the application of the contract technologies or the assignment or licensing of intellectual property rights or the communication of know-how required for such production, distribution or application <sup>(83)</sup>.

67. Joint exploitation of the results of the R&D is only covered by the R&D BER if the results are:

- (a) indispensable for the production of the contract products or the application of the contract technologies; and
- (b) protected by intellectual property rights or constitute know-how <sup>(84)</sup>.

68. The joint exploitation of the results of joint or paid-for R&D may be provided for in the *original* R&D agreement or may take place in the context of a *subsequent* agreement covering the joint exploitation of the results of a prior R&D agreement entered into between the same parties <sup>(85)</sup>. In the latter case, the prior R&D agreement must meet the conditions of the R&D BER in order for the subsequent joint exploitation agreement to be covered by the block exemption.

69. The R&D BER provides for three different ways in which the results of the R&D can be jointly exploited <sup>(86)</sup>:

- (a) The exploitation can be carried out *together by the parties* in a joint team, joint organisation or joint undertaking;
- (b) The parties can *jointly entrust a third party* with the exploitation work <sup>(87)</sup>;

<sup>(80)</sup> See Article 1(1), point (10) of the R&D BER.

<sup>(81)</sup> This can be distinguished from paid-for R&D, under which the R&D is carried out by one or more parties to the R&D agreement.

<sup>(82)</sup> See Article 1(1), point (11) of the R&D BER.

<sup>(83)</sup> See Article 1(1), point (7) of the R&D BER.

<sup>(84)</sup> See Article 5(1) of the R&D BER. Additional conditions linked to joint exploitation of the results of the R&D are described in Section 2.2.3.3.

<sup>(85)</sup> As covered by Article 1(1), points (1) (c) and (d) of the R&D BER.

<sup>(86)</sup> See Article 1(1), point (10) of the R&D BER.

<sup>(87)</sup> The agreement with the third party requires a separate assessment under Article 101.

(c) The parties can allocate the work between them by way of *specialisation in the context of exploitation*, which means that <sup>(88)</sup>:

- (i) the parties allocate between them individual tasks such as production or distribution. This includes a scenario where only one party produces and distributes the contract products or applies the contract technologies on the basis of an exclusive licence granted by the other parties; or
- (ii) the parties impose restrictions upon each other regarding the exploitation of the results, such as restrictions in relation to certain territories, customers or fields of use.

70. Where the parties agree to specialise in the context of exploitation, they may agree corresponding restrictions on their access to the results for the purposes of exploitation. For instance, they may agree to restrict the rights of certain parties to exploit the results of the R&D in certain territories, fields of use or vis-à-vis certain customers.

#### 2.2.2.3. Assignment and licensing of intellectual property rights

71. The exemption provided by the R&D BER also applies to R&D agreements which include provisions on the assignment or licensing of intellectual property rights to one or more of the parties or to an entity established by the parties to carry out the joint R&D, the paid-for R&D or the joint exploitation of the R&D results, provided that those provisions do not constitute the primary object of the R&D agreement but are directly related to and necessary for the implementation of that agreement <sup>(89)</sup>. In those cases, the assignment and licensing provisions will be covered by the R&D BER and not by the Technology Transfer Block Exemption Regulation <sup>(90)</sup>.

72. However, in the context of R&D agreements, the parties may also agree upon the conditions for licensing of the results of the R&D to third parties. Such licence agreements are not covered by the R&D BER but may be covered by the Technology Transfer Block Exemption Regulation if the conditions of that Regulation are fulfilled <sup>(91)</sup>.

#### 2.2.3. Conditions for exemption under the R&D BER

73. The R&D BER sets out several conditions that must be fulfilled in order for an R&D agreement to benefit from the block exemption.

##### 2.2.3.1. Access to the final results

74. The first condition for an R&D agreement to benefit from the exemption provided by the R&D BER is that all parties must have full access to the final results of the joint or paid-for R&D, for two purposes <sup>(92)</sup>:

- (a) conducting further research and development; and
- (b) exploiting the results of the R&D.

75. This condition relates to results of the R&D that are final and any resulting intellectual property rights and know-how <sup>(93)</sup>.

76. Access must be granted as soon as the final results of the R&D become available <sup>(94)</sup>. This requirement is not necessarily linked to the end of the R&D project.

<sup>(88)</sup> See Article 1(1), point (12) of the R&D BER.

<sup>(89)</sup> See Article 2(3) of the R&D BER.

<sup>(90)</sup> Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements (OJ L 93, 28.3.2014, p. 17). See also Commission Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements (OJ C 89, 28.3.2014, p. 3) points 73 and 74 ('Technology Transfer Guidelines').

<sup>(91)</sup> See Technology Transfer Guidelines, point 74.

<sup>(92)</sup> See Article 3(2) of the R&D BER.

<sup>(93)</sup> See Article 3(3), point (a) of the R&D BER.

<sup>(94)</sup> See Article 3(3), point (b) of the R&D BER.

77. The right of access to the results of the R&D cannot be restricted for the *purposes of conducting further research and development*. However, the R&D BER provides that the parties may restrict their *right to exploit the results* of the joint or paid-for R&D in two cases:
- (a) First, where the R&D agreement is concluded with one or more of the following categories of undertaking and those undertakings agree to use the results of the R&D only for further research (and not for exploitation). These categories of undertaking are:
    - (i) research institutes;
    - (ii) academic bodies;
    - (iii) undertakings that supply R&D as a commercial service without normally being active in the exploitation of the results <sup>(95)</sup>.
  - (b) Second, the parties may agree to *restrict their right to exploit the R&D results* in accordance with the R&D BER, in particular where they agree to specialise in the context of exploitation. For example, where the R&D agreement provides for specialisation in the context of exploitation, the parties may impose restrictions upon each other regarding the exploitation of the results in certain territories, fields of use or vis-à-vis certain customers).
78. Finally, since the parties to an R&D agreement may make unequal contributions to their R&D cooperation, for example, due to differing capabilities, resources or commercial interests, the R&D agreement may provide for one party to compensate the other(s) for granting access to the results for the purposes of further R&D or for the purpose of exploitation. However, in that case, the level of compensation must not be so high as to effectively impede such access <sup>(96)</sup>.

#### 2.2.3.2. Access to pre-existing know-how

79. A second condition applies to *R&D agreements that do not include joint exploitation of the R&D results*.
80. For such R&D agreements to benefit from the block exemption, the agreement must stipulate that each party is granted access to any pre-existing know-how of the other parties that is indispensable for the party to exploit the results of the joint or paid-for R&D <sup>(97)</sup>. It should be noted that this condition does not require the parties to grant access to all their pre-existing know-how, only to know-how that is indispensable to exploit the results of the joint or paid-for R&D.
81. R&D agreements may provide that the parties compensate each other for giving access to their pre-existing know-how (for example, in the form of licence fees). However, the compensation must not be so high as to effectively impede such access <sup>(98)</sup>.
82. This second condition applies in addition to the conditions set out in Article 3 of the R&D BER relating to access to the final R&D results (see Section 2.2.3.1). This means that, depending on the facts of the case, a given R&D agreement may have to include provisions both as regards access to pre-existing know-how and as regards the final results of the R&D in order to benefit from the block exemption.

#### 2.2.3.3. Conditions relating to joint exploitation

83. The R&D BER includes two further conditions for R&D agreements that provide for joint exploitation of the R&D results.
84. First, as set out in Article 5(1) of the R&D BER, any joint exploitation must be limited to R&D results that are indispensable for the production of the contract products or the application of the contract technologies and are protected by intellectual property rights or constitute know-how.

<sup>(95)</sup> These could for instance be SMEs whose main commercial activity is to supply R&D services for third parties.

<sup>(96)</sup> See Article 3(4) of the R&D BER.

<sup>(97)</sup> See Article 4(2) of the R&D BER.

<sup>(98)</sup> See Article 4(3) of the R&D BER.

85. Second, if the parties agree to specialise in the context of exploitation and one or more parties are charged with producing the contract products, those parties must be required to fulfil orders for supplies of the contract products from the other parties<sup>(99)</sup>. This requirement does not apply, however, where (i) the R&D agreement provides for joint distribution (by a joint team, organisation or undertaking or by a jointly appointed third party) or (ii) where the parties agree that only the parties charged with producing the contract products may distribute them<sup>(100)</sup>.

#### 2.2.3.4. Market share threshold and duration of the exemption

86. The exemption provided by the R&D BER is based on the assumption that, below a certain level of market power, the positive effects of R&D agreements will, in general, outweigh any negative effects on competition<sup>(101)</sup>.

(a) *R&D agreements that are subject to a market share threshold*

87. Article 6(1) of the R&D BER establishes a market share threshold of 25 %. This market share threshold applies to R&D agreements entered into between competing undertakings. For the purposes of the R&D BER, 'competing undertakings' means actual or potential competitors as defined in Article 1(1), point (15) of the R&D BER:

(a) an actual competitor is an undertaking that is supplying a product, technology or process capable of being improved, substituted or replaced by the contract product or contract technology on the relevant geographic market;

(b) a potential competitor is an undertaking that, in the absence of the R&D agreement, would, on realistic grounds and not just as a mere theoretical possibility, be likely to undertake, within not more than three years, the necessary additional investments or incur the necessary costs to supply a product, technology or process capable of being improved, substituted or replaced by the contract product or contract technology on the relevant geographic market.

88. Potential competition must be assessed on realistic grounds. The decisive question is whether each party has the necessary means in terms of assets, know-how and other resources and is likely to undertake the necessary steps to supply the products or technologies<sup>(102)</sup> that are capable of being improved, substituted or replaced by the contract products or contract technologies independently from the other parties<sup>(103)</sup>. Further guidance on the assessment of potential competition is provided in paragraph 16.

89. For these purposes, an *improved* or *substitute product or technology* means a product or technology that is interchangeable with the existing product, technology or process and belongs to the same relevant market. A *replacement product or technology* means a product or technology that satisfies the same demand as an existing product or technology but does not belong to the same relevant market, for example compact discs replacing vinyl records<sup>(104)</sup>.

90. Some products or technologies will not improve, substitute or replace existing products or technologies, but will instead create a new relevant market satisfying a new demand, for example, a vaccine which protects against a virus for which no vaccine existed previously. R&D agreements that concern the development of this category of products or technologies are covered by Article 6(2) of the R&D BER and are not subject to any market share threshold (see Section 2.2.3.4(b))<sup>(105)</sup>.

<sup>(99)</sup> See Article 5(2) of the R&D BER.

<sup>(100)</sup> See Article 5(2) of the R&D BER.

<sup>(101)</sup> See recital 5 of the R&D BER.

<sup>(102)</sup> In the remainder of this Chapter, references to technology or technologies include processes, unless indicated otherwise.

<sup>(103)</sup> See also Section 1.2.1.

<sup>(104)</sup> See paragraph 44 and the Commission's *Market Definition Notice* for guidance on defining the relevant market. See also Section 2.3.1.

<sup>(105)</sup> See paragraph 44 and the Commission's *Market Definition Notice* for guidance on defining the relevant market. See also Section 2.3.1.



(a.1) *Market share threshold*

91. If two or more of the parties to the R&D agreement are competing undertakings within the meaning of Article 1(1), point (15) of the R&D BER,<sup>(106)</sup> the R&D agreement can only benefit from the block exemption if the parties' combined market share does not exceed 25 % on the relevant product and technology markets at the time the R&D agreement is entered into. The market share threshold applies in the following way<sup>(107)</sup>:
- (a) for R&D agreements involving *joint R&D*, the combined market share of the parties to the agreement must not exceed 25 % on the relevant product and technology markets<sup>(108)</sup>;
  - (b) for R&D agreements involving *paid-for R&D*, the same market share threshold of 25 % applies, but the combined market share must take into account the market share of the financing party and the market shares of all undertakings with which the financing party has entered into R&D agreements relating to the same contract products or contract technologies<sup>(109)</sup>.

(a.2) *Calculation of market shares*

92. At the time the R&D agreement is entered into, the reference point is the market for existing products or technologies capable of being improved, substituted or replaced by the contract products or contract technologies<sup>(110)</sup>.
93. If the R&D agreement aims to *improve, substitute or replace* existing products or technologies, market shares are calculated solely by reference to those existing products or technologies that will be improved, substituted or replaced. This applies even if the replacement product or technology will be significantly different from the existing product or technology.
94. The R&D BER provides that the market shares of the parties must be calculated on the basis of *market sales value* data. If market sales value data are not available, the parties may use *market sales volumes* data, and if such data are not available, the parties may use other reliable market information to calculate their market shares, including R&D expenditure or R&D capabilities<sup>(111)</sup>.
95. In general, market shares must be calculated using sales data relating to the preceding calendar year<sup>(112)</sup>. However, in cases where sales data relating to the preceding calendar year are not representative of the parties' position in the relevant market(s), market shares are calculated as an average of the parties' market shares for the three preceding calendar years<sup>(113)</sup>. This may be relevant, for instance, in bidding markets where market shares vary significantly from year to year, depending on whether undertakings are successful in bidding processes. It may also be relevant in markets characterised by large, lumpy orders, for example, where sales data for the previous calendar year are not representative because no large orders were placed in that year. Similarly, it may be necessary to calculate market shares on the basis of an average of the three preceding calendar years in cases where there is a supply or demand shock in the calendar year preceding the cooperation agreement.
96. In the case of technology markets, the market share of a technology licensor is calculated on the basis of the sales by the licensor and all its licensees of products incorporating the licensed technology, as a share of all sales of competing products, irrespective of whether the competing products are produced using the technology that is being licensed. This methodology is used due to the general difficulty of obtaining reliable royalty income data and because calculations based on actual royalty income may under-estimate a technology's position on the market<sup>(114)</sup>.

<sup>(106)</sup> See paragraphs 87 and 88.

<sup>(107)</sup> See Section 2.2.2.1 on the distinction between joint R&D and paid-for R&D. See also Article 1(1), point (1) of the R&D BER.

<sup>(108)</sup> See Article 6(1), point (a) of the R&D BER.

<sup>(109)</sup> See Article 6(1), point (b) of the R&D BER. It is not necessary for all the financing party's R&D agreements relating to the same contract products or contract technologies to fall within the scope of the R&D BER.

<sup>(110)</sup> See paragraph 44 and the Commission's *Market Definition Notice* for guidance on defining the relevant market. See also Section 2.3.1.

<sup>(111)</sup> See Article 7(2) of the R&D BER.

<sup>(112)</sup> See Article 7(3) of the R&D BER.

<sup>(113)</sup> See Article 7(3) of the R&D BER.

<sup>(114)</sup> See also the Technology Transfer Block Exemption Regulation, Article 8(d) and the Technology Transfer Guidelines, paragraphs 25 and 86-88.

(b) *R&D agreements that are not subject to a market share threshold*

97. Where the parties to the R&D agreement are not competing undertakings within the meaning of Article 1(1), point (15) of the R&D BER <sup>(115)</sup>, Article 6(2) of the R&D BER provides that the block exemption applies for the duration of the joint or paid-for R&D and the exemption is not subject to a market share threshold.
98. Article 6(2) of the R&D BER applies, in particular, in the following situations <sup>(116)</sup>:
- (a) where only one party meets the definition of actual or potential competitor set out in Article 1(1), point (15) of the R&D BER;
  - (b) where the R&D agreement concerns the development of products or technologies that would not improve, substitute or replace existing products or technologies, but would instead create an entirely new demand, for example a vaccine to protect against a virus for which no vaccine existed previously;
  - (c) where the R&D agreement concerns innovation efforts that are, at the time when the R&D agreement is entered into, not yet closely related to a specific product or technology.
99. In the situations described in paragraph 98(b) and (c), it is not possible to identify a product or technology that will be improved, substituted or replaced by the contract products or contract technologies. In that case, the R&D agreement can benefit from the block exemption for the duration of the joint or paid-for R&D and no market share threshold applies <sup>(117)</sup>. The provisions of the R&D BER relating to the relevant market and market share thresholds are without prejudice to the competitive assessment of R&D agreements that do not benefit from the exemption provided by the R&D BER, including R&D agreements in respect of which the benefit of the block exemption has been withdrawn. For instance, undertakings that are not actual or potential competitors within the meaning of the R&D BER may nonetheless be competing in innovation.
- (c) *Duration*
100. Where the joint or paid-for R&D results are *not jointly exploited*, the exemption provided by the R&D BER applies for the duration of the R&D.
101. Where the results of the joint or paid-for R&D are *jointly exploited* and the R&D agreement falls within the definitions in Article 1(1), points (1)(a) or (1)(b) of the R&D BER (agreements pursuing joint or paid-for R&D), the R&D agreement continues to benefit from the exemption for seven years from the time when the contract products or contract technologies are first put on the market within the internal market if the relevant market share threshold was not exceeded at the time when the agreement was entered into.
102. Where the results of the joint or paid-for R&D are *jointly exploited* and the R&D agreement falls within the definitions in Article 1(1), points (1)(c) or (1)(d) of the R&D BER (agreements pursuing joint exploitation of the results of R&D carried out under a prior joint or paid-for R&D agreement between the same parties), the R&D agreement continues to benefit from the exemption for seven years from the time when the contract products or contract technologies are first put on the market within the internal market if the relevant market share threshold was not exceeded at the time when that prior agreement was entered into <sup>(118)</sup>.
103. Where an R&D agreement results in more than one contract product or contract technology being put on the market within the internal market and each contract product or contract technology belongs to a separate product market, the seven year exemption period applies separately for each contract product or contract technology, starting from the time when the product or technology is first put on the market within the internal market.

<sup>(115)</sup> See paragraphs 87 and 88.

<sup>(116)</sup> Article 6(2) does not apply if two or more of the parties are actual or potential competitors on a market for existing products or technologies that are capable of being improved, substituted or replaced by the contract products or contract technologies; in that case, Article 6(1) applies (market share threshold).

<sup>(117)</sup> This is without prejudice to the power for the Commission or NCAs to withdraw the benefit of the block exemption in individual cases. See Section 2.2.6.

<sup>(118)</sup> As mentioned in paragraph 68, the prior joint or paid-for R&D agreement must also meet the conditions of the R&D BER.



104. After the end of the seven year period referred to in Article 6(3) of the R&D BER, the exemption continues to apply as long as the combined market share of the parties does not exceed 25 % on the markets to which the contract products or contract technologies belong. If, after the expiry of the seven year period, the parties' combined market share rises above 25 %, the R&D agreement continues to benefit from the R&D BER for two consecutive calendar years following the year in which the threshold is first exceeded <sup>(119)</sup>.

#### 2.2.4. *Hardcore and excluded restrictions*

##### 2.2.4.1. *Hardcore restrictions*

105. Article 8 of the R&D BER contains a list of hardcore restrictions. Hardcore restrictions are serious restrictions of competition that will in general cause harm to the market and consumers. Where an R&D agreement includes one or more of these restrictions, the entire agreement is excluded from the exemption provided by the R&D BER.

106. The hardcore restrictions listed in Article 8 of the R&D BER can be grouped into the following categories: (i) restrictions of the freedom of the parties to carry out other R&D efforts, (ii) limitations of output or sales and the fixing of prices, (iii) active and passive sales restrictions, and (iv) other hardcore restrictions.

##### (a) *Restriction of the freedom of the parties to carry out other R&D efforts*

107. Article 8(a) of the R&D BER provides that it is a hardcore restriction to restrict the parties' freedom to carry out R&D independently or in cooperation with third parties, in either of the following:

(i) a field unconnected with that to which the R&D agreement relates;

(ii) the field to which the R&D agreement relates or in a connected field after the completion of the joint or paid-for R&D.

##### (b) *Limitations of output or sales and price fixing*

108. *Limitations of output or sales.* Article 8(b) of the R&D BER provides that *limitations of output or sales* are hardcore restrictions. However, this is subject to four exceptions:

(i) the setting of *production targets* where the R&D agreement provides for the joint exploitation of the R&D results and the joint exploitation includes the joint production of the contract products <sup>(120)</sup>;

(ii) the setting of *sales targets* where the joint exploitation of the R&D results (1) includes the joint distribution of the contract products or the joint licensing of the contract technologies, and (2) is carried out by a joint team, organisation or undertaking or is jointly entrusted to a third party <sup>(121)</sup>;

(iii) practices constituting *specialisation in the context of exploitation*, such as restrictions imposed upon the parties regarding the exploitation of the R&D results in relation to certain territories, customers or fields of use <sup>(122)</sup>;

(iv) certain *non-compete obligations* <sup>(123)</sup>, namely the restriction of the freedom of the parties to produce, sell, assign or license products or technologies which compete with the contract products or contract technologies during the period for which the parties have agreed to jointly exploit the results.

109. *Fixing of prices.* Article 8(c) of the R&D BER provides that the *fixing of prices* when selling the contract products or the fixing of licence fees when licensing the contract technologies to third parties is a hardcore restriction.

<sup>(119)</sup> See Article 6(5) of the R&D BER.

<sup>(120)</sup> See Article 8(b), point (i) of the R&D BER.

<sup>(121)</sup> See Article 8(b), point (ii) of the R&D BER.

<sup>(122)</sup> See Article 8(b), point (iii) of the R&D BER.

<sup>(123)</sup> See Article 8(b), point (iv) of the R&D BER.

110. However, the R&D BER provides exceptions to this hardcore restriction for the fixing of prices charged to immediate customers and the fixing of licence fees charged to immediate licensees where the R&D agreement provides for the joint exploitation of the R&D results and the joint exploitation (i) includes the joint distribution of the contract products or the joint licensing of the contract technologies, and (ii) is carried out by a joint team, organisation or undertaking or is jointly entrusted to a third party <sup>(124)</sup>.

(c) *Active and passive sales restrictions*

111. Articles 8(d) and (e) of the R&D BER concern passive and active sales restrictions. The R&D BER defines:

(i) *passive sales* <sup>(125)</sup> as those made in response to unsolicited requests from individual customers, including delivery of products to customers, without the sale having been initiated by actively targeting the particular customer, customer group or territory, and including sales resulting from participating in public procurement or responding to private invitations to tender;

(ii) *active sales* <sup>(126)</sup> as all forms of selling other than passive sales. This includes actively targeting customers by visits, letters, emails, calls or other means of direct communication or through targeted advertising and promotion, offline or online, for instance by means of print or digital media, including online media, price comparison services or advertising on search engines targeting customers in particular territories or customer groups, operating a website with a top-level domain corresponding to particular territories, or offering on a website languages that are commonly used in particular territories, where such languages are different from the ones commonly used in the territory in which the buyer is established.

112. Article 8(d) of the R&D BER provides that *passive sales* restrictions are hardcore restrictions. This covers any restriction of the territory in which or the customers to whom the parties may passively sell the contract products or license the contract technologies. However, Article 8(d) provides an exception for requirements to exclusively license the R&D results to another party to the R&D agreement. The reason for that exception is that the R&D BER provides for the possibility for the parties to specialise in the context of exploitation, which includes a scenario where only one party produces and distributes the contract products on the basis of an exclusive licence granted by the other parties.

113. Article 8(e) of the R&D BER provides that certain *active sales* restrictions are hardcore restrictions. This applies to any restriction of active sales of the contract products or contract technologies in territories or to customers that have not been exclusively allocated to one of the parties by way of specialisation in the context of exploitation.

(d) *Other hardcore restrictions*

114. Article 8(f) of the R&D BER provides that it is a hardcore restriction to require a party to refuse to meet demand from customers in its territory, or from customers otherwise allocated between the parties by way of specialisation in the context of exploitation, where such customers would market the contract products in other territories within the internal market.

115. Lastly, Article 8(g) of the R&D BER categorises as a hardcore restriction any requirement imposed on a party to make it difficult for users or resellers to obtain the contract products from other resellers within the internal market <sup>(127)</sup>. This might include, for example, the imposition of a requirement to make the provision of customer guarantee services conditional upon the purchasing the contract product in a particular Member State.

<sup>(124)</sup> See Article 8(c) of the R&D BER.

<sup>(125)</sup> See Article 1(1), point (19) of the R&D BER.

<sup>(126)</sup> See Article 1(1), point (18) of the R&D BER.

<sup>(127)</sup> See Article 8(g) of the R&D BER.

#### 2.2.4.2. Excluded restrictions

116. Article 9 of the R&D BER excludes from the block exemption certain obligations found in R&D agreements. These are obligations for which it cannot be assumed that they generally fulfil the conditions of Article 101(3). Unlike the hardcore restrictions set out in Article 8 of the R&D BER, the use of excluded restrictions does not remove the benefit of the block exemption for the entire R&D agreement. If the excluded restriction can be severed from the rest of the agreement, the remainder of the agreement continues to benefit from the block exemption, provided that it meets the conditions of the R&D BER.
117. Excluded restrictions are subject to an individual assessment under Article 101. There is no presumption that such restrictions fall within the prohibition laid down in Article 101(1) or that they fail to satisfy the conditions of Article 101(3).
118. The first excluded restriction is an obligation not to challenge:
- (a) after completion of the R&D, the validity of intellectual property rights which the parties hold in the internal market and which are relevant to the R&D <sup>(128)</sup>; or
  - (b) after the expiry of the R&D agreement, the validity of intellectual property rights which the parties hold in the internal market and which protect the results of the R&D <sup>(129)</sup>.
119. The reason for excluding such obligations from the block exemption is that parties that have information that is relevant for the identification of intellectual property rights that have been granted in error should not be prevented from challenging the validity of such intellectual property rights. However, provisions allowing for the termination of the R&D agreement if one of the parties challenges the validity of intellectual property rights which are relevant to the joint or paid-for R&D or which protect the R&D results are not excluded restrictions.
120. The second excluded restriction is an obligation not to grant licences to third parties to produce the contract products or to apply the contract technologies. This means that the parties should, in principle, be free to grant licences to third parties. An exception applies where R&D agreements provide for the exploitation of the results of the joint R&D or paid-for R&D by at least one of the parties and such exploitation takes place in the internal market vis-à-vis third parties.

#### 2.2.5. Relevant time for assessing compliance with the conditions of the R&D BER

121. For the purpose of applying the market share threshold set out in Article 6 of the R&D BER, the relevant time for the assessment is the date on which the parties enter into the joint or paid-for R&D agreement. At the end of the seven year period referred to in Article 6(4) of the R&D BER, the parties must assess to which market(s) the contract product or contract technologies belong and whether their combined market share exceeds 25 %. Compliance with the other conditions of the R&D BER must be assessed at the time when the R&D agreement is entered into and the agreement must continue to fulfil those conditions for its entire duration, including, if applicable, the period of exploitation of the R&D results.

#### 2.2.6. Withdrawal of the benefit of the block exemption

122. Articles 10 and 11 of the R&D BER provide that the Commission and the NCAs may withdraw the benefit of the block exemption pursuant to Article 29(1) and Article 29(2) of Regulation (EC) No 1/2003 respectively where they find, in an individual case, that an R&D agreement that is covered by the block exemption nonetheless has effects that are incompatible with Article 101(3).
123. Article 10(2) of the R&D BER sets out a non-exhaustive list of situations in which the Commission may consider using this power, namely, where:
- (a) the existence of the R&D agreement substantially restricts the scope for third parties to carry out R&D in fields related to the contract products or contract technologies; this could be due, for example, to the limited available research capacity;

<sup>(128)</sup> See Article 9(1), point (a)(i) of the R&D BER.

<sup>(129)</sup> See Article 9(1), point (a)(ii) of the R&D BER.

- (b) the existence of the R&D agreement substantially restricts the access of third parties to the relevant market for the contract products or contract technologies, for example, as a result of the grant of an exclusive licence to one of the parties to produce and distribute the contract products or contract technologies;
- (c) the parties do not exploit the results of the joint or paid-for R&D vis-à-vis third parties without any objectively valid reason, for example by refusing to license the results of the R&D;
- (d) the products or technologies resulting from the R&D agreement are not subject in the whole or a substantial part of the internal market to effective competition;
- (e) the existence of the research and development agreement would substantially restrict innovation competition or competition in research and development in a particular field. This may occur, for example, in cases where the contract products or contract technologies would create an entirely new demand and where at the time the agreement is entered into there is a low number of comparable independent research and development projects in the same field.

124. Article 29(1) of Regulation (EC) No 1/2003 provides that the Commission may withdraw the benefit of the block exemption on its own initiative or on the basis of a complaint. Where the Commission or an NCA wishes to withdraw the benefit of the block exemption in respect of an R&D agreement, it must establish, first, that the agreement restricts competition within the meaning of Article 101(1) and, second, that the agreement fails to fulfil at least one of the four cumulative conditions of Article 101(3) <sup>(130)</sup>. A decision to withdraw the benefit of the R&D BER may be combined with the finding of an infringement of Article 101 and a requirement to bring the infringement to an end. Behavioural or structural remedies may also be imposed <sup>(131)</sup>.

125. Any decision to withdraw the benefit of the block exemption only produces effects *ex nunc*, that is to say the exempted status of the R&D agreement remains unaffected for the period preceding the date on which the withdrawal becomes effective. Where an NCA intends to withdraw the benefit of the block exemption pursuant to Article 29(2) of Regulation (EC) No 1/2003, it must take into account its obligations under Article 11(4) of Regulation (EC) No 1/2003, in particular its obligation to consult the Commission on its envisaged decision.

#### 2.2.7. Transitional period

126. The R&D BER provides for a transitional period of two years (from 1 July 2023 to 30 June 2025), during which the prohibition laid down in Article 101(1) does not apply to R&D agreements that are already in force on 30 June 2023 and do not satisfy the conditions for exemption set out in the R&D BER but satisfy the conditions for exemption provided for in Regulation (EC) No 1217/2010.

### 2.3. Individual assessment of R&D agreements under Article 101(1)

127. Where an R&D agreement does not benefit from the exemption provided by the R&D BER, it is necessary to carry out an individual assessment under Article 101. The first step in the assessment is to determine whether the agreement restricts competition within the meaning of Article 101(1) <sup>(132)</sup>. If the agreement restricts competition within the meaning of that provision, the second step is to determine whether the agreement fulfils the conditions of Article 101(3).

<sup>(130)</sup> Pursuant to Article 41(2) of the EU Charter of Fundamental Rights, persons liable to be adversely affected by an individual decision applying EU law have the right to be heard before the decision is adopted.

<sup>(131)</sup> Pursuant to Article 7(1) of Regulation (EC) No 1/2003. The Commission used its power to withdraw the benefit of block exemption regulations in its decision of 25 March 1992 (interim measures) relating to a proceeding under Article 85 of the EEC Treaty in Case IV/34.072 – *Mars/Langnese and Schöller*, upheld by the judgment of 1 October 1998, *Langnese-Iglo v Commission*, C-279/95 P, EU:C:1998:447; and in its decision of 4 December 1991 (interim measures) relating to a proceeding under Article 85 of the EEC Treaty in Case IV/33.157 – *Eco System/Peugeot*.

<sup>(132)</sup> If that is not the case, Article 101 does not apply and no further assessment is required.

### 2.3.1. Relevant markets

128. The *Market Definition Notice* sets out the main criteria and evidence used by the Commission to define relevant markets when it enforces Union competition law (see also paragraph 44). For the individual assessment under Article 101 of R&D agreements that are not covered by the R&D BER <sup>(133)</sup>, the following considerations may be relevant.

#### 2.3.1.1. Product markets

129. If the R&D cooperation agreement relates to the development of products that will *improve or substitute* existing products, the market(s) for those existing products or technologies are relevant for the assessment under Article 101.

130. Existing product markets may also be relevant for the assessment where the R&D agreement relates to products that will *replace* existing products (namely where the product resulting from the R&D satisfies the same demand as the existing product, but belongs to a separate relevant market). This may in particular be the case where the replacement of the existing products is imperfect or long-term. So-called *pipeline products* <sup>(134)</sup> may, depending on the facts of the particular case, be considered as products that will improve or substitute existing products or as products that will replace existing products <sup>(135)</sup>.

131. Where the R&D concerns an *important component of a final product*, both the market for the component and the market for the final product may be relevant for the Article 101 assessment. However, the market for the final product will only be relevant if the component to which the R&D relates is technically or economically a key component of the final product and at least one of the parties to the R&D agreement is active on the market for the final products and has market power on that market.

#### 2.3.1.2. Technology markets

132. R&D agreements may concern not only products but also technology. Where intellectual property rights are marketed separately from the products to which they relate, technology markets will be relevant for the assessment under Article 101. The relevant technology market consists of the technology (intellectual property) that is sold or licensed and technologies that are regarded as substitutable by licensees <sup>(136)</sup>. Where an R&D agreement concerns the development of technologies that will improve, substitute or replace existing technologies, the markets for those existing technologies are relevant markets for the Article 101 assessment.

#### 2.3.1.3. Early innovation efforts

133. In some cases, undertakings may cooperate on R&D that is not closely related to a specific product or technology. The results of such early innovation efforts may ultimately serve multiple purposes and, in the longer term, feed into various products or technologies.

134. Where an R&D agreement concerns early innovation efforts, in order to assess the competitive position of the parties for the purpose of applying Article 101, it may be necessary to take into account factors such as the nature and scope of the innovation efforts, the objectives of the various lines of research, the specialisation of the different teams involved or the results of the past innovation efforts of the undertakings concerned. This may require the use of specific metrics, for example, the level of R&D expenditure, or the number of patents or patent citations.

### 2.3.2. Main competition concerns

135. R&D cooperation can give rise to various competition concerns, in particular it can directly limit competition between the parties, lead to a collusive outcome on the market or to anti-competitive foreclosure of third parties.

<sup>(133)</sup> The R&D BER contains specific definitions that are relevant for the application of the market share threshold in the R&D BER. See Section 2.2.3.4.

<sup>(134)</sup> This term is used in certain sectors to refer to products that have not yet been put on the market but for which there is sufficient visibility on the R&D process to establish to which market the products will likely belong, if the R&D process is successful.

<sup>(135)</sup> Some R&D agreements concern the development of products that will not improve, substitute or replace existing products, but will satisfy an entirely new demand. Pipeline products may also fall into that category of products.

<sup>(136)</sup> See also Technology Transfer Guidelines, paragraphs 19-26.

136. Where an R&D cooperation *directly limits or restricts competition* between the parties or *facilitates a collusive outcome* on the market, this may lead to higher prices, less choice for consumers or lower quality products or technologies. It may also lead to reduced or delayed innovation and thereby to worse quality or fewer products or technologies reaching the market.

137. R&D agreements can lead to the *anti-competitive foreclosure* of third parties where one or more parties to the agreement has market power in a relevant product or technology market and the agreement contains exclusivity or non-compete provisions.

### 2.3.3. *R&D agreements that generally do not restrict competition*

138. In the absence of market power, R&D agreements entered into by non-competitors generally do not restrict competition. This may be the case where the parties' assets, technologies or skills are complementary and they would not be capable of carrying out the R&D on their own within a short period of time<sup>(137)</sup>. The competitive relationship between the parties must be assessed on the basis of objective factors. For instance, an undertaking may not be capable of carrying out R&D independently where it has limited technical capabilities or limited access to finance, skilled workers, technologies or other resources.

139. The outsourcing of previously captive R&D to entities that are not active in the exploitation of R&D results, such as research institutes, academic bodies or other specialised undertakings, is an example of an R&D agreement that may bring together complementary assets, technologies and skills. Such agreements generally provide for a transfer of know-how and/or an exclusive supply obligation concerning the R&D results.

140. R&D cooperation relating to basic research generally does not restrict competition. In this context, basic research means experimental or theoretical work undertaken primarily to acquire new knowledge of the underlying foundations of phenomena and observable facts.

### 2.3.4. *Restrictions of competition by object*

141. R&D agreements may restrict competition by object if their main purpose is not the pursuit of R&D, but to serve as a tool to engage in a cartel, namely the parties engage in price fixing, output limitation, market allocation or restrictions of technical development<sup>(138)</sup>.

142. For example, undertakings may use an R&D agreement to (i) prevent or delay the market entry of products or technologies; (ii) coordinate the characteristics of products or technologies that are not covered by the R&D agreement, or (iii) limit the improvement of a jointly developed product or technology.

### 2.3.5. *Restrictive effects on competition*

143. In order to assess whether an R&D cooperation agreement has the effect of restricting competition, it is necessary to take into account the relevant parameters of competition in the particular case. Those parameters may include the product's price, but also its level of innovation, its quality in various aspects, as well as its availability, including in terms of lead time, resilience of supply chains, reliability of supply and transport costs.

144. R&D agreements that do not include the joint exploitation of the results of the R&D by means of licensing, production or marketing rarely give rise to restrictive effects on competition. Such agreements are only likely to give rise to anti-competitive effects where they restrict innovation competition.

#### 2.3.5.1. *Market power*

145. In general, R&D agreements are only capable of giving rise to restrictive effects on competition within the meaning of Article 101(1) where one or more of the parties to the agreement has market power on a relevant existing product or technology market or where the agreement leads to an appreciable reduction in innovation competition.

<sup>(137)</sup> See also paragraph 16 regarding potential competition.

<sup>(138)</sup> See, for example, Commission decision of 8 July 2021, *Car Emissions* (case AT.40178), which concerned a cartel which took place between five car manufacturers in the context of an association of undertakings. The ostensible purpose of the cooperation was to develop components for a new emission-cleaning system. However, in the context of that cooperation, the car manufacturers also agreed not to improve the effectiveness of the system beyond what was legally required, thereby restricting the technical development of the emission-cleaning technology.



146. There is no absolute threshold above which it can be assumed that an R&D agreement creates or maintains market power and thus is capable of giving rise to restrictive effects on competition. However, the stronger the combined position of the parties on the relevant markets, including their position in relation to innovation, the more likely it is that the R&D agreement will lead to restrictive effects<sup>(139)</sup>.

#### 2.3.5.2. R & D relating to existing products or technologies

147. If the R&D is directed at the *improvement or substitution of an existing product or technology*, possible effects concern the relevant market(s) for those existing products or technologies. Effects on prices, output, product quality, product variety or technical development in existing markets are, however, only likely if the parties together have a strong position, entry is difficult and if third party competitors are not capable of constraining the behaviour of the parties, for example due to their limited number or due to inferior resources or skills. Furthermore, if the R&D concerns a relatively minor input to a final product, any effects on competition in the relevant market(s) for that final product are likely to be limited.
148. If the R&D is directed at the *replacement of an existing product or technology*, possible anti-competitive effects include, for example, delaying the development of the replacing product or technology. This may occur, in particular, where the parties have market power on the existing product or technology market and they are also the only undertakings engaged in R&D relating to a replacement for the existing product or technology. A similar effect can occur if a major player in an existing market cooperates with a smaller player or a potential competitor who is just about to emerge with a product or technology that may jeopardise the incumbent's position.
149. R&D agreements which provide for joint exploitation of the results of the R&D (for example, joint production or distribution) have greater potential to restrict competition than agreements that provide for each party to exploit the R&D results independently. In the case of joint exploitation, restrictive effects in the form of increased prices or reduced output in existing markets are more likely where one or more of the parties has market power. On the other hand, if the joint exploitation is carried out solely by means of licensing to third parties, restrictive effects such as foreclosure are unlikely.

#### 2.3.5.3. Innovation relating to entirely new products and early innovation efforts

150. As regards R&D agreements relating to (i) the development of products or technologies that would create an entirely new demand or to (ii) early innovation efforts, effects on price and output on existing markets are generally unlikely. In such cases, the assessment will focus on possible restrictions of innovation competition concerning, for instance, the quality and variety of possible future products or technologies or the speed or level of innovation. The assessment must take into account that the outcome of R&D is by nature uncertain and that outcomes will, in general, be less certain for early innovation efforts than for R&D efforts that are close to the market launch of the products or technologies resulting from the R&D agreement.
151. Restrictive effects are generally unlikely to arise if a sufficient number of third parties have competing R&D projects. However, negative effects are more likely where the R&D agreement brings together independent R&D efforts that are at a stage that is close to the launch of the new product or technology. Restrictive effects may result directly from the coordination of the parties' R&D efforts, irrespective of whether the R&D agreement contains restrictions on the parties' ability to carry out R&D independently or with third parties. For example, the R&D agreement may lead one or more of the parties to abandon its R&D project and pool its capabilities with those of the other parties.

#### 2.3.5.4. Exchanges of information

152. The implementation of an R&D agreement may require the exchange of commercially sensitive information. Where the R&D agreement itself does not fall within the Article 101(1) prohibition because it has neutral or positive effects on competition, an information exchange that is ancillary to that agreement does not fall within that prohibition either<sup>(140)</sup>. This is the case if the information exchange is objectively necessary to implement the R&D agreement and is proportionate to the objectives thereof<sup>(141)</sup>.

<sup>(139)</sup> This is without prejudice to the assessment of possible efficiency gains, including those that regularly exist in publicly co-funded R&D. See Section 2.4.1.

<sup>(140)</sup> Judgment of 11 September 2014, *MasterCard v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 89.

<sup>(141)</sup> See also Section 1.2.6 and paragraph 369.

153. Where the information exchange goes beyond what is objectively necessary to implement the R&D agreement or is not proportionate to the objectives thereof, it should be assessed using the guidance provided in Chapter 6<sup>(142)</sup>. If the information exchange falls within Article 101(1), it may still fulfil the conditions of Article 101(3).

#### 2.4. Individual assessment of R&D agreements under Article 101(3)

154. Where an R&D agreement restricts competition within the meaning of Article 101(1), it will nonetheless comply with Article 101 if it fulfils the four cumulative conditions of Article 101(3) (see Section 1.2.7).

##### 2.4.1. Efficiency gains

155. R&D agreements – with or without joint exploitation of the results of the R&D – often generate efficiency gains by:

- (a) combining complementary skills and assets of the parties, thus resulting in a more rapid development and marketing of improved or new products and technologies than without the cooperation;
- (b) leading to a wider dissemination of knowledge, which may trigger further innovation;
- (c) giving rise to cost reductions or reducing dependencies in the case of products or technologies for which there are a limited number of suppliers.

156. Such efficiency gains can contribute to a resilient internal market.

157. Only objective benefits may be taken into account for the purpose of applying Article 101(3)<sup>(143)</sup>. For example, an R&D agreement may result in one or more of the parties abandoning all or part of its R&D. This may reduce (fixed) costs for the parties concerned but is unlikely to lead to benefits for consumers, unless the parties can show that the reduction in the number of R&D efforts is likely to be outweighed by products reaching the market more quickly or a higher likelihood that the R&D will be successful.

##### 2.4.2. Indispensability

158. Restrictions that go beyond what is necessary to achieve the efficiency gains generated by an R&D agreement do not fulfil the conditions of Article 101(3). In particular, the hardcore restrictions listed in Article 8 of the R&D BER<sup>(144)</sup> are unlikely to meet the indispensability criterion in an individual assessment.

##### 2.4.3. Pass-on to consumers

159. Efficiency gains achieved by indispensable restrictions must be passed on to consumers to an extent that outweighs the restrictive effects on competition caused by the R&D agreement. For example, the introduction of new or improved products on the market must outweigh any price increase or other restrictive effects on competition.

160. In general, it is more likely that an R&D agreement will bring about efficiency gains that will allow consumers a fair share of the resulting benefit where the parties combine complementary skills and assets, such as research capabilities developed in different sectors or different fields of research.

161. The greater the market power of the parties, the less likely they are to pass on the efficiency gains to consumers to an extent that would outweigh the restrictive effects on competition.

##### 2.4.4. No elimination of competition

162. The conditions of Article 101(3) cannot be met if the R&D agreement affords the parties the possibility of eliminating competition in respect of a substantial part of the products or technologies in question. In applying this condition, the impact of the agreement on innovation competition must be taken into account.

<sup>(142)</sup> See also paragraph 6.

<sup>(143)</sup> See paragraph 49 of the Article 101(3) Guidelines.

<sup>(144)</sup> See Section 2.2.4.1.



## 2.5. Relevant time for the assessment

163. The assessment of restrictive agreements under Article 101 is made within the actual context in which they occur and on the basis of the facts existing at any given point in time. The assessment is sensitive to material changes in the facts <sup>(145)</sup>. The exception provided for by Article 101(3) applies as long as the four cumulative conditions set out in Article 101(3) are fulfilled, and ceases to apply when that is no longer the case.
164. When applying Article 101(3), it is necessary to take into account the initial sunk investments made by any of the parties and the time needed and the restrictions required to make and recoup an efficiency-enhancing investment. Article 101 cannot be applied without taking due account of such *ex ante* investments. The risk facing the parties and the sunk investment that must be made to implement the agreement can thus lead to the agreement falling outside Article 101(1) or fulfilling the conditions of Article 101(3), as the case may be, for the period of time needed to recoup the investment. Where the investment results in an invention and the parties obtain exclusive rights in respect of that invention under intellectual property rules, the recoupment period for the investment is generally unlikely to exceed the period of exclusivity granted by those rules.
165. In some cases, the effects of a restrictive agreement may be irreversible. Once the agreement has been implemented, the *ex ante* situation cannot be re-established. In such cases, the assessment must be made exclusively on the basis of the facts pertaining at the time of implementation.
166. For instance, in the case of an R&D agreement concerning an entirely new product that does not improve, substitute or replace an existing product, whereby each party agrees to abandon its own research project and pool its capabilities with those of the other party(ies), it may be technically and economically impossible to revive the abandoned projects. If the agreement is compatible with Article 101 at the time when it is concluded, for instance because a sufficient number of third parties have competing R&D projects, the parties' agreement to abandon their individual projects remains compatible with Article 101, even if at a later point in time the third party projects fail.
167. However, the prohibition of Article 101(1) may apply to other parts of the agreement in respect of which the issue of irreversibility does not arise. For example, if, in addition to joint R&D, the agreement provides for joint exploitation, Article 101 may apply to those provisions of the agreement if, due to subsequent market developments, the agreement gives rise to restrictive effects on competition and does not (any longer) satisfy the conditions of Article 101(3), taking due account of *ex ante* sunk investments.

## 2.6. Examples

168. R&D agreements concerning products that create an entirely new demand

### Example 1

*Situation:* Companies A and B have each made significant investments in R&D to develop a new miniaturised electronic component. It is expected that the new component will not improve or replace existing components, but will instead create an entirely new demand. Companies A and B have each developed prototypes and expect to be able to bring these to market in approximately 18 months. Moreover, Companies A and B expect that only the first component to reach the market will be a blockbuster in terms of revenues and the second company to bring its product on the market will not be able to recuperate the considerable R&D investments made, while if both companies start selling the product on the market simultaneously, Companies A and B expect to be able to make a considerable profit. They thus agree to combine their R&D efforts in a joint venture which will develop the prototype of Company A and will then produce the new component and supply it to both companies, which will commercialise it independently. As a result of the joint venture agreement, Company B will abandon the development of its own prototype. By pooling their R&D efforts, the parties expect to be able to bring the new component to market in less than one year. No other company is developing a substitutable component.

<sup>(145)</sup> See paragraph 44 of the Article 101(3) Guidelines. As regards the relevant time for assessing the applicability of the R&D BER, see Section 2.2.5.

*Analysis:*

*Applicability of the R&D BER:* The miniaturised electronic component to which the R&D agreement relates would create an entirely new demand. It would not improve, substitute or replace an existing product. Companies A and B are competitors at innovation level; however, they do not fall within the definition of actual or potential competitors set out in the R&D BER <sup>(146)</sup>, so their agreement would not be subject to the market share threshold set out in Article 6(1) of the R&D BER. Instead, the R&D agreement between Companies A and B will be covered by Article 6(2) of the R&D BER and, hence the agreement will be exempted for the duration of the R&D, as long as the agreement fulfils all the other conditions for exemption included in the R&D BER (for example, conditions relating to access to the R&D results, absence of hardcore restrictions, etc.).

*Likelihood of withdrawal of the benefit of the block exemption:*

(i) *Restriction of competition within the meaning of Article 101(1):* The R&D agreement would result in Company B abandoning the development of its prototype component, which it would otherwise have been likely to bring to market in approximately 18 months. At the time when Companies A and B enter into the R&D agreement, they are the only undertakings engaged in R&D in relation to the miniaturised electronic component, and no other undertaking is developing a substitutable component. Moreover, the companies are at a late stage of the R&D process (they expect to bring the component to market in approximately 18 months) and through the agreement both companies could avoid a race to be the first one to reach the market, reducing the risk of not being able to recoup all or part of the investment they have already made. Therefore, the R&D agreement appears likely to restrict innovation competition within the meaning of Article 101(1). This conclusion is not altered by the fact that each party will commercialise the new component independently.

(ii) *Non-fulfilment of the conditions of Article 101(3):* The joint venture will enable the parties to bring the new component to market more quickly, which is an objective efficiency that is capable of benefitting consumers. However, this time saving is unlikely to outweigh the reduction in innovation competition and product variety resulting from the abandonment of Company B's prototype, given that it is likely that B's product would otherwise have been brought to the market before, or at the very latest, within a short period after A's product and the parties do not face any other competitive constraint at innovation level. Therefore, it appears that the R&D agreement does not fulfil at least one of the four cumulative conditions of Article 101(3), namely the fair share for consumers. In that scenario, the benefit of the block exemption is likely to be withdrawn, as provided for by Article 10 of the R&D BER, and the agreement is likely to be prohibited on the grounds that it infringes Article 101.

## 169. R&amp;D agreements involving academic bodies/ research institutes

**Example 2**

*Situation:* Company A is a major producer of agricultural pesticides. It is active on an upstream market for pesticide ingredients, with its ingredient X, and on a downstream market for pesticides with its pesticide Y. Ingredient X is a key input for the production of pesticide Y.

Company A plans to finance a research project aimed at improving ingredient X, so that customers who use pesticide Y will be able to achieve the same crop yields using smaller quantities of pesticide. For this purpose, Company A enters into an R&D agreement with University B, which has significant R&D capabilities in pesticide ingredients. University B does not produce or sell pesticides or pesticide ingredients.

The R&D agreement provides that Company A will finance, but will not carry out, the R&D activities, which will be conducted by University B. The R&D agreement does not allow University B to exploit the R&D results. The R&D agreement reserves the right to exploit the results of the paid-for R&D exclusively to Company A. University B only has the right to use the results of the R&D for the purposes of further R&D.

<sup>(146)</sup> See Article 1(1), point (15) of the R&D BER.

Analysis:

*Applicability of the R&D BER:* Company A and University B are not competing undertakings within the meaning of the R&D BER. Pursuant to Article 6(2) of the R&D BER, no market share threshold needs to be met.

Article 3 of the R&D BER imposes as a general condition for block exemption that all parties to the R&D agreement must have full access to the results of the paid-for R&D for the purposes of conducting further R&D and for exploitation. The R&D agreement does not fulfil this condition. However, the R&D agreement falls within the special exception provided by Article 3(5) of the R&D BER, according to which R&D agreements which restrict academic bodies' use of R&D results to further R&D only (that is, the agreement excludes exploitation of the results) can benefit from the block exemption.

Therefore, provided the other conditions of the R&D BER are fulfilled, the R&D agreement between Company A and University B benefits from the block exemption and no further assessment is required.

#### 170. Impact of R&D cooperation and the environment

##### Example 3

*Situation:* Two engineering companies that produce vehicle components agree to set up a joint venture to combine their existing R&D efforts aimed at improving the performance of an existing component. If the joint R&D is successful, the improved component will have a positive impact on the environment: vehicles incorporating the component will consume less fuel and therefore emit less CO<sub>2</sub>. The companies expect that combining their R&D efforts will accelerate the development of the improved product. The joint venture agreement provides that each company will continue to manufacture and sell the (existing and improved) components independently. On the Union-wide market for the supply of the existing component, the two companies have market shares of 15 % and 20 % respectively. There are three other significant competing component manufacturers. The product life cycle of the component is typically three to five years. In each of the last three years one of the major component manufacturers has introduced a new version or upgrade.

Analysis:

*Applicability of the R&D BER:* According to the R&D BER, the 'relevant product market' is the market for the products capable of being improved, substituted or replaced by the contract products. In the present case, this is the market for the vehicle component that the R&D aims at improving. The parties have a combined share of 35 % on the relevant product market. As this exceeds the 25 % market share threshold in the R&D BER, the joint venture cannot benefit from the block exemption.

*Individual assessment under Article 101(1):* By combining the parties' previously independent R&D efforts, the joint venture leads to a reduction in the number of R&D efforts relating to the improvement of the component. Whether this creates an appreciable restriction of competition in the relevant product market or an appreciable restriction of innovation competition requires a full assessment of the legal and economic context. For this purpose, relevant factors include the presence of three other significant manufacturers in the relevant product market; the record of those manufacturers in terms of innovation; the relatively short life cycle of the component, and the fact that the parties will continue to produce and sell the existing and improved components independently. On balance, it appears unlikely that the joint venture will lead to an appreciable restriction of competition.

*Individual assessment under Article 101(3):* An assessment under Article 101(3) is only necessary if the joint venture is considered to restrict competition appreciably within the meaning of Article 101(1). Accelerating the development of an improved version of the component that will reduce fuel consumption is an objective efficiency. Although the parties have a significant combined market share on the relevant components market, the presence of other significant competitors with a good record of innovation, the short life cycle of the component and the fact that the parties will continue to manufacture and sell the component

independently make it likely that the efficiency will be passed on to consumers and make it unlikely that the joint venture will eliminate competition in the relevant components market or eliminate relevant innovation competition. The parties' claim that combining their R&D efforts is indispensable to accelerate the development of the improved component appears plausible. The R&D joint venture is therefore likely to fulfil the conditions of Article 101(3).

#### 171. Research partnership

##### **Example 4**

*Situation:* Companies A, B and C are leading players in renewable energy technologies. They set up a research partnership, which defines an R&D agenda setting a common long-term vision for the development of new renewable energy technologies and the improvement of existing ones. This agenda will be implemented via a number of separate subsequent agreements covering individual joint and paid-for R&D projects.

This agenda will be formalised in a memorandum of understanding (MoU), which will establish a framework for the parties' cooperation, including objectives, terms and conditions, governance rules and monitoring arrangements. The MoU notably provides a compensation mechanism for cases in which one party wishes to exploit the results of R&D carried out by the other parties.

*Analysis:*

*Applicability of the R&D BER:* As the MoU does not relate to specific R&D projects (it merely establishes general terms and conditions for the implementation of R&D projects that will be the subject of separate, subsequent agreements), the MoU does not in itself constitute an R&D agreement within the meaning of the R&D BER. The block exemption is therefore not applicable.

*Individual assessment under Article 101(1) and Article 101(3):* The parties to the MoU are all active in the field of renewable energy technologies, but the MoU is a high-level framework agreement which does not relate to the specific R&D projects. It is therefore not possible to determine whether the parties are actual or potential competitors for the purposes of that agreement. It will only be possible to assess their competitive relationship when they enter into the subsequent implementing R&D agreements. The MoU therefore does not restrict competition within the meaning of Article 101(1).

### 3. PRODUCTION AGREEMENTS

#### 3.1. Introduction

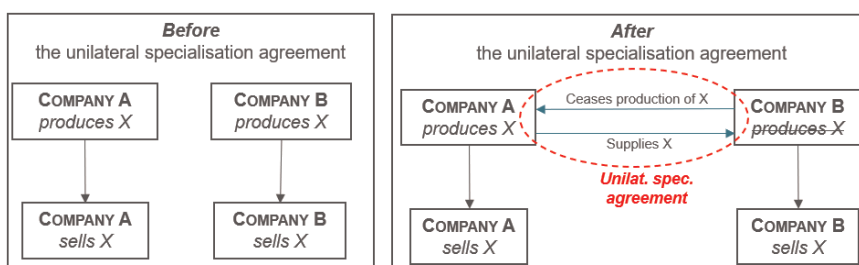
172. This Chapter provides guidance on the assessment of horizontal production agreements. For the purpose of this Chapter, production means the manufacture of goods and the preparation of services <sup>(147)</sup>.
173. Production agreements vary in form and scope:
- (a) they may provide that production is carried out jointly, for example by way of a joint venture, a joint team or a joint organisation; or
  - (b) they may provide that production is carried out by only one party or by two or more parties, by way of looser forms of cooperation, such as subcontracting agreements.
174. Joint production agreements are agreements under which two or more undertakings agree to produce certain products jointly. Joint production may take various forms, for example (i) a joint venture, that is to say, a jointly controlled company operating one or more production facilities <sup>(148)</sup>, or (ii) a joint team or joint organisation composed of an equal or unequal number of representatives of the parties.

<sup>(147)</sup> As regards the preparation of services, see in particular paragraph 200.

<sup>(148)</sup> See paragraphs 12 and 46. These Guidelines do not cover operations constituting a concentration within the meaning of Article 3 of the Merger Regulation; this includes the creation of a full-function joint venture.

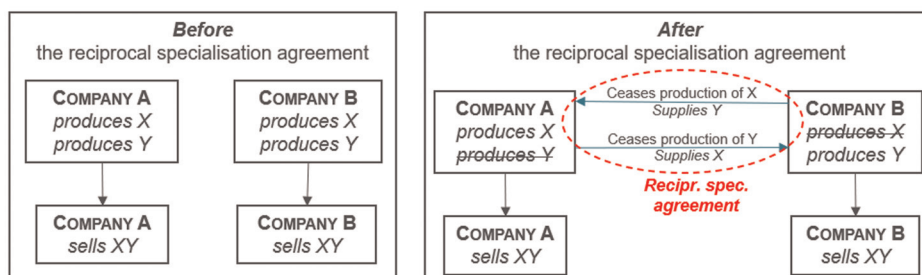
- 175. Subcontracting agreements are agreements whereby one party (the ‘contractor’) entrusts the production of a product to another party (the ‘subcontractor’). In this Chapter, horizontal subcontracting agreements mean subcontracting agreements between undertakings operating on the same product market but not necessarily on the same geographical market, hence irrespective of whether the undertakings are competitors. Horizontal subcontracting agreements include unilateral and reciprocal specialisation agreements as well as other types of subcontracting agreements.
- 176. *Unilateral specialisation agreements* are agreements between two or more parties that are active on the same product market, under which one or more parties agree to fully or partly cease production of certain products or to refrain from producing those products and to purchase them from the other party or parties, which agree to produce and supply the products to the party or parties that cease or refrain from producing them.

Example of a unilateral specialisation agreement



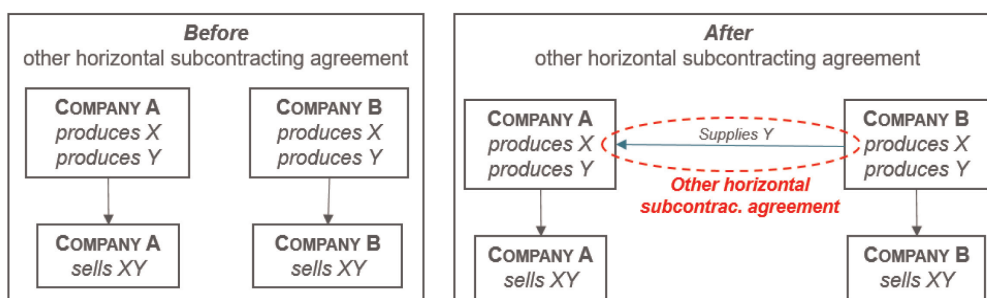
- 177. *Reciprocal specialisation agreements* are agreements between two or more parties that are active on the same product market and under which two or more parties, on a reciprocal basis, agree to fully or partly cease or refrain from producing certain but different products and to purchase those products from one or more of the other parties, which agree to produce and supply the products to the party or parties that cease or refrain from producing them.

Example of a reciprocal specialisation agreement



- 178. The guidance provided in this Chapter also applies to *other types of horizontal subcontracting agreements*. This includes subcontracting agreements aimed at expanding production, under which the contractor does not at the same time cease or limit its own production of the product.

Example of a specialisation agreement aimed at expanding production



179. These Guidelines apply to all forms of horizontal joint production agreements and horizontal subcontracting agreements <sup>(149)</sup>.
180. For expediency, undertakings that intend to enter into horizontal production agreements may first wish to consider whether their agreement can benefit from the Specialisation BER <sup>(150)</sup>. The exemption provided by the Specialisation BER is based on the presumption that – to the extent that a production agreement falls within the scope of Article 101(1) and fulfils the conditions set out in the Specialisation BER – it will generally fulfil the conditions of Article 101(3). Where a horizontal production agreement fulfils the conditions of the Specialisation BER, it is compatible with Article 101 and no further assessment is necessary <sup>(151)</sup>. Where a production - agreement is not covered by the Specialisation BER or does not fulfil the conditions of that Regulation, it is necessary to carry out an individual assessment under Article 101 in order to determine, first, whether the agreement restricts competition within the meaning of Article 101(1) and, if so, whether the agreement fulfils all of the four conditions set out in Article 101(3).
181. This Chapter is structured as follows:
- (a) Section 3.2 provides guidance on the identification of markets that are relevant for the assessment of production agreements;
  - (b) Section 3.3 provides guidance on the application of the Specialisation BER, including the conditions for exempting specialisation agreements, the market share threshold, and the hardcore and excluded restrictions;
  - (c) Section 3.4 provides guidance for the individual assessment of production agreements under Article 101(1);
  - (d) Section 3.5 provides guidance for the individual assessment of production agreements under Article 101(3);
  - (e) Section 3.6 provides specific guidance for the assessment of mobile telecommunications infrastructure sharing agreements under Article 101(1) and Article 101(3).

### 3.2. Relevant markets

182. The *Market Definition Notice* sets out the main criteria and evidence used by the Commission to define relevant markets when it enforces Union competition law (see also paragraph 44). Those criteria are applicable for the assessment of production agreements under Article 101.
183. Production agreements affect the markets directly concerned by the cooperation, namely the markets to which the products produced under the agreement belong. Production agreements may also affect markets upstream, downstream or neighbouring the markets directly concerned by the cooperation (*'spill-over markets'*) <sup>(152)</sup>. Such spill-over markets are likely to be relevant for the assessment if the markets are interdependent and the parties have a strong position on the spill-over market.
184. For the purposes of the Specialisation BER, the relevant market means the product and geographic market to which the products produced under the specialisation agreement belong, and, in addition, where those products are intermediary products that are fully or partly used captively by one or more of the parties as inputs for downstream products, the product and geographic markets to which those downstream products belong.

<sup>(149)</sup> Vertical subcontracting agreements are not covered by these Guidelines. Vertical subcontracting agreements are concluded between companies operating at different levels of the production or distribution chain. These agreements may fall within the scope of the Guidelines on Vertical Restraints and, subject to certain conditions, may benefit from the VBER. In addition, these agreements may be covered by the Commission notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article 85(1) of the EEC Treaty, (OJ C 1, 3.1.1979, p. 2) ('the Subcontracting Notice').

<sup>(150)</sup> Commission Regulation (EU) 2023/1067 of 1 June 2023 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements (OJ L 143, 2.6.2023, p. 20).

<sup>(151)</sup> Unless and until the Commission or an NCA withdraws the benefit of the block exemption in an individual case (see Section 3.3.7).

<sup>(152)</sup> See Article 2(5), first paragraph of Council Regulation (EC) No 139/2004.



### 3.3. The Specialisation BER

185. The Specialisation BER exempts certain production agreements from the prohibition laid down in Article 101(1) <sup>(153)</sup>. The exemption provided by the Specialisation BER is based on the assumption that – to the extent that a production agreement falls within the scope of Article 101(1) and fulfils the conditions set out in the Specialisation BER – it will generally fulfil the four cumulative conditions of Article 101(3). For expediency, undertakings that intend to enter into a production agreement may first wish to consider whether their agreement can benefit from the Specialisation BER.
186. Production agreements that fulfil the conditions of the Specialisation BER are compatible with Article 101 and no further assessment is necessary <sup>(154)</sup>. Where a production agreement does not fulfil the conditions of the Specialisation BER, it is necessary to carry out an individual assessment under Article 101 in order to determine, first, whether the agreement restricts competition within the meaning of Article 101(1) <sup>(155)</sup> and, if so, whether the agreement fulfils the four cumulative conditions set out in Article 101(3).
- 3.3.1. *Production agreements covered by the Specialisation BER*
187. The Specialisation BER covers the following types of horizontal production agreements: (a) unilateral specialisation agreements, (b) reciprocal specialisation agreements, and (c) joint production agreements. The Specialisation BER uses the term ‘specialisation agreement’ to refer to all these three types of horizontal production agreements. In each case, the agreement may relate to the manufacture of goods and/or the preparation of services <sup>(156)</sup>.
188. Article 1(1), point (1) (a) of the Specialisation BER defines *unilateral specialisation agreements* as follows:
- (a) the agreement involves two or more parties;
  - (b) the parties to the agreement are already active on the same product market;
  - (c) one or more parties agree to fully or partly cease or refrain from producing certain products and to purchase them from one or more of the other parties; and
  - (d) a different party or parties agree to produce and supply those products to the other party or parties that cease or refrain from producing them.
189. The definition of unilateral specialisation agreements does not require: (i) the parties to be active on the same geographic market or (ii) the party or parties that cease or refrain from producing certain products to reduce capacity (for example, to sell factories or close production lines). It is sufficient that those parties reduce their production volume.
190. Article 1(1), point (1) (b) of the Specialisation BER defines *reciprocal specialisation agreements* as follows:
- (a) the agreement involves two or more parties;
  - (b) the parties to the agreement are already active on the same product market;
  - (c) two or more parties, on a reciprocal basis, agree to fully or partly cease or refrain from producing certain but different products and to purchase those products from one or more of the other parties; and
  - (d) one or more of the other parties agree to produce and supply those products to the parties that cease or refrain from producing them.
191. The definition of reciprocal specialisation agreements does not require: (i) the parties to be active on the same geographic market, or (ii) that the parties which cease or refrain from producing must reduce their capacity (for example, sell factories or close production lines). It is sufficient that those parties reduce their production volume.

<sup>(153)</sup> Regulation (EEC) No 2821/71 empowers the Commission, in accordance with Article 101(3), to block-exempt by regulation agreements which have as their object specialisation, including agreements necessary for achieving it.

<sup>(154)</sup> Unless and until the Commission or an NCA withdraws the benefit of the block exemption in an individual case (see Section 3.3.7).

<sup>(155)</sup> For the assessment of specialisation agreements under Article 101(1), see Section 3.4.

<sup>(156)</sup> See recital 6 and Article 1(1), point (5) of the Specialisation BER.

192. Article 1(1), point (1) (c) of the Specialisation BER defines *joint production agreements* as follows:
- (a) the agreement involves two or more parties; and
  - (b) the parties agree to produce certain products jointly.
193. The Specialisation BER does not define the term ‘joint’ in the context of production. For the purposes of the Specialisation BER, joint production may take any form (for example, joint undertaking, joint organisation, joint team). Furthermore, in the case of joint production agreements there is no requirement that one or more parties must cease or refrain from producing any products.
- 3.3.2. *Other provisions covered by the Specialisation BER*
194. The exemption provided by the Specialisation BER also applies to certain provisions that are commonly used in production agreements.
195. *Provisions on the assignment or licensing of intellectual property rights to one or more of the parties.* Article 2(3) of the Specialisation BER provides that the block exemption also applies to specialisation agreements that include provisions on the assignment or licensing of intellectual property rights to one or more of the parties, provided that those provisions meet two cumulative conditions:
- (a) they are directly related to and necessary for the implementation of the specialisation agreement; and
  - (b) they do not constitute the primary object of the agreement.
196. *Provisions on supply or purchase obligations.* Article 2(4), point (a) of the Specialisation BER provides that the block exemption also applies to specialisation agreements under which the parties accept exclusive supply and exclusive purchase obligations <sup>(157)</sup>, which are defined as follows:
- (a) An *exclusive supply obligation* means an obligation not to supply the specialisation products to a competing undertaking other than a party or parties to the agreement (see Article 1(1), point (10) of the Specialisation BER). Specialisation products mean the products produced under a specialisation agreement (see Article 1(1), point (6) of the Specialisation BER).
  - (b) An *exclusive purchase obligation* means an obligation to purchase the specialisation products only from a party or parties to the agreement (see Article 1(1), point (11) of the Specialisation BER).
- 3.3.3. *Distribution under the Specialisation BER*
197. Article 2(4), point (b) of the Specialisation BER provides that the block exemption also applies to specialisation agreements that provide for joint distribution of the specialisation products. The parties remain free to also sell the specialisation products independently.
198. Article 1(1), point (13) of the Specialisation BER defines ‘*distribution*’ as the sale and supply of the specialisation products to customers, including the commercialisation of those products.
199. Article 1(1), point (12) of the Specialisation BER defines ‘*joint*’ in the context of distribution as:
- (a) distribution carried out by a joint team, joint organisation or joint undertaking, or
  - (b) distribution undertaken by a third party distributor that meets two cumulative conditions:
    - (a) the distributor is jointly appointed by the parties to the specialisation agreement (on an exclusive or non-exclusive basis); and
    - (b) the distributor is not an actual or potential competitor of the parties to the specialisation agreement.

<sup>(157)</sup> It should be noted that unilateral and reciprocal specialisation agreements must include supply and purchase obligations in order to fall within the definitions of those agreements set out in Article 1 of the Specialisation BER (see paragraphs 188 and 190).



### 3.3.4. *Services under the Specialisation BER*

200. The Specialisation BER applies to specialisation agreements which concern the preparation of services. The preparation of services refers to activities carried out upstream of the provision of services to customers (Article 1(1), point (5) of the Specialisation BER). Examples of preparation of services include the creation or operation of a platform through which services will be provided.
201. However, as explained in recital 6 of the Specialisation BER, the provision of services to customers falls outside the scope of the Specialisation BER, except where the parties agree to jointly provide services prepared under the specialisation agreement.

### 3.3.5. *Market share threshold and duration of the exemption*

#### 3.3.5.1. *Market share threshold*

202. Specialisation agreements can benefit from the block exemption where the following market share thresholds, set out in Article 3 of the Specialisation BER, are met:
- (a) The parties' combined market share does not exceed 20 % on the relevant market(s) to which the specialisation products belong.
  - (b) Where the specialisation products are intermediary products that are fully or partly used captively by one or more of the parties as inputs for the production of certain downstream products, which the parties also sell, the exemption provided by the Specialisation BER is conditional upon:
    - (a) the parties' combined market share not exceeding 20 % on the relevant market(s) to which the specialisation products belong; and
    - (b) the parties' combined market share not exceeding 20 % on the relevant market(s) to which the downstream products belong. The Specialisation BER defines a 'downstream product' as a product for which a specialisation product is used as an input by one or more of the parties and which is sold by those parties on the market (Article 1(1), point (7) of the Specialisation BER).

#### 3.3.5.2. *Calculation of market shares*

203. The Specialisation BER specifies that the market shares of the parties must be calculated on the basis of market sales value data (Article 4(a) of the Specialisation BER). If market sales value data are not available, the parties may use other reliable market information (including market sales volumes) to calculate their market shares.
204. The market share threshold applies throughout the duration of the specialisation agreement. To assess compliance with this condition, the parties' market shares must be calculated based on data relating to the calendar year preceding the date of the assessment (Article 4(b) of the Specialisation BER).
205. In some cases, data for the preceding calendar year will not be representative of the parties' position in the relevant market(s). This may occur, for instance, in markets characterised by lumpy or irregular demand. Examples of lumpy demand can be found in tender markets, where market shares may change significantly from one year to another depending on whether a party is awarded a contract or not. When the preceding calendar year is not representative of the parties' position in the relevant market(s), the market share is to be calculated as an average of the parties' market shares for the three preceding calendar years.

#### 3.3.5.3. *Duration of the exemption*

206. The exemption provided by the Specialisation BER is not time-limited. The exemption applies for the duration of the specialisation agreement as long as the market share thresholds and the other conditions of the Specialisation BER are met.
207. Article 4(d) of the Specialisation BER provides that where the parties' combined market share is initially not more than 20 %, but subsequently rises above 20 % in at least one of the relevant markets concerned by the specialisation agreement, the block exemption will continue to apply for a period of two consecutive calendar years following the year in which the 20 % threshold was first exceeded.

### 3.3.6. *Hardcore restrictions in the Specialisation BER*

#### 3.3.6.1. *Hardcore restrictions*

208. Article 5 of the Specialisation BER contains a list of hardcore restrictions. Hardcore restrictions are serious restrictions of competition that will in general cause harm to the market and to consumers.

209. Where a specialisation agreement includes one or more of the hardcore restrictions listed in Article 5 of the Specialisation BER, the entire agreement is excluded from the block exemption.

210. The hardcore restrictions listed in Article 5 of the Specialisation BER can be grouped into the following categories:

(a) the fixing of prices when selling the specialisation products to third parties;

(b) the limitation of output or sales; and

(c) the allocation of markets or customers.

211. Such restrictions may be achieved (a) directly or indirectly, and (b) in isolation or in combination with other factors under the control of the parties to the specialisation agreement.

#### 3.3.6.2. *Exceptions*

212. Article 5 of the Specialisation BER also provides several exceptions to the hardcore restrictions. Specialisation agreements that include these excepted provisions can therefore still benefit from the exemption, provided that the other conditions of the Specialisation BER are fulfilled.

(a) *Fixing of prices.* In the context of *joint distribution*, the Specialisation BER allows the fixing of prices charged to immediate customers (Article 5(a)).

(b) *Limitation of output or sales.*

(a) In the context of *unilateral or reciprocal specialisation agreements*, the Specialisation BER allows provisions on the agreed amount of products that (i) a party or parties cease to produce and/or that (ii) a party or parties produce for the other party or parties (Article 5(b), point (i));

(b) In the context of *joint production agreements*, the Specialisation BER allows provisions on setting capacity and production volumes for the parties concerning the specialisation products (Article 5(b), point (ii));

(c) In the context of *joint distribution*, the Specialisation BER allows provisions setting sales targets for the specialisation products (Article 5(b), point (iii)).

### 3.3.7. *Withdrawal of the benefit of the Specialisation BER*

213. Articles 6 and 7 of the Specialisation BER provide that the Commission or the NCAs may withdraw the benefit of the block exemption pursuant to Article 29(1) and Article 29(2) of Regulation (EC) No 1/2003 respectively where they find, in an individual case, that a specialisation agreement that is covered by the block exemption nonetheless has effects that are incompatible with Article 101(3). Article 6(2) of the Specialisation BER provides a non-exhaustive list of scenarios in which the Commission may consider using this power, namely where the relevant market is highly concentrated and competition is already weak, for example due to any of the following:

(a) the individual market positions of other market participants;

(b) links between other market participants created by parallel specialisation agreements;

(c) links between the parties and other market participants.

214. For example, one or more of the parties to a specialisation agreement might be party to separate specialisation agreements with other market participants. Alternatively, one or more of the parties might have contractual or structural links to other market participants relating to other markets.

215. The guidance provided in the Chapter 2 on R&D agreements regarding the procedure for withdrawing the benefit of the block exemption in individual cases and the consequences of withdrawal is also relevant for the withdrawal of the benefit of the Specialisation BER (see Section 2.2.6).

#### 3.3.8. *Transitional period*

216. The Specialisation BER provides for a transitional period of two years (from 1 July 2023 to 30 June 2025), during which the prohibition laid down in Article 101(1) does not apply to specialisation agreements that are already in force on 30 June 2023, and do not satisfy the conditions for exemption provided for in the Specialisation BER; but satisfy the conditions for exemption provided for in Commission Regulation (EU) No 1218/2010 <sup>(158)</sup>.

### 3.4. **Individual assessment of production agreements under Article 101(1)**

217. Where a production agreement does not benefit from the exemption provided by the Specialisation BER, it is necessary to carry out an individual assessment under Article 101. The first step in the assessment is to determine whether the agreement restricts competition within the meaning of Article 101(1) <sup>(159)</sup>. If the agreement restricts competition within the meaning of that provision, the second step is to determine whether the agreement fulfils the conditions of Article 101(3) <sup>(160)</sup>.

#### 3.4.1. *Main competition concerns*

218. Production agreements may raise various competition concerns, including:

- (a) a direct limitation of competition between the parties;
- (b) coordination of the parties' competitive behaviour as suppliers; or
- (c) anti-competitive foreclosure of third parties in a spill-over market.

219. Production agreements can lead to a *direct limitation of competition between the parties*. Production agreements, and in particular production joint ventures <sup>(161)</sup>, may lead the parties to directly align output levels, product quality, the price at which the joint venture sells its products, or other important parameters of competition (e.g. innovation or sustainability). This may restrict competition even if the parties sell the products produced under the agreement independently.

220. Production agreements may also result in *coordination of the parties' competitive behaviour as suppliers*, that is to say, a *collusive outcome*, leading to higher prices, reduced output, reduced product quality, reduced product variety or reduced innovation <sup>(162)</sup>. A collusive outcome is more likely where:

- (a) the parties have market power; and
- (b) factors conducive to such coordination are present, such as:
  - (a) where the production agreement increases the parties' commonality of costs (that is to say, the proportion of variable costs that the parties have in common) to a degree which enables them to achieve a collusive outcome, or
  - (b) where the agreement involves an exchange of commercially sensitive information that is capable of leading to a collusive outcome.

<sup>(158)</sup> Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements (OJ L 335, 18.12.2010, p. 43).

<sup>(159)</sup> If that is not the case, Article 101 does not apply and no further assessment is required.

<sup>(160)</sup> See Section 3.5.

<sup>(161)</sup> See paragraph 46 ('full-function joint ventures') and paragraph 12 ('liability for infringements of Article 101').

<sup>(162)</sup> Production agreements may also result in the coordination of the parties' behaviour as buyers. In that case, as explained in paragraph 6, the guidance provided in Chapter 4 (Purchasing agreements) may be relevant, in addition to the guidance provided in this Chapter 3.

221. Production agreements may also lead to anti-competitive foreclosure of third parties in downstream markets in situations where the production agreement concerns an intermediate product that accounts for a large proportion of the variable costs of a final product in respect of which the parties compete downstream. In that case, the parties may be able to use the production agreement to increase the price of the intermediate product and thereby raise the costs of their downstream rivals. This may weaken competition downstream and lead to higher final prices.
- 3.4.2. *Restrictions of competition by object*
222. Generally, agreements which involve (a) price fixing, (b) limiting output or (c) sharing markets or customers restrict competition by object.
223. However, in the context of production agreements, this does not apply where:
- (a) the parties agree on the *output directly concerned by the production agreement* (for example, the capacity and production volume of a joint venture or the agreed amount of outsourced products), provided that competition on other parameters (for example, prices) is not eliminated; or
  - (b) a production agreement that also provides for the joint distribution of the jointly produced products provides for *joint setting of the sales prices* of those products, and only those products, provided that the restriction is objectively necessary for the implementation of the combined production and distribution agreement and proportionate to attain the objectives of that agreement.
224. Where a production agreement does not fall within the Article 101(1) prohibition because it has neutral or positive effects on competition and contains a price-setting restriction as referred to in paragraph 223(b), this ancillary restraint will also escape the prohibition laid down in Article 101(1) <sup>(163)</sup>.
225. Where a production agreement contains an output-related restriction as referred to in paragraph 223(a) that does not constitute an ancillary restraint that escapes the prohibition laid down in Article 101(1) <sup>(164)</sup>, it is necessary to assess whether the agreement is likely to give rise to restrictive effects on competition within the meaning of Article 101(1). Such a restriction will not be assessed separately from the production agreement, but in the light of the overall effects of the entire production agreement.
- 3.4.3. *Restrictive effects on competition*
226. In order to assess whether a production agreement has the effect of restricting competition within the meaning of Article 101(1), it is necessary to take various factors into account. These include:
- (a) whether the parties to the agreement are actual or potential competitors <sup>(165)</sup>;
  - (b) the situation that would prevail in the absence of the agreement, including any restrictions it contains;
  - (c) the characteristics of the relevant market and whether the parties to the agreement have market power;
  - (d) the nature and scope of the cooperation;
  - (e) the products concerned by the cooperation.
- 3.4.3.1. *Production agreements that are unlikely to lead to restrictive effects*
227. Certain production agreements are unlikely to lead to restrictive effects:
- (a) production agreements between undertakings that are not actual or potential competitors. Such agreements are generally only capable of restricting competition where they include provisions that foreclose competition from third parties;
  - (b) production agreements that enable the parties to launch a product that, on the basis of objective factors, they would not otherwise have been able to produce (for example, due to their technical capabilities) and which do not lead to a collusive outcome in respect of other products for which the parties compete;

<sup>(163)</sup> See paragraph 34.

<sup>(164)</sup> See paragraph 34.

<sup>(165)</sup> See paragraph 16.

- (c) production agreements that affect markets in which the parties do not have market power <sup>(166)</sup>, including agreements which benefit from the *De Minimis* Notice <sup>(167)</sup>.

#### 3.4.3.2. Market power

228. Only if the parties to the agreement have market power will they be able to profitably maintain prices above the competitive level, or profitably maintain output, product quality or variety below competitive levels. The starting point for the analysis of market power is (a) the individual and combined market share of the parties. This will normally be followed by (b) the concentration ratio and the number of players in the market and by (c) dynamic factors, such as potential entry and changing market shares, as well as (d) other relevant factors.

##### (a) Market shares

229. Undertakings are unlikely to have market power below a certain level of market share.
230. *Specialisation BER*: Specialisation agreements <sup>(168)</sup> benefit from the Specialisation BER if they are concluded between parties with a combined market share not exceeding 20 % in the relevant markets <sup>(169)</sup> and the other conditions for the application of the Specialisation BER are fulfilled.
231. *Outside the Specialisation BER*: For horizontal production agreements that do not constitute specialisation agreements as defined in the Specialisation BER, it is in most cases unlikely that market power exists if the parties to the agreement have a combined market share not exceeding 20 % on the relevant markets.
232. As explained in paragraph 183, a production agreement may have spill-over effects in markets upstream, downstream or neighbouring the market directly concerned by the cooperation (for example, where the agreement concerns intermediary products that are used as inputs for downstream products). Restrictive effects in spill-over markets are more likely where the markets are interdependent and the parties have market power on the spill-over market.
233. *Market share above 20 %*: If the parties' combined market share exceeds 20 %, it is necessary to assess the restrictive effects of the production agreement. In general, the higher the combined market shares of the parties, the higher the risk that the production agreement will increase the incentives of the parties to increase their prices (and/or decrease the quality and/or range of their products).

##### (b) Market concentration ratio

234. In general, a production agreement is more likely to lead to restrictive effects on competition in a concentrated market (namely, a market with a limited number of players) than in a market that is not concentrated. In a concentrated market, a production agreement may increase the risk of a collusive outcome even if the parties only have a moderate combined market share. The mere fact that the parties' combined market share slightly exceeds 20 % does not in itself imply a highly concentrated market.

##### (c) Dynamic factors

235. Even if the market shares of the parties to the agreement and the market concentration ratio are high, the risks of restrictive effects on competition may still be low if the market is dynamic, that is to say, a market in which entry occurs and market shares change frequently.

##### (d) Other factors relevant for the assessment of market power

236. The number and intensity of links (for example, other cooperation agreements) between the competitors in the market; customers' ability to switch suppliers, and/or whether competitors are unlikely to increase supply if prices increase may also be relevant to assess whether the parties have market power.

<sup>(166)</sup> See Section 3.4.3.2.

<sup>(167)</sup> See paragraph 41. In many cases, production agreements between SMEs will fall within the scope of the *De Minimis* Notice. However, that Notice does not apply to agreements that contain restrictions of competition by object.

<sup>(168)</sup> See Article 2(1) of the Specialisation BER.

<sup>(169)</sup> See Section 3.3.5.1.

237. In addition, where an undertaking with market power in one market cooperates with a potential entrant, for example, with a supplier of the same product in a neighbouring geographic market, the agreement may increase the market power of the incumbent. This can lead to restrictive effects on competition if: (a) actual competition in the incumbent's market is already weak, and (b) the threat of entry is a significant competitive constraint.

#### 3.4.3.3. Direct limitation of competition between the parties

238. A production agreement may directly limit competition between the parties in various ways. For example:

- (a) The parties to a production joint venture may agree to limit the output of the joint venture compared to the output that they would have put on the market if each of them had decided their output independently;
- (b) Where the main product characteristics are determined by the production agreement, this may eliminate competition between the parties on key parameters (for example, quality and/or range of products or innovation), irrespective of whether the agreement also involves joint distribution. This concern is particularly relevant in industries where production is the main economic activity, such as manufacturing industries or food processing;
- (c) A joint venture that charges a high transfer price to the parties could increase their input costs, which could lead to higher downstream prices. Third party competitors may find it profitable to increase their prices as a response, thereby contributing to price increases in the relevant market.

239. In general, production agreements which also provide for joint distribution (namely joint selling of the products) carry a higher risk of restrictive effects than production agreements that are limited to production. Joint distribution brings the cooperation closer to the consumer and often involves the joint setting of prices and sales, namely practices that carry the highest risks for competition.

#### 3.4.3.4. Collusive outcome and anti-competitive foreclosure

240. The likelihood of a collusive outcome and/or anti-competitive foreclosure depends on the parties' market power, as well as the characteristics of the relevant market. The parties' ability to achieve a collusive outcome and/or anti-competitive foreclosure can also be increased by *inter alia* commonality of costs or an exchange of information brought about by the production agreement.

##### (a) Commonality of costs

241. Where one or more of the parties to a production agreement has market power and the agreement increases the parties' commonality of costs to a substantial level, this may increase the parties' ability to achieve a collusive outcome on prices (including charging higher prices for intermediate products in order to foreclose third party competitors in downstream markets).

242. Commonality of costs refers to the proportion of variable costs that the parties to the agreement have in common. The relevant costs are the variable costs of the products in respect of which the parties to the production agreement compete. Therefore, an agreement is less likely to increase commonality of costs where the cooperation concerns products which require costly commercialisation (for example, new or heterogeneous products requiring expensive marketing) or products with high transport costs and the cooperation does not include the joint distribution of those products.

243. The increased commonality of costs may also increase the parties' ability to achieve a collusive outcome in downstream markets. This may occur, for example, where the production agreement concerns an intermediate product that accounts for a large proportion of the variable costs of a final product in respect of which the parties compete downstream. In that case, the parties may use the production agreement to increase the price of the intermediate product and thereby raise final prices<sup>(170)</sup>.

<sup>(170)</sup> Including by increasing the price charged by the parties for the intermediate product to third party competitors in the downstream market who rely on the parties for the supply of the intermediate product.



(b) *Exchanges of information*

244. The implementation of a production agreement may require the exchange of commercially sensitive information, for example on production costs and processes. Where the production agreement itself does not fall within the Article 101(1) prohibition because it has neutral or positive effects on competition, an information exchange that is ancillary to that agreement does not fall within that prohibition either<sup>(171)</sup>. This is the case if the information exchange is objectively necessary to implement the production agreement and is proportionate to the objectives thereof<sup>(172)</sup>. For example, the exchange of information on sales volumes and prices may be necessary to implement a production agreement that provides for joint distribution, but will generally not be necessary where the agreement does not include joint distribution.

245. Where the information exchange goes beyond what is objectively necessary to implement the production agreement or is not proportionate to the objectives thereof, it should be assessed using the guidance provided in Chapter 6<sup>(173)</sup>. If the information exchange falls within Article 101(1), it may still fulfil the conditions of Article 101(3).

3.5. **Individual assessment of production agreements under Article 101(3)**

246. Where a production agreement restricts competition within the meaning of Article 101(1)<sup>(174)</sup> and does not fulfil the conditions of the exemption provided by the Specialisation BER<sup>(175)</sup>, it is necessary to assess whether the agreement fulfils the four cumulative conditions of Article 101(3), which are described in Section 1.2.7. The following factors are relevant for the application of these conditions to production agreements.

3.5.1. *Efficiency gains*

247. The production agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress.

248. Production agreements may generate efficiency gains by, for example:

- (a) enabling undertakings to save costs that otherwise they would duplicate;
- (b) helping undertakings to improve product quality by combining complementary skills and know-how;
- (c) enabling undertakings to increase product variety, which they otherwise could not have afforded, or would not have been able to achieve;
- (d) enabling undertakings to improve production technologies or launch new products (such as sustainable products), which they would otherwise not have been able to do (for example, due to their technical capabilities);
- (e) incentivising and enabling undertakings to adapt their production capacities to a sudden surge in demand or drop in supply of certain products, which can result in shortages;
- (f) enabling undertakings to produce at lower cost, in cases where the cooperation enables the parties to increase production and where marginal costs decline with output, namely, to achieve economies of scale;
- (g) providing cost savings by means of economies of scope, if the agreement allows the parties to increase the number of different types of products that they produce.

<sup>(171)</sup> Judgment of 11 September 2014, *MasterCard v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 89.

<sup>(172)</sup> See also Section 1.2.6 and paragraph 369.

<sup>(173)</sup> See also paragraph 6.

<sup>(174)</sup> See Section 3.4.

<sup>(175)</sup> See Section 3.3.

249. These efficiency gains may contribute to a resilient internal market. For example, a production agreement may increase resilience by re-locating production to areas closer to sustainable energy sources.

#### 3.5.2. *Indispensability*

250. The production agreement must not impose restrictions that are not indispensable to the attainment of efficiencies within the meaning of Article 101(3).

251. Restrictions that go beyond what is necessary to achieve the efficiency gains generated by a production agreement do not fulfil the conditions of Article 101(3). For instance, restrictions imposed in a production agreement on the parties' competitive conduct with regard to output outside the cooperation will normally not be considered to be indispensable. Similarly, joint price setting will not be considered indispensable if the production agreement does not provide for joint distribution.

#### 3.5.3. *Pass-on to consumers*

252. The production agreement must allow consumers a fair share of the resulting benefit. Efficiency gains achieved by indispensable restrictions must be passed on to consumers to an extent that outweighs the restrictive effects on competition, for example in the form of lower prices or better product quality or variety.

253. Efficiency gains that only benefit the parties, or cost savings that are caused by output reduction or market allocation are not sufficient to meet the conditions of Article 101(3).

254. Savings in variable costs are more likely to be passed on to consumers than savings in fixed costs <sup>(176)</sup>.

255. Moreover, the higher the market power of the parties, the less likely they will pass on the efficiency gains to consumers to an extent that will outweigh the restrictive effects on competition.

#### 3.5.4. *No elimination of competition*

256. The production agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

257. This condition has to be assessed in the relevant market to which the products subject to the agreement belong and in any spill-over markets in which the agreement produces restrictive effects.

### 3.6. **Mobile telecommunications infrastructure sharing agreements**

258. This Section provides guidance on the competitive assessment of a specific type of production agreement: mobile telecommunications infrastructure sharing agreements <sup>(177)</sup> (referred to in this Section as 'NSAs'). These are agreements under which mobile telecommunications network operators share the use of parts of their network infrastructure, operating costs and the cost of subsequent upgrades and maintenance <sup>(178)</sup>. Connectivity networks are particularly important for the development of the digital economy and society, and are relevant to virtually all businesses and consumers. Mobile telecommunications network operators often pool their resources in order to offer mobile telecommunication services more cost-effectively.

<sup>(176)</sup> See paragraph 98 of the Article 101(3) Guidelines.

<sup>(177)</sup> It should be noted that the term 'mobile infrastructure' in this Section concerns the use of the infrastructure not only for mobile telecommunications services, such as mobile broadband, but also for the provision of wireless access to a fixed location, such as the Fixed Wireless Access (FWA) that is used as an alternative to wired connections.

<sup>(178)</sup> The guidance in this Section covers agreements relating to the joint deployment of infrastructure by mobile telecommunications network operators. This Section does not cover agreements relating to the provision of mobile telecommunications wholesale access products.

259. NSAs may provide for the sharing of basic site infrastructure, such as masts, cabinets, antennas or power supplies ('passive sharing' or 'site sharing'). Mobile telecommunications network operators may also share the Radio Access Network ('RAN') equipment at the sites, such as base transceiver stations or controller nodes ('active sharing' or 'RAN sharing'), or their spectrum, such as frequency bands ('spectrum sharing')<sup>(179)</sup>. NSAs may involve geographical segmentation, whereby the mobile telecommunications network operators divide their responsibilities for installing, maintaining and operating the infrastructure and equipment in their respective territories.
260. The Commission recognises that NSAs can provide benefits in terms of cost reductions and improvements in quality and choice. For example, reductions in the cost of rollout and maintenance may benefit consumers in the form of lower prices or more investment in infrastructure. Likewise, the faster roll-out of new networks and technologies, wider coverage or denser network grids can lead to improvements in the quality of services and to a wider variety of products and services. NSAs may also allow the emergence of competition that would not otherwise exist<sup>(180)</sup>. The Commission has also found that NSAs enable mobile telecommunications network operators to gain access to larger, more efficient networks<sup>(181)</sup>, without the need for consolidation through mergers.
261. The Commission considers that, in principle, NSAs, including spectrum sharing, do not restrict competition by object within the meaning of Article 101(1), unless they serve as a tool to engage in a cartel.
262. NSAs can, however, give rise to restrictive effects on competition. They may limit infrastructure competition that would take place absent the agreement<sup>(182)</sup>. Reduced infrastructure competition may in turn limit competition in the supply of mobile telecommunications services, at wholesale as well as at retail level. This is because more limited competition at the infrastructure level may affect parameters of competition such as the number, location and installed capacity of infrastructure sites, the availability of backhaul connections<sup>(183)</sup> for sites where the parties to the NSA co-locate their mobile communications equipment, the timing of the rollout of new sites, as well as the amount of capacity installed at each site<sup>(184)</sup>, which, in turn, can affect quality of service and prices at wholesale and retail level.
263. NSAs may also reduce the parties' decision-making independence and limit their ability or incentives to engage in infrastructure competition with each other. This may in turn reduce the parties' flexibility in innovation and technology/product differentiation on the wholesale and retail mobile telecommunication markets and thereby limit competition between them<sup>(185)</sup>. Therefore, mobile infrastructure sharing agreements – because of their

<sup>(179)</sup> Mobile telecommunications operators may also engage in other types of sharing: besides sharing the RAN part of their network, they may also share certain nodes of their core network, such as mobile switching centres and mobile management entities.

<sup>(180)</sup> For example, mobile infrastructure sharing may allow competition at the retail level that would not exist absent the agreement. See by analogy the judgment of 2 May 2006, *O2 (Germany) v Commission*, T-328/03, EU:T:2006:116, paragraphs 77 to 79. This judgment relates to national roaming agreements, however the principles can be applied *mutatis mutandis* to mobile infrastructure sharing agreements.

<sup>(181)</sup> The regulatory framework for electronic communications enables Member State authorities to impose infrastructure sharing on network operators in certain circumstances, for example, in geographic areas where there are insurmountable economic or physical barriers to the replication of infrastructure and end-users risk being deprived of digital connectivity. See Article 61(4) of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) ('European Electronic Communications Code') (OJ L 321, 17.12.2018, p. 36). See also the Commission Recommendation (EU) 2020/1307 of 18 September 2020 on a common Union toolbox for reducing the cost of deploying very high capacity networks and ensuring timely and investment-friendly access to 5G radio spectrum, to foster connectivity in support of economic recovery from the COVID-19 crisis in the Union. The recommendation highlights that '5G networks require a considerably denser cell deployment in higher frequency bands compared to previous technology generations. Passive and active infrastructure sharing and joint roll-out of wireless infrastructure can reduce the cost of such deployment (including incremental costs), [...], and thereby accelerate its pace, support increased network coverage and allow for more effective and efficient use of radio spectrum to the benefit of consumers. It should therefore be considered positively by competent authorities, in particular in areas of limited economic return', see recital 26 and point 20(f) (OJ L 305, 21.9.2020, p. 33).

<sup>(182)</sup> The competition in question must be understood within the actual context in which it would occur in the absence of the agreement; the interference with competition may in particular be doubted if the agreement is necessary for the penetration of a new area by an undertaking. See Judgment of 2 May 2006, *O2 (Germany) v Commission*, T-328/03, paragraph 68.

<sup>(183)</sup> Backhaul connections link the backbone of the network to the more peripheral parts of the network.

<sup>(184)</sup> Restrictions on installed capacity, together with restrictions driven by the shared backhaul network could for example have a direct effect on the supply of wholesale services for mobile virtual network operators ('MVNOs') and of (international and national) roaming services.

<sup>(185)</sup> Commission decision of 11 July 2022, *Network sharing – Czech Republic*, AT.40305, recital 89.

effects on the structure of the market – can harm final consumers by leading to less choice, lower quality of services, as well as delays in innovation<sup>(186)</sup>. For instance, this may occur due to certain technical<sup>(187)</sup>, contractual<sup>(188)</sup> or financial terms in the agreement<sup>(189)</sup>. Where the parties to the NSA are competitors, exchanges of commercially sensitive information between them may also raise competition concerns if the information exchange exceeds what is objectively necessary and proportionate for the implementation of the agreement.

264. NSAs always require an individual assessment under Article 101<sup>(190)</sup>. Depending on the facts of the case, some or all of the following factors may be relevant for the assessment:
- (a) the type and depth of sharing (including the degree of independence retained by the mobile telecommunications network operators)<sup>(191)</sup>;
  - (b) the scope of the shared services and shared technologies, the purpose of the (spectrum) sharing, the duration and the structure of the cooperation put in place by the agreements;
  - (c) the geographic scope and the market coverage of the NSA (for example, the population coverage and whether the agreement concerns densely populated areas)<sup>(192)</sup>;
  - (d) the characteristics and structure of the relevant market (market shares of the parties, amount of spectrum held by the parties, closeness of competition between the parties, number of operators outside the agreement and extent of the competitive pressure exerted by them, barriers to entry, agreements with third parties (such as third party owners of components of network infrastructure or third party service providers, for instance, providers of tower services));
  - (e) the number of NSAs in the relevant market and the number and identity of participating network operators.
265. While a case-by-case assessment based on the above factors will always be required, the Commission considers that, in order for a NSA not to be considered, *prima facie*, as likely to have restrictive effects within the meaning of Article 101(1), it must comply, as a minimum, with the following conditions:
- (a) The participating operators each control and operate their own core network and there are no technical, contractual, financial or other disincentives that prevent each operator from implementing unilaterally any infrastructure deployments and upgrades that it wishes to implement;
  - (b) The participating operators maintain independent retail and wholesale operations (technical and commercial decision-making independence). This includes the freedom to set prices for their services, to determine the product/bundle parameters and to differentiate their services based on quality and other parameters;
  - (c) The participating operators maintain the ability to follow independent spectrum strategies<sup>(193)</sup>;
  - (d) The participating operators do not exchange commercially sensitive information other than that which is strictly necessary for the mobile infrastructure sharing to function and, where necessary, barriers to information exchange have been put in place.

<sup>(186)</sup> Commission decision of 11 July 2022, *Network sharing – Czech Republic*, AT.40305, recital 89.

<sup>(187)</sup> Mobile infrastructure sharing agreements can lead to situations where one party holds back another party: for example, where the mobile network infrastructure operated by one party in a certain area does not support certain technology that the other party using that infrastructure in that area would like to deploy. See also Commission decision of 11 July 2022, *Network sharing – Czech Republic*, AT.40305, recital, section 4.4.1, recitals 91 and 106.

<sup>(188)</sup> For example, if two parties agree on a geographic split (whereby (i) party A is the network operator for geographic area A and party B is the network operator for area B; (ii) both parties continue to operate and compete in each others' area; while (iii) the network operator for a given area is responsible for investment decisions on behalf of both operators for that area) and the agreement confers on the network operator the right to refuse to implement network expansions requested by the other party.

<sup>(189)</sup> For example, in the case of geographical split, when network upgrades are charged by one party to another party at a price that is higher than the underlying incremental costs.

<sup>(190)</sup> Judgment of 2 May 2006, *O2 (Germany) v Commission*, T-328/03, EU:T:2006:116, paragraphs 65 to 71.

<sup>(191)</sup> Commission decision of 16 July 2003, *T-Mobile Deutschland/O2 Germany: Network Sharing Rahmenvertrag*, COMP/38.369, recital 12; Commission decision of 30 April 2003, *O2 UK Limited / T-Mobile UK Limited ('UK Network Sharing Agreement')*, COMP/38.370, recital 11.

<sup>(192)</sup> See the Body of European Regulators for Electronic Communications (BEREC) common position on mobile infrastructure sharing of 13 June 2019, section 4.2. Active sharing.

<sup>(193)</sup> Such as, for instance, independent acquisitions of spectrum; independent decisions on how to use such spectrum and which spectrum bands, and whether or not to share the spectrum once acquired.

266. Finally, the following general guidance is provided for the various types of mobile infrastructure sharing agreements <sup>(194)</sup>:
- (a) Passive sharing agreements <sup>(195)</sup> are unlikely to give rise to restrictive effects on competition, provided that (i) the network operators maintain a significant degree of independence and flexibility in defining their commercial strategy, the characteristics of their services and their network investments and (ii) access to passive infrastructure in the relevant market is not restricted (in this respect, relevant factors to be considered are, for example, regulatory obligations or existing commercial arrangements limiting such access);
  - (b) Active sharing agreements <sup>(196)</sup> are more likely to give rise to restrictive effects on competition. This is because, compared to passive sharing, active sharing generally involves more extensive cooperation on components of the network that are likely to affect not only coverage but also independent deployment of capacity;
  - (c) Spectrum sharing agreements (also referred to as 'spectrum pooling') are a more far-reaching form of cooperation and may further restrict the parties' ability to differentiate their retail and/or wholesale offers and directly limit competition between them <sup>(197)</sup>. While the sharing of radio spectrum may be permitted by regulatory authorities when they grant rights to use radio spectrum, <sup>(198)</sup> these agreements require a more careful Article 101 assessment than other forms of network sharing <sup>(199)</sup>.

### 3.7. Examples

267. Direct limitation of competition

#### Example 1

*Situation:* Companies A and B, two suppliers of a product X, decide to close their existing old production plants and build a new larger and more efficient production plant operated by a joint venture, which will have a higher capacity than the total capacity of the old plants of Companies A and B. Competitors are using their existing production plants at full capacity and have no expansion plans. Companies A and B have market shares of 20 % and 25 % respectively in the relevant market for product X. The market is concentrated and stagnant; there has been no recent entry and market shares have been stable over time. Production costs constitute a major part of Company A's and Company B's variable costs for product X. Commercialisation is a minor economic activity in terms of costs and strategic importance compared to production: marketing costs are low, as product X is homogenous and established, and transport is not a key driver of competition.

<sup>(194)</sup> Depending on the evolution of the relevant (RAN) technology over time, this distinction between passive, active and spectrum sharing may become less relevant for future NSAs. However, the principles set out in this paragraph are likely to remain relevant for the assessment of future NSAs, depending also on the role that the hardware components of the (RAN) technology will play in the future in terms of differentiation. For example, in the future, less differentiation may be possible at the level of the hardware components of RAN but more differentiation may be possible at the level of the software.

<sup>(195)</sup> See paragraph 259.

<sup>(196)</sup> See paragraph 259.

<sup>(197)</sup> It should be noted that the term 'spectrum sharing' in this Section concerns only the type of infrastructure sharing agreement in which two or more competing mobile telecommunications network operators use as a shared resource (i.e. pooling) their respective spectrum holdings in one or more spectrum bands. The guidance in this Section relating to spectrum sharing does not concern other types of spectrum sharing, for instance between non-competitors (including between mobile telecommunications network operators and non-mobile telecommunications network operators) that use the same spectrum bands in a dynamic way, thereby fostering the efficient use of this scarce resource and new opportunities for 5G deployment. Furthermore, the term 'Spectrum Sharing' in this Section should not be confused with so-called 'Dynamic Spectrum Sharing', which is a technology that permits the dynamic allocation of the capacity resources of a mobile operator in a specific spectrum band, to enable the simultaneous operation of more than one mobile technology generation, such as 3G, 4G and 5G, on that spectrum band.

<sup>(198)</sup> Article 47(2) of the European Electronic Communications Code. In addition, competent authorities, when attaching conditions to individual rights of use for radio spectrum, may provide for the following possibilities: (a) sharing passive or active infrastructure which relies on radio spectrum or sharing radio spectrum; (b) commercial roaming access agreements; (c) joint roll-out of infrastructure for the provision of networks or services which rely on the use of radio spectrum.

<sup>(199)</sup> For example, a mobile infrastructure sharing agreement between two mobile operators having a high combined market share and covering a large part of the territory of a Member State and with spectrum sharing is more likely to warrant an in-depth investigation. However, under certain circumstances (for example if the agreement is limited only to sparsely populated areas), such agreements may not have restrictive effects.



*Analysis:*

*Applicability of the Specialisation BER:* The Specialisation BER does not apply, as the combined market share of the parties exceeds 20 % on the relevant market for product X. Therefore, an individual assessment of the production agreement is necessary.

*Individual assessment under Article 101(1):* If the joint venture results in Companies A and B sharing most of their variable costs for product X, it is likely to directly limit competition between them. The joint venture may also lead the parties to limit their output of product X compared to the output that they would have put on the market if each party had decided its output independently. In light of the limited constraints that competitors will exert in terms of capacity, this limitation of output could lead to higher prices.

Therefore, the production joint venture is likely to restrict competition within the meaning of Article 101(1) on the market for product X.

*Individual assessment under Article 101(3):* The replacement of the two old smaller production plants by a new one may lead the joint venture to increase output at lower prices to the benefit of consumers. However, the production agreement will only meet the conditions of Article 101(3) if the parties can demonstrate that the efficiency gains will be substantial, and are likely to be passed on to consumers to such an extent that they will outweigh the restrictive effects on competition.

## 268. Collusive outcomes and links between competitors

**Example 2**

*Situation:* Two suppliers, Companies A and B, form a production joint venture to manufacture product Y. Companies A and B have market shares of 15 % and 10 % respectively in the market for product Y. There are three other players on the market: Company C, with a market share of 30 %, Company D, with 25 % and Company E, with 20 %. Company B already has a joint production plant with Company D. Product Y is homogeneous; the underlying technology is simple, and suppliers have very similar variable costs.

*Analysis:*

*Applicability of the Specialisation BER:* The Specialisation BER does not apply, as the combined market share of the parties exceeds 20 % on the relevant market for product Y. Therefore, an individual assessment of the production agreement is necessary.

*Individual assessment under Article 101(1):* The market is characterised by very few players, with similar market shares and similar variable production costs. The joint venture between Companies A and B will create an additional link between the suppliers in the market, *de facto* increasing the concentration in the market, as it will also link Company D to Companies A and B. This cooperation is likely to increase the risk of a collusive outcome and is thereby likely to restrict competition within the meaning of Article 101(1).

*Individual assessment under Article 101(3):* The conditions of Article 101(3) will only be fulfilled in the presence of significant efficiency gains which are passed on to consumers to such an extent that they outweigh the restrictive effects on competition. However, in this example, given the homogeneous nature of product Y and the simplicity of its underlying technology, this appears unlikely.

## 269. Anti-competitive foreclosure

**Example 3**

*Situation:* Companies A and B set up a production joint venture for intermediate product X, which covers their entire production of product X. Product X is a key input for the production of downstream product Y and no other types of product are substitutable as inputs. The production costs of X account for 50 % of the variable costs of final product Y, in respect of which Companies A and B also compete downstream. Companies A and B each have a share of 20 % on the downstream market for product Y. There has



been limited entry on this downstream market and market shares have been stable over time. In addition to covering their own demand for product X (captive use), Companies A and B each have a market share of 30 % on the market for product X (sales to third parties). There are high barriers to entry on the market for product X, and existing producers are operating near full capacity. On the market for product Y, there are two other significant suppliers, each with a 15 % market share, and several smaller competitors. The joint venture generates economies of scale in the form of a reduction in the fixed costs of the parties' headquarters.

*Analysis:*

*Applicability of the Specialisation BER:* The Specialisation BER does not apply, as the combined market share of the parties exceeds 20 % both on the market for the intermediate product X and on the market for the downstream product Y. Therefore, an individual assessment of the production agreement is necessary.

*Individual assessment under Article 101(1):* By virtue of the production joint venture and their high combined market share in the upstream market for product X, Companies A and B will be able to largely control supplies of the essential input X to their competitors in the downstream market for Y. This is likely to give Companies A and B the ability to raise their rivals' costs, by artificially increasing the price of X, or by reducing output. This could foreclose the competitors of Companies A and B in the market for Y. Because of this likelihood of anti-competitive foreclosure downstream, this agreement is likely to restrict competition within the meaning of Article 101(1).

*Individual assessment under Article 101(3):* The economies of scale generated by the production joint venture are limited to fixed costs and are unlikely to outweigh the restrictive effects on competition and therefore this agreement is unlikely to meet the conditions of Article 101(3).

#### 270. Production agreement as market allocation

##### **Example 4**

*Situation:* Companies A and B each manufacture both products X and Y. Company A has a market share of 30 % in the market for product X and a share of 10 % in the market for product Y. Company B has a market share of 10 % in the market for product X and a share of 30 % in the market for product Y. To achieve economies of scale in production, Companies A and B enter into a production agreement under which Company A will only produce product X and Company B will only produce product Y. The agreement does not provide for the parties to cross-supply the products to each other. As a result, following the agreement, Company A will only sell product X and Company B will only sell product Y. The parties claim that by specialising in this way they will make significant savings of fixed costs, due to economies of scale, and that by each focusing on only one product, they will improve their production technologies, which will lead to better quality products.

*Analysis:*

*Applicability of the Specialisation BER:* The Specialisation BER does not apply, as the parties' combined market share exceeds 20 % in each of the relevant markets for product X and Y. In any case, the agreement does not qualify as a reciprocal specialisation agreement within the definition of the Specialisation BER, as the parties do not agree to supply each other with the products that they respectively cease to produce. Therefore, an individual assessment of the agreement is required.

*Individual assessment under Article 101(1):* Under the agreement, Companies A and B agree to cease producing (and selling) products in respect of which they compete. The agreement therefore has the object of restricting competition within the meaning of Article 101(1).

*Individual assessment under Article 101(3):* The alleged efficiency gains derived from the agreement (reduction in fixed costs and improvement of production technology) are linked to the market allocation, so they are unlikely to outweigh the agreement's restrictive effects, and therefore the agreement does not meet the conditions of Article 101(3). In any event, if Company A or B consider that it would be more efficient to focus on only one product, they could simply take the unilateral decision to produce only X or Y, without agreeing that the other company will focus on producing the other product.

## 271. Potential competitors

**Example 5**

*Situation:* Company A produces final product X and Company B produces final product Y. Products X and Y belong to separate product markets, in which Companies A and B each have market power, with individual market shares exceeding 20 %. Both companies use product Z as an input for their respective production of products X and Y and they both produce Z for captive use only. Product X can be produced by a simple transformation of Z and Company B has made preparations to enter the market for product X and it appears realistic that it will enter that market next year. Companies A and B agree to jointly produce Z, which generates modest economies of scale, and they agree to cease independent production of Z. As part of the agreement, Company B agrees not to enter the market for product X within the next five years.

*Analysis:*

*Applicability of the Specialisation BER:* The Specialisation BER does not apply, as the 20 % market share threshold is exceeded on the downstream markets for final products X and Y. These markets are relevant for the application of the market share threshold because the product concerned by the production agreement (intermediate product Z) is used by the parties as an input to produce X and Y.

*Individual assessment under Article 101(1):* Companies A and B are not actual competitors with regard to products X, Y or Z. However, in view of its plan to enter the market for product X within one year, Company B is a potential competitor of Company A on that market. Hence the joint production agreement restricts competition on the market for product X within the meaning of Article 101(1) by removing the constraint imposed by Company B's planned entry.

*Individual assessment under Article 101(3):* The conditions of Article 101(3) are unlikely to be met because the efficiency gains in the form of economies of scale generated by the joint production agreement are modest, so they would be unlikely to outweigh the restrictive effects of the agreement on competition in the market for product X, where Company A has market power.

## 272. Information exchange

**Example 6**

*Situation:* Companies A and B both produce Z, a commodity chemical. Z is a homogenous product which is manufactured according to a European standard which does not allow for any product variations. Production costs are a significant component of the total cost of product Z. Company A has a market share of 20 % and Company B has a share of 25 % on the Union-wide market for Z. There are four other manufacturers on the market, with shares of 20 %, 15 %, 10 % and 10 % respectively. The production plant of Company A is located in Member State X in northern Europe, whereas the production plant of Company B is located in Member State Y in southern Europe. Even though the majority of Company A's customers are located in northern Europe, Company A also has a number of customers in southern Europe. The majority of Company B's customers are in southern Europe, although it also has a number of customers located in northern Europe. Currently, Company A supplies its southern European customers with Z manufactured in its production plant in northern Member State X and transports it to southern Europe by truck. Similarly, Company B supplies its northern European customers with Z manufactured in southern Member State Y and transports it to northern Europe by truck. Transport costs are quite high, but not so high as to make the deliveries by Company A to southern Europe or by Company B to northern Europe unprofitable.

Companies A and B decide that it would be more efficient if Company A stopped transporting Z from Member State X to southern Europe and if Company B stopped transporting Z from Member State Y to northern Europe. However, both companies wish to retain their existing customers. To do so, Companies A and B intend to enter into a swap agreement which allows them to purchase an agreed annual quantity of Z from the other party's plant with a view to selling the purchased Z to those of their customers which are located closer to the other party's plant. In order to calculate a purchase price which does not favour one

party over the other and which takes due account of the parties' different production costs and different savings on transport costs, and in order to ensure that both parties can achieve an appropriate margin, they agree to disclose to each other their costs relating to product Z (namely production costs and transport costs).

*Analysis:*

*Applicability of the Specialisation BER:* The Specialisation BER does not apply, as the swap agreement does not correspond to any of the types of agreements covered by the Specialisation BER.

*Individual assessment under Article 101(1):* The fact that Companies A and B – which are competitors – swap part of their production does not in itself give rise to competition concerns. However, the agreement also provides for the exchange of information between the parties on production and transport costs for product Z, in respect of which they compete. The information exchange between competitors exceeds what is necessary for the implementation of the swap agreement. Given the relatively concentrated structure of the market, the homogenous nature of product Z and the fact that production and transport costs are a major component of the total product costs and therefore an important parameter of competition, the information exchange could lead to a collusive outcome. In view of the parties' significant market shares, the agreement is therefore likely to restrict competition within the meaning of Article 101(1).

*Individual assessment under Article 101(3):* The agreement will generate efficiency gains in the form of cost savings for the parties, however the content of the information exchange does not appear to be indispensable for the attainment of the efficiencies. The parties could achieve similar cost savings by agreeing on a price formula which does not entail the disclosure of their production and transport costs. Consequently, in its current form the swap agreement does not fulfil the conditions of Article 101(3).

#### 4. PURCHASING AGREEMENTS

##### 4.1. Introduction

273. This Chapter provides guidance on the assessment of agreements concerning the joint purchase of products by more than one undertaking. Joint purchasing involves the pooling of purchasing activities and can be carried out in various ways, including through a jointly controlled company, through a company in which undertakings hold non-controlling stakes, through a cooperative, by a contractual arrangement or by looser forms of cooperation, for example where a representative negotiates or concludes purchases on behalf of several undertakings (collectively referred to as 'joint purchasing arrangements').
274. Joint purchasing arrangements exist in a variety of economic sectors. They may provide for the members to make joint purchases, or they may be limited to the joint negotiation of purchase prices, components of the purchase price or other terms and conditions with a supplier, leaving the actual purchase transactions to be concluded by each party individually, based on the jointly negotiated prices and/or terms and conditions. Whenever this Chapter refers to joint purchasing, this covers both joint purchases and joint negotiations of (components of) purchase prices or of other terms and conditions. A joint purchasing arrangement may also involve additional activities, such as joint transport, quality control and warehousing, thus avoiding duplication of delivery costs. Depending on the sector, the purchasers may consume the jointly purchased products or use them as inputs for their own activities, as in the case of, for example, energy or fertilisers. Alternatively, the purchasers may resell the products, as, for example, in the case of fast-moving consumer goods (for example, food, home or personal care products, etc.) or consumer electronics. Groups of independent retailers, retail chains or retailer groups engaging in joint purchasing are often referred to as 'retail alliances' <sup>(200)</sup>.

<sup>(200)</sup> See Colen, L., Bouamra-Mechemache, Z., Daskalova, V., Nes, K., *Retail alliances in the agricultural and food supply chain*, EUR 30206 EN, European Commission, 2020, ISBN 978-92-76-18585-7, doi:10.2760/33720, JRC120271. This JRC report notably provides a typology of retail alliances (see Section 2.3 distinguishing between (i) groups of independent retailers, (ii) national retail alliances and (iii) international or European retail alliances. Unlike groups of independent retailers, national and international retail alliances generally do not jointly purchase products from suppliers but only negotiate certain purchase conditions with manufacturers of branded products, such as, for example, the grant of additional rebates by the manufacturer in return for the provision of certain services by the retailers. These conditions apply in addition to the conditions agreed with the individual members of the alliance.

275. Joint purchasing arrangements generally aim to create a degree of buying power vis-à-vis suppliers, which individual members of the joint purchasing arrangement might not attain if they acted independently. The buying power of a joint purchasing arrangement can lead to lower prices, more variety or better quality products for consumers. It may also allow the members, in particular smaller undertakings, to obtain better purchasing terms and thereby remain competitive on the downstream selling market(s) when faced with strong competitors. Undertakings may also engage in joint purchasing in order to prevent shortages or address interruptions in the production of certain products, thus avoiding disruption to the supply chain. However, in certain circumstances, joint purchasing may also give rise to competition concerns, as set out in Section 4.2.3.

276. Joint purchasing arrangements may involve both horizontal and vertical agreements. In such cases, a two-step analysis is necessary. First, the horizontal agreement(s) between the competing undertakings engaging in joint purchasing or the decisions adopted by the association of purchasing undertakings must be assessed according to the principles set out in these Guidelines. If that assessment leads to the conclusion that the joint purchasing arrangement does not give rise to competition concerns, it is necessary to carry out a further assessment of any vertical agreements between the joint purchasing arrangement and its individual members and between the joint purchasing arrangement and suppliers. Such vertical agreements must be assessed using the VBER and Vertical Guidelines. Vertical agreements that are not covered by the VBER are not presumed to be illegal but require an individual assessment under Article 101.

#### 4.2. Assessment under Article 101(1)

##### 4.2.1. Main competition concerns

277. Joint purchasing arrangements between actual or potential competitors may lead to restrictions of competition on the upstream purchasing and/or downstream selling market or markets, such as increased prices or reduced output, product quality or variety, or innovation, market allocation, or anti-competitive foreclosure of other purchasers.

##### 4.2.2. Restrictions of competition by object

278. Joint purchasing arrangements generally do not amount to a restriction of competition by object if they genuinely concern joint purchasing, namely where two or more purchasers jointly negotiate and conclude an agreement with a given supplier relating to one or more trading terms governing the supply of products to the cooperating purchasers.

279. Joint purchasing arrangements should be distinguished from buyer cartels, which have as their object the restriction of competition in the internal market contrary to Article 101(1) <sup>(201)</sup>. Buyer cartels are agreements or concerted practices between two or more purchasers which, without engaging in joint negotiations vis-à-vis the supplier:

(a) coordinate those purchasers' individual competitive behaviour on the purchasing market or influencing the relevant parameters of competition between them through practices such as, but not limited to, the fixing or coordination of purchase prices or components thereof (including, for example, agreements to fix wages or not to pay a certain price for a product); the allocation of purchase quotas or the sharing of markets and suppliers; or

(b) influence those purchasers' individual negotiations with suppliers or their individual purchases from suppliers, for example through coordination of the purchasers' negotiation strategies or exchanges on the status of such negotiations with suppliers.

280. Where purchasers deal individually with suppliers (namely they do not engage in joint negotiations with the supplier), they must make their purchasing decisions independently and must not remove strategic uncertainty between themselves regarding their future behaviour on the market through agreements or concerted practices. Purchasers may not first fix one or more of the conditions of purchase (price, quantity, source of supply, quality or other parameters of competition) between themselves before each purchaser individually negotiates and purchases from the supplier.

<sup>(201)</sup> Judgment of 7 November 2019, *Campine*, T-240/17, EU:T:2019:778, paragraph 297; see also judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 37; judgment of 13 December 2006, *French Beef*, joined cases T-217/03 and T-245/03, EU:T:2006:391, paragraph 83 and following.

281. A buyer cartel may also exist where purchasers agree to exchange commercially sensitive information between themselves about their individual purchasing intentions or their negotiations with suppliers, outside any genuine joint purchasing arrangement that interacts with suppliers collectively, on behalf of its members<sup>(202)</sup>. This concerns, in particular, exchanges between purchasers about the purchase prices they will pay (maximum prices, minimum discounts and other aspects of prices), other terms and conditions of purchase, sources of supply (both in terms of suppliers and territories), volumes and quantities, quality or other parameters of competition (for example timing, delivery and innovation).
282. A buyer cartel reveals by its nature a sufficient degree of harm to competition such that it is not necessary to assess the effects that it may have. It will thus, provided that it affects trade between Member States, constitute a restriction of competition by object within the meaning of Article 101(1). Therefore, the assessment of buyer cartels, contrary to that of joint purchasing arrangements, does not, in principle, require a definition of the relevant market(s), consideration of the market position of the purchasers on the upstream purchasing market nor whether they compete on the downstream selling market<sup>(203)</sup>. The following factors make it less likely that a purchasing arrangement entered into between buyers will amount to a buyer cartel:
- (a) The joint purchasing arrangement makes it clear to suppliers that the negotiations are conducted on behalf of its members and that the members will be bound by the agreed terms and conditions for their individual purchases, or that the joint purchasing arrangement purchases on behalf of its members. This does not require the joint purchasing arrangement to disclose the identity of its members, in particular where they are small- or medium-sized undertakings and/or account for only a limited share of the joint arrangement's purchases from a supplier. However, it is not the responsibility of suppliers to take steps to find out about the existence of a joint purchasing arrangement, for example through third parties or press reports. That being said, secrecy is not a requirement for establishing a buyer cartel<sup>(204)</sup>.
  - (b) The members of the joint purchasing arrangement have defined the form, scope and functioning of their cooperation in a written agreement, so that its compliance with Article 101 can be verified *ex post* and checked against the actual operation of the joint purchasing arrangement. However, a written agreement cannot in itself shield the arrangement from competition law enforcement.
283. Joint purchasing arrangements can also contribute or serve as a tool to engage in a seller cartel, that is to say, an agreement between competitors to fix sale prices, limit output or share markets or customers on downstream selling markets. In that case, the joint purchasing arrangement may be assessed together with the cartel on the downstream selling market.
284. A joint purchasing arrangement that aims to exclude an actual or potential competitor from the downstream selling market(s) is a form of horizontal boycott and amounts to a restriction of competition by object. Horizontal boycotts should be distinguished from vertical boycotts, namely an agreement between purchasers not to buy from particular suppliers on the upstream market. While a vertical boycott may amount to a restriction of competition by object in certain circumstances, this is not generally the case. For example, an agreement between purchasers to no longer buy products from certain suppliers due to particular product characteristics, production processes or working conditions, for example because the products offered are unsustainable whereas the purchasers want to buy only sustainable products, does not have the object of restricting competition. Vertical boycotts must therefore be considered in their legal and economic context to assess their actual or likely effects on competition.

<sup>(202)</sup> See Chapter 6 on exchange of information and, in particular, Section 6.2.6, which also applies to exchanges of commercially sensitive information between purchasers.

<sup>(203)</sup> Any possible pro-competitive effects of an agreement must be duly taken into account as elements of context for the purposes of categorising it as a restriction by object, in so far as they are capable of calling into question the overall assessment of whether the agreement is sufficiently harmful to competition; see para 28.

<sup>(204)</sup> The Commission has sanctioned buyer cartels that did not operate entirely secretly but at least began in a relatively transparent way. See Commission Decision 2003/600/EC of 2 April 2003, *French Beef* (OJ L 209, 19.8.2003, p. 12).



#### 4.2.3. Restrictive effects on competition

285. Joint purchasing arrangements, whereby purchasers interact jointly with suppliers through the arrangement, must be assessed in their legal and economic context with regard to their actual and likely effects on competition. The assessment must cover the possible restrictive effects on both the relevant purchasing market or markets, where the joint purchasing arrangement interacts with suppliers, and the relevant selling market or markets, where the members of the joint purchasing arrangement may compete as sellers. In this assessment, the Commission will compare the actual or likely effects of the joint purchasing arrangement on the relevant purchasing and selling market(s) to the situation that would occur in the absence of that specific arrangement.
286. In general, joint purchasing arrangements are less likely to give rise to competition concerns when the members do not have market power on the relevant selling market or markets.
287. Certain restrictions imposed by a joint purchasing arrangement on its members may fall outside the scope of Article 101(1) where they are limited to what is objectively necessary and proportionate to ensure that the arrangement functions properly and enables the members to exercise buying power vis-à-vis suppliers<sup>(205)</sup>. This may apply, for example, to a provision that prohibits the members from participating in competing joint purchasing arrangements to the extent that this would jeopardise the proper functioning of the purchasing arrangement and its buying power.

##### 4.2.3.1. Relevant markets

288. There are two markets which may be affected by joint purchasing arrangements. First, the market or markets directly concerned by the joint purchasing arrangement, namely the relevant purchasing market(s) where the members of the joint purchasing arrangement jointly negotiate with or purchase from suppliers. Secondly, the downstream selling market or markets, namely the market(s) where the members of the joint purchasing arrangement are individually active as sellers.
289. The definition of relevant purchasing markets follows the principles set out in the Market Definition Notice and is based on the concept of substitutability to identify competitive constraints. The only particularity for purchasing markets, as compared to selling markets, is that substitutability must be defined from the viewpoint of supply and not from the viewpoint of demand. In other words, the suppliers' alternatives are decisive in identifying the competitive constraints on purchasers. Those alternatives could be analysed, for instance, by examining the suppliers' likely reaction to a small but non-transitory decrease of the price offered for their products. Once the relevant market has been defined, the market share of the members of the joint purchasing arrangement can be calculated based on the value or volume of the members' purchases of the relevant products as a share of the total sales in the relevant purchasing market.
290. If the members are, in addition, competitors on one or more selling markets, those markets are also relevant for the assessment. The relevant selling markets are defined using the methodology described in the Market Definition Notice.

##### 4.2.3.2. Market power

291. There is no absolute threshold above which it can be presumed that the members of a joint purchasing arrangement have market power such that the joint purchasing arrangement is likely to give rise to restrictive effects on competition within the meaning of Article 101(1). However, in most cases it is unlikely that market power exists if the members of the joint purchasing arrangement have a combined market share not exceeding 15 % on the relevant purchasing market(s) as well as a combined market share not exceeding 15 % on the relevant selling market(s). In any event, if the members' combined market shares do not exceed 15 % on both the purchasing and the selling markets, it is likely that the conditions of Article 101(3) are fulfilled, unless the arrangement involves a by object restriction of competition.
292. A market share above that threshold in one or both markets does not in itself indicate that the joint purchasing arrangement is likely to give rise to restrictive effects on competition. A joint purchasing arrangement with a combined market share exceeding that threshold requires a detailed assessment of its effects on the market, taking into account factors such as market concentration, profit margins, closeness of competition, nature of the products subject to the purchasing arrangement and possible countervailing seller power of suppliers.

<sup>(205)</sup> Judgment of 15 December 1994, *Gøttrup-Klim*, C-250/92, EU:C:1994:413, paragraph 34. See also Section 1.2.6 on ancillary restraints.



293. Moreover, in the analysis of whether the members of a joint purchasing arrangement jointly have buying power, the number and intensity of links between competitors in the purchasing market are also relevant. For example, some of the same members may also participate in other purchasing arrangements.
294. If the members of the joint purchasing arrangement have a significant degree of buying power on the purchasing market, there is a risk that the arrangement may harm competition upstream, which may ultimately also cause harm to consumers downstream. For example, the exercise of joint buying power may harm suppliers' investment incentives and force suppliers that do not have countervailing seller power to reduce the range or quality of products that they produce. This may lead to restrictive effects on competition in the upstream market, such as quality reductions, lessening of innovation efforts and ultimately sub-optimal supply. Moreover, retailers may exercise buying power and play off suppliers against each other by jointly limiting product variety in their shops, ultimately harming consumers downstream.
295. The risk that a joint purchasing arrangement may disincentivise supplier investments or innovations is greater where the purchasers jointly account for a large share of relevant purchases, in particular where such purchasers deal with suppliers that do not have countervailing seller power. Such suppliers may be particularly vulnerable to a reduction in profits, especially when they have made specific investments in order to supply the members of the joint purchasing arrangement. Restrictive effects on competition are less likely where suppliers have a significant degree of countervailing seller power (which does not necessarily amount to dominance) on the purchasing market or markets, for example, because they sell products or services that purchasers need to have in order to compete on downstream selling markets and that are difficult to substitute.
296. The buying power of the members of the joint purchasing arrangement may also be used to foreclose competing purchasers from the purchasing market, by limiting their access to efficient suppliers. Such restrictive effects are more likely where there are only a limited number of suppliers and there are barriers to entry on the supply side of the purchasing market.
297. Where the members of a joint purchasing arrangement are actual or potential competitors downstream, their incentives to compete on price on the downstream selling market(s) may be considerably reduced if they purchase jointly a significant share of the products in respect of which they compete downstream. First, if the members together hold a significant degree of market power on the selling market(s) (which does not necessarily amount to dominance), the lower purchase prices achieved through the joint purchasing arrangement are less likely to be passed on to consumers. This is especially the case where the competitors of the members of the joint purchasing arrangement have, due to their weak market position, a limited capacity to compete effectively on the selling market. Second, the higher the combined market share of the members of the joint purchasing arrangement on the downstream selling market, the greater the risk that the coordination of upstream purchasing will lead to coordination of downstream selling. This risk is particularly high if the joint purchasing arrangement limits (or disincentivises) the ability of its members to independently purchase additional volumes of the input in the purchasing market. An obligation on the members to purchase all or most of their requirements through the joint purchasing arrangement, with the aim of ensuring a sufficiently strong negotiation position vis-à-vis strong suppliers, should be assessed taking into account factors such as the scope (volume or share of the purchases concerned) and duration of the obligation, and the combined market share of the members of the joint purchasing arrangement on the relevant purchasing market(s) and selling market(s).
298. However, where the parties of a joint purchasing arrangement jointly do not have market power or are not active on the same relevant selling market(s) (for example, retailers which are active in different geographic markets and are not potential competitors), the joint purchasing arrangement is unlikely to have restrictive effects on competition in the selling market(s).

#### 4.2.3.3. Collusive outcome

299. Joint purchasing arrangements may lead to a collusive outcome if they facilitate the coordination of the members' behaviour on downstream selling markets where they are actual or potential competitors. This may occur, in particular, if the market structure in the selling market is conducive to collusion (for example because the market is concentrated and displays a significant degree of transparency). A collusive

outcome is also more likely if the members of the joint purchasing arrangement have a high combined market share in the selling market and the arrangement extends beyond joint purchasing or joint negotiation of purchasing terms. For example, such a collusive outcome could be facilitated where the members of the arrangement agree the volumes that they will purchase through the arrangement or coordinate the timing of sale price discounts or sales promotions in the downstream selling market, thereby significantly restricting competition between them on the selling market.

300. Collusion can also be facilitated if the members of the joint purchasing arrangement achieve a high degree of commonality of costs through joint purchasing, provided they have market power in the selling market and the market characteristics are conducive to coordination. In particular, restrictive effects on competition are more likely if the parties have a significant proportion of their variable costs in the selling market in common. This is, for instance, the case where competing manufacturers and sellers of a final product jointly purchase a high proportion of their inputs together. It may also be the case where retailers that are active on the same relevant retail market(s) jointly purchase a significant share of the products that they offer for resale. Besides increasing the scope for hub-and-spoke type collusion,<sup>(206)</sup> retailers that are members of a joint purchasing arrangement may also be more willing to concede price increases by suppliers if they know that these increases will also apply to most of their competitors in the downstream selling market(s), and can thus be passed on to consumers.
301. The implementation of a joint purchasing arrangement may require the exchange of commercially sensitive information, such as purchase prices (or parts thereof) and volumes. Where the joint purchasing arrangement itself does not fall within the Article 101(1) prohibition because it has neutral or positive effects on competition, an information exchange that is ancillary to that arrangement does not fall within that prohibition either<sup>(207)</sup>. This will be the case if the information exchange is objectively necessary to implement the joint purchasing arrangement and is proportionate to the objectives thereof<sup>(208)</sup>. Where the information exchange goes beyond what is objectively necessary to implement the joint purchasing arrangement or is not proportionate to the objectives thereof, it should be assessed using the guidance provided in Chapter 6<sup>(209)</sup>. If the information exchange falls within Article 101(1), it may still fulfil the conditions of Article 101(3).
302. The exchange of commercially sensitive information may facilitate coordination with regard to sales prices and output and thus lead to a collusive outcome on selling markets. Spill-over effects from the exchange of commercially sensitive information can be minimised, for example, where data is collated by the joint purchasing arrangement that is established as a separate entity and does not pass on any individual information to the participating purchasers, or by putting in place technical or practical measures to limit access to such information and protect its confidentiality. The members of the joint purchasing arrangement may thus provide for clean teams or effective confidentiality rules for the relevant staff of the joint purchasing arrangement and its members which would continue to apply in case certain staff return to the individual members of the arrangement or certain staff or members switch to another joint purchasing arrangement. Moreover, the participation of an undertaking in multiple joint purchasing arrangements should not lead to anti-competitive exchanges of information or other types of coordination between the different purchasing arrangements.
303. In the context of joint negotiations of terms and conditions with suppliers, a joint purchasing arrangement (i.e. its members or the legal entity formed by them) may exert its buying power by, for example, threatening to abandon negotiations or to stop purchasing unless the supplier offers better terms and conditions or lower prices. The counterparties in such negotiations may similarly threaten to stop negotiating or supplying products in their negotiations with purchasers.
304. Such collective negotiation threats can be considered to form an integral part of the joint purchasing arrangement where they concern the products that are subject to the negotiations and are temporary in nature, ceasing when the parties have resumed their negotiations or concluded an agreement. Without prejudice

<sup>(206)</sup> See Section 6.2.4.2.

<sup>(207)</sup> Judgment of 11 September 2014, *MasterCard v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 89.

<sup>(208)</sup> See paragraph 369.

<sup>(209)</sup> See also paragraph 6.

to the application of stricter national laws that prohibit unilateral conduct or unfair trading practices<sup>(210)</sup>, such threats generally do not amount to a restriction of competition by object<sup>(211)</sup>. Any effects on competition arising from such threats will be assessed under Article 101(1) in the light of the overall effects of the joint purchasing arrangement, taking into account the market position of the members that implement the threats<sup>(212)</sup>. An example of collective threats that could be considered to form an integral part of a joint purchasing arrangement concerns members of a retail alliance stopping orders of certain products from a supplier during their negotiations about the terms and conditions for the future supply of those products. Such order stops may result in the products selected by the individual members of the alliance becoming temporarily unavailable in their shops until the retail alliance and the supplier have agreed on the terms and conditions of future supplies. Such (threats of) order stops will, in general, not appreciably affect competition in the downstream selling market(s) where retailers continue to offer products that are substitutes of the products in question and to the extent that customers in the selling market(s) can purchase these products or substitute products from competitors of the members of the joint purchasing arrangement.

### 4.3. Assessment under Article 101(3)

#### 4.3.1. Efficiency gains

305. Joint purchasing arrangements can give rise to significant efficiency gains. In particular, they can lead to cost savings, such as lower purchase prices, lower production cost and reduced transaction costs. Moreover, joint purchasing arrangements may give rise to qualitative efficiency gains, for example, by leading suppliers to innovate and introduce new or improved products on the market or, in particular for smaller suppliers, by expanding distribution of their products to a larger number of purchasers and markets. Such qualitative efficiencies can benefit consumers, by reducing dependencies and avoiding shortages through more resilient supply chains and contributing to a more resilient internal market, for example, through joint purchases of medicines or energy.

#### 4.3.2. Indispensability

306. Restrictions that go beyond what is necessary to achieve the efficiency gains generated by a joint purchasing arrangement do not meet the conditions of Article 101(3). For example, cost savings that are not the result of the joint purchasing itself but from additional activities carried out by the joint purchasing arrangement, such as logistics, transportation or storage, can only be considered as efficiency gains of the arrangement if the additional activity is necessary for the purchasing arrangement to function and could not be achieved with less restrictive means. An obligation to purchase or negotiate exclusively through the joint purchasing arrangement may, in certain cases, be indispensable to achieve the necessary degree of buying power or volume for the realisation of economies of scale. However, such an obligation has to be assessed in the context of the individual case.

#### 4.3.3. Pass-on to consumers

307. Efficiency gains, such as cost reductions or qualitative efficiencies in the form of the introduction of new or improved products on the market, that are attained by indispensable restrictions must be passed on to consumers to an extent that outweighs any restrictive effects on competition caused by the joint purchasing arrangement. Hence, cost savings or other efficiencies that only benefit the members of the joint purchasing arrangement do not suffice. Instead, cost savings need to be passed on to the members' customers. For example, in the case of lower purchasing costs, pass-on may occur through lower prices on the selling market or markets.

<sup>(210)</sup> For example, national legislation transposing Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (OJ L 111, 25.4.2019, p. 59), or that is stricter than Article 102 by prohibiting or imposing sanctions on abusive behaviour toward economically dependent undertakings, see Article 3(2) and Recital 8 of Regulation (EC) No 1/2003.

<sup>(211)</sup> See paragraph 278.

<sup>(212)</sup> Such threats can be an integral part of efficient bargaining to achieve more competitive prices. On the other hand, such threats may also occur in the context of joint purchasing arrangements that have the effect of restricting competition. In itself, the observation of such threats is therefore neither evidence of competitive harm nor of the lack thereof.

308. Companies normally have an incentive to pass on at least part of a reduction in variable costs to their own customers. The higher profit margin resulting from variable cost reductions provides companies with a significant incentive to expand output through price reductions. However, where the members of a joint purchasing arrangement together hold market power on the relevant selling market(s), they may be less inclined to pass on variable cost reductions to customers. Moreover, reductions in fixed costs (such as lump-sum payments by suppliers) are less likely to be passed on to consumers, as they may often not provide companies with an incentive to expand output. A careful assessment of the specific joint purchasing arrangement is therefore required to assess whether it generates an economic incentive to expand output and thus pass on cost reductions or efficiencies <sup>(213)</sup>. Finally, lower sales prices for customers are particularly unlikely if the joint purchasing arrangement limits (or disincentivises) the ability of its members to purchase additional volumes from a given supplier, either through the joint purchasing arrangement or independently outside the arrangement. In fact, joint purchasing arrangements that limit the independent ordering of additional volumes by their members from a given supplier provide an incentive to raise sale prices. This is because jointly limiting the purchase of inputs will generally have the effect of limiting the volume of sales in the selling market or markets.

4.3.4. *No elimination of competition*

309. The conditions of Article 101(3) cannot be fulfilled if the parties are afforded the possibility of eliminating competition in respect of a substantial part of the products in question. This condition must be satisfied in both the relevant purchasing and selling markets.

4.4. **Examples**

310. Buyer cartel

**Example 1**

*Situation:* Many small undertakings collect used mobile phones through retail outlets where they are returned upon the purchase of a new mobile phone. These collectors sell used mobile phones on to recycling undertakings that extract valuable raw materials such as gold, silver and copper for re-use as a more sustainable alternative to mining. Five recycling undertakings representing 12 % of the purchasing market for used mobile phones agree to a common maximum purchase price per phone. These five recycling undertakings also keep each other informed about the price discussions that they are conducting individually with collectors of used mobile phones, as well as the offers that the collectors have made to them, and the price per phone that they eventually agree to pay to the collectors.

*Analysis:* The five recycling undertakings are all party to a buyer cartel. They each negotiate and purchase individually from the collectors of mobile phones. There is no joint purchasing arrangement involved that represents the buyers jointly in the negotiations with or the purchase from the collectors. Irrespective of the relatively small combined market share of the recycling undertakings on the purchasing market for electronic waste, the agreement between them qualifies as a by object restriction of competition. It is therefore unnecessary to define the relevant market or to assess the actual or potential effects of the cartel on the market.

311. Joint negotiation of inputs by manufacturers

**Example 2**

*Situation:* Five competing steel manufacturers have a combined market share of 40 % on the relevant purchasing market in Member State A. The steel manufacturers set up, own and operate a joint venture that will negotiate the purchase of iron ore on their behalf. The joint venture demands and obtains from a major iron ore supplier a 20 % reduction in the purchase price of iron ore in Member State A. Instead of competing with each other on the purchasing market, the five steel manufacturers buy iron ore at the purchase price negotiated by the joint venture. There is no evidence that the owners of the joint venture lowered their steel prices in the selling market as a result of the lower prices that they paid for iron ore.

<sup>(213)</sup> E.g., while a rebate may have the contractual form of a lump-sum payment, it may effectively be contingent on the buyer reaching certain expected sales targets when the contract is renegotiated the following year. Similarly, the payment may be contingent on the provision of certain services.

*Analysis:* The joint venture is a joint purchasing arrangement which negotiates with suppliers on behalf of the five steel manufacturers. The five steel manufacturers that are party to the joint venture have been able to obtain a lower price for their purchases of iron ore. The parties to the joint venture make their purchases of iron ore independently, albeit on the basis of the price negotiated by the joint venture. The formation and implementation of the joint venture does not have as its object the restriction of competition. Whether the joint venture has restrictive effects on competition will depend on, for example, whether it gives rise to significant commonality of costs and whether the joint purchasing arrangement produces a real risk of collusion on the selling market for steel. All things being equal, the fact that none of the steel manufacturers party to the joint venture would have lowered its prices for steel could be an indication of such collusion.

312. Joint negotiation by a European retail alliance

**Example 3**

*Situation:* A European retail alliance, having as its members seven large retail chains, each operating in different national markets, jointly negotiates with a major brand manufacturer of sweet biscuits and fruit juices, with a 30 % market share in those product categories, certain terms for a future supply agreement. The alliance has a market share of no more than 18 % on each relevant (national) purchasing market and each of its members has a market share of between 15 % and 20 % on the relevant (local) retail markets in their respective Member State. The members of the alliance are not potential entrants to each other's selling markets. The negotiations cover in particular an additional rebate from the manufacturer to the retailers. Both sides drive a hard bargain to get the best possible deal. At a certain point in the negotiations, the retail alliance requests its members to temporarily stop ordering products from the two categories that are under negotiation with the manufacturer in order to increase the pressure. In implementing this decision, each member of the alliance decides individually which of the manufacturer's products in those categories it will stop ordering during the deadlock in the negotiations, taking into account local consumer preferences on the selling markets. Eventually, after a further round of negotiations, the manufacturer and the alliance agree on the additional rebate that the manufacturer will grant to the individual alliance members and they restart their orders of the entire range of products from the manufacturer.

*Analysis:* The European retail alliance is not a buyer cartel and does not constitute a by object restriction of competition. It qualifies as a joint purchasing arrangement even if it only jointly negotiates a particular rebate as part of the wider purchase transaction between the manufacturer and the members of the retail alliance, based on which they individually purchase their required quantities of the manufacturer's products. The national retail chains that are members of the alliance are not active on the same selling markets and are not potential competitors of each other. As a result, the joint purchasing arrangement is unlikely to have restrictive effects on competition between retailers in the downstream selling market(s). In addition, the retailers face sufficient competitive pressure from competing retailers not taking part in the joint purchasing arrangement. The arrangement may still require an assessment of potential negative effects on competition upstream, resulting from the additional rebate (for instance in terms of reduced innovation by suppliers). However, such negative effects seem unlikely in view of the parties' combined market share of no more than 18 % on each relevant purchasing market. The temporary stopping of orders has to be assessed together with the overall effects of the joint purchasing arrangement. Such measure only concerns the product categories that are under negotiation with the manufacturer and does not appear to harm consumers directly or indirectly, in particular, insofar as these retailers offer substitute products or there are other competing retailers from which consumers can purchase the same products, and it may lead to a benefit for consumers in the form of lower prices after an agreement has been reached.



## 313. Joint purchasing by small undertakings with moderate combined market shares

**Example 4**

*Situation:* 150 small retailers conclude an agreement to form a joint purchasing arrangement. They are obliged to purchase a minimum volume through the arrangement, which accounts for roughly 50 % of each retailer's total costs. The retailers can purchase more than the minimum volume through the arrangement and they may also purchase outside the arrangement. They have a combined market share of 23 % on both the purchasing and selling markets. Undertaking A and Undertaking B are two large competitors of the members of the joint purchasing arrangement. Undertaking A has a 25 % share on both the purchasing and selling markets and Undertaking B has 35 %. There are no barriers which would prevent the remaining smaller competitors from also forming a joint purchasing arrangement. The 150 retailers achieve substantial cost savings by purchasing jointly through the joint purchasing arrangement.

*Analysis:* The joint purchasing arrangement is not a buyer cartel and does not qualify as a by object restriction of competition. The combined market share of the participating retailers on the purchasing and selling markets exceeds the soft safe harbour of 15 %, but they are constrained by Undertakings A and B, which have higher market shares on both markets. The likelihood that the joint purchasing arrangement will disincentivise investments or innovation by the product suppliers remains low, in view of the members' combined market share on the purchasing market. However, this also depends on the degree of countervailing seller power of suppliers on the purchasing market and, in the case of suppliers with no seller power, whether they have made customer-specific investments for the members of the joint purchasing arrangement. Even though the participating retailers achieve a high degree of commonality of costs, they are unlikely to have market power on the selling market, due to the market presence of Undertakings A and B, which are both stronger individually than the combined retailers that are party to the joint purchasing arrangement. Consequently, the 150 retailers are unlikely to be able to successfully coordinate their behaviour on sale prices and reach a collusive outcome on the selling market that would prevent them from passing on lower purchasing prices or related discounts. The joint purchasing arrangement is therefore unlikely to give rise to restrictive effects on competition within the meaning of Article 101(1). Furthermore, the cooperation brings about some efficiencies via economies of scale that may further decrease selling prices and make the retailers more competitive on the selling market vis-à-vis Undertakings A and B.

## 314. Commonality of costs and market power on the selling market

**Example 5**

*Situation:* Two competing supermarket chains conclude an agreement to jointly purchase products which account for roughly 80 % of their variable costs. On the relevant purchasing markets for the different categories of products the parties have combined market shares of between 25 % and 40 %. On the relevant selling market they have a combined market share of 60 %, and there are four other significant retailers, each with a 10 % market share. Market entry is not likely.

*Analysis:* The purchasing agreement is not a buyer cartel and does not qualify as a by object restriction of competition. However, it is likely to give the parties the ability to coordinate their behaviour on the selling market, thereby leading to a collusive outcome. The parties have market power on the selling market, given the few, much smaller competitors in that market, and the purchasing agreement gives rise to significant commonality of costs. Moreover, market entry is unlikely. The incentive for the parties to coordinate their behaviour on the selling market would be even stronger if their cost structures were already similar prior to concluding the agreement. Moreover, similar margins of the parties would further increase the risk of a collusive outcome. This agreement also creates a risk that the parties could withhold demand and, consequently, as a result of reduced purchases, also reduce sales volumes, thus increasing downstream selling prices. Hence, the purchasing agreement is likely to give rise to restrictive effects on competition within the meaning of Article 101(1). Even though the agreement is very likely to give rise to efficiency gains in the form of cost savings, due to the parties' significant market power on the selling market, these are unlikely to be passed on to consumers to an extent that would outweigh the restrictive effects on competition. Therefore, the purchasing agreement is unlikely to fulfil the conditions of Article 101(3).



## 315. Parties active in separate geographic markets

**Example 6**

*Situation:* Six large retailers, each based in a different Member State, form a joint purchasing arrangement to buy several branded durum wheat flour-based products jointly. The arrangement allows the retailers to purchase other similar branded products outside the cooperation. The members of the joint purchasing arrangement have a combined market share of approximately 22 % on the relevant purchasing market, which is Union-wide. In the purchasing market there are three other large buyers of a similar size to the joint purchasing arrangement. Each of the members of the joint purchasing arrangement has a market share of between 20 % and 30 % on the selling markets on which they are active, which are national markets. None of the parties is active on the selling market of a Member State where another party is active. The parties are not potential entrants to each other's national selling markets.

*Analysis:* The joint purchasing arrangement is not a buyer cartel and does not qualify as a by object restriction of competition. Through the arrangement, the participating retailers will be able to compete with the other existing major buyers on the purchasing market and obtain better prices or terms and conditions than would be the case if they purchased the products independently. The likelihood that the joint purchasing arrangement will disincentivise investments or innovation by the product suppliers remains low in view of the participants' combined market share on the purchasing market. However, this also depends on the degree of countervailing seller power of suppliers on the purchasing market and, in the case of suppliers with no seller power, whether they have made customer-specific investments for the purchasers that are party to the arrangement. Compared to the Union-wide purchasing market, the national selling markets are much smaller (in turnover and geographic scope) and in those markets some of the members of the arrangement may have some degree of market power. However, even though the members of the joint purchasing arrangement have a combined market share of more than 15 % on the purchasing markets, the parties are not able to successfully coordinate their conduct on the national selling markets since they are neither actual or potential competitors on those downstream markets. Consequently, the joint purchasing arrangement is not likely to give rise to restrictive effects on competition within the meaning of Article 101(1). However, even if the arrangement were to have restrictive effects on competition, it is likely to fulfil the conditions of the Article 101(3) exception. The joint purchasing arrangement leads to lower purchasing costs, which the members would not be able to obtain if they negotiated prices independently. In view of the individual members' market position downstream, where they are not present on each other's selling markets but faced with significant competition from other retailers (holding at least 70 % of the selling market), it seems likely that these lower purchasing costs will be passed on to consumers. Indeed, the members of the arrangement should have an incentive to pass on at least part of the reduction in variable costs to their own customers, by expanding downstream sales through price reductions.

## 316. Information exchange

**Example 7**

*Situation:* Three competing manufacturers A, B and C entrust an independent joint purchasing arrangement with the purchase of product Z, which is an intermediate product used by the three manufacturers for their production of final product X. The costs of Z are not a significant cost factor for the production of X. All information necessary for the joint purchases (for example quality specifications, quantities, delivery dates, maximum purchase prices) is only disclosed to the joint purchasing arrangement and not shared with the other members of the arrangement. The joint purchasing arrangement agrees the purchasing prices with each supplier of product Z. A, B and C have a combined market share of 30 % on each of the purchasing and selling markets. They have six competitors in the purchasing and selling markets, two of which each have a market share of 20 %.

*Analysis:* The joint purchasing arrangement is not a buyer cartel and is not a by object restriction of competition. The members of the joint purchasing arrangement together have a combined market share of 30 % on both the purchasing and selling markets that clearly exceeds the soft safe harbour of 15 %. This may give them a significant degree of market power on both the purchasing and selling markets. However, the members of the arrangement face competition both upstream and downstream from several competitors. At least two of these competitors have a significant market position (market share each of 20 %) that allows them to exert an effective competitive constraint on the members of the arrangement.

It therefore seems unlikely that the members of the joint purchasing arrangement hold a significant degree of market power on the selling markets to be able to exclude these competitors from the purchasing market. Moreover, the arrangement is limited to the purchase of product Z, which is not a significant cost factor for the production of product X. This means that it does not constitute a significant input for the parties' activities on the selling markets and will not lead to a high degree of commonality of costs. A, B and C still buy or produce independently the other inputs for product X, which represent more significant cost factors, and they face effective competition from the six remaining competitors, as well as from each other on the market for product X.

Therefore, the joint purchasing arrangement is unlikely to restrict competition on the purchasing or selling markets within the meaning of Article 101(1) or, in any event, may meet the four cumulative conditions of Article 101(3).

Moreover, as regards the exchange of information, it will similarly not fall within the prohibition of Article 101(1) if it is objectively necessary for and proportionate to the implementation of the joint purchasing arrangement for product Z, covering only those parameters that are required for the members of the arrangement to conclude an agreement with suppliers. Since the information is not shared between the individual members, but only with the joint purchasing arrangement, there is no direct information exchange between A, B and C, and the transfer of the information is thus unlikely to lead to a collusive outcome between them contrary to Article 101(1).

## 5. COMMERCIALISATION AGREEMENTS

### 5.1. Introduction

317. Commercialisation agreements involve cooperation between competitors in the selling, distribution or promotion of their substitute products. This type of agreement can have a widely varying scope, depending on the commercialisation functions which are covered by the cooperation. At one end of the spectrum, joint selling agreements may lead to a joint determination of all commercial aspects related to the sale of the product, including price. At the other end, there are more limited agreements that only address one specific commercialisation function, such as distribution, after-sales service, or advertising.
318. An important category of those more limited agreements is distribution agreements. The VBER and the Vertical Guidelines in principle cover distribution agreements unless the parties to the agreement are actual or potential competitors. If competitors agree to distribute their substitute products (in particular if they do so on different geographic markets) there is a risk that the agreements may have as their object or effect the partitioning of markets between the parties or that they lead to a collusive outcome. This can be true both for reciprocal and non-reciprocal agreements between competitors, which thus have to be assessed, first, according to the principles set out in this Chapter. If that assessment leads to the conclusion that cooperation between competitors in the area of distribution would in principle be acceptable, a further assessment will be necessary to examine any vertical restraints included in such agreements. That second step of the assessment should be based on the principles set out in the Vertical Guidelines.
319. The only exception to the two-step process mentioned in the previous paragraph concerns non-reciprocal distribution agreements between competitors where (a) the supplier is a manufacturer, wholesaler, or importer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing, wholesale or import level, or, (b) the supplier is a provider of services at several levels of trade, while the buyer provides its services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services<sup>(214)</sup>. In those scenarios, the distribution agreement can benefit from the VBER, in which case these Guidelines do not apply<sup>(215)</sup>. Paragraph 43 provides additional guidance on the general relationship between these Guidelines and the VBER and Vertical Guidelines.

<sup>(214)</sup> Article 2(4) of the VBER.

<sup>(215)</sup> The exemption provided for in Article 2(4) VBER does not apply to (i) the exchange of information between the supplier and the buyer that is either not directly related to the implementation of the vertical agreement or is not necessary to improve the production or distribution of the contract goods or services, or which fulfils neither of those two conditions (Article 2(5) VBER) or to (ii) vertical agreements relating to the provision of online intermediation services where the provider of the online intermediation services is a competing undertaking on the relevant market for the sale of the intermediated goods or services (Article 2(6) VBER). In these cases, these Guidelines apply alongside the Vertical Guidelines. Such information exchanges and agreements require an individual assessment under Article 101. The Vertical Guidelines may be relevant for the assessment of any vertical restraints, while the present Guidelines may provide relevant guidance for the assessment of possible collusive effects.

320. A further distinction should be drawn between agreements where the parties agree only on joint commercialisation and agreements where the commercialisation is related to another type of cooperation upstream, such as joint production or joint purchasing. When analysing commercialisation agreements combining different stages of cooperation, it is necessary to undertake the assessment in accordance with paragraphs 6-8.

321. There are exclusions to the application of Article 101(1) to the commercialisation of agricultural products provided for in Regulation (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products <sup>(216)</sup>.

## 5.2. Assessment under Article 101(1)

### 5.2.1. Main competition concerns

322. Commercialisation agreements can restrict competition in several ways. First, and most obviously, commercialisation agreements may lead to price fixing.

323. Second, commercialisation agreements may also facilitate output limitations, because the parties may decide on the volume of products to be put on the market, thereby reducing supply.

324. Third, commercialisation agreements may be used as a means for the parties to divide markets or to allocate orders or customers, for example in cases where the parties' production plants are located in different geographic markets or when the agreements are reciprocal.

325. Fourth, commercialisation agreements may also lead to the exchange of commercially sensitive information relating to aspects within or outside the scope of the cooperation or to commonality of costs – in particular in the case of agreements not encompassing price fixing – which may result in a collusive outcome.

326. On the other hand, a commercialisation agreement is generally unlikely to give rise to competition concerns if it is objectively necessary in order to allow a party to enter a market that it could not have entered independently, or that it could not have entered with a smaller number of parties than those that take part in the cooperation, for example, because of the costs involved. In such a scenario, the parties to the agreement are not each other's potential or actual competitors and, therefore, the agreement will not have the effect of restricting competition between them.

327. Therefore, a key issue in assessing a reciprocal commercialisation agreement is whether the agreement is objectively necessary for the parties to enter each other's markets. If it is, the agreement does not create competition problems. However, if a party is capable of entering another party's market without the agreement, and the agreement reduces the first party's decision-making independence regarding the possibility of entering the other party's market, it is likely to give rise to restrictive effects on competition. The same principle applies to non-reciprocal commercialisation agreements. The risk of restrictive effects on competition is, however, less pronounced for non-reciprocal agreements, as the parties are less likely to have a mutual incentive to allocate markets or customers.

### 5.2.2. Restrictions of competition by object

328. First, commercialisation agreements lead to a restriction of competition by object if they serve as a tool to engage in a disguised cartel. In any case, commercialisation agreements involving price fixing, output limitations or market partitioning are likely to restrict competition by object, except if those restrictions are ancillary to the main aim of the agreement and where that main aim falls outside the prohibition of Article 101(1).

329. Price fixing is one of the major competition concerns arising from commercialisation agreements between competitors. Agreements limited to joint selling and in general commercialisation agreements that include joint pricing generally lead to the coordination of the pricing policy of competing manufacturers or service providers. Such agreements may not only eliminate price competition between the parties in respect of substitute products but may also restrict the total volume of products to be delivered by the parties within the framework of a system for allocating orders. Such agreements are therefore likely to restrict competition by object.

<sup>(216)</sup> See also paragraph 47.

330. That assessment does not change if the agreement is non-exclusive (that is to say, where the parties are free to sell individually outside the agreement), as long as it can be concluded that the agreement will lead to a coordination of the prices charged by the parties to all or part of their customers.
331. Similarly, output limitations are a serious competition concern that can arise from commercialisation agreements. Where the parties to the agreement decide jointly on the quantity of the products to be marketed, the available supply of the contractual products may be reduced, which increases their price. Each party to the agreement should in principle remain free to independently decide to increase or reduce its output to meet market demand. The risk of output limitations is more limited in the case of non-exclusive commercialisation agreements, provided that the parties remain free and truly available to serve individually any additional demand and provided that the agreement does not lead to a coordination of the supply policy of the parties.
332. Commercialisation arrangements between parties active in different geographic markets or vis-à-vis different categories of customers can also be used as an instrument of market partitioning. If the parties use a reciprocal commercialisation agreement to distribute each other's products in order to eliminate actual or potential competition between them by allocating markets or customers, the agreement is likely to have the object of restricting competition. If the agreement is not reciprocal, the risk of market partitioning is less pronounced. However, it is nonetheless necessary to assess whether the non-reciprocal agreement constitutes the basis for a mutual understanding between the parties to refrain from entering each other's markets.

#### 5.2.3. Restrictive effects on competition

333. A commercialisation agreement that is not restrictive by object may still have restrictive effects on competition. To assess the effects of commercialisation agreements on competition, it is necessary to take account of the factors mentioned in paragraph 32, as well as the following additional guidance relating specifically to this type of agreement.
334. To assess the effects of a commercialisation agreement, it is necessary to define the relevant product and geographic markets and to determine the respective positions of the parties on those markets. The markets directly concerned by the cooperation are those to which the products subject to the agreement belong and in which the parties will jointly commercialise those products. However, as a commercialisation agreement in one market may also affect the competitive behaviour of the parties in neighbouring markets closely related to the market directly concerned by the cooperation (spillover markets), it is also necessary to define any such spillover markets <sup>(217)</sup>.
335. In cases where commercialisation agreements between competitors do not restrict competition by object, they will generally only have restrictive effects on competition if the parties have some degree of market power. To assess whether the parties have such market power, it is necessary to take into account the possible existence of their customers' countervailing buyer power. Where the parties jointly have market power, it is in general likely that they will have the ability to raise prices or reduce output, product quality, product variety or innovation. In addition, under a commercialisation agreement, the parties pool (part of) their market-related activities, namely activities that have a direct impact on their customers. This direct impact on customers increases the risk that commercialisation agreements may lead to anti-competitive effects.

##### 5.2.3.1. Collusive outcome

336. A joint commercialisation agreement that does not involve price fixing, output limitation or market partitioning may nonetheless give rise to restrictive effects on competition if it increases the parties' commonality of variable costs to a level which is likely to lead to a collusive outcome. This is likely to be the case if prior to the agreement the parties already have a high proportion of their variable costs in common. In that scenario, the additional increment in commonality (namely the commercialisation costs of the product subject to the agreement), even if it is limited, can tip the balance towards a collusive outcome. Conversely, if the increment is large, the risk of a collusive outcome may be high even if the initial level of commonality of costs is low.

<sup>(217)</sup> For instance, in the case of a commercialisation agreement in a specific geographic market, other geographic markets where the parties to the agreement are also active; or markets for the supply of inputs purchased jointly for the commercialisation of the contractual products.

337. The likelihood of a collusive outcome depends on the parties' market power and the characteristics of the relevant market. Commonality of costs can only increase the risk of a collusive outcome if the parties have market power and if commercialisation costs constitute a significant proportion of the variable costs related to the products concerned. Commonality of commercialisation costs increases the risk of a collusive outcome if the commercialisation agreement concerns products that entail costly commercialisation, for example, high distribution or marketing costs. Consequently, even agreements that are limited to joint advertising or joint promotion can give rise to restrictive effects on competition if those activities represent a significant proportion of the variable costs of the product.
338. The implementation of a joint commercialisation agreement may require the exchange of commercially sensitive information, in particular on marketing strategy and pricing. Where the commercialisation agreement itself does not fall within the Article 101(1) prohibition because it has neutral or positive effects on competition, an information exchange that is ancillary to that agreement does not fall within that prohibition either<sup>(218)</sup>. This will be the case if the information exchange is objectively necessary to implement the commercialisation agreement and is proportionate to the objectives thereof<sup>(219)</sup>. Where the information exchange goes beyond what is objectively necessary to implement the commercialisation agreement or is not proportionate to the objectives thereof, it should be assessed using the guidance provided in Chapter 6<sup>(220)</sup>. If the information exchange falls within Article 101(1), it may still fulfil the conditions of Article 101(3).

#### 5.2.3.2. Cooperation that generally does not raise concerns

339. As already mentioned in paragraph 335, commercialisation agreements between competitors that do not restrict competition by object will generally only have restrictive effects on competition if the parties have some degree of market power. In most such cases, it is unlikely that market power exists if the parties to the agreement have a combined market share not exceeding 15 % in the market(s) where they jointly commercialise the contractual products. In any event, if the parties' combined market share does not exceed 15 %, it is likely that the conditions of Article 101(3) are fulfilled.
340. If the parties' combined market share exceeds 15 %, it is not possible to presume that their agreement will not have restrictive effects and it is therefore necessary to assess the likely impact of the joint commercialisation agreement on the relevant market(s).

### 5.3. Assessment under Article 101(3)

#### 5.3.1. Efficiency gains

341. Commercialisation agreements can give rise to significant efficiency gains. The efficiencies to be taken into account when assessing whether a commercialisation agreement fulfils the conditions of Article 101(3) will depend on the nature of the cooperation and the parties to the cooperation. Price fixing can generally not be justified, unless it is indispensable for the integration of other marketing functions and such integration generates substantial efficiencies. Joint distribution can generate significant efficiencies, stemming from economies of scale or scope, especially for smaller producers or groups of independent retailers, for instance where they take advantage of new distribution platforms in order to compete with larger operators. Joint distribution can in particular be used to achieve environmental objectives, which may constitute efficiencies within the meaning of Article 101(3), provided that they are objective, concrete and verifiable<sup>(221)</sup>. Commercialisation agreements can also contribute to a resilient internal market and generate efficiencies benefiting consumers by reducing dependencies and/ or mitigating shortages and disruptions in supply chains, for instance when they allow a party to enter a market that it could not have entered independently.
342. The efficiency gains must result from the integration of the parties' economic activities. Savings that result only from the elimination of costs that are an inherent part of competition cannot be taken into account. For example, a reduction of transport costs that is merely the result of customer allocation, without any integration of the parties' logistical systems, cannot be regarded as an efficiency gain within the meaning of Article 101(3).

<sup>(218)</sup> Judgment of 11 September 2014, *MasterCard v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 89.

<sup>(219)</sup> See also Section 1.2.6 regarding ancillary restraints.

<sup>(220)</sup> See also paragraph 6.

<sup>(221)</sup> See in particular Chapter 9, paragraph 559 on sustainability agreements.



343. Efficiency gains must be demonstrated by the parties to the agreement. An important element in this respect would be the contribution to the joint commercialisation by the parties of significant capital, technology, or other assets. Cost savings generated by reducing duplication of resources and facilities can also be accepted. However, if the joint commercialisation consists of no more than a sales agency without any investment, it is unlikely to fulfil the conditions of Article 101(3).

#### 5.3.2. *Indispensability*

344. Restrictions that go beyond what is necessary to achieve the efficiency gains generated by the commercialisation agreement will not fulfil the conditions of Article 101(3). The question of indispensability is especially important for agreements that involve price fixing or market partitioning, which can only under exceptional circumstances be considered indispensable.

#### 5.3.3. *Pass-on to consumers*

345. Efficiency gains achieved by indispensable restrictions must be passed on to consumers to an extent that outweighs the restrictive effects on competition caused by the commercialisation agreement. This pass-on may take the form of lower prices or better product quality or variety. However, the greater the market power of the parties, the less likely it is that efficiency gains will be passed on to consumers to an extent that outweighs the restrictive effects on competition. Where the parties have a combined market share of below 15 %, it is more likely that any efficiency gains generated by the agreement will be sufficiently passed on to consumers.

#### 5.3.4. *No elimination of competition*

346. The conditions of Article 101(3) cannot be fulfilled if the parties are afforded the possibility of eliminating competition in respect of a substantial part of the products in question. Compliance with this condition must be assessed in respect of all relevant markets, namely those to which the products subject to the cooperation belong and any spillover markets.

### 5.4. **Bidding consortia**

347. The term bidding consortium refers to a situation where two or more parties cooperate to submit a joint bid in a public or private procurement competition <sup>(222)</sup>.

348. For the purpose of this Section, bidding consortia must be distinguished from bid rigging (or collusive tendering), namely illegal agreements between economic operators which aim to distort competition in contract award procedures. Bid rigging is one of the most serious restrictions of competition, constituting a restriction by object, and may take various forms, such as agreeing the content of each party's tenders beforehand (especially the price) in order to influence the outcome of the award procedure, refraining from submitting a tender, allocating the market based on geography, the contracting authority or the subject of the procurement, or setting up rotation schemes for a series of procedures. The aim of all these practices is to enable a pre-determined tenderer to win the contract while creating the impression that the procedure is genuinely competitive <sup>(223)</sup>. Under competition law, bid rigging is a form of cartel that consists in the manipulation of a tender procedure for the award of a contract <sup>(224)</sup>.

<sup>(222)</sup> Cooperation in bidding can be implemented either through subcontracting, where the official bidder agrees that if the contract is awarded to it, it will subcontract part of the activity to one or more other parties, or through a consortium, where all the consortium partners participate jointly in the tender procedure, generally through a legal entity established specifically for the purpose of that procedure. From a public procurement perspective, the difference between subcontracting and a consortium is that, in the first case, the lead contractor may not have to disclose immediately the names of its subcontractors, whereas in the case of a consortium the names of the consortium members are immediately declared to the tender authority. From a competition law perspective, subcontracting and consortia both constitute joint bidding. In this Section, the term bidding consortium will be used for simplicity instead of joint bidding. Furthermore, a distinction should be drawn between situations where i) the subcontracting is agreed upon before the bid, and ii) the subcontracting is agreed upon and entered into after the contract has been awarded. In general, it is only in the first situation that subcontracting amounts to joint bidding, and in some situations, to a form of bid rigging.

<sup>(223)</sup> Commission Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground (OJ C 91, 18.3.2021, p. 1).

<sup>(224)</sup> Judgment of 14 January 2021, *Kilpailu- ja kuluttajavirasto*, C-450/19, EU:C:2021:10, paragraph 35.



349. Bid rigging generally does not involve joint participation in the tender procedure. It typically consists of a hidden or tacit agreement between potential participants to coordinate their apparently independent decisions relating to participation in the tender procedure. However, in some cases, the distinction between bid rigging and legitimate forms of joint bidding is not straightforward, in particular in the case of subcontracting. For example, where two tenderers cross-subcontract to each other, this may be an indication of collusion, given that such subcontracting agreements usually allow the parties to find out about each other's financial offer, thus calling into question the parties' independence in formulating their own tenders. However, there is no general presumption that subcontracting between tenderers participating in the same procedure constitutes collusion between the undertakings concerned <sup>(225)</sup>.
350. Bidding consortium agreements can involve a significant degree of integration of resources and activities by the parties for the purpose of participating in the tender procedure, in particular when forms of joint production are included in the activity subject to the tender. In situations where joint commercialisation is ancillary to the integration of the parties' production activities (joint production), the centre of gravity of the agreement lies in the production activity, and the competitive assessment must be carried out using the rules and guidance applicable to joint production agreements. In such situations, price fixing for the contract products or services is generally not considered a restriction by object and a by effect assessment will be necessary (see paragraph 223 on production agreements).
351. However, in general, bidding consortium agreements that consist mainly or exclusively of joint commercialisation should be considered as commercialisation agreements and should therefore be assessed in accordance with the principles set out in the present Chapter.
352. A bidding consortium agreement – irrespective of its legal qualification – will not restrict competition within the meaning of Article 101(1) if it allows the parties to participate in projects that they would not be able to undertake individually. In that scenario, the parties to the bidding consortium agreement are neither actual nor potential competitors for the implementation of the project. This may be the case where the parties to a bidding consortium agreement supply different services that are complementary for the purposes of participation in the tender procedure. This may also be the case where the parties to the bidding consortium agreement, although all active in the same market(s), cannot carry out the project individually, for example due to the size of the project or its complexity.
353. The assessment of whether the parties are capable of competing in a tender procedure individually, and are thus competitors, depends firstly on the requirements included in the tender rules. However, the mere theoretical possibility of carrying out the contractual activity alone does not automatically make the parties competitors: it is necessary to assess whether each party is realistically capable of completing the contract on its own, taking into account the specific circumstances of the case, such as the size and capabilities of the undertaking, the level of financial risk induced by the project as well as the level of the investments required for the project, and the present and future capacity of the undertaking assessed in light of the contractual requirements <sup>(226)</sup>.
354. Where tender procedures provide for the possibility of submitting bids for parts of the contract (lots), undertakings that have the ability to bid for one or more lots – but possibly not for the whole contract – must be considered competitors and Article 101(1) is in principle applicable. In this type of situation, undertakings often justify their cooperation in the bidding consortium agreement on the basis that it allows them to bid for the complete contract and thereby to offer a combined rebate for the complete contract. However, this does not change the fact that the parties are competitors for at least part of the tender procedure and Article 101(1) is therefore applicable. Any efficiencies claimed in respect of the joint bid for the complete contract must be assessed in accordance with the conditions of Article 101(3).
355. If it is not possible to exclude that the parties to the bidding consortium agreement could each participate individually in the tender procedure (or if the bidding consortium agreement contains more parties than necessary), the joint bid may restrict competition within the meaning of Article 101(1). This may be the case even if only one party to the agreement is capable of bidding individually.

<sup>(225)</sup> Commission Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground, Section 5.6.

<sup>(226)</sup> Judgment of 30 January 2020, *Generics (UK) Ltd and Others v Competition and Markets Authority*, C-307/18, EU:C:2020:52, paragraph 39.

356. In general, in cases where Article 101(1) is applicable to joint bidding, it is necessary to carry out an individual assessment of the bidding consortium agreement, taking into account all relevant factors, including the parties' position on the relevant market, the number and the market position of the other likely participants in the tender procedure, the content of the bidding consortium agreement, the products or services involved and the market conditions.
357. The restriction may qualify as a restriction by object or by effect, depending on the content of the agreement and on the particular circumstances of the case. In general, and for bidding consortia that have to be considered as commercialisation agreements, the observations made at paragraphs 328-340 are applicable. In addition:
- (a) In circumstances where two (or more) parties are able to bid individually and there is not a significant degree of integration of resources and activities of the parties, a joint bid would in principle amount to a by object restriction, because it involves price setting between competitors and this provision does not appear ancillary to a genuine cooperation between the parties;
  - (b) In the case of bidding consortium agreements containing more parties than necessary, if there is only one party that could bid individually, in principle the mere fact that there are more parties than necessary may not in itself be sufficient to find a by object restriction, as it is possible that the parties may not be actual or potential competitors. However, there could be other reasons for such a consortium agreement to be considered a by object restriction, e.g. if a party that could have bid individually enters into a joint bidding arrangement with one or more other parties with the specific aim of pre-empting a competing joint bid from those other parties, even jointly with a third party;
  - (c) As for anticompetitive effects, and in the absence of a restriction by object, whether these types of joint bids may restrict competition depends on a specific assessment of, among other factors, how the competition would most realistically play out without the bidding consortium agreement in question;
  - (d) Only the information strictly necessary for the formulation of the bid and the performance of the contract should be shared between the members of the consortium. Moreover, circulation of the information should be restricted to relevant staff on a 'need to know' basis.
358. In any event, a bidding consortium agreement between competitors to which Article 101(1) applies may fulfil the conditions of Article 101(3). Possible efficiencies may take the form of lower prices, but also of better quality, greater choice or faster realisation of the products or services covered by the call for tenders. In addition, the other conditions of Article 101(3) must be fulfilled (indispensability, pass-on to consumers and no elimination of competition). In tender procedures, these conditions are often interlinked: the efficiency gains of a joint bid through a bidding consortium agreement are more easily passed on to consumers – in the form of lower prices or better quality of the offer – if competition for the award of the contract is not eliminated and other effective competitors take part in the tender procedure.
359. In essence, the conditions of Article 101(3) may be fulfilled if the joint bid allows the parties to submit an offer that is more competitive than the offers that they could have submitted on their own – in terms of price and/or quality – and the benefits accruing to the contracting entity and final consumers outweigh the restrictions of competition. Efficiencies must be passed on to consumers and will not fulfil the conditions of Article 101(3) if they only benefit the parties to the bidding consortium agreement.

5.5. **Examples**

## 360. Joint commercialisation necessary to enter a market

**Example 1**

*Situation:* Four undertakings providing laundry services in a large city close to the border of another Member State, each with a 3 % market share of the overall laundry market in that city, agree to create a joint marketing arm for the selling of laundry services to institutional customers (that is to say, hotels, hospitals and offices), whilst keeping their independence and freedom to compete for local, individual customers. For the purpose of targeting the new segment of demand (the institutional customers) they develop a common brand name, a common price and common standard terms, including scheduled deliveries and a maximum delivery time of 24 hours. They set up a common call centre where institutional customers can request their collection and/ or delivery service. They hire a receptionist (for the call centre) and several drivers. They further invest in vans for dispatching and in brand promotion, to increase their visibility. The agreement does not completely eliminate their individual infrastructure costs (since they keep their own premises and still compete with each other for the individual local customers), but it increases their economies of scale and allows them to offer a more comprehensive service to a new category of customers, which requires longer opening hours and dispatching to a wider geographic coverage. In order to ensure the viability of the project, it is indispensable that all four undertakings enter into the agreement. The market is very fragmented, with no individual competitor having more than 15 % market share.

*Analysis:* Although the joint market share of the parties is below 15 %, the fact that the agreement involves price fixing means that, in principle, Article 101(1) applies. Given that the parties are active in a large city close to the border of another Member State, it is assumed that trade between Member States will be affected. However, the parties would not have been in a position to provide laundry services to institutional customers, either individually or in cooperation with a smaller number of parties than the four that are participating in the agreement. Since the price fixing restriction can be considered as indispensable to the promotion of the common brand and the success of the project, that restriction appears to be ancillary to the main aim of the agreement, which is not anti-competitive, and would, overall, not create competition concerns.

## 361. Commercialisation agreement involving more parties than are necessary to enter a market

**Example 2**

*Situation:* The same facts as in Example 1, paragraph 360, apply with one main difference: in order to ensure the viability of the project, the agreement could have been implemented by only three of the parties (instead of the four actually taking part in the cooperation).

*Analysis:* Although the joint market share of the parties is below 15 %, Article 101(1) applies for the same reasons as set out above under Example 1. The agreement could have been carried out by fewer than the four parties. However, as none of the parties could have implemented the project alone, the fact that there are more parties than necessary might not be sufficient to find a restriction by object, unless the agreement aims at pre-empting a competing initiative involving one of the parties. As for possible restrictive effects, a counterfactual analysis is necessary. In any case, the agreement may be assessed under Article 101(3). The agreement gives rise to efficiency gains as the parties are now able to offer improved services for a new category of customers on a larger scale (which they would not otherwise have been able to service individually). In the light of the parties' combined market share of below 15 %, it is likely that they will sufficiently pass-on any efficiency gains to consumers. It is further necessary to consider whether the restrictions imposed by the agreement are indispensable to achieve the efficiencies and whether the agreement eliminates competition. Given that the aim of the agreement is to provide a more comprehensive service (including dispatch, which was not offered before) to an additional category of customers, under a single brand with common standard terms, the price fixing can be considered as indispensable to the promotion of the common brand and, consequently, the success of the project and the resulting efficiencies. Additionally, taking into account the market fragmentation, the agreement will not eliminate competition. The fact that there are four parties to the agreement (instead of the three that would have been strictly necessary) allows for increased capacity and contributes to simultaneously fulfilling the demand of several institutional customers in compliance with the standard terms (that is to say, meeting maximum delivery

time). As such, the efficiency gains are likely to outweigh the restrictive effects arising from the reduction of competition between the parties and the agreement is likely to fulfil the conditions of Article 101(3).

362. Joint internet selling

**Example 3**

*Situation:* A number of small specialty shops throughout a Member State create an electronic web-based infrastructure for the promotion, sale and delivery of gift fruit baskets. There are a number of competing webshops with comparable and limited market shares. The participating specialty shops share the operating costs of the webshop and jointly invest in brand promotion. Through the webshop, where a wide range of different types of gift baskets are offered, customers order (and pay for) the type of gift basket they want to have delivered or will pick up in the store. The order is then allocated to the specialty shop selected by the customer or, in the absence of an express selection, to the shop located closest to the address of delivery or that is the most convenient for the customer to pick up the order. Each specialty shop individually bears the costs of composing the gift basket and delivering it to the customer or making it available for pick-up in the shop. The shop retains 90 % of the final price, which is set by the web-based infrastructure and uniformly applies to all participating specialty shops, whilst the remaining 10 % is used for the common promotion and the operating costs of the webshop. Apart from the payment of the fee, there are no further restrictions for specialty shops to join the web-based infrastructure, throughout the national territory. Moreover, specialty shops that have their own company website are also able to (and in some cases do) sell gift fruit baskets on the internet under their own name and thus can still compete between themselves outside the cooperation. Customers purchasing through the webshop are guaranteed same day delivery or pick-up in the store of the fruit baskets and they can also choose a delivery or pick-up time convenient to them.

*Analysis:* Assuming that the specialty shops are competitors, Article 101(1) applies and, given that the agreement involves price fixing, it is likely to restrict competition by object. The agreement therefore needs to be assessed under Article 101(3). The specialty shops taking part in the cooperation are all small shops and it is understood that they would not be able to compete on a national basis with other webshops. Thus, the agreement could give rise to efficiency gains, such as greater choice and higher quality service and the reduction of search costs, which benefit consumers and are likely to outweigh the restrictive effects on competition resulting from the agreement. Given that the specialty shops taking part in the cooperation are still able to sell independently and to compete with each other, both through their brick and mortar shops and via the internet, the price-fixing restriction limited to the webshop could be considered as indispensable for the promotion of the product (since when buying through the webshop consumers do not want to deal with a multitude of different prices) and the ensuing efficiency gains. In the absence of other restrictions, the agreement fulfils the conditions of Article 101(3). Moreover, as other significant competing webshops exist and the parties continue to compete with each other through their brick and mortar specialty shops or via the internet, competition will not be eliminated.

363. Sales joint venture

**Example 4**

*Situation:* Undertakings A and B, located in two different Member States, produce bicycle tyres. They have a combined market share of 14 % on the Union-wide market for bicycle tyres. They decide to set up a (non full-function) sales joint venture for marketing the tyres to bicycle producers and agree to sell all their production through the joint venture. The production and transport infrastructure remains separate within each party. The parties claim considerable efficiency gains stem from the agreement. Such gains mainly relate to increased economies of scale, being able to fulfil the demands of their existing and potential new customers and better competing with imported tyres produced in third countries. The joint venture negotiates the prices and allocates orders to the closest production plant, as a way to rationalise transport costs when delivering to the customer.

*Analysis:* Even though the combined market share of the parties is below 15 %, the agreement falls under Article 101(1). It restricts competition by object since it involves customer allocation and the setting of prices by the joint venture. The claimed efficiencies deriving from the agreement do not result from the integration of economic activities or from common investment. The joint venture would have a very limited scope and would only serve as an interface for allocating orders to the production plants. It is therefore unlikely that any efficiency gains would be passed on to consumers to such an extent that they would outweigh the restrictive effects on competition brought about by the agreement. Thus, the conditions of Article 101(3) would not be fulfilled.

364. Media Distribution Platform

**Example 5**

*Situation:* TV broadcaster A and TV broadcaster B, both active mainly in the free-to-air TV market in a Member State, create a joint venture for the launch in the same national market of an online video-on-demand platform, on which consumers can, subject to a charge, watch films or series produced by each of the two broadcasters or by third parties having licensed the relevant audiovisual rights to one of them. TV broadcaster A's group has a market share of around 25 % in the free-to-air TV market and TV broadcaster B has a market share of about 15 %. There are two other large TV broadcasters with market shares of between 10 % and 15 % and a series of minor broadcasters. The national video-on-demand market, where the JV will be mainly active, is a young market which is generally expected to grow significantly. The price for watching a video will be determined centrally by the joint venture, which will also coordinate prices for the acquisition of video-on-demand licenses in the upstream market.

*Analysis:* Considering their share of the national TV market and their large library of audiovisual rights, both A and B could launch a video-on-demand platform independently. Therefore, they are potential competitors in the nascent consumer market for video-on-demand. Since the agreement restricts the parties' incentive to enter the market independently, Article 101(1) applies. Moreover, the agreement eliminates price competition between the two broadcasters and entails coordination regarding pricing for video-on-demand. As a consequence, the agreement constitutes, in principle, a restriction of competition by object. As for the application of Article 101(3), the benefits resulting from an increased range of video-on-demand offer and from easier navigation through content do not appear to outweigh the negative effects for competition, which will be appreciable, considering the activities and market position of the undertakings involved. Moreover, the restrictions do not appear necessary to achieve the mentioned efficiencies, as these could be obtained also with an open platform and a purely technical cooperation. In conclusion, the agreement does not appear to fulfil the conditions of Article 101(3).

365. Bidding consortia

**Example 6**

*Situation:* Undertakings A and B are competing providers of specialised medical products for hospitals. They decide to enter into a bidding consortium agreement to submit joint bids in a series of tenders organised by the national health system in a Member State, for the supply of a set of plasma-derived medicinal products to public hospitals. The criterion for the awarding of contracts is the most economically advantageous tender, taking into account a balance between price and quality. In particular, additional points are awarded in case the offer includes a series of optional products. Both Undertakings A and B could each compete in the tenders individually, on the basis of the requirements included in the tender rules. In fact, both Undertakings A and B have already competed individually in one of the relevant tenders, adjudicated to another participant as A's and B's individual offers were inferior, in terms of price and quality, in particular because of a limited offer of optional products. In general, there are at least two other participants in the tender procedures in question.



*Analysis:* As Undertaking A and B could each compete individually in the tenders, their joint participation may restrict competition and Article 101(1) applies. The agreement therefore needs to be assessed under Article 101(3). According to the result of the previous tender procedure where the parties competed separately, it appears that a joint offer would be more competitive than the individual offers, in terms of pricing and range of products offered, in particular optional products, which is particularly important for the tendering authority. The bidding consortium agreement appears to be indispensable for the parties involved to submit a truly competitive offer in the tender procedures, compared with the offers presented by the other participants. It is understood that the parties would be able to demonstrate that the joint bidding creates a significant degree of synergies capable of leading to efficiencies – in the form of lower prices and increased quality – in turn leading to a more competitive offer. Competition in the tender procedure is not eliminated as at least two other relevant competitors are capable of participating independently in the tender procedure. This implies that the efficiency gains of the joint offer could benefit the contracting entity and ultimately consumers. Therefore, the agreement appears to fulfil the conditions of Article 101(3).

## 6. INFORMATION EXCHANGE

### 6.1. Introduction

366. This Chapter provides guidance on the competitive assessment of information exchange<sup>(227)</sup>. Information exchange can take various forms and can occur in different contexts.
367. For the purposes of this Chapter, information exchange includes the exchange of (i) raw, unorganised digital content that may need processing in order to make it useful (raw data); (ii) pre-processed data, that has already been prepared and validated; (iii) data that has been manipulated in order to produce meaningful information of any form, as well as (iv) any other type of information, including non-digital information. It includes physical information sharing and digital data sharing between actual or potential competitors<sup>(228)</sup>. In this Chapter, the term ‘information’ covers all of the types of data and information set out in points (i) to (iv).
368. Information may be exchanged directly between competitors (in the form of a unilateral disclosure or in a bi- or multilateral exchange), or indirectly, by or through a third party (such as a service provider, platform, online tool or algorithm), via a common agency (for example, a trade association), via a market research organisation, via suppliers or customers of the parties to the exchange, or via a website or press release. The exchange may take place between undertakings that compete in respect of the same brand (intra-brand competition) or between undertakings that compete under different brands (inter-brand competition). This Chapter applies to direct and indirect forms of information exchange and information exchanges between intra- and inter-brand competitors.
369. Information exchange may take place in the context of another type of horizontal cooperation agreement, for example, a joint purchasing, joint production or joint commercialisation agreement. Where that cooperation agreement itself does not fall within the Article 101(1) prohibition because it has neutral or positive effects on competition, an information exchange that is ancillary to that agreement does not fall within that prohibition either. This will be the case if the information exchange is objectively necessary to implement the cooperation agreement and is proportionate to the objectives thereof (see also Section 1.2.6)<sup>(229)</sup>. Where the information exchange goes beyond what is objectively necessary to implement the cooperation agreement or is not proportionate to the objectives thereof, it should be assessed using the guidance provided in this Chapter<sup>(230)</sup>. Where the information exchange itself forms the main object of the cooperation, the guidance

<sup>(227)</sup> In so far as the information exchanged constitutes in whole or in part personal data, these Guidelines are without prejudice to Union law on data protection, in particular Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1). No provision of these Guidelines should be applied or interpreted in such a way as to diminish or limit the right to the protection of personal data.

<sup>(228)</sup> The term data sharing is used to describe all possible forms and models of data access and transfer between undertakings. It includes data pools, where data holders group together to share data.

<sup>(229)</sup> Judgment of 11 September 2014, *MasterCard v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 89.

<sup>(230)</sup> See also paragraph 6.



provided in this Chapter will prevail for the purpose of assessing whether the cooperation restricts competition. If the information exchange falls within Article 101(1), it may still fulfil the conditions of Article 101(3).

370. Information exchange in the context of a vertical agreement, where information is exchanged between a supplier and a buyer, may benefit from the block exemption provided by the VBER<sup>(231)</sup>. This will be the case if the information exchanged is directly related to the implementation of the vertical agreement between those parties and necessary to improve the production or distribution of the contract goods or services.
371. Information may also be exchanged in the context of an acquisition process. In such cases, depending on the circumstances, the exchange may be subject to the rules of the Merger Regulation<sup>(232)</sup>. Any conduct restricting competition that is not directly related to and necessary for the implementation of the acquisition of control remains subject to Article 101. This assessment must be made throughout the acquisition process, as what is directly related to and necessary for the implementation of the acquisition may depend on which stage the acquisition process is at.
372. Information exchange may also occur in the context of regulatory initiatives. Where undertakings are encouraged by law or by public authorities to share information with other undertakings, or where they have discretion in deciding what information to share with other undertakings, Article 101 continues to apply. In practice, this means that undertakings that are subject to regulatory requirements must not use these requirements as a means to infringe Article 101. They should restrict the scope of the information exchange to what is required by the applicable regulation and they may have to implement precautionary measures where commercially sensitive information is exchanged.

*A Union Regulation may, for example, provide for the possibility for undertakings to share information in order to obviate or reduce the need for animal testing or to reduce research costs. Such exchanges are subject to the application of Article 101. Undertakings participating in exchanges provided for by such regulation must therefore not share commercially sensitive information that reveals their market strategy or technical information that goes beyond the requirements of the regulation. Undertakings may be able to reduce the frequency of the exchange in order to make the information less commercially sensitive. Where possible, aggregated information or ranges should be used in order to avoid the exchange of granular data or data that can be attributed to individual undertakings. Undertakings may also consider using an independent third party service provider ('a trustee'), which will collect the information from several sources on the basis of non-disclosure agreements and will then collate, verify and aggregate the data to create a composite data set to be shared with the participants, in which it is not possible to attribute identifiable data to individual undertakings.*

## 6.2. Assessment under Article 101(1)

### 6.2.1. Introduction

373. Information exchange is a common feature of many competitive markets and may generate various types of efficiency gains. It may solve problems of information asymmetries<sup>(233)</sup>, thereby making markets more efficient. In recent years, data sharing has gained in importance as a means to inform decision making, for instance

<sup>(231)</sup> See Article 2(1) and (5) of Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ L 134, 11.5.2022, p. 4). For a non-exhaustive list of examples of information that may, depending on the particular circumstances, be directly related to the implementation of a vertical agreement and necessary to improve the production or distribution of the contract goods or services, see paragraph 99 of the Communication from the Commission Guidelines on vertical restraints (OJ C 248, 30.6.2022, p. 1). Where parties to a vertical agreement that fulfils the conditions of Article 2(4), point (a) or (b), of Regulation (EU) 2022/720 exchange information that is either not directly related to the implementation of their vertical agreement or is not necessary to improve the production or distribution of the contract goods or services, or which fulfils neither of those two conditions, the information exchange must be assessed individually under Article 101 of the Treaty and with the assistance of these Guidelines.

<sup>(232)</sup> Article 4(1) and Article 7(1) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1). See also Commission Notice on restrictions directly related and necessary to concentrations (OJ C 56, 5.3.2005, p. 24). See also judgment of 22 September 2021, *Altice Europe v Commission*, T-425/18, EU:T:2021:607, paragraph 239.

<sup>(233)</sup> Economic theory on information asymmetries deals with the study of decisions in scenarios where one party has more information than the other.

through the use of big data analytics and machine learning techniques<sup>(234)</sup>. Moreover, undertakings may be able to improve their internal efficiency by benchmarking against each other's best practices. Exchanging information may also help undertakings to save costs by, for example, reducing their inventories and enabling quicker delivery of perishable products to consumers. Information exchange may enable firms to develop new or better products or services or to train algorithms on a broader, more meaningful basis. Furthermore, exchanges of information may directly benefit consumers by reducing their search costs and improving choice.

374. The main principle of competition is that each undertaking determines independently its economic conduct on the relevant market. This principle does not prevent undertakings from adapting themselves intelligently to the existing or anticipated conduct of their competitors or to customary conditions existing in the market. However, it does preclude any direct or indirect contact between undertakings of such a kind as either to influence the conduct on the market of an actual or potential competitor or to reveal to such a competitor the conduct which an undertaking has decided to follow itself or contemplates adopting on the market, where the object or effect of those contacts is to give rise to conditions of competition which do not correspond to the normal conditions of the market in question<sup>(235)</sup>.
375. As indicated in paragraph 14, an information exchange only falls within Article 101(1) if it establishes or is part of an agreement between undertakings, a concerted practice or a decision by an association of undertakings. The concept of a concerted practice implies, in addition to the participating undertakings concerting with each other, subsequent conduct on the market and a relationship of cause and effect between the two<sup>(236)</sup>. Where an exchange of commercially sensitive information between competitors takes place in preparation of an anti-competitive agreement, this suffices to prove the existence of a concerted practice within the meaning of Article 101(1). In that regard, it is not necessary to show that those competitors formally undertook to adopt a particular course of conduct, or that the competitors colluded in relation to their future conduct on the market, or that the competitors had a commercial interest in the exchange<sup>(237)</sup>. In addition, in order to establish the above-mentioned relationship of cause and effect, there is a rebuttable presumption that undertakings that take part in a concerted practice and that remain active on the market take into account the information exchanged with their competitors in determining their conduct on the market<sup>(238)</sup>.
376. This Chapter is structured as follows. Section 6.2.2 presents the two main competition concerns associated with information exchange. Section 6.2.3 provides guidance on the relevance of the nature of the information exchanged for the assessment under Article 101(1). Section 6.2.4 provides guidance on the relevance of the characteristics of the exchange. Section 6.2.5 provides guidance on the relevance of the characteristics of the market. Section 6.2.6 covers information exchanges that restricts competition by object and Section 6.2.7 covers exchanges that restrict competition by effect. Section 6.3 provides guidance on the application of Article 101(3) to information exchange and the Chapter concludes with a number of examples, a flowchart with self-assessment steps and a tabular overview of different information exchange scenarios in Section 6.4.

## 6.2.2. Main competition concerns arising from the exchange of commercially sensitive information<sup>(239)</sup>

### 6.2.2.1. Collusive outcome

377. By artificially increasing transparency between competitors in the market, the exchange of commercially sensitive information can facilitate coordination of undertakings' behaviour and result in restrictions of competition<sup>(240)</sup>. First, information exchanges are likely to facilitate collusion if they allow an

<sup>(234)</sup> Data sharing is also encouraged in the European Strategy for Data.

<sup>(235)</sup> Judgment of 21 January 2016, *Euras and Others*, C-74/14, EU:C:2016:42, paragraph 27 and judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraphs 32-33.

<sup>(236)</sup> Judgment of 21 January 2016, *Euras and Others*, C-74/14, EU:C:2016:42, paragraphs 39-40; judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 126

<sup>(237)</sup> Judgment of 26 January 2017, *Duravit and Others v Commission*, C-609/13 P, EU:C:2017:46, paragraph 135. and judgment of 12 January 2023, *HSBC Holdings and Others v Commission*, C-883/19 P, EU:C:2023:11, paragraph 123.

<sup>(238)</sup> Judgment of 10 November 2017, *ICAP and Others v Commission*, T-180/15, EU:T:2017:795, paragraph 57; judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 51; judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 127 and judgment of 8 July 1999, *Hüls v Commission*, C-199/92 P, EU:C:1999:358, paragraphs 161-163.

<sup>(239)</sup> The use of the term 'main competition concerns' means that the ensuing description of competition concerns is neither exclusive nor exhaustive.

<sup>(240)</sup> This applies in particular where the exchange underpins another anti-competitive arrangement. See: judgment of 26 January 2017, *Duravit and Others v Commission*, C-609/13 P, EU:C:2017:46, paragraph 134; judgment of 7 January 2004, *Aalborg Portland and Others v Commission*, Case C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 281.

undertaking to signal to its competitors, through any means, the conduct that it would find desirable for those competitors to follow, or the conduct that the undertaking itself would adopt in reaction to the same competitors' conduct <sup>(241)</sup>.

378. Second, the exchange of commercially sensitive information may in itself allow undertakings to reach a common understanding on the terms of coordination, which can lead to a collusive outcome on the market. The exchange can create mutually consistent expectations regarding the uncertainties present in the market. On that basis, undertakings can then reach a common understanding on their behaviour on the market, even without an explicit agreement on coordination <sup>(242)</sup>.
379. Third, the exchange of commercially sensitive information can be used as a means to increase the internal stability of an anti-competitive agreement or concerted practice. Information exchange can make the market sufficiently transparent to allow the colluding undertakings to monitor whether other undertakings are deviating from the collusive outcome and thus to know when to retaliate and against whom. Exchanges of both present and past data are capable of being used for such monitoring. This can either enable undertakings to achieve a collusive outcome on markets where they would otherwise not have been able to collude, or it can increase the stability of a collusive outcome already present on the market.

*For example, algorithms can generate efficiencies. They can reduce costs and barriers to entry. Undertakings can for instance independently use algorithms to monitor the prices of competitors and to inform their own price setting. However, algorithms can also be used to monitor (pre-existing) anti-competitive agreements between competitors. When used as part of an act of collusion, price monitoring algorithms can increase market transparency, detect price deviations in real time and make punishment mechanisms more effective. Undertakings can also use behavioural coordination algorithms to agree on essential parameters of competition. Algorithms then become a device to facilitate collusion (collusion by code). Collusion by code on essential parameters of competition is typically a cartel and therefore a restriction of competition by object, irrespective of the market conditions.*

*The treatment of pricing algorithms under Union competition law is based on two important principles.*

*First, if pricing practices are illegal when implemented offline, there is a high probability that they will also be illegal when implemented online.*

*Second, firms involved in illegal pricing practices cannot avoid liability on the ground that their prices were determined by algorithms. Just like an employee or an outside consultant working under a firm's "direction or control", an algorithm remains under the firm's control, and therefore the firm is liable even if its actions were informed by algorithms.*

380. Information exchange can also be used as a method to increase the external stability of an anti-competitive agreement or concerted practice. Exchanges that make the market sufficiently transparent can allow colluding undertakings to monitor where and when other undertakings are attempting to enter the market, thus allowing the colluding undertakings to target the new entrant.

#### 6.2.2.2. Anti-competitive foreclosure

381. Apart from facilitating collusion, an information exchange can also lead to anti-competitive foreclosure on the same market where the exchange takes place or on a related market <sup>(243)</sup>.

<sup>(241)</sup> Information exchange can thus facilitate collusion by contributing to a mutual understanding of a reward-punishment scheme that is characteristic of collusive agreements. Such information exchanges can involve either private or public exchanges. For example, if an undertaking were to privately communicate to its competitors that they should all raise prices, or reduce sales or capacity, or take business decisions jointly, anticompetitive intent would indisputably be present. The effect is likely to be similar if the undertaking instead publicly communicates this plan, unless it can be demonstrated that customers will benefit from the information, rather than solely the undertaking itself, its competitors or investors. This is because undertakings, their competitors and investors will typically benefit from higher profits under a collusive scheme, while customers lose.

<sup>(242)</sup> See, for example, judgment of 7 November 2019, *Campine and Campine Recycling v Commission*, T-240/17, EU:T:2019:778, paragraph 305.

<sup>(243)</sup> As regards foreclosure concerns arising from vertical agreements, see paragraphs 18-22 of the Guidelines on Vertical Restraints.

382. Foreclosure on the same market can occur when the exchange of commercially sensitive information places competitors that do not take part in the exchange at a significant competitive disadvantage compared to the undertakings that participate in the exchange. This type of foreclosure is possible if the information concerned is of strategic importance in order to compete on the market and the exchange covers a significant share of the relevant market. This may be the case, for instance, in data-sharing initiatives, where the data shared is of strategic importance, covers a large share of the market and competitors' access to the shared data is prevented <sup>(244)</sup>.
383. Information exchange may also lead to anti-competitive foreclosure of third parties in a related market. For instance, vertically integrated companies that exchange information in an upstream market may gain market power and collude to raise the price of a key input for a market downstream. They could thereby raise the costs of their competitors downstream, which could result in anti-competitive foreclosure in the downstream market. In addition, undertakings that apply non-transparent and discriminatory terms of access to shared information may limit third parties' ability to detect trends for potential new products on related markets.

*A number of undertakings supplying financial services to consumers may, for instance, establish an association with a shared database containing customer information. All members of the association contribute information to the database and have access to the data, which allows them to better assess the risk of providing financial services to new customers. Exchanging the customer information facilitates the members' risk assessments regarding those customers. This can in turn facilitate market entry and thus benefit consumers. Such a database does not have the object of restricting competition within the meaning of Article 101(1).*

*Shared databases as described above may, however, have the effect of restricting competition depending on the economic conditions on the relevant market(s) and on the specific characteristics of the database concerned. These characteristics include the purpose of the database and the conditions of access to and participation in it, as well as the type of information exchanged (for example, whether it is public or confidential, aggregated or detailed, historical, current or future information, the frequency with which the database is updated and the relevance of the information for setting prices, volumes or conditions of service). A database that covers a significant part of the relevant market and to which access is denied or delayed for other competitors may create an information asymmetry, placing those other competitors at a disadvantage compared to the undertakings that participate in the database. Fair, objective, transparent and non-discriminatory access criteria may alleviate competition concerns <sup>(245)</sup>.*

### 6.2.3. The nature of the information exchanged

#### 6.2.3.1. Commercially sensitive information

384. Article 101(1) applies where an exchange of commercially sensitive information is likely to influence the commercial strategy of competitors, thereby creating or being capable of creating conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market <sup>(246)</sup>. This is the case when the exchange of information reduces uncertainty regarding the operation of market in question <sup>(247)</sup>. Article 101(1) applies regardless of whether the undertakings involved in the exchange obtain some benefit from their cooperation. It concerns information that in markets with effective competition is important for an undertaking to protect in order to maintain or improve its competitive position on the market(s).

<sup>(244)</sup> The judgment of 23 November 2006, *Asnef-Equifax*, C-238/05, EU:C:2006:734, paragraphs 57-58 highlights the importance of analysing the underlying market structure in order to establish whether the risk of foreclosure is likely. See also: Commission Decision of 30 June 2022 in Case AT.40511, *Insurance Ireland* where the participants in the exchange accounted for 98 % of the relevant market.

<sup>(245)</sup> This does not require that access is free. A fee may be charged, as long as it is fair, transparent and non-discriminatory. In addition, third parties may also be required to contribute data themselves to the database. See also: judgment of 23 November 2006, *Asnef-Equifax*, C-238/05, EU:C:2006:734, paragraph 60.

<sup>(246)</sup> Access to an undertaking's own data, for instance user data generated through the use of a platform, does not qualify as an exchange of commercially sensitive information.

<sup>(247)</sup> Judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 121 and judgment of 12 January 2023, *HSBC Holdings and Others v Commission*, Case C-883/19 P, EU:C :2023:11, paragraph 115

385. Information on pricing is generally considered commercially sensitive and Article 101(1) may apply even if the exchange does not have a direct effect on the prices paid by end users<sup>(248)</sup>. Other categories of potentially commercially sensitive information include information on costs, capacity, production, quantities, market shares, customers, plans to enter or exit markets, or concerning other important elements of a firm's strategy that undertakings active in a genuinely competitive market would not have an incentive to reveal to each other. The fact that the information exchanged may be incorrect or misleading does not in itself eliminate the risk that it may influence the conduct of competitors on the market<sup>(249)</sup>.
386. Information which is generally not commercially sensitive includes, for instance, information relating to: the general functioning or state of an industry; public policy or regulatory matters (which could be used, for example in industry-wide public relations or lobbying initiatives); non-confidential technical issues relevant to the industry in general, such as standards or health and safety matters; general, non-proprietary technology and related issues, such as the characteristics and suitability of particular equipment (but not a particular company's plans regarding the adoption of specific equipment or technology); general promotional opportunities relevant to the industry in general (but not a particular company's promotional plans). It also includes non-strategic educational, technical or scientific data that results in consumer benefits and non-strategic information needed to build new business partnerships between undertakings<sup>(250)</sup>.
387. Undertakings may have legitimate reasons to inform their shareholders, potential investors or the general public about the state and performance of their business. This desire to inform third parties or the public can however not be relied on to disclose to competitors commercially sensitive information which, in a market with effective competition, undertakings would not disclose to their competitors.
388. In general, and under normal competitive conditions, undertakings do not have an incentive to publish commercially sensitive information. If they do so, this may raise questions as to whether the market in question is characterised by effective competition. Information that has been put in the public domain for legitimate reasons – and therefore has become readily accessible (in terms of access costs) to all competitors and customers<sup>(251)</sup> – is usually not commercially sensitive<sup>(252)</sup>.
389. Even if information is readily available (for example, information published by regulators), an additional information exchange between competitors may further reduce strategic uncertainty in the market. This may be the case, for example, where the information is exchanged in a less aggregated or more granular form, or the information is exchanged more frequently than it is made publicly available, or when comments are attached to the information that may signal to competitors the desired joint action to undertake. In that case, the information exchange may restrict competition within the meaning of Article 101(1).

#### 6.2.3.2. Aggregated versus individualised information

390. Whether information is commercially sensitive depends on its usefulness to competitors. In general, information that contains a lot of detail and enables the identification of the undertaking(s) that provided it will be more commercially sensitive. Exchanges of individualised information may facilitate a common understanding on the market and punishment strategies, by allowing coordinating undertakings to more easily single out a deviator or new entrant.

<sup>(248)</sup> Judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 123 and judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 36.

<sup>(249)</sup> Judgment of 15 December 2016, *Philips and Philips France v Commission*, T-762/14, EU:T:2016:738, paragraph 91.

<sup>(250)</sup> This list is not exhaustive.

<sup>(251)</sup> Judgment of 8 July 2008, *BPB v Commission*, T-53/03, EU:T:2008:254, paragraph 236 and judgment of 2 February 2022, *Scania v Commission*, T-799/17, EU:T:2022:48, paragraph 347. Information is in the public domain when it is available from publicly accessible sources. Information is not public if the costs involved in collecting the information deter other undertakings and customers from doing so. The fact that it may be possible to gather certain information in the market, for example by collecting it from customers, does not necessarily mean that such information constitutes market data that is readily accessible to competitors. See judgment of 12 July 2001, *Tate & Lyle and Others v Commission*, T-202/98, T-204/98 and T-207/98, EU:T:2001:185, paragraph 60.

<sup>(252)</sup> See judgment of 5 October 2020, *Casino, Guichard-Perrachon and AMC v Commission*, T-249/17, EU:T:2020:458, paragraphs 263-267 and judgment of 30 September 2003, *Atlantic Container Line and Others v Commission*, T-191/98, T-212/98 to T-214/98, EU:T:2003:245, paragraph 1 154. See also paragraph 398, which explains that public disclosure may in some cases form part of a communication channel between competitors to signal future intentions to behave on the market in a specific way or to provide a focal point for coordination between competitors and may thus fall within Article 101(1).



391. The exchange of aggregated information, where the attribution of information to particular undertakings is sufficiently difficult or uncertain, or where the data are aggregated across a range of different products, especially if the products have different characteristics or belong to different markets, is less likely to lead to a restriction of competition. The collection and publication of aggregated market information (such as sales data, data on capacities, and data on costs of inputs and components) by a trade association or market intelligence firm may benefit competitors and customers alike, by saving costs and by allowing them to get a clearer overall picture of the economic situation in a sector. Such information collection and publication may allow individual competitors to make better-informed choices in order to adapt efficiently their individual competitive strategy to market conditions. Unless it takes place between a relatively small number of undertakings with a sufficiently large share of the relevant market <sup>(253)</sup>, the exchange of aggregated information is unlikely to give rise to a restriction of competition. Nevertheless, the possibility cannot be excluded that even the exchange of aggregated information and data may facilitate a collusive outcome in markets with specific characteristics.

*For example, where undertakings that form part of a very tight and stable oligopoly exchange aggregated price information, the detection of a market price below a certain level may enable them to deduce that one of them has deviated from the collusive outcome and take market-wide retaliatory steps. In other words, in order to keep collusion stable, undertakings in a very tight and stable oligopoly may not always need to know who has deviated; it may be enough to learn that 'someone' has deviated.*

392. Depending on the circumstances, the exchange of raw data may be less commercially sensitive than an exchange of data that has already been processed into meaningful information. In particular, the exchange of raw data may be less commercially sensitive where each party uses its own (proprietary) method of processing the raw data.

#### 6.2.3.3. The age of the information

393. In many industries, information becomes historical relatively quickly and thus loses its commercially sensitive nature. The exchange of historical information is unlikely to lead to a collusive outcome, as it is unlikely to be indicative of competitors' intended conduct or to facilitate a common understanding on the market <sup>(254)</sup>. In principle, the older the information, the less useful it tends to be for the timely detection of deviations and thus as a means to create a credible threat of prompt retaliation <sup>(255)</sup>. However, this requires a case by case assessment of the relevance of the information <sup>(256)</sup>.
394. Whether information is historical depends on the specific characteristics of the relevant market; the frequency of sale and purchase negotiations in the sector, and the age of the information typically relied on in the sector for the purpose of business decisions. For example, information can be considered historical if it is several times older than the average length of the pricing cycles or the average lengths of the contracts in the industry, where the latter are indicative of the frequency of price (re)negotiations. Conversely, the exchange of current information may have restrictive effects on competition, especially if the exchange serves to artificially increase transparency for competitors rather than for consumers.

*For example, if undertakings typically rely on data about consumer preferences (purchases or other choices) over the last year to optimise strategic business decisions for their brands, information covering this period will generally be more commercially sensitive than older data. In that case, the information relating to the last year is not considered 'historical'.*

<sup>(253)</sup> For instance, in the case of a tight oligopoly.

<sup>(254)</sup> Trade associations may collect historical data in order to provide input to public policy reviews or to analyse the results of such reviews.

<sup>(255)</sup> For example, in past cases the Commission has considered the exchange of *undertaking-specific* data which was more than one year old as historical and as not restrictive of competition within the meaning of Article 101(1), whereas information less than one year old has been considered as recent; Commission Decision in Case IV/31.370, *UK Agricultural Tractor Registration Exchange*, recital 50; Commission Decision in Case IV/36.069, *Wirtschaftsvereinigung Stahl* (OJ L 1, 3.1.1998, p. 10), recital 17.

<sup>(256)</sup> In its judgment of 12 July 2019, *Sony and Sony Electronics v Commission*, T-762/15, EU:T:2019:515, paragraph 127, the General Court considered that in the circumstances of the case, knowledge of past auction results was highly relevant information for competitors, both for monitoring purposes and with a view to future contracts.



*In the context of a stable, non-complex market with high barriers to entry, exchanges of recent past information between close competitors may also result in collusion. For example, exchanging detailed information about recent past sales may reduce uncertainty about the future market behaviour of competitors and allow the parties to adapt their own future market behaviour accordingly.*

#### 6.2.4. *The characteristics of the exchange of commercially sensitive information*

395. Article 101(1) applies to exchanges where competitors bilaterally or multilaterally exchange commercially sensitive information. Such exchanges include data sharing arrangements, whereby two or more competitors contribute data to a common database and obtain access to some or all of the data contributed by other competitors. Where two or more competitors take part in an exchange, it may not be necessary to precisely characterise the exchange as an agreement between undertakings, a decision by an association of undertakings or a concerted practice<sup>(257)</sup>. In addition, under certain circumstances a unilateral disclosure or indirect information exchange may also constitute a concerted practice falling within Article 101(1).

##### 6.2.4.1. *Unilateral disclosure*

396. A situation in which one undertaking discloses commercially sensitive information to a competitor, which requested it or at the very least accepts it, can constitute a concerted practice where this competitor acts upon such a disclosure and provided that there is a link of cause and effect between the disclosure and the competitor's subsequent conduct on the market<sup>(258)</sup>. Where one undertaking alone discloses commercially sensitive information to its competitors, this reduces strategic uncertainty as to the future operation of the market for those competitors and increases the likelihood of limiting competition and of collusive behaviour unless competitors publicly distance themselves from the disclosure<sup>(259)</sup>. Unilateral disclosure can occur, for example, via (chat) messages, emails, phone calls, input in a shared algorithmic tool, meetings, etc. It is irrelevant whether only one undertaking unilaterally discloses commercially sensitive information or whether all the participating undertakings disclose such information.

397. Where an undertaking receives commercially sensitive information from a competitor during a meeting or other contact, that undertaking will be presumed to take account of such information and to adapt its market conduct accordingly, unless it publicly distances itself (for example, by responding with a clear statement that it does not wish to receive such information<sup>(260)</sup>) or reports it to the administrative authorities.

*For example, participation in a meeting<sup>(261)</sup> where one undertaking discloses its pricing plans to its competitors – without those competitors publicly distancing themselves – is likely to be caught by Article 101(1), even in the absence of an explicit agreement to raise prices<sup>(262)</sup>. Similarly, introducing a pricing rule in a shared algorithmic tool (for instance, a rule to match the lowest price on a particular online platform or shop + 5 %, or to match the price of a particular competitor – 5 %), is also likely to be caught by Article 101(1), even in the absence of an explicit agreement to align future pricing.*

*On the other hand, if one undertaking sends an email message to the personal email addresses of employees at other undertakings, this does not in itself indicate that the recipients ought to have been aware of the content of that message<sup>(263)</sup>. It may, in the light of other objective and consistent indicia, justify the presumption that the recipients*

<sup>(257)</sup> See judgment of 23 November 2006, *Asnef-Equifax*, C-238/05, EU:C:2006:734, paragraphs 31-32.

<sup>(258)</sup> See judgment of 15 March 2000, *Cimenteries CBR v Commission*, T-25/95 and others, EU:T:2000:77, paragraph 1 849 and judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 51.

<sup>(259)</sup> See Opinion of Advocate General Kokott of 19 February 2009, *T-Mobile Netherlands and Others*, Case C-8/08, EU:C:2009:110, paragraph 54. On distancing: see Judgment of 20 January 2016, *Toshiba Corporation v Commission*, C-373/14 P, paragraphs 62-63. See further, paragraph 410.

<sup>(260)</sup> See judgment of 21 January 2016, *Eturas and Others*, C-74/14, EU:C:2016:42, paragraph 48, judgment of 8 July 1999, *Hüls v Commission*, C-199/92 P, EU:C:1999:358, paragraph 162; judgment of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 121.

<sup>(261)</sup> See judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 59.

<sup>(262)</sup> See judgment of 12 July 2001, *Tate & Lyle and Others v Commission*, T-202/98, T-204/98 and T-207/98, EU:T:2001:185, paragraph 54.

<sup>(263)</sup> Judgment of 21 January 2016, *Eturas and Others*, C-74/14, EU:C:2016:42, paragraphs 39-40.

were aware of the content and have taken the information into account, but those recipients must still have the opportunity to rebut that presumption <sup>(264)</sup>.

398. The fact that an undertaking discloses commercially sensitive information through a public announcement (for example, through a post on a publicly accessible website, a statement at a public event or in a newspaper) does not in itself exclude the possibility that the announcement may constitute a concerted practice within the meaning of Article 101(1). Indeed, public disclosure may in some cases form part of a communication channel between competitors to signal future intentions to behave on the market in a specific way, or to provide a focal point for coordination between competitors and thereby fall within Article 101(1). Moreover, the fact that the parties to the exchange have previously published the same type of information (for example, through a newspaper or on their public websites) does not imply that a subsequent non-public exchange would not restrict competition within the meaning of Article 101(1) <sup>(265)</sup>.

*A typical example of unilateral disclosures in the public domain is the advertising by operators of petrol stations of their current retail prices (or the advertisement of grocery prices by retailers, for instance). In the absence of an anti-competitive agreement or concerted practice, such advertising benefits consumers, as it helps them to compare petrol stations before filling up their cars (or to compare grocery retailers before deciding where to shop), even if the advertising also allows rival petrol stations to become aware of the prices charged by their nearby competitors.*

*Other forms of unilateral disclosure in the public domain may involve announcements that may be indicative of possible underlying anti-competitive concerted practices.*

*For instance, it may be public knowledge in a given sector that the cost of supplies is rising. At public meetings, such as meetings of the relevant trade association, this phenomenon may be mentioned by participants. While competitors may refer to the rising cost of supplies – as they are public knowledge – they must not publicly evaluate their individual response to these rising costs, as doing so reduces uncertainty regarding their conduct on the market <sup>(266)</sup>. The same reasoning applies when company representatives comment on market events through unilateral public announcements and disclose their strategies on how to react to changing market conditions. Undertakings must determine independently the policy they intend to adopt on the internal market. This means that each competitor has to decide independently what its response will be to the rising cost of supplies.*

399. There is also a distinction between, on the one hand, competitors obtaining information independently or discussing future pricing with customers or third parties and, on the other hand, competitors discussing price-setting factors with other competitors before setting their own prices <sup>(267)</sup>.
400. As explained in paragraph 425, putting certain information into the public domain can help customers make informed purchase choices. However, these efficiencies are less likely if the information concerns future intentions. Public information may be less likely to generate efficiencies if it relates to parameters that may not materialise and it does not commit the undertaking vis-à-vis its customers <sup>(268)</sup>.

*For example, a unilateral public announcement referring to intentions relating to future pricing (as opposed to communicating an actual decision to change prices as of a certain date in the near future) will not commit the undertaking making the announcement vis-à-vis its customers, but may give signals concerning an undertaking's intended strategy on the market to its competitors. This will be the case in particular if the information is sufficiently specific. Such announcements therefore generally do not create benefits for consumers and they may facilitate collusion.*

<sup>(264)</sup> In its judgment of 21 January 2016, *Eturas and Others*, C-74/14, EU:C:2016:42, paragraph 41, the Court of Justice mentioned examples of means to rebut this presumption: by proving that the addressee did not receive the message, or that they did not look at the section in question, or that they did not look at the message until some time had passed since its dispatch.

<sup>(265)</sup> See also, paragraph 389.

<sup>(266)</sup> See, for instance, judgment of 14 March 2013, *Dole Food Company and Dole Germany v Commission*, T-588/08, EU:T:2013:130, paragraphs 291-295.

<sup>(267)</sup> Judgment of 24 September 2019, *HSBC Holdings and Others v Commission*, T-105/17, EU:T:2019:675, paragraph 144.

<sup>(268)</sup> See, for instance, Commission Decision of 7 July 2016, Case AT.39850 *Container Shipping*, recitals 40-43.

*Unilateral public announcements may be indicative of an underlying anti-competitive agreement or concerted practice. For example, on a market where there are only a few competitors and with high barriers to entry, undertakings that continuously publish information that provides no apparent benefit for consumers (for instance, information on R&D costs, costs of adaptations to environmental requirements, etc.) may be engaged in restricting competition within the meaning of Article 101(1). The unilateral public announcements may be used to implement or monitor their collusive arrangements. Whether such a restriction is indeed found will depend on all the facts of the particular case.*

#### 6.2.4.2. Indirect information exchange

401. Exchanges of commercially sensitive information between competitors can take place via a third party, such as a third party service provider (including a platform operator or optimisation tool provider), a common agency (for instance, a trade organisation), a supplier or customer <sup>(269)</sup>, or a shared algorithm (collectively referred to as the ‘third party’). As with direct information exchanges, an indirect exchange may also reduce uncertainty about the actions of competitors and lead to a collusive outcome on the market. The collusion in such cases is either facilitated or enforced via the third party. Depending on the facts of the case, the participating competitors and the third party may all be held liable for such collusion. The prohibition laid down in Article 101(1) is not directed solely at parties to agreements or concerted practices that are active on the markets affected by those agreements or practices <sup>(270)</sup>.
402. Where commercially sensitive information is exchanged indirectly, a case-by-case analysis of the role of each participant is required to establish whether the exchange constitutes an anti-competitive agreement or concerted practice and who bears the liability for the collusion. This assessment will notably have to take into account the level of awareness of the providers or recipients of the information regarding the exchanges between other providers or recipients of the information and the third party.

*Several scenarios can be distinguished:*

*Certain indirect information exchanges are referred to as hub-and-spoke arrangements. For example, a common manufacturer or supplier may act as a hub in order to relay information to multiple distributors or retailers, or a distributor or retailer may act as a hub to relay information to multiple manufacturers or suppliers. An online platform can also act as a hub where it facilitates, coordinates or enforces information exchanges between business users of the platform, for example, to secure certain margins or price levels. Platforms may also be used to impose technical measures which prevent platform users from offering lower prices or other advantages to final customers.*

*Information may also be exchanged indirectly via a shared optimisation algorithm which takes commercial decisions based on commercially sensitive data feeds from competitors. Whilst using publicly available data to feed algorithmic software is legal, the aggregation of commercially sensitive information into a pricing tool offered by a single IT company to which various competitors have access could amount to horizontal collusion.*

403. Competitors that exchange commercially sensitive information indirectly (via a third party) may be engaging in an infringement of Article 101. This will be the case when the undertaking that shares the commercially sensitive information expressly or tacitly agrees with the third party that the third party may share the said information with the undertaking’s competitors, or where that undertaking intended, via the third party, to disclose commercially sensitive information to its competitors. This may also be the case when the undertaking that shares the commercially sensitive information could reasonably have foreseen that the third party would share the information with the undertaking’s competitors and it was prepared to accept the risk which that entailed <sup>(271)</sup>. The competitor receiving the commercially sensitive information would equally be participating in

<sup>(269)</sup> Competition law does not prevent customers from independently disclosing one supplier’s pricing offer to another supplier with a view to obtaining better commercial conditions, such as a lower price. Such instances have to be differentiated from situations where a customer has knowledge of an anti-competitive arrangement between suppliers and exchanges information in order to implement such arrangement.

<sup>(270)</sup> Judgment of 10 November 2017, *ICAP and Others v Commission*, T-180/15, EU:T:2017:795, paragraph 103; judgment of 22 October 2015, *AC-Treuhand v Commission*, C-194/14 P, EU:C:2015:717, paragraphs 27, 34-35. See also, judgment of 30 March 2022, *Air Canada v Commission*, T-326/17, EU:T:2022:177, paragraphs 370-371 in which the General Court established that the liability of such third parties does not depend on whether they played the role of an intermediary and remunerated moderator in the arrangement. See also paragraph 454.

<sup>(271)</sup> Judgment of 21 July 2016, *VM Remonts and Others*, C-542/14, EU:C:2016:578, paragraph 31.

the infringement, and be liable for it, if it was aware of the anti-competitive objectives pursued by the undertaking sharing the information and by the third party, and intended to contribute to those objectives by its own conduct. On the other hand, the undertaking that shares the information will not be engaging in an infringement where the third party obtains that undertaking's commercially sensitive information and, without informing that undertaking, passes the information on to that undertaking's competitors, or where that undertaking could not have reasonably foreseen that the information would be passed on<sup>(272)</sup>.

404. Similarly, a third party that transmits commercially sensitive information of undertakings may also be liable for an infringement if it intends to contribute by its own conduct to the common objectives pursued by the participants to the exchange and was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same anti-competitive objectives or could reasonably have foreseen such conduct and was prepared to take the risk<sup>(273)</sup>.

#### 6.2.4.3. Frequency of the exchange of commercially sensitive information

405. Frequent exchanges of information that facilitate a better common understanding of the market and monitoring of deviations increase the risks of a collusive outcome. In unstable markets, more frequent exchanges of information may be necessary to facilitate a collusive outcome than in stable markets. In markets with long-term contracts (which are indicative of infrequent sale and purchase negotiations), a less frequent exchange of information is generally sufficient to achieve a collusive outcome. By contrast, infrequent exchanges may not be sufficient to achieve a collusive outcome in markets with short-term contracts that are indicative of frequent re-negotiations<sup>(274)</sup>. In general, the frequency at which information needs to be exchanged to facilitate a collusive outcome also depends on the nature, age and degree of aggregation of such information<sup>(275)</sup>. As a result of the growing importance of real-time data for business decision-making, the highest competitive advantage is obtained by automated real-time information exchange. What constitutes a frequent or infrequent exchange of information depends on the circumstances and the market in question<sup>(276)</sup>.

#### 6.2.4.4. Measures to reduce the risk of competition law infringements

406. Undertakings that want (or need) to exchange commercially sensitive information are encouraged to implement measures to restrict access to the information or control how it is used<sup>(277)</sup>. Undertakings should also consider to limit the exchange to what is necessary for the intended purpose.
407. Undertakings can, for instance, use 'clean teams' or trustees to receive and process information. A clean team generally refers to a restricted group of individuals within an undertaking who are not involved in the undertaking's commercial operations and are bound by strict confidentiality protocols with regard to the commercially sensitive information<sup>(278)</sup>. A trustee is an independent third party that provides services to the undertaking. A clean team or trustee can also be used for the purpose of implementing other forms of horizontal cooperation agreements, to ensure that the information provided for the purposes of such cooperation is exchanged exclusively on a need-to-know basis and in an aggregated manner.
408. Participants in a reciprocal data-sharing arrangement such as a data pool should in principle only have access to their own information and the final, aggregated, information of other participants. Technical and practical measures can ensure that a participant is unable to obtain commercially sensitive information from other participants individually. The management of a data pool can be assigned to a trustee that is subject to strict

<sup>(272)</sup> Judgment of 21 July 2016, *VM Remonts and Others*, C-542/14, EU:C:2016:578, paragraph 30. See also paragraph 406 which explains that a recipient of commercially sensitive information is presumed to have taken account of the information unless it distances itself by making clear that it does not wish to receive such information or by reporting the exchange to the administrative authorities.

<sup>(273)</sup> Judgment of 10 November 2017, *ICAP and Others v Commission*, T-180/15, EU:T:2017:795, paragraph 100.

<sup>(274)</sup> For example, infrequent contracts may reduce the possibility of retaliation.

<sup>(275)</sup> Depending on the structure of the market and the overall context of the exchange, the possibility cannot be excluded that an isolated exchange may constitute a sufficient basis for the undertakings to concert their market conduct; see judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 59.

<sup>(276)</sup> For example, in some markets such as online market-places or at petrol retailing, pricing decisions are taken several times per day. In other markets, firms revise their prices only a few times per year. A quarterly exchange of information may not be considered as frequent in the former, while it may be regarded as such in the latter. In certain financial markets, trading takes place with such high frequency that information published with daily frequency may be regarded as non-frequent.

<sup>(277)</sup> Such measures may already be required in order to comply with the General Data Protection Regulation, where the exchange includes personal data.

<sup>(278)</sup> See, Commission Decision of 24 April 2018 in Case M.7993, *Alice/PT Portugal*, at paragraph 53.

confidentiality rules as regards the information received from participants in the data pool. Undertakings that manage a data pool should also ensure that only information that is necessary for the implementation of the legitimate purpose of the data pool is collected.

409. Undertakings can take further measures to reduce the risk that commercially sensitive information is exchanged during interactions with (potential) competitors. Prior to planned contacts, undertakings should carefully review the agenda and purpose of the meeting or call to ensure that potential risks concerning the exchange of commercially sensitive information are identified in advance and that appropriate measures are taken to avoid them. Undertakings may also decide to attend the meeting(s) or call(s) accompanied by a lawyer specialised in competition law. During contacts, participants should stick to the agenda and, if commercially sensitive information is disclosed or exchanged, they should raise objections, ensure that their objections are recorded in the minutes of the meeting or call and publicly distance themselves if the exchange of information occurs despite their objections (see paragraph 410). Ensuring that accurate minutes are produced and circulated soon after each contact may allow undertakings to quickly identify whether commercially sensitive information was inadvertently exchanged and immediately raise objections to the minutes.
410. During contacts, an undertaking can publicly distance itself from any anti-competitive exchange of commercially sensitive information by making its opposition clear to the other participants in the exchange. To establish whether an undertaking has actually distanced itself, what is important is the understanding held by the other participants in the exchange regarding the intentions of the distancing undertaking. For example, an undertaking that wishes to distance itself can state immediately and expressly that they cannot participate in discussions on the subject in question and ask that the subject be changed at once. If the objection and request is ignored, the undertaking should immediately leave the meeting or call in a manner that makes the reason for its departure apparent to all present. Undertakings should ensure that their objections and departure are recorded in any shared minutes of the meeting or, if there are no such minutes, record their departure in their own notes of the contact.
411. Undertakings can also take measures to limit the risks of disclosing commercially sensitive information in public (see paragraph 398). Before disclosing commercially sensitive information, undertakings must verify whether the information really serves the legitimate purpose intended and whether the level of detail of the disclosure is required for that purpose. The public disclosure of commercially sensitive information regarding planned conduct on prices and quantities reduces strategic uncertainty in the market and may lead to a collusive outcome. Aggregated and historical information is generally less strategic. Any strategic information announced should also be limited to the undertaking itself and not extend to the sector or industry. In particular, undertakings should avoid public announcements on strategic steps that are dependent on the actions of their (potential) competitors. Depending on the context, undertakings that are faced with public announcements by competitors revealing commercially sensitive information may reduce the risk of competition law infringements by publicly distancing themselves or by reporting the announcements to the public authorities.

*For example, three undertakings A B and C are competing on a certain retail market, and are faced with rising costs. Undertaking A should not make public statements suggesting that as long as B and C also pass on these rising costs to consumers the sector will continue to be profitable. Nor should it announce that it is desirable that B and C should pass on these costs. Similarly, A should not publicly announce that it will not be able to avoid passing on these rising costs to consumers as B and C intend to do the same.*

#### 6.2.5. Market characteristics

412. The likelihood that an information exchange will result in collusion or foreclosure depends on the market characteristics. The information exchange itself may also affect those market characteristics. Relevant market characteristics in this respect include, among others, the level of transparency in a market, the number of undertakings active in the market (market concentration), the existence of barriers to entry, whether the product or service concerned by the exchange is homogenous, whether the undertakings involved are similar (the complexity of the market), as well as the stability of the conditions of supply and demand on the market <sup>(279)</sup>.

<sup>(279)</sup> This list of characteristics is not exhaustive; other market characteristics may also be relevant for the assessment of particular information exchanges.



The following list of relevant market characteristics is not exhaustive, as other market characteristics may also be relevant for the assessment of particular information exchanges.

*Transparency:* The more transparent a market is, the less the uncertainty on which there can be competition, thus making further exchanges all the more problematic <sup>(280)</sup>.

*Market concentration:* It is easier to reach a common understanding on the terms of coordination and to monitor deviations in markets in which only a few competitors are present. Where a market is highly concentrated, the exchange of certain information may, depending in particular on the type of information exchanged, enable undertakings to be aware of the market position and commercial strategy of their individual competitors, thus distorting rivalry on the market and increasing the probability of collusion, or even facilitating it. On the other hand, if a market is fragmented, information exchange between competitors may be neutral, or even positive, for the competitive nature of the market <sup>(281)</sup>.

*Barriers to entry:* The existence of barriers to entry makes it more difficult for outsiders to undermine the collusive outcome by entering the market and undercutting the colluding incumbents on the market. Barriers to entry thus make it more likely that a collusive outcome on the market is feasible and sustainable.

*Complexity of the market:* When undertakings have similar costs, customers, market shares, product range, capacities, etc., they are more likely to reach a common understanding on the terms of coordination, because their incentives are more aligned. Similarly, it may be easier to achieve a collusive outcome on a price for a single homogeneous product than on numerous prices in a market with many differentiated products, even though technical developments, such as the use of price tracking tools, may also facilitate collusion in respect of differentiated products.

*Market stability:* Collusive outcomes are also more likely where the conditions of supply and demand on the market are relatively stable. Volatile demand, substantial internal growth by some undertakings in the market, or frequent entry by new undertakings, may indicate that the market is not sufficiently stable for coordination to be likely <sup>(282)</sup>, or may require more frequent exchanges to have an effect on competition.

#### 6.2.6. Restriction of competition by object

413. As set out in Section 1.2.4, some agreements reveal in themselves and having regard to the content of their provisions, their objectives and the economic and legal context of which they form part, a sufficient degree of harm to competition such that it is not necessary to assess their effects. In particular, an information exchange will be considered a restriction of competition by object where the information is commercially sensitive and the exchange is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market <sup>(283)</sup>. In assessing whether an exchange constitutes a restriction of competition by object, the Commission will pay particular attention to its content, its objectives and the legal and economic context in which the information exchange takes place <sup>(284)</sup>. When assessing that context, it is necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question <sup>(285)</sup>.
414. Exchanging information relating to undertakings' future conduct regarding prices or quantities <sup>(286)</sup> is particularly likely to lead to a collusive outcome. Depending on the objectives that the exchange seeks to attain, and the legal and economic context thereof, exchanges of other types of information may also constitute restrictions of competition by object. It is therefore necessary to assess exchanges of information on a case-by-case basis.

<sup>(280)</sup> See also, paragraph 389.

<sup>(281)</sup> See judgment of 23 November 2006, *Asnef-Equifax*, C-238/05, EU:C:2006:734, paragraph 58 and the case-law cited therein.

<sup>(282)</sup> See Commission Decision in Cases IV/31.370 and 31.446, *UK Agricultural Tractor Registration Exchange* (OJ L 68, 13.3.1992, p. 19), recital 51 and judgment of 27 October 1994, *Deere v Commission*, T-35/92, EU:T:1994:259, paragraph 78.

<sup>(283)</sup> Judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 122; judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 41; judgment of 12 January 2023, *HSBC Holdings and Others v Commission*, C-883/19, EU:C:2023:11, paragraphs 115-116; judgment of 8 July 2020, *Infineon Technologies v Commission*, T-758/14 RENV, EU:T:2020:307, paragraph 100.

<sup>(284)</sup> See, for example, judgment of 6 October 2009, *GlaxoSmithKline*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 58; judgment of 20 November 2008, *BIDS*, C-209/07, EU:C:2008:643, paragraph 15 and further.

<sup>(285)</sup> Judgment of 26 September 2018, *Philips and Philips France v Commission*, C-98/17 P, EU:C:2018:774, paragraph 35.

<sup>(286)</sup> Information regarding intended future quantities could for instance include intended future sales, market shares, and sales to particular territories or sales to particular customer groups.



Exchanges that in individual cases have been considered as by object restrictions - in light of the content of the information shared, the objectives pursued and the legal and economic context - include the following:

- (a) The exchange with competitors of an undertaking's current pricing and future pricing intentions <sup>(287)</sup>;
- (b) The exchange with competitors of an undertaking's current and future production capacities <sup>(288)</sup>;
- (c) The exchange with competitors of an undertaking's current <sup>(289)</sup> or future commercial strategy <sup>(290)</sup>;
- (d) The exchange with competitors of an undertaking's forecasts relating to current and future demand <sup>(291)</sup>;
- (e) The exchange with competitors of an undertaking's forecasts of future sales data <sup>(292)</sup>;
- (f) The exchange with competitors of future product characteristics which are relevant for consumers <sup>(293)</sup>;

In all these instances, the information exchanged was considered capable of removing uncertainty between participants regarding the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market.

415. The examples given in paragraph 414 show that no direct connection is required between the information exchanged and consumer prices for the exchange to constitute a by object restriction <sup>(294)</sup>. Furthermore, in order to establish whether there is a restriction of competition by object, the decisive criterion is the nature of the contacts, not their frequency <sup>(295)</sup>.

For example: a group of competitors is concerned that their products may be subject to ever stricter environmental regulations. In the context of common lobbying efforts, they regularly meet and exchange views. In order to reach a common position concerning future legislative proposals, they exchange certain information relating to the environmental characteristics of their existing products. As long as this information is historical and does not allow the undertakings to become aware of the intended market strategies of their competitors, the exchange does not constitute a restriction within the meaning of Article 101(1).

However, if the undertakings start exchanging information regarding their development of current or future products, or reveal how they would react to each other's conduct, there is a risk that such exchanges may influence their behaviour in the market. For example, such an exchange may lead the competitors to reach a common understanding not to market products that are more environmentally friendly than required by law. Such coordination affects the parties' behaviour in the market and restricts competition on product characteristics and consumer choice. It will therefore be considered a restriction of competition by object.

416. Depending on the legal and economic context and on the objectives an undertaking seeks to attain, a public disclosure that signals the undertaking's future intentions on key competition parameters, for instance, prices or quantities, may also be considered a restriction by object. Similarly, a public disclosure that does not clearly

<sup>(287)</sup> See, for instance judgment of 8 July 2020, *Infineon Technologies v Commission*, T-758/14 RENV, EU:T:2020:307, paragraph 96; judgment of 15 December 2016, *Philips and Philips France v Commission*, T-762/14, EU:T:2016:738, paragraphs 134-136. It is not necessary for the information to relate directly to prices. Exchanges concerning information that forms a decisive element of the price to be paid by the end user may also amount to a restriction by object. See, judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 37.

<sup>(288)</sup> Judgment of 8 July 2020, *Infineon Technologies v Commission*, T-758/14 RENV, EU:T:2020:307, paragraphs 85 and 96; judgment of 15 December 2016, *Philips and Philips France v Commission*, T-762/14, EU:T:2016:738, paragraph 104.

<sup>(289)</sup> Judgment of 8 July 2020, *Infineon Technologies v Commission*, T-758/14 RENV, EU:T:2020:307, paragraph 70.

<sup>(290)</sup> Judgment of 8 July 2020, *Infineon Technologies v Commission*, T-758/14 RENV, EU:T:2020:307, paragraph 98.

<sup>(291)</sup> Judgment of 9 September 2015, *Samsung SDI and Others v Commission*, T-84/13, EU:T:2015:611, paragraph 51.

<sup>(292)</sup> Judgment of 8 July 2020, *Infineon Technologies v Commission*, T-758/14 RENV, EU:T:2020:307, paragraph 96.

<sup>(293)</sup> Commission Decision of 8 July 2021 in Case AT.40178 *Car Emissions*, recitals 84, 107 and 124-126.

<sup>(294)</sup> See judgment of 12 January 2023, *HSBC Holdings and Others v Commission*, C-883/19 P, EU:C:2023:11, paragraphs 120-121, which clarify that Article 101 is designed to protect not only the immediate interests of individual competitors or consumers, but also to protect the structure of the market and thus competition as such.

<sup>(295)</sup> Judgment of 7 November 2019, *Campine and Campine Recycling v Commission*, T-240/17, EU:T:2019:778, paragraph 308.

benefit customers but does signal to competitors how they should act, or the consequences of acting or failing to act in a certain way, or how the undertaking will react to competitors' conduct, will be considered a restriction by object.

417. Where an information exchange constitutes an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or at influencing the relevant parameters of competition, it may be considered a cartel. This is particularly the case where the exchange concerns the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports, or anti-competitive actions against other competitors. Exchanges of information that constitute cartels not only restrict competition by object within the meaning of Article 101(1), but, in addition, are very unlikely to fulfil the conditions of Article 101(3). Information exchanges may also facilitate the implementation of a cartel by enabling undertakings to monitor whether the participants comply with the agreed terms. Those types of exchanges of information will be assessed as part of the cartel.
418. Data sharing arrangements to which different competitors contribute data generally do not amount to a restriction of competition by object if it is established that they have genuine pro-competitive effects meeting the requirements set out in paragraph 419.

*For instance, a data pool in which (partly) commercially sensitive data is exchanged which addresses information asymmetry in a non-concentrated market and that will result in benefits for consumers is unlikely to be considered as a restriction by object if the participants ensure that any commercially sensitive data that they exchange through the pool is necessary and proportionate to achieve the pro-competitive aim. Participants can, for instance, rely as much as possible on aggregate and historical data; reduce the frequency of the exchange, and implement measures to restrict access to the information exchanged and/or to control how it is used. The participants should ensure that the arrangement is set up in a transparent manner.*

419. Finally, the assessment of whether an exchange of information constitutes a restriction by object should take into consideration any argument put forward by the parties that the exchange is pro-competitive. In that regard, the mere existence of such pro-competitive effects cannot as such preclude the characterisation of the exchange as a restriction by object. Such pro-competitive effects must be demonstrated, relevant, specifically related to the exchange of information concerned and sufficiently significant to justify a reasonable doubt as to whether the exchange causes a sufficient degree of harm to competition<sup>(296)</sup>. If these conditions are met, a full assessment of the effects of the exchange of information is required to determine whether it constitutes a restriction of competition by effect (see Section 6.2.7).

#### 6.2.7. *Restriction of competition by effect*

420. An exchange of commercially sensitive information that does not reveal in itself a sufficient degree of harm to competition in light of its content, its objectives and the economic and legal context of which it forms part, may still have restrictive effects on competition<sup>(297)</sup>.
421. As indicated in Section 1.2.5, these effects on competition must be analysed on a case-by-case basis, as the outcome of the assessment depends on a combination of various case-specific factors. In this assessment, the Commission will compare the actual or potential effects of the information exchange on the market to the situation that would prevail in the absence of that specific information exchange<sup>(298)</sup>. For an information exchange to have restrictive effects on competition within the meaning of Article 101(1), it must be likely to have an appreciable adverse impact on the operation of the market in question, by impacting one (or more) of the parameters of competition in that market, including, for example, price, output, product quality, product variety or innovation.
422. For the assessment of possible restrictive effects, the nature of the information that is exchanged (see Section 6.2.3), the characteristics of the exchange (see Section 6.2.4) and the market characteristics (see Section 6.2.5) are relevant<sup>(299)</sup>.

<sup>(296)</sup> Judgment of 12 January 2023, *HSBC Holdings and Others v Commission*, C-883/19 P, EU:C:2023:11, paragraphs 195-205.

<sup>(297)</sup> The guidance in the remainder of this Section 6.2.7 applies only to information exchanges that do not restrict competition by object.

<sup>(298)</sup> Judgment of 28 May 1998, *John Deere*, C-7/95 P, EU:C:1998:256, paragraph 76.

<sup>(299)</sup> Judgment of 23 November 2006, *Asnef-Equifax*, C-238/05, EU:C:2006:734, paragraph 54.

423. For an information exchange to be likely to have restrictive effects on competition, the undertakings involved in the exchange must cover a sufficiently large share of the relevant market<sup>(300)</sup>. Otherwise, competitors that do not participate in the exchange may constrain any anti-competitive behaviour by the undertakings involved. What constitutes 'a sufficiently large share of the market' cannot be defined in the abstract and will depend on the specific facts of each case, the structure of the market and the type of exchange in question<sup>(301)</sup>.
424. An information exchange that contributes little to the transparency of a market is less likely to have restrictive effects on competition than an information exchange that significantly increases transparency. Therefore, the combination of both the pre-existing level of transparency and how the exchange changes that level will determine how likely it is that the information exchange will have restrictive effects on competition. Exchanges of information in tight oligopolies are more likely to lead to restrictive effects on competition, while exchanges are unlikely to lead to such restrictive effects in very fragmented markets.
- 6.3. **Assessment under Article 101(3)**
- 6.3.1. *Efficiency gains*<sup>(302)</sup>
425. An information exchange may lead to efficiency gains, depending on the nature of the information exchanged, the characteristics of the exchange and the structure of the market. In the context of the assessment under Article 101(3), any pro-competitive effects resulting from an information exchange will be taken into account.

*Examples of efficiencies that may be taken into account include:*

*Undertakings may become more efficient by benchmarking their performance against best practices in the industry.*

*An information exchange may contribute to a resilient market by enabling undertakings to respond more quickly to changes in supply and demand and allow them to mitigate internal and external risks of supply chain disruptions or vulnerabilities.*

*An information exchange may benefit consumers and undertakings alike by enabling them to compare the price or quality of products, for instance through the publication of best-selling lists or price comparison data. It can thus help consumers and undertakings make more informed choices (and reduce their search costs).*

*An information exchange in the form of data sharing may be essential for the development of new products, services and technologies.*

*Pooling data on producers supplying sustainable products or producers using sustainable production processes may help undertakings fulfil their sustainability obligations under EU or national law.*

*Exchanges of information about consumers between undertakings providing insurance services to consumers may improve the knowledge of risks and facilitate the rating of risks by individual companies. This may in turn benefit consumers by enabling them to access insurance services that would not have been available absent a comprehensive risk profile.*

*Sharing data between e-commerce marketplaces about online sellers engaging in illegal practices such as the sale of counterfeit products may facilitate the identification of counterfeit products by individual marketplaces, thereby protecting consumers from buying such products.*

*An information exchange may also reduce consumer lock-in, thereby inducing stronger competition. This is because information is generally specific to a relationship and consumers would otherwise lose the benefit of information created in their relationship with one supplier when switching to another supplier.*

<sup>(300)</sup> In certain instances, an information exchange can only generate benefits if a sufficiently large share of the market is covered. This can for instance be the case in the compilation of information in the financial services sector, where the use of non-binding credit registers and joint compilations can improve the knowledge of risks and facilitate the rating of risks for individual companies.

<sup>(301)</sup> In its Decision of 30 June 2022 in Case AT.40511, *Insurance Ireland*, the Commission found that an exchange covered a significant part of the relevant market. In that case, the participants to the exchange accounted for 98 % of the relevant market.

<sup>(302)</sup> The discussion of potential efficiency gains from information exchange is not exhaustive.

### 6.3.2. Indispensability

426. Restrictions that go beyond what is necessary to achieve the efficiency gains generated by an information exchange do not fulfil the conditions of Article 101(3). To fulfil the condition of indispensability, the parties must be able to prove that the nature of the information exchanged and the characteristics of the exchange are the least restrictive means of generating the claimed efficiency gains. In particular, the exchange should not involve information that goes beyond the variables that are relevant for the attainment of the efficiency gains.

*For instance, for the purpose of benchmarking, an exchange of individualised data would generally not be indispensable, because aggregated information (for example, via some form of industry ranking) could also generate the claimed efficiency gains while carrying a lower risk of leading to a collusive outcome.*

### 6.3.3. Pass-on to consumers

427. Efficiency gains achieved by indispensable restrictions must be passed on to consumers to an extent that outweighs the restrictive effects on competition caused by an information exchange. The lower the market power of the undertakings involved in the information exchange, the more likely it is that the efficiency gains will be passed on to consumers to an extent that outweighs the restrictive effects on competition.

### 6.3.4. No elimination of competition

428. The conditions of Article 101(3) cannot be met if the undertakings involved in the information exchange are afforded the possibility of eliminating competition in respect of a substantial part of the products concerned.

## 6.4. Examples, self-assessment steps and table giving guidance on liability in different settings

429. Benchmarking

### Example 1

*Situation:* Three undertakings with a combined market share of 80 % in a stable, non-complex <sup>(303)</sup>, concentrated market, with high barriers to entry, frequently exchange non-public information directly between themselves about a substantial proportion of their individual variable costs. The undertakings claim that they do this to benchmark their performance against their competitors in order to become more efficient.

*Analysis:* Information on costs may be commercially sensitive and through the exchange parties may remove or reduce uncertainty between them as regards the timing, extent and details of the modifications to be adopted in their conduct on the market. Depending on an assessment of its contents, objectives and the legal and economic context, this exchange may therefore constitute an infringement by object. As regards the parties' claim that the information exchange has a pro-competitive purpose, such pro-competitive effects must be demonstrated, relevant, specifically related to the exchange of information concerned and sufficiently significant to justify a reasonable doubt as to whether the exchange causes a sufficient degree of harm to competition.

If the information exchanged does not reveal in itself a sufficient degree of harm to competition because it does not remove uncertainty about the participants' individual conduct on the market, its effects on the market need to be assessed. Because of the market structure, the large market share held by the participants in the information exchange, the fact that the information exchanged relates to a large proportion of the undertakings' variable costs, and, in particular, if the data is exchanged in individualised form, the information exchange is likely to facilitate a collusive outcome. It may thus give rise to restrictive effects on competition within the meaning of Article 101(1). It is unlikely that the conditions of Article 101(3) are fulfilled, because there are less restrictive means to achieve the claimed efficiency gains, for example by using a third party to collect, anonymise and aggregate the data in some form of industry ranking. Finally, in this case, since the parties form a very tight, non-complex and stable oligopoly, even the exchange of aggregated data could facilitate a collusive outcome in the market.

<sup>(303)</sup> See paragraph 412.

## 430. Data sharing arrangement to address shortages of supply

**Example 2**

*Situation:* Several producers of essential medical products are active on a market that is frequently hit by shortages of supply. In order to improve supply and increase production in the most effective and expedient manner, the industry association proposes to gather and model demand and supply data for the essential products concerned. In addition, the association would gather data to identify production capacity, existing stocks and potential to optimise the supply chain. The association would share the results of its data gathering and modelling with its members via non-public channels.

*Analysis:* The data sharing arrangement has a pro-competitive purpose and, depending on an assessment of the legal and economic context, in principle does not constitute a restriction of competition by object. Consequently, its effects on the market need to be assessed. As the data gathered is commercially sensitive, the exchange may have the effect of restricting competition between the participating producers. In addition, producers that are not members of the industry association may be placed at a competitive disadvantage, as compared to the undertakings that participate in the exchange system. In order to avoid the risk of collusion, several measures could be taken. For example, a consultancy firm could be appointed to assist the association with collecting the data and aggregating it in a model, subject to non-disclosure agreements concluded with each producer. Aggregated data could be fed back to the producers with the aim of rebalancing and adapting their individual capacity utilisation, production and supply.

If it were absolutely necessary for the producers to exchange additional commercially sensitive information (beyond the data that would be collected and shared in aggregated form by the industry association and the consultancy), (for instance, to jointly identify where to best switch production or increase capacity), such additional exchanges would have to be strictly limited to what is indispensable for effectively achieving the aims. Any information and exchanges relating to the project would need to be well documented to ensure the transparency of the interactions. Participants would need to commit to avoiding any discussion of prices or any coordination on other parameters that are not strictly necessary for achieving the stated pro-competitive aims. The project should also be limited in time, so that the exchanges immediately cease once the risk of supply shortages ceases to be a sufficiently urgent threat to justify the cooperation. Only the consultant would receive the commercially sensitive data and be charged with aggregating it. The foreclosure concerns could be alleviated if the data sharing arrangement were made accessible to every manufacturer that produces the relevant product, regardless of whether they are a member of the relevant industry association.

## 431. Use of public announcements

**Example 3**

*Situation:* Four suppliers with a combined market share of 70 % frequently announce future prices publicly by posting them on their websites and issuing related press statements. There is typically an interval of several months between the date of the price announcement and the date on which the announced prices are available for customers to place orders. The suppliers often revise the announced prices during that interval. Executives of the suppliers regularly make public comments about the price announcements of their competitors, explaining how the competitors should revise their prices. The suppliers claim they do this to inform investors about the future performance of their company.

*Analysis:* Information concerning an undertaking's future conduct regarding prices or quantities is particularly likely to lead to a collusive outcome. The information announced in public is commercially sensitive and, together with the comments of the executives, the exchange is capable of removing uncertainty between the participants as regards future pricing intentions. This kind of public communication is unlikely to benefit customers, for example by enabling them to make informed purchase decisions, as the announced prices are often changed before the date on which they come into effect. The price announcements therefore do not appear to be a legitimate attempt to inform customers. Moreover, the executives' public comments concerning the prices of rival suppliers may allow the participating suppliers to develop a mutual understanding of a reward-punishment scheme that is characteristic of collusive agreements. Depending



on the other elements of economic and legal context, the exchange appears capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market. The exchange is therefore likely to be considered as a restriction by object.

432. Unilateral public announcements

**Example 4**

*Situation:* The CEO of a major producer of a homogenous product refers publicly in a regular earnings call to the need to respond to recent raw material price increases and address the current excessively low profit margins by means of an industry-wide price increase. She mentions that she would go along with any price increase that competitors would announce in the market. She also expresses her conviction that the industry is 'disciplined enough' to know what it takes now to 'get the margins right again'. After all, she says, the industry successfully implemented price increases ten years ago, when it found itself in a similar situation.

*Analysis:* The statements of the CEO in the earnings call can be read as a unilateral invitation to collude. The fact that the announcement takes place in public does not as such exclude that it could constitute a concerted practice within the meaning of Article 101(1). The statements may provide a potential focal point for coordination between competitors. If, for instance, other competitors make contemporary statements or behave in the market showing that they have taken the invitation to collude into account when determining their own future course of action on the market, and, depending on the legal and economic context, the conduct may amount to a restriction of competition by object within the meaning of Article 101(1). Other competitors may limit such risk by publicly distancing themselves from the announcements or by reporting the announcements to the public authorities.

433. Data sharing to combat counterfeiting

**Example 5**

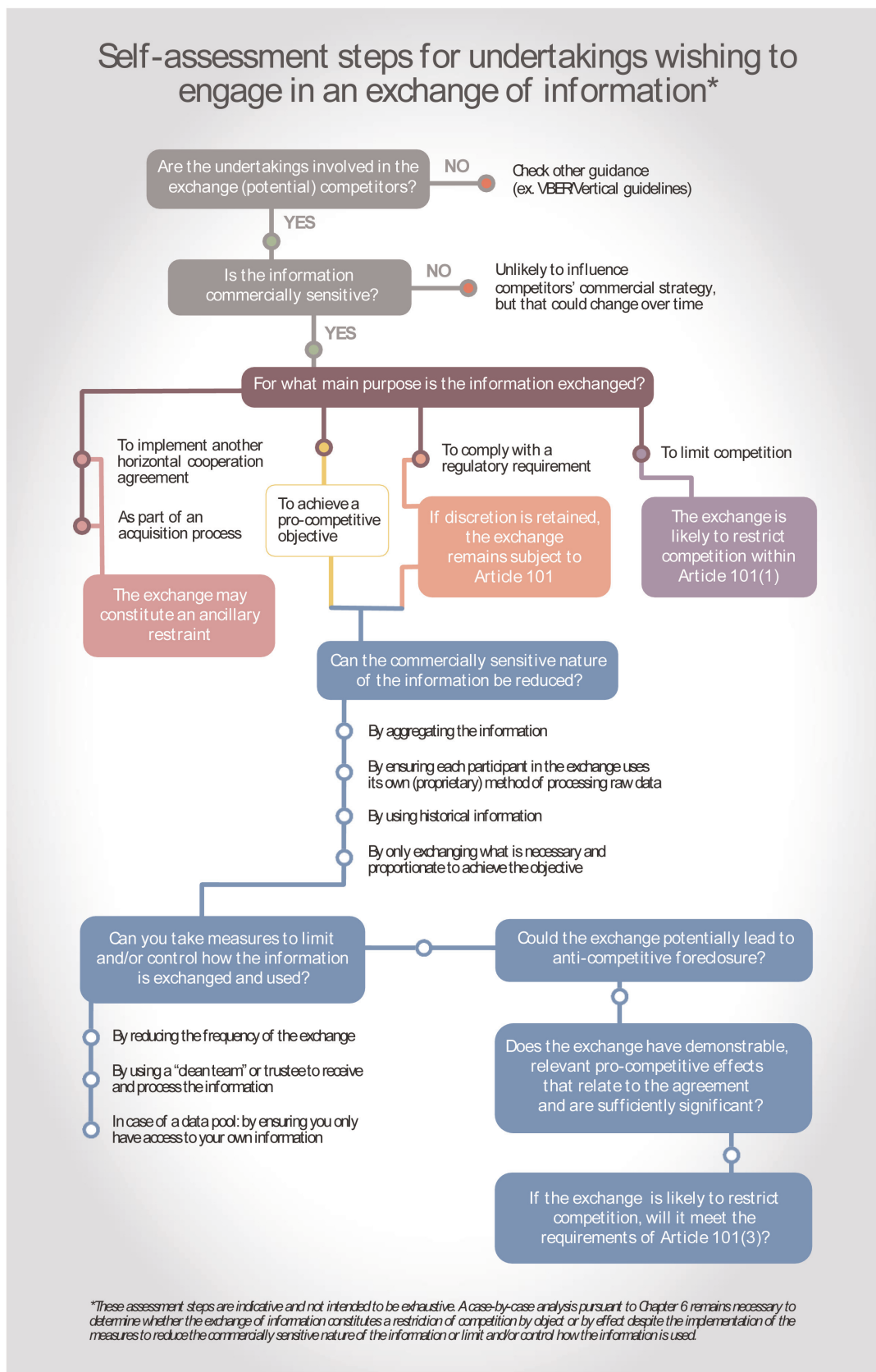
*Situation:* A brand owner identifies on several social media platforms accounts that have a similar name to the one of his brand. When the brand owner checks the respective accounts, she establishes that counterfeit products are being sold under her brand both on the social media platforms and via a redirection link to a counterfeit website. The legal representatives of the brand owner then contact one of the social media platforms to (i) eliminate the account and block the user from creating new accounts in the future, and (ii) provide the platform with information to identify the counterfeiter with the aim of initiating legal action, such as name, address, IP address, email, etc. The brand owner then asks the social media platforms to share this information with other intermediaries and platforms to avoid platform-shopping for the purpose of promoting or selling illegally produced goods which infringe intellectual property rights.

*Analysis:* The exchange of information between social media platforms is intended to prevent the sale of counterfeit products and, given this objective, does not constitute a restriction of competition by object. Moreover, as regards the content of the exchange, the information exchanged is unlikely to constitute commercially sensitive information. Any exchanges of commercially sensitive information would have to be limited to what is objectively necessary for effectively identifying the counterfeiter. To ensure transparency, the exchanges should be documented.

Other market players not directly affected by the counterfeiting activity would not be placed at a competitive disadvantage as a result of the information exchange, since preventing counterfeit sales does not affect them. However, to avoid the risk of collusion, several measures could be taken such as concluding non-disclosure agreements between the parties.



434. Self-assessment steps



435. Liability for exchanges of commercially sensitive information in different settings <sup>(304)</sup>.

Format of the exchange	Liability of A	Liability of B	Liability of C
Direct exchange between A and B	Yes	Yes	—
Direct exchange from A to B	Yes <sup>(1)</sup>	If B remains active on the market, authorities can rely on the presumption that B takes the information into account unless B publicly distances itself or reports it to the authorities	—
Public disclosure by A; B receives it	Yes, if the disclosure constitutes a concerted practice	Possibly a concerted practice if the authorities can show that B requested the information or accepted it. Authorities can rely on a presumption that B takes it into account unless B publicly distances itself or reports the disclosure to the authorities	—
Indirect exchange from A via C to B	A liable if it expressly or tacitly consented with C to disclose the information to B, or was aware of it and was prepared to accept the risk	B liable if it requested or accepted the information and acted upon it. Authorities can rely on a presumption that B takes it into account unless B publicly distances itself or reports the disclosure to the authorities	C liable as facilitator if it was aware of the anti-competitive objectives of A and intended to contribute to those objectives

<sup>(1)</sup> If B publicly distances itself or reports the exchange to the authorities, A's liability would depend on whether the existence of a concerted practice can be established.

## 7. STANDARDISATION AGREEMENTS

### 7.1. Introduction

436. Standardisation agreements have as their primary objective the definition of technical or quality requirements with which current or future products, production processes, value chain due diligence processes, services or methods may comply <sup>(305)</sup>. Standardisation agreements can cover various issues, such as standardisation of different grades or sizes of a particular product, or technical specifications in product or services markets where compatibility and interoperability with other products or services 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, as well as agreements setting out sustainability standards. While sustainability standards have similarities with the standardisation agreements addressed in this Chapter, they also have certain special features. Guidance on sustainability standards is therefore provided in Chapter 9.

<sup>(304)</sup> This table gives an overview of the relevant considerations when assessing liability for exchanges of commercially sensitive information in various contexts. The table is indicative and not exhaustive.

<sup>(305)</sup> Standardisation can take place in various ways, ranging from the adoption of consensus-based standards by recognised international, European or national standards bodies, through consensus-based technical specifications developed by consortia and fora, to agreements between independent undertakings.

437. The preparation and production of technical standards as part of the exercise of public powers are not covered by these Guidelines<sup>(306)</sup>. The European standardisation organisations recognised under Regulation (EU) No 1025/2012 of the European Parliament and of the Council<sup>(307)</sup> are subject to competition law to the extent that they can be considered to be an undertaking or an association of undertakings within the meaning of Articles 101 and 102<sup>(308)</sup>. Standards relating to the supply of professional services, such as rules of admission to a liberal profession, are not covered by these Guidelines.

## 7.2. Relevant markets

438. Standardisation agreements may produce effects on four possible markets, which are to be defined according to the Market Definition Notice. First, standard development may have an impact on the markets for goods or services to which the standard relates. Second, where the standard development involves the development or selection of technology, or where intellectual property rights are marketed separately from the products to which they relate, the standard can have effects on the relevant technology market<sup>(309)</sup>. Third, the market for standard development may be affected if there are several standard development bodies or standardisation agreements. Fourth, where relevant, a distinct market for testing and certification may be affected by standard development.

## 7.3. Assessment under Article 101(1)

### 7.3.1. Main competition concerns

439. Standardisation agreements generally produce significant positive economic effects<sup>(310)</sup>, for example by promoting economic interpenetration on the internal market and encouraging the development of new and improved products or markets and improved supply conditions. Standards thus generally increase competition and lower output and sales costs, benefiting economies as a whole. Standards may maintain and enhance product quality, safety, provide information and ensure interoperability and compatibility (thus increasing value for consumers).
440. In the context of standards involving intellectual property rights ('IPR')<sup>(311)</sup>, it is possible to distinguish three main groups of undertakings, with differing interests in the standard development process.
- (a) Firstly, there are upstream-only undertakings which solely develop and market technologies. This also includes undertakings that acquire technology for the purpose of licensing it. Their only source of income is the licensing revenue, and their incentive is to maximise their royalties.
  - (b) Secondly, there are downstream-only undertakings which solely manufacture products or supply services based on technologies developed by others and that do not hold relevant IPR. Royalties represent a cost for them, and not a source of revenue, and their incentive is to reduce royalties.
  - (c) Finally, there are integrated undertakings which both develop technology protected by IPR and manufacture products for which they need a licence. These undertakings have mixed incentives. On the one hand, they may earn licensing revenue from their own IPR. On the other hand, they may have to pay royalties to other undertakings holding IPR that are essential to the standard that applies to their own products. They might therefore cross-license their own essential IPR in exchange for essential IPR held by other undertakings, or use their IPR defensively. In addition, undertakings may also monetise their IPRs through methods other than royalties. In practice, many undertakings use a mix of these business models.

<sup>(306)</sup> See judgment of 26 March 2009, *Selex Sistemi Integrati v Commission*, C-113/07 P, EU:C:2009:191, paragraph 92.

<sup>(307)</sup> Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council (OJ L 316, 14.11.2012, p. 12).

<sup>(308)</sup> See judgment of 12 May 2010, *EMC Development v Commission*, T-432/05, EU:T:2010:189.

<sup>(309)</sup> See Chapter 2 on R&D agreements, as well as the Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements (OJ C 89, 28.3.2014, p. 3), paragraphs 20 to 26) ('Technology Transfer Guidelines') which address aspects of market definition that are of particular importance in the field of technology rights licensing. For an example of market definition based on those Guidelines, see Commission Decision in Case AT.39985, *Motorola - Enforcement of GPRS standard essential patents*, recitals 184-220.

<sup>(310)</sup> See also paragraph 475.

<sup>(311)</sup> In this Chapter, IPR refers in particular to patent(s) (excluding non-published patent applications). However, where other types of IPR give the IPR holder effective control over the use of the standard, the same principles should be applied.

441. Participants in standardisation are not necessarily competitors. Standard development can, however, in specific circumstances where competitors are involved, also give rise to restrictive effects on competition by restricting price competition and limiting or controlling production, markets, innovation or technical development. As further explained below, this can occur in three main ways, namely (a) restriction of price competition, (b) foreclosure of innovative technologies and (c) exclusion of, or discrimination against, certain undertakings by preventing effective access to the standard.
442. First, if undertakings engage in anti-competitive information exchanges in the context of standard development, this could reduce or eliminate price competition in the markets concerned, or limit or control production, thereby facilitating a collusive outcome on the market <sup>(312)</sup>.
443. Second, standards that set detailed technical specifications for a product or service may limit technical development and innovation. While a standard is being developed, alternative technologies can compete for inclusion in the standard. Once one technology has been chosen to be included in the standard and the standard has been set, some technologies and undertakings may face a barrier to entry and may potentially be excluded from the market. In addition, standards requiring the exclusive use of a particular technology can have the effect of hindering the development and diffusion of other technologies. Preventing the development of other technologies by obliging the members of the standard development organisation ('SDO') to exclusively use a particular standard may lead to the same effect. The risk of limitation of innovation is increased if one or more undertakings are unjustifiably excluded from the standard development process.
444. Third, standardisation may lead to anti-competitive results by preventing certain undertakings from obtaining effective access to the results of the standard development process (that is to say, the specification and/or the essential IPR for implementing the standard). If an undertaking is either completely prevented from obtaining access to the result of the standard, or is only granted access on prohibitive or discriminatory terms, there is a risk of an anti-competitive effect. A system where potentially relevant IPR is disclosed up-front may increase the likelihood of effective access being granted to the standard <sup>(313)</sup>, since it allows the participants to identify which technologies are covered by IPR and which are not. Intellectual property laws and competition laws share the same objectives <sup>(314)</sup> of promoting consumer welfare and innovation, as well as an efficient allocation of resources. IPR promote dynamic competition by encouraging undertakings to invest in developing new or improved products and processes. IPR are therefore in general pro-competitive. However, by virtue of its IPR, a participant holding IPR essential for implementing a standard could, in the specific context of standard development, also acquire control over the use of the standard. When the standard constitutes a barrier to entry, the undertaking could thereby control the product or service market to which the standard relates. This in turn could allow undertakings to behave in anti-competitive ways, for example by refusing to license the necessary IPR or by extracting excess rents by way of discriminatory or excessive <sup>(315)</sup> royalty fees, thereby preventing effective access to the standard ('hold-up'). The reverse situation may also arise if licensing negotiations are drawn out for reasons attributable solely to the user of the standard. This could include for example a refusal to pay a royalty fee on fair, reasonable and non-discriminatory ('FRAND') terms, or using dilatory strategies ('hold-out') <sup>(316)</sup>.

<sup>(312)</sup> Depending on the participants in the standard development process, restrictions may occur either on the supplier or on the purchaser side of the market for the standardised product.

<sup>(313)</sup> If also accompanied by a FRAND commitment. See paragraphs 451 to 457.

<sup>(314)</sup> See Technology Transfer Guidelines, paragraph 7.

<sup>(315)</sup> High royalty fees can only be qualified as excessive if the conditions for an abuse of a dominant position as set out in Article 102 of the Treaty and the case-law of the Court of Justice of the European Union are fulfilled. See for example judgment of 14 February 1978, *United Brands*, Case 27/76, EU:C:1978:22.

<sup>(316)</sup> While hold-up and hold-out concerns are both generally of a unilateral nature, hold-up concerns generally follow from the standardisation agreement itself, whereas hold-out concerns are inherent to the intangible nature of IPRs. In other words, during the standardisation process, members of the standard development agree on a particular technological solution among (potentially) competing technologies, which may create market power that the holder of a standard-essential IPR can exploit to 'hold up' implementers. By contrast, hold-out by an implementer unwilling to take a licence is not the result of the standardisation but follows from the fact that IPR holders can ultimately only prevent unlicensed use by court action. The requirements imposed by the Court of Justice in *Huawei v ZTE* on implementers of standard-essential IPR to avoid being subject to an injunction by a national court should normally provide sufficient protection against hold-out tactics within the European Union; see judgment of 16 July 2015, *Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH*, C-170/13, EU:C:2015:477, in particular paragraphs 65-67.

445. Even if the establishment of a standard can create or increase the market power of IPR holders possessing IPR essential to the standard, there is no presumption that holding or exercising IPR essential to a standard equates to the possession or exercise of market power. The question of market power can only be assessed on a case by case basis <sup>(317)</sup>.

#### 7.3.2. *Restrictions of competition by object*

446. Agreements that use a standard as part of a broader restrictive agreement aimed at excluding actual or potential competitors restrict competition by object. For instance, an agreement whereby a national association of manufacturers sets a standard and puts pressure on third parties not to market products that do not comply with the standard or where the producers of the incumbent product collude to exclude new technology from an already existing standard <sup>(318)</sup> would fall into this category.

447. Agreements to reduce competition by using the disclosure of the most restrictive licensing terms prior to the adoption of a standard as a cover to jointly fix prices either of downstream products or of substitute IPR or technology will constitute restrictions of competition by object <sup>(319)</sup>.

#### 7.3.3. *Restrictive effects on competition*

##### 7.3.3.1. *Agreements which generally do not restrict competition*

448. Standardisation agreements which do not restrict competition by object must be analysed in their legal and economic context, including by taking into account the nature of the goods, services or technologies affected, the real conditions of the functioning and the structure of the market or markets in question, with regard to their actual and likely effect on competition. In the absence of market power <sup>(320)</sup>, a standardisation agreement is not capable of producing restrictive effects on competition. Therefore, restrictive effects are most unlikely in a situation where there is effective competition between a number of voluntary standards.

449. For standard development agreements which may create market power, paragraphs 451-457 set out the conditions under which such agreements will generally fall outside the scope of Article 101(1).

450. The non-fulfilment of any or all of the principles set out in this Section will not lead to any presumption of a restriction of competition within the meaning of Article 101(1). However, it will necessitate a self-assessment to establish whether the agreement falls under Article 101(1) and, if so, if the conditions of Article 101(3) are fulfilled. In this context, it is recognised that there exist different models for standard development and that competition within and between such models is a positive aspect of a market economy. Therefore, SDOs remain entirely free to put in place rules and procedures that do not violate competition rules whilst being different from those described in paragraphs 451-457.

451. Where participation in standard development is unrestricted and the procedure for adopting the standard in question is transparent, standardisation agreements which contain no obligation to comply <sup>(321)</sup> with the standard and which provide effective access to the standard on FRAND terms will generally not restrict competition within the meaning of Article 101(1).

452. In particular, to ensure unrestricted participation, the rules of the SDO should provide that all competitors in the market or markets affected by the standard can participate in the process leading to the selection of the standard <sup>(322)</sup>. The SDO should also provide objective and non-discriminatory procedures for allocating voting rights, as well as, if relevant, objective criteria for selecting the technology to be included in the standard.

<sup>(317)</sup> See Commission Decision in Case AT.39985, *Motorola - Enforcement of GPRS standard essential patents*, recitals 221-270.

<sup>(318)</sup> See for example Commission Decision in Case IV/35.691, *Pre-insulated pipes*, recital 147, where part of the infringement of Article 101 consisted in 'using norms and standards in order to prevent or delay the introduction of new technology which would result in price reductions'.

<sup>(319)</sup> This paragraph should not prevent ex ante disclosures of the most restrictive licensing terms for standard-essential patents by individual IPR holders or of a maximum cumulated royalty rate by all IPR holders, as described in paragraph 474. It also does not prevent patent pools created in accordance with the principles set out in Section IV.4 of the Technology Transfer Guidelines, or the decision to license IPR that is essential to a standard on royalty-free terms, as set out in this Chapter.

<sup>(320)</sup> See also Chapter 1 Introduction. As regards market shares, see also paragraph 472.

<sup>(321)</sup> See also paragraph 464 in this regard.

<sup>(322)</sup> Unrestricted participation should cover participation in all the steps of the process, including participation in the preparatory phase to the standardisation process within the SDO, such as in the context of SDO specific special interest groups.



453. With respect to transparency, the relevant SDO should have procedures which allow stakeholders to effectively inform themselves of upcoming, on-going and finalised standardisation work in good time at each stage of the development of the standard.
454. Furthermore, the SDO's rules should ensure effective access to the standard on FRAND terms<sup>(323)</sup>.
455. Where an SDO develops standards involving IPR, a clear and balanced IPR policy<sup>(324)</sup>, adapted to the particular industry and the needs of the organisation in question, increases the likelihood that the implementers of the standards will be granted effective access.
456. In order to ensure effective access to the standard, the IPR policy should require participants wishing to have their IPR included in the standard to provide an irrevocable commitment in writing to offer to license their essential IPR to all third parties on FRAND terms ('FRAND commitment')<sup>(325)</sup>. That commitment should be given prior to the adoption of the standard. At the same time, the IPR policy should allow IPR holders to exclude specified technology from the standard development process and thereby from the FRAND commitment, provided that exclusion takes place at an early stage in the development of the standard. To ensure the effectiveness of the FRAND commitment, there should also be a requirement for all participating IPR holders who provide such a commitment to ensure that any undertaking to which the IPR owner transfers its IPR (including the right to license that IPR) is bound by that commitment, for example through a contractual clause between buyer and seller. It should be noted that FRAND can also cover royalty-free licensing.
457. Moreover, the IPR policy should require good faith disclosure by participants of their IPR that may be essential for the implementation of the standard under development<sup>(326)</sup>. This is relevant to (a) enable the industry to make an informed choice of the technology to be included in a standard<sup>(327)</sup> and (b) achieve the goal of effective access to the standard. As the standard develops, the disclosure could be updated based on reasonable endeavours to identify IPR reading on the (future) standard. With respect to patents, the IPR disclosure should include at least the patent number or patent application number. If this information is not yet publicly available, then it is also sufficient if the participant declares that it is likely to have IPR claims over a particular technology, without identifying specific IPR claims or applications for IPR (so-called blanket disclosure)<sup>(328)</sup>. Participants should also be encouraged to update their disclosures at the time of adoption of a standard, in particular if there are any changes which may have an impact on the essentiality or validity of their IPRs. Since the risks relating to effective access are not the same in the case of an SDO with a royalty-free standards policy<sup>(329)</sup>, IPR disclosure would not be relevant in that context.

<sup>(323)</sup> For example, effective access should be granted to the specification of the standard.

<sup>(324)</sup> As specified in paragraphs 456 and 457. See also the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee Setting out the EU approach to Standard Essential Patents ('Communication on Standard Essential Patents') (COM/2017/0712 final).

<sup>(325)</sup> See judgment of 16 July 2015, *Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH*, C-170/13, EU:C:2015:477, paragraph 53: 'In those circumstances, and having regard to the fact that an undertaking to grant licences on FRAND terms creates legitimate expectations on the part of third parties that the proprietor of the SEP will in fact grant licences on such terms, a refusal by the proprietor of the SEP to grant a licence on those terms may, in principle, constitute an abuse within the meaning of Article 102 TFEU'. See also Commission Decision in Case AT.39985 - *Motorola - Enforcement of GPRS standard essential patents*, paragraph 417: 'In view of the standardisation process that led to the adoption of the GPRS standard and Motorola's voluntary commitment to license the Cudak SEP on FRAND terms and conditions, implementers of the GPRS standard have a legitimate expectation that Motorola will grant them a licence over that SEP, provided they are not unwilling to enter into a licence on FRAND terms and conditions'.

<sup>(326)</sup> To obtain the desired result, good faith disclosure does not need to go as far as to require participants to compare their IPR against the potential standard and issue a statement positively concluding that they have no IPR reading on the potential standard.

<sup>(327)</sup> Conversely, a 'patent ambush' occurs when an undertaking taking part in the standard-development process intentionally hides the fact that it holds essential patents over the standard being developed, and starts asserting such patents only after the standard has been agreed and other undertakings are therefore 'locked in' to using it. When a 'patent ambush' occurs during the standard development process, this undermines confidence in the process, given that an effective standard development process is a precondition to technical development and the development of the market in general to the benefit of consumers. See, for example, Commission Decision of 9 December 2009 in Case COMP/38.636 - *RAMBUS* (OJ C 30, 6.2.2010, p. 17).

<sup>(328)</sup> Participants should be encouraged to complete their earlier blanket disclosure with the patent number and/or patent application numbers when that information becomes publicly available.

<sup>(329)</sup> The same would apply where the organisation applies a licensing policy based on a one-off nominal fee.



458. FRAND commitments are designed to ensure that essential IPR-protected technology incorporated in a standard is accessible to the users of that standard on fair, reasonable and non-discriminatory terms and conditions. In particular, FRAND commitments can prevent IPR holders from making the implementation of a standard difficult by refusing to license or by requesting unfair or unreasonable fees (in other words excessive fees) after the industry has been locked into the standard or by charging discriminatory royalty fees<sup>(330)</sup>. At the same time, FRAND commitments allow IPR holders to monetise their technologies via FRAND royalties and, in line with the principles in the following paragraphs, obtain a reasonable return on their investment in R&D, which by its nature is risky. This can ensure continued incentives to contribute the best available technology to the standard.
459. Compliance with Article 101 by the SDO does not require it to verify whether the licensing terms of participants fulfil the FRAND commitment<sup>(331)</sup>. Participants must assess for themselves whether their licensing terms and in particular the fees they charge fulfil the FRAND commitment. Therefore, when deciding whether to commit to FRAND for a particular IPR, participants will need to anticipate the implications of the FRAND commitment, notably on their ability to freely set the level of their fees.
460. In the case of a dispute, the assessment of whether fees charged for access to IPR in the standard development context are unfair or unreasonable should be based on whether the fees bear a reasonable relationship to the economic value of the IPR<sup>(332)</sup>. The economic value of the IPR could be based on the present value added of the covered IPR and should be irrespective of the market success of the products, which is unrelated to the patented technology<sup>(333)</sup>. In general, there are various methods of carrying out the assessment<sup>(334)</sup>, and in practice, more than one method is often used to compensate for the shortcomings of a particular method and cross-check the result<sup>(335)</sup>. It may be possible to compare the licensing fees charged by the undertaking in question for the relevant IPRs in a competitive environment before the industry has developed the standard (*ex ante*); with the value/royalty of the next best available alternative (*ex-ante*), or with the value/royalty charged after the industry has been locked in (*ex post*). This assumes that the comparison can be made in a consistent and reliable manner<sup>(336)</sup>.
461. An independent expert assessment could also be obtained for the objective centrality and essentiality of the relevant IPR to the standard at issue. In an appropriate case, it may also be possible to refer to *ex ante* disclosures of licensing terms, including the individual or aggregate royalties for relevant IPR, in the context of a specific standard development process. Similarly, it may be possible to compare the licensing terms in agreements of the IPR holder with other implementers of the same standard. The royalty rates charged for the same IPR in other comparable standards may also provide an indication for FRAND royalty rates. These methods assume that the comparison can be made in a consistent and reliable manner and the level of the royalty rates is not the result of undue exercise of market power. Another method consists in determining, first, an appropriate overall value for all relevant IPR and, second, the portion attributable to a particular IPR holder. These Guidelines do not seek to provide an exhaustive list of appropriate methods to assess whether royalty fees are excessive or discriminatory under Article 102.

<sup>(330)</sup> See also judgment of 16 July 2015, *Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH*, C-170/13, EU:C:2015:477, paragraph 71, according to which an action for infringement may constitute an abuse of a dominant position within the meaning of Article 102 if it is brought against a willing licensee without complying with the procedural steps set out by the Court of Justice in its judgment.

<sup>(331)</sup> Standard development organisations are not involved in the licensing negotiations or resulting agreements.

<sup>(332)</sup> See judgment of 14 February 1978, *United Brands*, Case 27/76, EU:C:1978:22, paragraph 250; see also judgment of 16 July 2009, *Der Grüne Punkt – Duales System Deutschland v Commission*, C-385/07 P, EU:C:2009:456, paragraph 142.

<sup>(333)</sup> Communication on Standard Essential Patents, page 7.

<sup>(334)</sup> In principle, cost-based methods may not be the most suitable, not least because they entail the difficulty of assessing the costs attributable to the development of a particular patent or groups of patents and may distort the incentives to innovate.

<sup>(335)</sup> The methods described here are not exclusive and other methods reflecting the spirit of the described methods can be used to determine FRAND rates. See also Chryssoula Pentheroudakis, Justus A. Baron (2017) Licensing Terms of Standard Essential Patents. A Comprehensive Analysis of Cases. JRC Science for Policy Report. EUR 28302 EN; doi:10.2791/193948.

<sup>(336)</sup> See judgment of 13 July 1989, *Tournier*, C-395/87, EU:C:1989:319, paragraph 38; judgment of 13 July 1989, *Lucazeau and Others v SACEM and Others*, Cases 110/88, 241/88 and 242/88, EU:C:1989:326, paragraph 33.

462. However, it should be emphasised that nothing in these Guidelines affects the possibility for parties to resolve their disputes about the level of FRAND royalty rates by having recourse to the competent civil or commercial courts or alternative methods of dispute resolution <sup>(337)</sup>.

#### 7.3.3.2. Effects-based assessment of standardisation agreements

463. The assessment of a standardisation agreement must take into account the likely effects of the standard on the markets concerned. In analysing standardisation agreements, the characteristics of the sector and industry must be taken into consideration. The following considerations apply to all standardisation agreements that depart from the principles set out in paragraphs 451-457.

##### (a) Voluntary nature of the standard

464. Whether standardisation agreements may give rise to restrictive effects on competition may depend on whether the members of an SDO remain free to develop alternative standards or products that do not comply with the agreed standard <sup>(338)</sup>. For example, if the standardisation agreement binds the members to only produce products in compliance with the standard, the risk of a likely negative effect on competition is significantly increased and could in certain circumstances give rise to a restriction of competition by object <sup>(339)</sup>. In the same vein, standards that only cover minor characteristics of the final product are less likely to lead to competition concerns than more comprehensive standards, in particular where the standard does not involve any essential IPR.

##### (b) Access to the standard

465. The assessment of whether the agreement restricts competition will also focus on access to the standard. Where the result of a standard (that is to say, the specification of how to comply with the standard and, if relevant, the essential IPR for implementing the standard) is not at all accessible for all members or third parties (that is to say, non-members of the relevant SDO), this may foreclose or segment markets and is thereby likely to restrict competition. Competition is likewise likely to be restricted where the result of a standard is only accessible on discriminatory or excessive terms for certain members or for third parties. However, where there are several competing standards, or where there is effective competition between the standardised solution and non-standardised solutions, a limitation of access may not produce restrictive effects on competition.

466. As regards standard development agreements with IPR disclosure models that are different from the ones described in paragraph 457, it is necessary to assess on a case by case basis whether the disclosure model in question (for example a disclosure model that does not require but only encourages IPR disclosure) guarantees effective access to the standard. Standard development agreements providing for the disclosure of information regarding the characteristics and value-added of each IPR belonging to a standard and which thereby increase transparency for parties involved in the development of the standard will not, in principle, restrict competition within the meaning of Article 101(1).

##### (c) Participation in the development of the standard

467. Preventing certain undertakings from being able to influence the choice and definition of the standard is (except as described in paragraph 470) likely to result in a restrictive effect on competition. By contrast, if participation in the standard development process is open, the risks of a restrictive effect on competition are lower. <sup>(340)</sup>
468. Open participation can be achieved by allowing all competitors and/or relevant stakeholders in the market affected by the standard to take part in developing and choosing the standard.
469. The greater the likely market impact of the standard and the wider its potential fields of application, the more important it is to allow equal access to the standard development process.

<sup>(337)</sup> If both parties agree, disputes over what are FRAND terms for the SEPs can also be determined by an independent third party, for example an arbitrator. See, for example, judgment of 16 July 2015, *Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH*, C-170/13, EU:C:2015:477, paragraph 68 and Commission Decision of 29 April 2014 in Case AT. 39939, *Samsung - Enforcement of UMTS standard essential patents*, recital 78.

<sup>(338)</sup> See Commission Decision in Case IV/29/151, *Philips/VCR*, recital 23: 'As these standards were for the manufacture of VCR equipment, the parties were obliged to manufacture and distribute only cassettes and recorders conforming to the VCR system licensed by Philips. They were prohibited from changing to manufacturing and distributing other video cassette systems ... This constituted a restriction of competition under Article 85(1)(b)'.

<sup>(339)</sup> See Commission Decision in Case IV/29/151, *Philips/VCR*, recital 23.

<sup>(340)</sup> In Commission Decision in Case IV/31.458, *X/Open Group*, the Commission considered that even if the standards adopted were made public, the restricted membership policy had the effect of preventing non-members from influencing the results of the work of the group and from getting the know-how and technical understanding relating to the standards which the members were likely to acquire. In addition, non-members could not, in contrast to the members, implement the standard before it was adopted (see paragraph 32). The agreement was therefore considered to restrict competition within the meaning of Article 101(1).

470. However, in certain situations, restricting participation may not have restrictive effects on competition within the meaning of Article 101(1), for instance: (a) if there is competition between several standards and SDOs, (b) if in the absence of a restriction on the participants <sup>(341)</sup> it would not have been possible to adopt the standard or such adoption would have been unlikely or (c) if the restriction on the participants is limited in time and with a view to progressing quickly (for example at the start of the standardisation effort) and as long as at major milestones all competitors have an opportunity to be involved in order to continue the development of the standard.

471. In certain situations, the potential negative effects of restricted participation may be removed or at least lessened by ensuring that stakeholders are kept informed and consulted on the work in progress <sup>(342)</sup>. This could be achieved by establishing procedures for the collective representation of stakeholders. The more stakeholders can influence the process leading to the selection of the standard and the more transparent the procedure for adopting the standard, the more likely it is that the adopted standard will take into account the interests of all stakeholders.

(d) *Market shares*

472. To assess the effects of a standard development agreement, the market shares of the goods, services or technologies that are based on the standard should be taken into account. It may not always be possible <sup>(343)</sup> to assess with any certainty at an early stage whether the standard will in practice be adopted by a large, or only by an insignificant, share of the relevant industry. In cases where undertakings contributing technology to the standard are vertically integrated, the relevant market shares of the undertakings having participated in developing the standard may be used as a proxy for estimating the likely market share of the standard (since the undertakings participating in developing the standard will in most cases have an interest in implementing the standard) <sup>(344)</sup>. However, as the effectiveness of standardisation agreements is often proportional to the share of the industry involved in developing and/or applying the standard, high market shares held by the parties in the market or markets affected by the standard will not necessarily lead to the conclusion that the standard is likely to give rise to restrictive effects on competition.

(e) *Discrimination*

473. Any standard development agreement which clearly discriminates against any of the participating or potential members could lead to a restriction of competition. For example, if an SDO explicitly excludes upstream-only undertakings (that is to say, undertakings that are not active on the downstream production market), this could lead to the exclusion of potentially better upstream technologies.

(f) *Ex ante disclosure of royalty rates*

474. Standard development agreements providing for the ex ante disclosure of the most restrictive licensing terms for standard-essential patents by individual IPR holders or of a maximum accumulated <sup>(345)</sup> royalty rate by all IPR holders will not, in principle, restrict competition within the meaning of Article 101(1). In that regard, it is important that parties involved in the selection of a standard be fully informed, not only as to the available technical options and the associated IPR, but also as to the likely cost of that IPR. Therefore, should an SDO's IPR policy choose to provide for IPR holders to disclose prior to the adoption of the standard their most restrictive licensing terms, including the maximum royalty rates or maximum accumulated royalty rate to be charged, this will generally not lead to a restriction of competition within the meaning of Article 101(1) <sup>(346)</sup>. Such *ex ante* unilateral disclosures of the most restrictive licensing terms or maximum accumulated royalty rate would be one way to enable the parties involved in the development of a standard to take an informed decision based on the disadvantages and advantages of various alternative technologies.

<sup>(341)</sup> Such restriction may materialise via the exclusion of stakeholders from the standardisation agreement or via a more limited participant status.

<sup>(342)</sup> See Commission Decision of 14 October 2009 in Case 39.416, *Ship Classification*.

<sup>(343)</sup> In particular when the introduction of the standard is likely to result in a new relevant market.

<sup>(344)</sup> See paragraph 438.

<sup>(345)</sup> In order to increase the transparency of the potential costs of implementing a standard, SDOs could take an active role in disclosing the total maximum stack of royalties for the standard. Similar to the concept of a patent pool, IPR holders can share the total royalty stack.

<sup>(346)</sup> Any unilateral or joint ex ante disclosure of the most restrictive licensing terms should not serve as a cover to jointly fix prices either of downstream products or of substitute IPR/technologies, which is a restriction of competition by object.

#### 7.4. Assessment under Article 101(3)

##### 7.4.1. Efficiency gains

475. Standardisation agreements frequently give rise to significant efficiency gains. For example, Union-wide standards may facilitate market integration and allow undertakings to market their goods and services in all Member States, leading to increased consumer choice and decreasing prices. Standards which establish technical interoperability and compatibility often encourage competition on the merits between the technologies of different undertakings and help prevent lock-in to a particular supplier. Furthermore, standards may reduce transaction costs for sellers and buyers. Standards relating to, for instance, the quality, safety and environmental aspects of a product may also facilitate consumer choice and may lead to increased product quality. Standards also play an important role for innovation: they can reduce the time it takes to bring a new technology to the market and facilitate innovation, by allowing undertakings to build on top of agreed solutions. These efficiency gains can contribute to a resilient internal market.

476. In order for standardisation agreements to achieve efficiency gains, the information necessary to apply the standard must be effectively available to those wishing to enter the product/service market to which the standard relates <sup>(347)</sup>.

477. Dissemination of a standard can be enhanced by marks or logos certifying compliance, thereby providing certainty to customers. Agreements for testing and certification go beyond the primary objective of defining the standard and generally affect a distinct market.

478. While effects on innovation must be analysed on a case-by-case basis, standards creating compatibility at a horizontal level between different technologies are likely to give rise to efficiency gains.

##### 7.4.2. Indispensability

479. Restrictions that go beyond what is necessary to achieve the efficiency gains that can be generated by a standardisation agreement do not fulfil the conditions of Article 101(3).

480. The assessment of a standardisation agreement must take into account its likely effect on the markets concerned, on the one hand, and the scope of restrictions that possibly go beyond the objective of achieving efficiencies, on the other <sup>(348)</sup>.

481. Participation in standard development should generally be open to all competitors in the market or markets affected by the standard, unless such participation would generate significant inefficiencies, such as long delays in the adoption process <sup>(349)</sup>. Where participation in the development of the standard is restricted, any restrictive effects of such limited participation should be removed or lessened <sup>(350)</sup> in order for such restriction on the participants to be outweighed by efficiencies under Article 101(3).

<sup>(347)</sup> See Commission Decision of 15 December 1986 in Case IV/31.458, X/Open Group, recital 42: 'The Commission considers that the willingness of the Group to make available the results as quickly as possible is an essential element in its decision to grant an exemption'.

<sup>(348)</sup> In Commission Decision in Case IV/29/151, Philips/VCR, compliance with the VCR standards led to the exclusion of other, perhaps better systems. Such exclusion was particularly serious in view of the pre-eminent market position enjoyed by Philips '... [R]estrictions were imposed upon the parties which were not indispensable to the attainment of these improvements. The compatibility of VCR video cassettes with the machines made by other manufacturers would have been ensured even if the latter had to accept no more than an obligation to observe the VCR standards when manufacturing VCR equipment' (recital 31).

<sup>(349)</sup> See Commission Decision of 15 December 1986 in Case IV/31.458, X/Open Group, recital 45: '[T]he aims of the Group could not be achieved if any company willing to commit itself to the Group objectives had a right to become a member. This would create practical and logistical difficulties for the management of the work and possibly prevent appropriate proposals being passed.' See also Commission Decision in Case 39.416, Ship Classification, paragraph 36: 'the Commitments strike an appropriate balance between maintaining demanding criteria for membership of IACS on the one hand, and removing unnecessary barriers to membership of IACS on the other hand. The new criteria will ensure that only technically competent CSs are eligible to become member of IACS, thus preventing that the efficiency and quality of IACS' work is unduly impaired by too lenient requirements for participation in IACS. At the same time, the new criteria will not hinder CSs, who are technically competent and willing to do so from joining IACS'.

<sup>(350)</sup> See paragraph 471 above on ensuring that stakeholders are kept informed and consulted on the work in progress if participation is restricted.

482. As a general rule, standardisation agreements should cover no more than what is necessary to ensure their aims, whether this is technical interoperability and compatibility or a certain level of quality. In cases where having only one technological solution would benefit consumers or the economy at large, that standard should be set on a non-discriminatory basis. Technology-neutral standards can, in certain circumstances, lead to larger efficiency gains. Including substitute IPR <sup>(351)</sup> as essential parts of a standard while at the same time forcing the users of the standard to pay for more IPR than technically necessary would go beyond what is necessary to achieve any identified efficiency gains. In the same vein, including substitute IPR as essential parts of a standard and limiting the use of that technology to that particular standard (that is to say, exclusive use) could limit inter-technology competition and would not be necessary to achieve the efficiencies identified.
483. Restrictions in a standardisation agreement making a standard binding and obligatory for the industry are in principle not indispensable.
484. In a similar vein, standardisation agreements that entrust certain bodies with the exclusive right to test compliance with the standard go beyond the primary objective of defining the standard and may also restrict competition. The exclusivity can, however, be justified for a certain period of time, for example by the need to recoup significant start-up costs <sup>(352)</sup>. The standardisation agreement should in that case include adequate safeguards to mitigate possible risks to competition resulting from exclusivity. This concerns, among others, the certification fee, which should be reasonable and proportionate to the cost of the compliance testing.
- 7.4.3. *Pass-on to consumers*
485. Efficiency gains attained by indispensable restrictions must be passed on to consumers to an extent that outweighs the restrictive effects on competition caused by the standardisation agreement. For the purpose of assessing the likelihood of pass-on to consumers it is relevant to take into account the procedures that are used to guarantee that the interests of the users of standards and end consumers are protected. In addition, where standards facilitate technical interoperability and compatibility or competition between new and existing products, services and processes, it can be presumed that the standard will benefit consumers.
- 7.4.4. *No elimination of competition*
486. Whether a standardisation agreement affords the parties the possibility of eliminating competition depends on the various sources of competition in the market, the level of competitive constraint that they impose on the parties and the impact of the agreement on that competitive constraint. While market shares are relevant for that analysis, the magnitude of remaining sources of actual competition cannot be assessed exclusively on the basis of market share, except in cases where a standard becomes a *de facto* industry standard <sup>(353)</sup>. In the latter case, competition may be eliminated if third parties are foreclosed from effective access to the standard.
- 7.5. **Examples**
487. Setting standards competitors cannot satisfy

#### Example 1

*Situation:* An SDO sets and publishes safety standards that are widely used by the relevant industry. Most competitors in the industry take part in the development of the standard. Prior to the adoption of the standard, a new entrant has developed a product which is technically equivalent in terms of performance and functional requirements and which is recognised by the technical committee of the SDO. However, the technical specifications of the safety standard are, without any objective justification, drawn up in such a way as to not allow for this or other new products to comply with the standard.

<sup>(351)</sup> Substitutable IPR refers to technology which is regarded by users or licensees as interchangeable with or substitutable for another technology, by reason of the characteristics and intended use of the technologies.

<sup>(352)</sup> In this context, see Commission Decision of 29 November 1995 in Cases IV/34.179, 34.202, 216, *Dutch Cranes (SCK and FNK)*, recital 23: 'The ban on calling on firms not certified by SCK as sub-contractors restricts the freedom of action of certified firms. Whether a ban can be regarded as preventing, restricting or distorting competition within the meaning of Article 85(1) must be judged in the legal and economic context. If such a ban is associated with a certification system which is completely open, independent and transparent and provides for the acceptance of equivalent guarantees from other systems, it may be argued that it has no restrictive effects on competition but is simply aimed at fully guaranteeing the quality of the certified goods or services'.

<sup>(353)</sup> *De facto* standardisation refers to a situation where a (legally non-binding) standard, is, in practice, used by most of the industry.



*Analysis:* In this case, participation in the development of the standard is not unrestricted, and the process used to adopt the standard does not seem transparent. This standardisation agreement is likely to give rise to restrictive effects on competition within the meaning of Article 101(1) and is unlikely to meet the conditions of Article 101(3). The members of the SDO have, without any objective justification, set the standard in such a way that the products of their competitors which are based on different technological solutions cannot satisfy it, even though they have equivalent performance. Hence, this standard, which has not been set on a non-discriminatory basis, will reduce or prevent innovation and product variety. It is unlikely that the way the standard is drafted will lead to greater efficiency gains than a neutral standard.

488. Non-compulsory and transparent standard covering a large share of the market

**Example 2**

*Situation:* A number of consumer electronics manufacturers with substantial market shares agree to develop a new standard for a product to follow up the DVD.

*Analysis:* Provided that (a) the manufacturers remain free to produce other new products which do not conform to the new standard, (b) participation in the development of the standard is unrestricted and transparent, and (c) the standardisation agreement does not otherwise restrict competition, the agreement is unlikely to restrict competition within the meaning of Article 101(1). On the other hand, if the parties agreed to only manufacture products which conform to the new standard, the agreement would be likely to restrict competition within the meaning of Article 101(1), by limiting product variety and technical innovation.

489. Standardisation agreement without IPR disclosure

**Example 3**

*Situation:* A private SDO active in standardisation in the ICT (information and communication technology) sector has an IPR policy which neither requires nor encourages disclosures of IPR which could be essential for any future standard. The SDO took the conscious decision not to include such an obligation, in particular considering that in general all technologies potentially relevant for the future standard are covered by many IPR. Therefore the SDO considered that an IPR disclosure obligation would, on the one hand, not lead to the benefit of enabling the participants to choose a solution with little or no IPR and, on the other, would lead to additional costs in analysing whether the IPR would be potentially essential for the future standard. However, the IPR policy of the SDO requires all participants to make a commitment to license any IPR that might read on the future standard on FRAND terms. The IPR policy allows for opt-outs if there is specific IPR that an IPR holder wishes to put outside the blanket licensing commitment. In this particular industry there are several competing private SDOs. Participation in the SDO is open to anyone active in the industry.

*Analysis:* In many cases, an IPR disclosure obligation would be pro-competitive, as it would increase competition between technologies ex ante. In general, such an obligation allows the members of an SDO to factor in the amount of IPR reading on a particular technology when deciding between competing technologies (or even - where possible - to choose a technology which is not covered by IPR). The amount of IPR reading on a technology will often have a direct impact on the cost of access to the standard. However, in this particular context, all available technologies seem to be covered by IPR, and even many IPR. Therefore, any IPR disclosure would not have the positive effect of enabling the members to factor in the amount of IPR when choosing technology, since regardless of what technology is chosen, it can be presumed that there is IPR reading on that technology. The agreement is unlikely to give rise to any negative effects on competition within the meaning of Article 101(1).



## 8. STANDARD TERMS

### 8.1. Definitions

490. In some industries, undertakings use standard terms and conditions of sale or purchase elaborated by a trade association or directly by the competing undertakings ('standard terms')<sup>(354)</sup>. Such standard terms are covered by these Guidelines to the extent that they establish standard conditions for the sale or purchase of goods or services by those competing undertakings to third party customers or from third party suppliers (and not conditions of sale or purchase between the competitors). When such standard terms are widely used within an industry, the conditions of purchase or sale used in the industry may become *de facto* aligned<sup>(355)</sup>. Examples of sectors in which standard terms play an important role are banking (for example, bank account terms) and insurance.

491. Standard terms established independently by an undertaking solely for its own use when contracting with its suppliers or customers are not horizontal agreements and are therefore not covered by these Guidelines.

### 8.2. Relevant markets

492. In general, standard terms produce effects on the downstream market where the undertakings using the standard terms compete by selling their products to their customers.

### 8.3. Assessment under Article 101(1)

#### 8.3.1. Main competition concerns

493. Standard terms can give rise to restrictive effects on competition by limiting product choice and innovation. If a large part of an industry adopts the standard terms and chooses not to deviate from them in individual cases (or only deviates from them in exceptional cases of strong buyer power), customers might have no option other than to accept the conditions in the standard terms. However, the risk of limiting choice and innovation is only likely in cases where the standard terms define the scope of the final product. As regards consumer goods, standard terms of sale generally do not limit innovation of the actual product or product quality or variety.

494. In addition, depending on their content, standard terms may affect the commercial conditions of the sale of the final product. In particular, there is a serious risk that standard terms relating to price may restrict price competition.

495. Moreover, where standard terms are widely adopted in an industry, access to them may be vital for entry to the market. In such cases, refusing access to the standard terms could lead to anti-competitive foreclosure. Provided that the standard terms remain effectively open for use by any undertaking that wishes to have access to them, they are unlikely to give rise to anti-competitive foreclosure.

#### 8.3.2. Restriction of competition by object

496. Agreements that use standard terms as part of a broader restrictive agreement aimed at excluding actual or potential competitors restrict competition by object. An example would be where a trade association does not allow a new entrant access to its standard terms, the use of which is vital to ensure entry to the market.

497. Standard terms containing provisions that directly influence the prices<sup>(356)</sup> charged to customers (that is to say, recommended prices, rebates, etc.) generally constitute a restriction of competition by object.

#### 8.3.3. Restrictive effects on competition

498. The establishment and use of standard terms must be assessed in their economic context and in the light of the situation on the relevant market in order to determine whether the standard terms are likely to give rise to restrictive effects on competition.

<sup>(354)</sup> Such standard terms might cover only a very small or a large part of the clauses contained in the final contract.

<sup>(355)</sup> This refers to a situation where (non-compulsory) standard terms are in practice used by most of the industry and/or for most aspects of the product/service, thus leading to a limitation or even lack of consumer choice.

<sup>(356)</sup> See also footnote 32. In markets where non-price parameters are important parameters of competition, standard terms relating to such parameters may also constitute a by object restriction of competition.

499. Where participation in the establishment of standard terms is unrestricted for competitors in the relevant market (either by participation in the trade association or directly) and provided that the use of the standard terms is not compulsory and they are effectively accessible for use by any undertaking, agreements relating to standard terms are unlikely to lead to negative effects on product quality, product variety or innovation and therefore are unlikely to give rise to restrictive effects on competition (provided that the standard terms have no effect on price and subject to the caveats set out in paragraphs 501-505).
500. There are, however, two general exceptions where a more in-depth assessment is required.
501. First, standard terms for the sale of consumer goods or services where the standard terms define the characteristics of the final product sold to the customer, and where therefore the risk of limiting product choice is more significant, could give rise to restrictive effects on competition within the meaning of Article 101(1) where their common application is likely to result in a *de facto* alignment. This could be the case when the widespread use of the standard terms *de facto* leads to a limitation of innovation and product variety on the market. For instance, this may arise where standard terms in insurance contracts limit the customer's choice of key elements of the contract, such as the types of risk covered. Even if the use of the standard terms is not compulsory, they may undermine the incentives of competing insurers to compete on product diversification. This can be overcome by allowing insurers to also include risks other than standard risks in their insurance contracts.
502. When assessing whether standard terms are likely to have restrictive effects by way of a limitation of product variety, factors such as existing competition on the market should be taken into account. For example, if there is a large number of smaller competitors, the risk of a limitation of product variety is generally less than if there are only a few bigger competitors<sup>(357)</sup>. The market shares of the undertakings participating in the establishment of the standard terms may also give an indication of the likelihood of uptake of the standard terms or of the likelihood that the standard terms will be used by a large share of the market. However, in this respect, it is not only relevant to analyse whether the standard terms are likely to be used by a large share of the market, but also whether the standard terms cover all or only part of the product (the less extensive the scope of the standard terms, the less likely that they will lead, overall, to a limitation of product variety). Moreover, in cases where in the absence of the establishment of the standard terms, it would not have been possible to offer a certain product, there is unlikely to be any restrictive effect on competition within the meaning of Article 101(1). In that scenario, product variety is increased rather than decreased by the establishment of the standard terms.
503. Secondly, even if the standard terms do not define the characteristics of the final product, they may exert significant influence on customers' decisions to enter into transactions, for other reasons. An example is online shopping, where customer confidence is essential (for example, in the use of safe payment systems, a proper description of the products, clear and transparent pricing rules, flexibility of the return policy, etc). As it is difficult for customers to make a clear assessment of all those parameters, they tend to favour practices which are widespread. In that context, standard terms regarding those parameters could therefore become a *de facto* standard with which undertakings would need to comply in order to sell in the market. Even though their use is not compulsory, such standard terms could become a *de facto* standard, the effects of which are very close to a compulsory standard and need to be analysed accordingly.
504. If the use of standard terms is compulsory, there is a need to assess their impact on product quality, product variety and innovation (in particular if the use of the standard terms is compulsory for the entire market).
505. Moreover, should the standard terms (whether their use is compulsory or not) contain terms that are likely to have a negative effect on competition relating to prices<sup>(358)</sup> (for example terms indirectly influencing the types of rebates to be granted), they are likely to give rise to restrictive effects on competition within the meaning of Article 101(1).

<sup>(357)</sup> If previous experience with standard terms on the relevant market shows that the standard terms did not lead to reduced competition on product differentiation, this might also be an indication that the use of the same type of standard terms in a neighbouring product will not lead to a restrictive effect on competition.

<sup>(358)</sup> In markets where non-price parameters are important parameters of competition, standard terms relating to such parameters may also have the effect of restricting competition.

#### 8.4. Assessment under Article 101(3)

##### 8.4.1. Efficiencies

506. The use of standard terms can create economic benefits, such as making it easier for customers to compare the conditions offered, thus facilitating switching between suppliers. Standard terms may also lead to efficiency gains in the form of savings in transaction costs and, in certain sectors (in particular where the contracts are of a complex legal structure), facilitate entry. Standard terms may also increase legal certainty for the contract parties. These efficiency gains can contribute to a resilient internal market.

507. The higher the number of competitors on the market, the greater the efficiency gain of facilitating the comparison of conditions offered.

##### 8.4.2. Indispensability

508. Restrictions that go beyond what is necessary to achieve the efficiency gains that can be generated by standard terms do not fulfil the conditions of Article 101(3). For example, it is generally not necessary to make standard terms compulsory for the industry. However, it cannot be excluded that in specific cases it may be indispensable to make the use of standard terms compulsory in order to attain particular efficiency gains.

##### 8.4.3. Pass on to consumers

509. Both the risk of restrictive effects on competition and the likelihood of efficiency gains increase with the participating undertakings' market shares and the extent to which the standard terms are used. Hence, it is not possible to provide any general 'safe harbour' within which there is no risk of restrictive effects on competition or which would allow the presumption that efficiency gains will be passed on to consumers to an extent that outweighs any restrictive effects on competition.

510. However, certain efficiency gains generated by standard terms, such as increased comparability of the offers on the market, facilitated switching between providers, and legal certainty, are necessarily beneficial for consumers. As regards other possible efficiency gains, such as lower transaction costs, it is necessary to assess on a case-by-case basis and in the relevant economic context whether these are likely to be passed on to consumers.

##### 8.4.4. No elimination of competition

511. Standard terms used by a majority of the industry can create a *de facto* industry standard. In such a case, competition may be eliminated if third parties are foreclosed from effective access to the standard. However, if the standard terms only concern minor characteristics of the product or service, competition is not likely to be eliminated.

#### 8.5. Examples

512. Non-compulsory and open standard terms used for contracts with end-users

##### **Example 1**

*Situation:* A trade association for electricity distributors establishes non-compulsory standard terms for the supply of electricity to end-users. The standard terms have been established in a transparent and non-discriminatory manner. The standard terms cover issues such as the specification of the point of consumption, the location of the connection point and the connection voltage, provisions on service reliability as well as the procedure for settling the accounts between the parties to the contract (for example, what happens if the customer does not provide the supplier with the readings of the measurement devices). The standard terms do not relate to prices, that is to say, they contain no recommended prices or other clauses related to price. Any undertaking active within the sector is free to use the standard terms as it sees fit. About 80 % of the contracts concluded with end-users in the relevant market are based on these standard terms.

*Analysis:* The standard terms are not likely to restrict competition within the meaning of Article 101(1). Even if they have become industry practice, they appear unlikely to have any appreciable negative impact on prices, product quality or variety.

## 513. Standard terms used for contracts between undertakings

**Example 2**

*Situation:* Construction undertakings in a certain Member State come together to establish non-compulsory and open standard terms and conditions for use by a contractor when submitting a quotation for construction work to a client. A form of quotation is included, together with terms and conditions suitable for building or construction. Together, the documents create the construction contract. Clauses cover such matters as contract formation, general obligations of the contractor and the client and non-price related payment conditions (for example, a provision specifying the contractor's right to give notice to suspend the work for non-payment), insurance, duration, handover and defects, limitation of liability, termination, etc. These standard terms will often be used between undertakings, one active upstream and one active downstream.

*Analysis:* The standard terms are not likely to restrict competition within the meaning of Article 101(1). They will generally not lead to any significant limitation in the customer's choice of the final product, namely the construction work. Other restrictive effects on competition do not seem likely. Indeed, several of the clauses above (handover and defects, termination, etc.) would often be regulated by law.

## 514. Standard terms facilitating the comparison of different undertakings' products

**Example 3**

*Situation:* A national association for the insurance sector distributes non-compulsory standard policy conditions for house insurance contracts. The conditions give no indication of the level of insurance premiums, the amount of the cover or the excesses payable by the insured. They do not impose comprehensive cover including risks to which a significant number of policyholders are not simultaneously exposed and do not require the policyholders to obtain cover from the same insurer for different risks. While the majority of insurance undertakings use the standard policy conditions, not all their contracts contain the same conditions, as they are adapted to each client's individual needs and therefore there is no de facto standardisation of insurance products offered to consumers. The standard policy conditions enable consumers and consumer organisations to compare the policies offered by the different insurers. A consumer association is involved in the process of establishing the standard policy conditions. They are also available for use by new entrants to the market, on a non-discriminatory basis.

*Analysis:* The standard policy conditions relate to the composition of the final insurance product. To the extent that the market conditions and other factors show that there is a risk of limitation in product variety as a result of insurance undertakings using the standard policy conditions, any such limitation is likely to be outweighed by efficiencies, such as the facilitation of comparisons by consumers of the conditions offered by insurance undertakings. Those comparisons in turn facilitate switching between insurance undertakings and thus enhance competition. Furthermore, the ability to switch between providers, as well as market entry by competitors, constitutes an advantage for consumers. The fact that the consumer association has participated in the process may increase the likelihood of those efficiencies being passed on. The standard policy conditions are also likely to reduce transaction costs and facilitate entry by insurers to different geographic and/or product markets. Moreover, the restrictions do not seem to go beyond what is necessary to achieve the identified efficiencies, and competition would not be eliminated. Consequently, the conditions of Article 101(3) are likely to be fulfilled.

**9. SUSTAINABILITY AGREEMENTS****9.1. Introduction**

515. This Chapter provides general guidance on the competitive assessment of agreements between competitors that pursue sustainability objectives ('sustainability agreements'). In addition to this general guidance, the Commission is committed to provide informal guidance regarding novel or unresolved questions on individual sustainability agreements through its Informal Guidance Notice <sup>(359)</sup>.

<sup>(359)</sup> Commission Notice on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union that arise in individual cases (guidance letters) (OJ C 381, 4.10.2022, p. 9).

516. Sustainable development is a core principle of the Treaty on European Union and a priority objective for the Union's policies<sup>(360)</sup>. The Commission has committed to implement the United Nations' sustainable development goals<sup>(361)</sup>. In line with this commitment, the European Green Deal sets out a growth strategy that aims to transform the Union into a fair and prosperous society, with a modern, resource-efficient and competitive economy, where there are no net emissions of greenhouse gases from 2050 onwards and where economic growth is decoupled from resource use<sup>(362)</sup>.
517. In broad terms, sustainable development refers to the ability of society to consume and use the resources available today without compromising the ability of future generations to meet their own needs. It encompasses activities that support economic, environmental and social (including labour and human rights) development<sup>(363)</sup>. The notion of sustainability objectives therefore includes, but is not limited to, addressing climate change (for instance, through the reduction of greenhouse gas emissions), reducing pollution, limiting the use of natural resources, upholding human rights, ensuring a living income, fostering resilient infrastructure and innovation, reducing food waste, facilitating a shift to healthy and nutritious food, ensuring animal welfare, etc.<sup>(364)</sup>.
518. Competition law enforcement contributes to sustainable development by ensuring effective competition, which spurs innovation, increases the quality and choice of products, ensures an efficient allocation of resources, reduces the costs of production, and thereby contributes to consumer welfare.
519. However, one concern related to sustainable development is that individual production and consumption decisions can have negative effects ('negative externalities'), for example on the environment, that are not sufficiently taken into account by the economic operators or consumers that cause them. This type of market failure can be mitigated or cured by collective action, primarily through public policies or (sector-specific) regulation, and secondarily through cooperation agreements between undertakings that promote sustainable production or consumption.
520. Where such market failures are addressed by appropriate regulation, for example, mandatory Union pollution standards, pricing mechanisms, such as the Union's Emissions Trading System ('ETS'), or taxes, additional measures by undertakings, for example through cooperation agreements, may be unnecessary. However, cooperation agreements may address residual market failures that are not or not fully addressed by public policies and regulation.
521. In these Guidelines, the term 'sustainability agreement' refers to any horizontal cooperation agreement that pursues a sustainability objective, irrespective of the form of the cooperation. Sustainability agreements will only raise competition concerns under Article 101 if they entail restrictions of competition by object or they lead to appreciable actual or likely negative effects on competition. Agreements that restrict competition cannot escape the prohibition laid down in Article 101(1) simply by referring to a sustainability objective<sup>(365)</sup>.
522. Where sustainability agreements restrict competition within the meaning of Article 101(1), they may still be compatible with Article 101 if they fulfil the four conditions of the exception provided by Article 101(3). Detailed guidance on the application of those conditions is set out in the Commission Guidelines on the application of Article 101(3)<sup>(366)</sup>.

<sup>(360)</sup> Article 3 TEU.

<sup>(361)</sup> The 2030 Agenda for Sustainable Development, adopted by all United Nations Member States in 2015.

<sup>(362)</sup> Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the regions, The European Green Deal (COM/2019/640 final).

<sup>(363)</sup> See for example, UN Resolution 66/288 adopted by the General Assembly on 27 July 2012.

<sup>(364)</sup> The 2030 UN Agenda for Sustainable Development identifies 17 Sustainable Development Goals (including, for example, Goal 2: End hunger, achieve food security and improved nutrition and promote sustainable agriculture; Goal 7: ensure access to affordable, reliable, sustainable and modern energy; Goal 9: build resilient infrastructure, promote inclusive and sustainable industrialisation and foster innovation; Goal 13: take urgent action to combat climate change and its impacts); and 169 targets (including, for example, Target 9.1: develop quality, reliable, sustainable and resilient infrastructure, including regional and transborder infrastructure, to support economic development and human well-being, with a focus on affordable and equitable access for all; and Target 13.1: strengthen resilience and adaptive capacity to climate-related hazards and natural disasters in all countries).

<sup>(365)</sup> See above Section 1.2.6. The Court of Justice has acknowledged that restrictions of competition emanating from agreements or decisions of associations of undertakings may fall outside the scope of Article 101(1) if they are inherent in the pursuit of a legitimate objective and proportionate thereto (see, inter alia, judgments of 21 September 1999, *Albany International*, C-67/96, EU: C:1999:430; of 19 February 2002, *Wouters and Others*, C-309/99, EU:C:2002:98; and of 16 July 2006, *Meca-Medina and Majcen v Commission*, C-519/04 P, EU:C:2006:492).

<sup>(366)</sup> Commission Guidelines on the application of Article 81(3) of the Treaty ('Article 101(3) Guidelines') (OJ C 101, 27.4.2004, p. 97).



523. Sustainability agreements are not a distinct category of horizontal cooperation agreement for the purposes of applying Article 101. Therefore, where a horizontal cooperation agreement corresponds to one of the types of horizontal agreements covered by the preceding Chapters of these Guidelines and that agreement also pursues a sustainability objective, it should be assessed on the basis of the guidance contained in the relevant preceding Chapter(s), together with the guidance provided in this Chapter.
524. This means, in practice, that an R&D or specialisation agreement that pursues a sustainability objective (for example, an agreement between competitors to develop jointly a production technology that reduces energy consumption, or an agreement to share infrastructure with a view to reducing the environmental impact of a production process), and which therefore also qualifies as a sustainability agreement, can benefit from the block exemption regulations applicable to R&D agreements or specialisation agreements, provided that the conditions of those regulations are met. If the conditions of the relevant block exemption regulation are not met, it is necessary to carry out a full assessment under Article 101, based on the guidance provided in Chapter 2 (in the case of R&D agreements) and the guidance provided in Chapter 3 (in the case of production agreements, including mobile telecommunications infrastructure sharing agreements), while for both types of agreement the guidance provided in this Chapter should also be taken into account. Similarly, an agreement between competitors to jointly purchase as an input for their production only products that have a limited environmental impact, or to purchase exclusively from suppliers that respect certain sustainability standards, should be assessed according to the guidance in Chapter 4 (Purchasing agreements) <sup>(367)</sup>, while also taking into account the guidance in this Chapter.
525. In the event of any inconsistency between the guidance provided in this Chapter and the guidance provided in the relevant preceding Chapters for the assessment of a particular sustainability agreement (Chapters 2 to 8), the parties to the agreement may rely on the guidance in the Chapter that is the more favourable to them. In view of their distinct characteristics (see paragraphs 540-544), sustainability standardisation agreements should be assessed in accordance with the guidance provided in Section 9.3 <sup>(368)</sup>, whereas Chapter 7 (Standardisation agreements) only provides further background on the conditions that both Chapters have in common.
526. This Chapter is structured as follows: Section 9.2 sets out examples of sustainability agreements that are unlikely to restrict competition within the meaning of Article 101(1); Section 9.3 provides guidance on specific aspects of the assessment of sustainability agreements under Article 101(1) and focuses on the most common sustainability agreements, namely those which set sustainability standards; Section 9.4 covers specific aspects of the assessment of sustainability agreements under Article 101(3); Section 9.5 discusses the consequences of the involvement of public authorities in the conclusion of sustainability agreements. Finally, Section 9.6 provides an assessment of hypothetical examples of sustainability agreements.

## 9.2. Sustainability agreements that are unlikely to raise competition concerns

527. Not all sustainability agreements between competitors fall within the scope of Article 101. Where such agreements do not negatively affect parameters of competition, such as price, quantity, quality, choice or innovation, they are not capable of raising competition law concerns. The following are examples of sustainability agreements that fall outside the scope of Article 101. These examples are illustrative and not exhaustive.
528. First, agreements that aim solely to ensure compliance with sufficiently precise requirements or prohibitions in legally binding international treaties, agreements or conventions, whether or not they have been implemented in national law (for example, compliance with fundamental social rights or prohibitions on the use of child labour, the logging of certain types of tropical wood or the use of certain pollutants) and which are not fully implemented or enforced by a signatory State, fall outside the scope of Article 101. This exclusion from Article 101 only applies if the agreement provides that the participating undertakings, their suppliers and/or their distributors must comply with such requirements or prohibitions, for example, by preventing, reducing or eliminating the production or importation into the EU of products contrary to such requirements or prohibitions. Such agreements may be an appropriate measure to enable undertakings to implement their sustainability due diligence obligations under national or EU law and can also form part of wider industry cooperation schemes or multi-stakeholder initiatives to identify, mitigate and prevent adverse sustainability impacts in their value chains or their sector.

<sup>(367)</sup> See paragraph 284.

<sup>(368)</sup> Since sustainability standardisation agreements are a sub-category of standardisation agreements.



529. Second, agreements that do not concern the economic activity of undertakings, but their internal corporate conduct, will generally fall outside the scope of Article 101. Competing undertakings may seek to increase the reputation of their industry for being environmentally responsible, and for this purpose agree, for example, on measures to eliminate single-use plastics from their business premises; not to exceed a certain ambient temperature in their buildings, or to limit the volume of internal documents that they print.
530. Third, agreements to set up a database containing general information about suppliers that have (un)sustainable value chains (for instance, suppliers that respect labour rights or pay living wages); use (un)sustainable production processes, or supply (un)sustainable inputs, or information about distributors that market products in a(n) (un)sustainable manner, but which do not forbid or oblige the parties to purchase from such suppliers or to sell to such distributors, will in general not restrict competition and fall outside the scope of Article 101 <sup>(369)</sup>. Such limited forms of exchange of information may again help undertakings to fulfil their sustainability due diligence obligations under national or EU law.
531. Fourth, agreements between competitors relating to the organisation of industry-wide awareness campaigns, or campaigns raising customers' awareness of the environmental impact or other negative externalities of their consumption, provided that they do not amount to joint advertising of specific products, will also generally not restrict competition and fall outside the scope of Article 101.

### 9.3. Assessment of sustainability agreements under Article 101(1)

#### 9.3.1. General principles

532. Where sustainability agreements negatively affect one or more parameters of competition, they have to be assessed under Article 101(1).
533. Where a cooperation agreement between competitors (whether or not it is covered by any of the preceding Chapters of these Guidelines) pursues a sustainability objective, this must be taken into account for the purpose of determining whether the agreement restricts competition by object within the meaning of Article 101(1) <sup>(370)</sup>.
534. Where the parties to an agreement substantiate that the main object of an agreement is the pursuit of a sustainability objective, and where this casts reasonable doubt on whether the agreement reveals by its very nature, having regard to the content of its provisions, its objectives, and the economic and legal context, a sufficient degree of harm to competition to be considered a by object restriction <sup>(371)</sup>, the agreement's effects on competition will have to be assessed. This is not the case where the agreement is used to disguise a by object restriction of competition such as price fixing, market sharing or customer allocation, or limitation of output or innovation.
535. Any effects assessment is carried out according to the principles set out in Section 1.2.5 and in the Sections on 'Restrictive effects on competition' of the preceding Chapter of these Guidelines corresponding to the particular type of horizontal agreement <sup>(372)</sup>. The following factors should in particular be taken into account when assessing the effects of a sustainability agreement: the market power of the parties participating in the agreement; the degree to which the agreement limits the decision-making independence of the parties in relation to the main parameters of competition; the market coverage of the agreement; the extent to which commercially sensitive information is exchanged in the context of the agreement; and whether the agreement results in an appreciable increase in price or an appreciable reduction in output, variety, quality or innovation.
536. Sustainability agreements that restrict competition within the meaning of Article 101(1), either by object or by effect, can still benefit from the exception provided by Article 101(3) if the parties are able to demonstrate that the four cumulative conditions of that provision are fulfilled (see Section 9.4).

<sup>(369)</sup> As long as the database does not reduce uncertainty regarding recent or future actions of competitors in the market, it will not amount to an exchange of commercially sensitive information. In other words, the undertakings contributing to the database should not identify who are their current or future suppliers.

<sup>(370)</sup> See paragraphs 23 and 28.

<sup>(371)</sup> In principle, the evidence demonstrating the pursuit of a sustainability objective should be such as to justify a reasonable doubt as to the anti-competitive object of the agreement. The pursuit of the sustainability objective should not however be uncertain. See by analogy judgment of 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paras 107-108.

<sup>(372)</sup> See also paragraphs 24-27 of the Article 101(3) Guidelines.

### 9.3.2. Sustainability standardisation agreements

537. Sustainability standardisation agreements are a sub-category of sustainability agreements. Their compliance with Article 101 is to be assessed according to the following principles.

#### 9.3.2.1. Definition and characteristics

538. In order to contribute to sustainable development, competitors may wish to agree to phase out, withdraw, or, in some cases, replace non-sustainable products (for example, plastics or fossil fuels, such as oil and coal) and processes (for example, coal-fired steel production) with sustainable ones. Competitors may also wish to agree to harmonise packaging materials in order to facilitate recycling or harmonise packaging sizes (and hence product content) to reduce waste. They may wish to agree to purchase only production inputs that have been manufactured in a sustainable manner. Similarly, they may wish to agree on certain standards to improve animal welfare (e.g. standards to provide animals with more space and better living conditions). For these purposes, competitors may agree to adopt and comply with certain sustainability standards. In this Chapter, such agreements are referred to as 'sustainability standardisation agreements' or 'sustainability standards'. However, for the purposes of these Guidelines, agreements between competitors that limit the participating undertakings' output of the products concerned by the agreement do not qualify as sustainability standardisation agreements.

539. Sustainability standardisation agreements are used to specify requirements that producers, processors, distributors, retailers or service providers in a supply chain have to meet in relation to a wide range of sustainability metrics, such as the environmental impacts of production<sup>(373)</sup>. Sustainability standardisation agreements usually provide rules, guidelines or characteristics for products and processes in relation to such sustainability metrics and are sometimes referred to as sustainability systems. They are often private initiatives and can range from codes of conduct adopted by undertakings, to standards driven by civil society organisations and multi-stakeholder initiatives that involve undertakings across the value chain<sup>(374)</sup>. These Guidelines only cover sustainability standards developed by competitors or in which competitors participate, including quality marks or labels.

540. Sustainability standardisation agreements have similarities with the standardisation agreements addressed in Chapter 7, and the guidance provided in that Chapter contains further explanations of some of the conditions set out in Section 9.3.2.4. However, sustainability standardisation agreements also have specific features.

541. First, the adoption of a sustainability standard may lead to the creation of a label, logo or brand name for products that meet certain minimum requirements. The use of such labels, logos or brand names in principle obliges the adopters to comply with those requirements and if they cease to do so, they lose the right to use the label, logo or brand name.

542. Second, the cost of adhering to and complying with a sustainability standard can be high, particularly if this requires changes to existing production or distribution processes. Therefore, adhering to a sustainability standard may lead to an increase in production or distribution costs and consequently to an increase in the price of the products sold by the parties.

543. Third, unlike technical standards, which ensure interoperability and encourage competition between technologies developed by different undertakings in the standard development process, questions of interoperability and compatibility between technologies are generally less relevant for sustainability standards.

544. Fourth, many sustainability standards are process-, management- or performance-based. This means that, unlike many technical standards, sustainability standards often simply specify a goal to be met, without imposing a specific technology or production method to achieve that goal. Adopters of such sustainability standards may commit to the target but remain free to decide on the use of a particular technology or production method to attain the target.

<sup>(373)</sup> See for example, United Nations Forum on Sustainability Standards, <https://unfss.org/home/objective-of-unfss>

<sup>(374)</sup> See, for example, United Nations Conference on Trade and Development, Framework for the Voluntary Sustainability Standards (VSS) Assessment Toolkit, [https://unctad.org/system/files/official-document/ditctabinf2020d5\\_en.pdf](https://unctad.org/system/files/official-document/ditctabinf2020d5_en.pdf)

### 9.3.2.2. Main competition concerns

545. Sustainability standardisation agreements often have positive effects on competition. They may contribute to sustainable development by enabling the development of new products or markets, increasing product quality or improving conditions of supply or distribution. In particular, by providing information about sustainability matters (e.g. via labels), sustainability standards empower consumers to make informed purchase decisions and therefore play a role in the development of markets for sustainable products. Lastly, sustainability standards can also level the playing field between producers that are subject to different regulatory requirements.
546. In some circumstances, however, sustainability standards may restrict competition. This can occur in three ways in particular: through price coordination, foreclosure of alternative standards, and the exclusion of, or discrimination against certain competitors <sup>(375)</sup>.

### 9.3.2.3. Restriction of competition by object

547. Sustainability standards that are used to disguise price fixing, market or customer allocation, limitations of output or limitations of quality or innovation restrict competition by object.
548. In particular, an agreement between competitors on how to pass on to customers increased costs resulting from the adoption of a sustainability standard in the form of increased sale prices or to fix the prices of products incorporating the standard restricts competition by object. Similarly, an agreement between the parties to a sustainability standard to put pressure directly on competing third parties to refrain from marketing products that do not comply with the standard restricts competition by object. The same applies to agreements between competitors to limit technological development to the minimum sustainability standards required by law, instead of cooperating to achieve more ambitious environmental goals <sup>(376)</sup>.

### 9.3.2.4. Restrictive effects on competition

#### (a) Soft safe harbour

549. Sustainability standardisation agreements are unlikely to produce appreciable negative effects on competition as long as the following six cumulative conditions are met <sup>(377)</sup>:

*First, the procedure for developing the sustainability standard must be transparent, and all interested competitors must be able to participate in the process leading to the selection of the standard <sup>(378)</sup>.*

*Second, the sustainability standard must not impose on undertakings that do not wish to participate in the standard any direct or indirect obligation to comply with the standard <sup>(379)</sup>.*

*Third, in order to ensure compliance with the standard, binding requirements can be imposed on the participating undertakings, but they must remain free to apply higher sustainability standards.*

*Fourth, the parties to the sustainability standard must not exchange commercially sensitive information that is not objectively necessary and proportionate for the development, implementation, adoption or modification of the standard <sup>(380)</sup>.*

*Fifth, effective and non-discriminatory access to the outcome of the standard-setting process must be ensured. This includes allowing effective and non-discriminatory access to the requirements and conditions for using the agreed label, logo or brand name, and allowing undertakings that have not participated in the process of developing the standard to adopt the standard at a later stage <sup>(381)</sup>.*

<sup>(375)</sup> See paragraphs 442-444 for a more detailed description of the main ways in which standardisation agreements may restrict competition.

<sup>(376)</sup> Commission Decision in Case AT.40178, *Car Emissions* of 8 July 2021.

<sup>(377)</sup> As indicated in paragraph 538, agreements between competitors that limit the participating undertakings' output of the products concerned do not qualify as sustainability standardisation agreements. Such agreements therefore require an individual assessment under Article 101.

<sup>(378)</sup> See paragraph 453 for an explanation of the concept of 'transparency' in the standard-setting process.

<sup>(379)</sup> See paragraph 464. In other words, undertakings that do not wish to participate in the standard should not be hindered from continuing to supply the market and consumers with products that meet legal requirements but do not meet the additional requirements created by the new sustainability standard.

<sup>(380)</sup> See Section 6.1 on information exchange and in particular paragraph 369.

<sup>(381)</sup> See paragraph 465 and following in Section 7.3.3.2 on the conditions for access to the standard.

*Sixth, the sustainability standard must satisfy at least one of the following two conditions:*

- (a) The standard must not lead to a significant increase in the price <sup>(382)</sup> or a significant reduction in the quality of the products concerned;*
- (b) The combined market share of the participating undertakings <sup>(383)</sup> must not exceed 20 % on any relevant market affected by the standard <sup>(384)</sup>.*

550. These conditions ensure that the sustainability standard does not lead to an appreciable restriction of competition (for example, by eliminating less expensive product variants from the market). Moreover, the conditions ensure that the standard does not foreclose alternative standards, or exclude or discriminate against other undertakings, and they ensure effective access to the standard. The condition not to exchange unnecessary commercially sensitive information ensures that information exchanges are limited to what is necessary and proportionate to the standard-setting procedure and that they are not used to facilitate collusion or restrict competition between the parties.
551. As mentioned in paragraph 542, sustainability standards often lead to price increases. However, where the standard is adopted by undertakings representing a significant share of the market, it may allow undertakings to preserve the previous price level or to apply only an insignificant price increase. This will be particularly relevant where the product covered by the sustainability standard represents only a small input cost for the product.
552. Failure to comply with one or more of the conditions of the soft safe harbour does not create a presumption that the sustainability standardisation agreement restricts competition within the meaning of Article 101(1). However, if one or more of these conditions are not met, it is necessary to carry out an individual assessment of the agreement under Article 101. There are different models for standard setting, and undertakings are free to agree rules and procedures that do not infringe the competition rules, even though they may differ from those described in paragraph 549 above.
553. A sustainability standardisation agreement is more likely to promote the attainment of a sustainability objective if it provides for a mechanism or monitoring system to ensure that undertakings adopting the sustainability standard comply with the requirements of the standard <sup>(385)</sup>.
- (b) Assessment under Article 101(1) outside the soft safe harbour*
554. To assess the effects of sustainability standardisation agreements that do not fulfil the conditions of the soft safe harbour, the factors listed in paragraph 549 should be taken into account as well as the ability for third parties to participate in the agreement.
555. The sustainability standard may still lack appreciable anti-competitive effects because there exists sufficient competition from alternative sustainability labels or standards and/or from products produced and distributed outside any sustainability label or standard. Even if the market coverage of the sustainability standardisation agreement is significant, the constraint exerted by potential competition may still be sufficient, in particular in cases where the sustainability standardisation agreement is limited to establishing a label, leaving the participating firms free to also operate outside the label. In that case, consumers have the choice of buying products that bear the label or other products, possibly produced by the same undertakings, that do not comply with the label, and hence competition is unlikely to be restricted <sup>(386)</sup>. In cases where a sustainability standardisation agreement is likely to lead to a significant increase in price or reduction in output, product variety, quality or innovation, the agreement may nonetheless fulfil the conditions of Article 101(3)

<sup>(382)</sup> The significance of the price increase will depend on the characteristics of the product and of the relevant market.

<sup>(383)</sup> The combined market share of the participating undertakings refers to the market share of the undertakings' products in general in the relevant markets affected by the standard and is not limited to the products that are specifically covered by the sustainability standardisation agreement.

<sup>(384)</sup> The soft safe harbour does not prevent the Commission or a national competition authority from intervening in individual cases where a sustainability standardisation agreement would result in an appreciable restriction of competition in the market, for example, due to the cumulative effect of sustainability standardisation agreements entered into by different undertakings resulting in a significant price increase or a significant reduction in quality.

<sup>(385)</sup> The presence of such a monitoring and enforcement system to ensure compliance with the sustainability standard is a factor that will be taken into account when assessing whether an agreement has as its main object the pursuit of a sustainability objective as per paragraph 534.

<sup>(386)</sup> Agreements between competitors that do not contain restrictions of competition by object may also benefit from the *De Minimis* Notice where the aggregate market share of the parties to the agreement does not exceed 10 % on any relevant market affected by the agreement – see paragraph 41.

#### 9.4. Assessment of sustainability agreements under Article 101(3)

556. A sustainability agreement that restricts competition within the meaning of Article 101(1) can benefit from the exception provided by Article 101(3) if the parties to the agreement are able to show that the four cumulative conditions of that provision are satisfied.

##### 9.4.1. Efficiency gains

557. The first condition of Article 101(3) requires that the agreement contributes to improving the production or distribution of goods or contributes to promoting technical or economic progress. In essence, it requires that the agreement contributes to objective efficiencies, understood in broad terms, encompassing not only reductions in production and distribution costs but also increases in product variety and quality, improvements in production or distribution processes, and increases in innovation<sup>(387)</sup>. It therefore allows for a broad range of sustainability benefits resulting from the use of particular ingredients, technologies and production processes to be taken into account.

558. Examples of efficiencies that can be generated by sustainability agreements include the use of less polluting production or distribution technologies, improved conditions of production and distribution, more resilient infrastructure, better quality products. Sustainability agreements can also reduce supply chain disruptions, shorten the time it takes to bring sustainable products to the market and enable consumers to make informed purchasing decisions by facilitating the comparison of products. These efficiency gains can contribute to a resilient internal market.

559. Such efficiencies cannot simply be assumed; they must be capable of being substantiated<sup>(388)</sup>. They also need to be objective, concrete and verifiable<sup>(389)</sup>. For instance, if the claimed efficiency consists of a product improvement, the parties must be able to demonstrate the exact characteristics of the product improvement. If the claimed efficiency is the reduction of water contamination, the parties must be able to explain how exactly the agreement contributes to the reduction of water contamination and provide an estimate of the magnitude of the claimed benefit<sup>(390)</sup>.

##### 9.4.2. Indispensability

560. For the purpose of these Guidelines, it is appropriate to deal with the third condition of Article 101(3) (indispensability), before the second condition (the fair share for consumers). This is because the analysis of consumer fair share should not include the effects of any restrictions that do not meet the indispensability condition and that are therefore prohibited by Article 101<sup>(391)</sup>.

561. According to the third condition of Article 101(3), the restrictive agreement must not impose restrictions of competition that are not indispensable to the attainment of the benefits generated by the agreement. To satisfy this condition, the parties must be able to demonstrate that their agreement as such, and each of the restrictions of competition that it entails, are reasonably necessary for the claimed sustainability benefits to materialise, and that there are no other economically practicable and less restrictive means of achieving those benefits<sup>(392)</sup>.

562. In principle, each undertaking should decide for itself how to achieve sustainability benefits, and insofar as consumers value such benefits, the market will reward good decisions and sanction bad ones. Where there is demand for sustainable products, cooperation agreements are in general not indispensable for the attainment of sustainability benefits. However, they may be indispensable in order to reach a sustainability goal in a more cost-efficient or quicker way<sup>(393)</sup>.

<sup>(387)</sup> See also paragraphs 48-72 of the Article 101(3) Guidelines. In particular, paragraph 70 states that 'By cooperating, undertakings may be able to create efficiencies that would not have been possible without the restrictive agreement or would have been possible only with substantial delay or at higher cost'.

<sup>(388)</sup> See also paragraphs 50-58 of the Article 101(3) Guidelines. In particular, paragraph 58 clarifies that '[i]n cases where the agreement has yet to be fully implemented the parties must substantiate any projections as to the date from which the efficiencies will become operational so as to have significant positive impact on the market.'

<sup>(389)</sup> See paragraph 56 of the Article 101(3) Guidelines, 'The data submitted must be verifiable so that there can be a sufficient degree of certainty that the efficiencies have materialised or are likely to materialise.'

<sup>(390)</sup> See for example, Commission Recommendation (EU) 2021/2279 of 15 December 2021 on the use of the Environmental Footprint methods to measure and communicate the life cycle environmental performance of products and organisations (OJ L 471, 30.12.2021, p. 1).

<sup>(391)</sup> See in particular paragraph 39 of the Article 101(3) Guidelines.

<sup>(392)</sup> See in particular paragraphs 73-82 of the Article 101(3) Guidelines.

<sup>(393)</sup> See in particular paragraphs 76 and 89 of the Article 101(3) Guidelines regarding the time within which efficiencies are attained.



563. A sustainability agreement may be indispensable in cases where the parties can show that the consumers in the relevant market find it difficult, for example due to lack of sufficient knowledge or information about the product or the consequences of its use, to objectively assess whether the benefits that they will obtain from the sustainability agreement outweigh the harm that they will suffer from the agreement and that, as a result, they overestimate the magnitude of the immediate negative effects. For example, fast-moving consumer goods manufacturers often use large packaging because consumers perceive big as better. If the manufacturers reduce the excess packaging while maintaining the same contents, consumers will not suffer any harm, however they may perceive the smaller package as a reduction in quantity (see Example 1 at paragraph 599). Similarly, consumers may not appreciate the value of future benefits in the form of improved quality or innovation where the immediate effect of the agreement is an increase in the price of the product <sup>(394)</sup>.
564. Negative externalities or other market failures are often addressed through public policy and regulation. These public measures typically require action by all involved, in order to ensure efficient market outcomes by making citizens and undertakings responsible for the sustainability consequences of their individual choices/actions <sup>(395)</sup>. Therefore, where EU or national law requires undertakings to comply with specific obligations that have a sustainability objective, cooperation agreements and the restrictions they entail cannot be considered to be indispensable to ensure compliance with the obligation imposed, given that the legislator has already decided that each undertaking must individually comply with the obligation in question <sup>(396)</sup>.
565. However, even in the presence of regulation, agreements may still be indispensable for the achievement of sustainability benefits in specific situations. First, this may be the case if not all aspects of a market failure are addressed by regulation, leaving residual scope for cooperation agreements. For instance, where undertakings enter into a sustainability agreement in order to achieve a substantially higher sustainability standard than the one set by regulation. Second, cooperation agreements may be indispensable to reach the goal in a more cost-efficient way or more quickly, provided that the relevant regulation leaves room for companies to agree on this and, when doing so, they respect all the requirements of the regulation.
566. There may be other instances where, due to negative externalities or other market failures, sustainability benefits cannot be achieved through the free interplay of market forces, or can be achieved more cost-efficiently through cooperation between undertakings. For example, a sustainability agreement may be necessary - in an initial phase - to avoid free-riding on the investments required to promote a sustainable product and to provide information to consumers (overcoming the so-called 'first mover disadvantage') <sup>(397)</sup>.
567. In this context, a restrictive agreement may also be necessary to achieve economies of scale, in particular to reach a sufficient scale to cover the fixed costs of setting up, operating and monitoring a sustainability label or standard. Restrictions may also be indispensable in order to align the incentives of the parties and ensure that they concentrate their efforts on the implementation of the agreement <sup>(398)</sup>. If the agreement obliges the parties not to operate outside the label or standard, they must be able to show why merely establishing a label or standard is not sufficient to attain the efficiencies. In general, it is sufficient that the agreement defines the sustainability standard as a common minimum standard, thereby leaving the participating undertakings free to individually apply higher sustainability standards.
568. As a general rule, the obligations imposed by sustainability agreements must not go beyond what is necessary to achieve the objective of the agreement.

<sup>(394)</sup> In this case, possible benefits to consumers could be shown using evidence of their 'willingness to pay', see Section 9.4.3.2.

<sup>(395)</sup> For example, environmental regulation achieves this through taxes, prohibitions, or subsidies.

<sup>(396)</sup> If the undertakings are bound by a cap-and-trade system, such as the EU ETS system, it must be considered that any reduction of pollution and corresponding decrease in use of emission allowances by a given undertaking or sector will free up those allowances, resulting in a zero net effect on pollution absent a reduction of emission allowances (waterbed effect).

<sup>(397)</sup> For instance, this could happen where a company invests in marketing a sustainable product to ensure consumers are aware of the quality of the new product. If competitors then also start producing sustainable versions of their own products, for which consumer demand has already been established, these competitors do not have to incur the costs linked to the initial launch of the sustainable product and can free-ride on the investments made by the first company to launch the sustainable product.

<sup>(398)</sup> See in particular paragraph 80 of the Article 101(3) Guidelines.

#### 9.4.3. *Pass-on to consumers*

569. The second condition of Article 101(3) requires that consumers receive a fair share of the claimed benefits. The concept of ‘consumers’ encompasses all direct and indirect customers of the products covered by the agreement<sup>(399)</sup>. Consumers receive a fair share of the benefits when the benefits deriving from the agreement outweigh the harm caused by the agreement, so that the overall effect on consumers in the relevant market is at least neutral<sup>(400)</sup>. Therefore, the sustainability benefits that result from an agreement must accrue to the consumers of the products covered by that agreement.

570. There may be instances where the competitive harm is clearly insignificant compared to the potential benefits for the consumers in the relevant market, obviating the need for a detailed assessment. Conversely, in many instances, it may be obvious either that the claimed sustainability benefits do not accrue to the consumers in the relevant market or that they would not be significant enough to compensate for the harm suffered by those consumers. However, there may also be cases in which a detailed assessment cannot be avoided.

##### 9.4.3.1. *Individual use value benefits*

571. Consumer benefits typically derive from the consumption or the use of the products covered by the agreement under assessment. These benefits may take the form of improved product quality or product variety resulting from qualitative efficiencies, or take the form of a price decrease as a result of cost efficiencies. Such benefits may also result from the consumption of a sustainable product in the same way as they result from the consumption of any other product. These benefits can be referred to as ‘individual use value benefits’, as they result from the use of the product and directly improve the consumer’s experience of the product in question.

572. For example, vegetables that are cultivated using organic fertilizers may have better taste and/or be healthier for consumers than vegetables produced with non-organic fertilizers. Similarly, replacing plastic in certain products with more durable materials may increase the longevity of the products in question. In these circumstances, consumers enjoy greater quality simply by consuming the product in question. These are typical qualitative efficiencies that may be brought about by a restrictive agreement and may outweigh the harm caused by a price increase (for example, due to the agreed use of more expensive sustainable materials), or by a reduction in choice (for example, due to an agreement not to use a non-sustainable input). If the benefits are significant enough to outweigh the harm caused by the price increase or reduced choice, they will compensate the consumers harmed by the agreement and will thus fulfil the second condition of Article 101(3).

573. In the examples above, in addition to the individual use value benefits, the agreements in question may generate positive effects that are external to the consumers (positive externalities). Positive externalities are present when negative externalities, such as pollution, soil erosion, etc. are reduced. These positive externalities, which may benefit society today or in the future, may not have been possible in the absence of the restrictive agreement in question. Such positive externalities are distinct from the individual use value benefits enjoyed by the consumers in the relevant market (see Section 9.4.3.3).

574. Agreements to reduce packaging may also reduce production and distribution costs and ultimately the price of the product. For example, an agreement between competitors to supply detergent liquid in a concentrated form in smaller bottles may reduce the costs of materials, transport and storage. Similarly, agreements to share infrastructure or distribution transport services between competitors may reduce the parties’ costs and thus the price of the final product. The harm resulting from such agreements may consist in reduced choice for consumers or reduced product quality, but the benefit of the lower price may outweigh such harm<sup>(401)</sup>. The same agreements may also have positive externalities consisting of a reduced negative impact on the environment (see Section 9.4.3.3 below).

##### 9.4.3.2. *Individual non-use value benefits*

575. Consumer benefits from sustainability agreements may consist not only of direct benefits from the use of a sustainable product but also indirect benefits resulting from consumers’ appreciation of the impact

<sup>(399)</sup> This includes producers that use the products as an input, wholesalers, retailers and final consumers, i.e. natural persons who are acting for purposes that are outside their trade or profession. See paragraph 84 of the Article 101(3) Guidelines.

<sup>(400)</sup> See paragraph 85 of the Article 101(3) Guidelines, see also judgment of 23 November 2006, *Asnef-Equifax*, C-238/05, EU: C:2006:734, paragraph 72.

<sup>(401)</sup> Reductions in marginal or variable costs are more likely to be relevant to the assessment of efficiencies than reductions in fixed costs; the former are, in principle, more likely to result in lower prices for consumers.

of their sustainable consumption on others. In particular, some consumers may value their consumption of a sustainable product more highly than the consumption of a non-sustainable product because the sustainable product has less negative impact on others.

576. For example, consumers may opt for a particular washing liquid not because it cleans better but because it contaminates the water less. Similarly, consumers may be willing to pay a higher price for furniture made from wood that is grown sustainably, not because of the better quality of the furniture but because they want to stop de-forestation and the loss of natural habitats. Likewise, drivers may opt to use more expensive fuel not because it is of higher quality and better for their vehicles, but because it pollutes less.
577. In these cases, the consumer's experience of the product is not directly improved. Nevertheless, consumers may be willing to pay a higher price for a sustainable product or to limit their choice of products (by not buying non-sustainable variants) in order to benefit society or future generations. Hence, indirect, non-use value benefits accrue to consumers within the relevant market via their individual valuation of the effect on others, including on non-users outside the relevant market.
578. Consumers who are willing to pay more for such products may perceive them to be of a higher quality precisely because of the benefits accruing to others. From an economic perspective, such indirect qualitative benefits are no different from the quality-enhancing benefits that increase the direct use value of a product, as discussed in Section 9.4.3.1. Such indirect, non-use value benefits can in some cases be measured by investigating consumers' willingness to pay, for instance, through customer surveys<sup>(402)</sup>.
579. There may be a difference between what consumers declare to be their preferences and what their purchasing behaviour shows to be their actual preferences. This may indicate that consumers' declared preferences either over-estimate or under-estimate their true preferences. To mitigate such biases, which often result from hypothetical questions in consumer surveys, such surveys should provide appropriate context. In addition, the questions posed should take into account societal norms, consumer knowledge and habits, and expectations about the behaviour of others.
580. More generally, to discharge their burden of proof under Article 101(3), the parties to an agreement have to be able to provide evidence of the actual preferences of consumers. Parties should avoid projecting their own preferences onto consumers.
581. For the purpose of assessing consumers' willingness to pay, it is not necessary to assess the willingness to pay of each and every consumer in the relevant market. It is sufficient that the assessment is based on the overall effect on consumers in the relevant market<sup>(403)</sup>.

#### 9.4.3.3. Collective benefits

582. Section 9.4.3.2 refers to individual non-use value benefits that are limited to voluntary (altruistic) choices by individual consumers. However, not all negative externalities can be cured through voluntary, individual consumer actions. As the sustainability impact from individual consumption accrues not necessarily to the consuming individual but to a larger group, a joint initiative, such as a cooperation agreement, may be needed to internalise negative externalities and bring about sustainability benefits for a wider section of society<sup>(404)</sup>. For example, consumers may be unwilling to pay a higher price for a product produced with a green but costly technology. To ensure that the benefits derived from the use of that technology materialise, an agreement to phase out the polluting technology may be necessary. These benefits are referred to as 'collective benefits', as they occur irrespective of the consumers' individual appreciation of the product and accrue to a wider section of society than just consumers in the relevant market.

<sup>(402)</sup> Consumers' willingness to pay is one element that can help to identify the type of benefit that the parties to the agreement can claim. The fact that consumers are willing to pay, i.e. there is demand for sustainable products, does not necessarily mean that an agreement is not indispensable. Even though consumers may be willing to pay for a sustainable product, a restrictive agreement may still be indispensable, for instance, to overcome a first-mover disadvantage or to achieve cost-reducing economies of scale.

<sup>(403)</sup> Judgment of 23 November 2006, *Asnef-Equifax*, C-238/05, EU:C:2006:734, paragraph 72.

<sup>(404)</sup> The market failure in such situations typically consists in the fact that non-sustainable consumption causes negative externalities for others. These negative externalities (such as emissions) are not fully internalised (taken into account) by individual consumers, which results in over-consumption of the non-sustainable product. Similarly, the market failure can consist of positive externalities (such as a reduction in emissions) from sustainable consumption. In that case, sustainable products are under-provided by the market for essentially the same reason, namely because consumers do not take into account the effects of their consumption on others.

583. Although the weighing of the positive and negative effects of the restrictive agreements is normally done within the relevant market to which the agreement relates, where two markets are related, efficiencies generated on separate markets can be taken into account, provided that the group of consumers that is affected by the restriction and that benefits from the efficiencies is substantially the same<sup>(405)</sup>.
584. By analogy, where consumers in the relevant market substantially overlap with, or form part of the group of beneficiaries outside the relevant market, the collective benefits to the consumers in the relevant market that occur outside that market can be taken into account if they are significant enough to compensate the consumers in the relevant market for the harm that they suffer<sup>(406)</sup>.
585. For example, drivers purchasing less polluting fuel are also citizens who would benefit from cleaner air, if less polluting fuel were used. To the extent that a substantial overlap of consumers (the drivers in this example) and the wider beneficiaries (citizens) can be established, the sustainability benefits of cleaner air can be taken into account, provided that they compensate the consumers in the relevant market for the harm suffered. Conversely, consumers may buy clothing made of sustainable cotton that reduces the use of fertilisers and water on the land where the cotton is cultivated. Such environmental benefits could in principle be taken into account as collective benefits. However, in this case there is unlikely to be any substantial overlap between the consumers of the clothing and the beneficiaries of the environmental benefits, as these occur only in the area where the cotton is grown. Therefore, it is unlikely that these collective benefits would accrue to the consumers in the relevant market. They could therefore only be taken into account if and to the extent that consumers of the clothing are willing to pay more for clothing that is made of sustainably grown cotton (individual non-value benefit, see Section 9.4.3.2).
586. For collective benefits to materialise, the market coverage of the agreement will often need to be significant. If, for example, only two out of ten washing machine producers agree to abandon their more polluting models, then it is unlikely that the agreement will be able to prevent free-riding (by washing machine producers continuing to offer more polluting models) and hence will be unlikely to sufficiently reduce pollution, since self-interested consumers could switch to polluting models produced by the remaining suppliers<sup>(407)</sup>.
587. For collective benefits to be taken into account, the parties to the agreement must be able to:
- (a) describe clearly the claimed benefits and provide evidence that they have already occurred or are likely to occur<sup>(408)</sup>;
  - (b) define clearly the beneficiaries;
  - (c) demonstrate that the consumers in the relevant market substantially overlap with the beneficiaries or form part of them<sup>(409)</sup>; and
  - (d) demonstrate that the share of the collective benefits that accrues to the consumers in the relevant market, possibly together with individual use and non-use value benefits accruing to those consumers, outweighs the harm suffered by those consumers as a result of the restriction.
588. Evidence for collective benefits contained in public authorities' reports or in reports prepared by recognized academic organisations may be of particular value for this assessment.
589. Where there is no available data that allows for a quantitative analysis of the benefits of the agreement, other evidence may be considered, provided that it shows a clearly identifiable positive impact on consumers in the relevant market, not a marginal one. As there is currently little experience with measuring and quantifying collective benefits, the Commission aims to provide more guidance on this issue when it has gained sufficient experience of dealing with concrete cases, which may enable it to develop methodologies of assessment.

<sup>(405)</sup> Paragraph 43 of the Article 101(3) Guidelines; see also judgment of 27 September 2006, *GlaxoSmithKline Services and Others v Commission*, T-168/01, EU:T:2006:265, paragraphs 248 and 251; judgment of 11 September 2014, *MasterCard Inc*, C-382/12 P, EU:C:2014:2201, paragraph 242; Commission decision of 23 May 2013 in Case AT.39595 *Air Canada/United Airlines/Lufthansa* ('STAR alliance').

<sup>(406)</sup> Consumers can be compensated through one type of sustainability benefits or through a combination of individual and collective benefits, see Section 9.4.3.4.

<sup>(407)</sup> However, in this example, it is not only the potential benefit of the agreement that is limited due to insufficient coverage, but also the potential competitive harm (for essentially the same reasons).

<sup>(408)</sup> Benefits that will materialise in the future may be taken into account to the extent that they will accrue to consumers in the relevant market.

<sup>(409)</sup> In cases where collective benefits are dispersed among a large section of society, it is less likely that the overlap with the consumers in the relevant market will be substantial.

#### 9.4.3.4. Any or all types of benefits

590. Parties to sustainability agreements may rely on any or all of the three types of consumer benefits to justify their agreement under Article 101(3). The choice of benefits relied upon may depend on the facts of the case and the robustness of the available evidence. In some cases, demonstrating only individual use value benefits may be enough to satisfy the conditions of Article 101(3). In other cases, evidence of individual non-use value benefits or of collective benefits may suffice. And in some cases the parties may be able to show a combination of two or all three types of benefits.

591. In some cases a certain period of time may be needed before the benefits materialise. Until such time, the agreement may have only negative effects. The fact that pass-on to consumers occurs with a certain time lag does not in itself exclude the application of Article 101(3). However, the greater the time lag, the greater must be the efficiencies to compensate also for the loss to consumers during the period preceding the pass-on. In making this assessment, the value of future benefits must be appropriately discounted<sup>(410)</sup>.

#### 9.4.4. No elimination of competition

592. According to the fourth condition of Article 101(3), the agreement must not allow the parties the possibility to eliminate competition in respect of a substantial part of the products in question. In essence, this condition ensures that there remains a degree of residual competition on the relevant market(s), regardless of the extent of the benefits.

593. This last condition may be satisfied even if the agreement restricting competition covers the entire industry, as long as the parties to the agreement continue to compete vigorously on at least one important parameter of competition. For instance, if the agreement eliminates competition on quality or variety, but price is also an important parameter of competition in the industry concerned, and prices are not restricted, this condition may still be fulfilled.

594. Moreover, if competitors compete with a range of differentiated products, all in the same relevant market, the elimination of competition for one or more of the variants of the product does not necessarily mean that competition in the relevant market is eliminated.

595. Similarly, if competitors decide not to use a particular polluting technology or a particular non-sustainable ingredient in the production of their products, competition will not be eliminated if they continue to compete on the price and/or quality of the final product.

596. Finally, the elimination of competition for a limited period of time, where this has no impact on the development of competition after that period elapses, is not an obstacle to meeting this condition. For example, an agreement between competitors to temporarily limit the production of one variant of a product, containing a non-sustainable ingredient, in order to introduce to the market a sustainable substitute for the product, with the aim of raising consumer awareness about the characteristics of the new product, will, in general, fulfil the last condition of Article 101(3).

### 9.5. Involvement of public authorities

597. The involvement of national or local public authorities in the process of conclusion of sustainability agreements, or knowledge by those authorities of the existence of such agreements, does not in itself preclude the application of Article 101 to such agreements. Similarly, if acts by public authorities merely encourage, or make it easier for undertakings to engage in anti-competitive sustainability agreements, without depriving undertakings of their autonomy, such agreements remain subject to Article 101<sup>(411)</sup>.

598. However, the parties to an anti-competitive sustainability agreement will not be liable under Article 101 if they have been compelled or required by public authorities to conclude the agreement or where the public authorities reinforce the effect of the agreement<sup>(412)</sup>.

### 9.6. Examples

599. An agreement that benefits from the soft safe harbour

<sup>(410)</sup> See Article 101(3) Guidelines, p. 87.

<sup>(411)</sup> Judgment of 9 September 2003, *CIF*, C-198/01, EU:C:2003:430, paragraph 56. See also Chapter 1, paragraph 19.

<sup>(412)</sup> Judgment of 12 December 2013, *Soa Nazionale Costruttori*, C-327/12, EU:C:2013:827, paragraph 38; judgment of 5 December 2006, *Cipolla and Others*, C-94/04, EU:C:2006:758, paragraph 47.



**Example 1**

*Situation:* Breakfast cereal is sold in attractive colourful cardboard boxes. Over the years, these boxes have become bigger, not because the content has increased, but merely to make them look more attractive and promising to consumers. This is a profitable marketing strategy, because consumers often purchase breakfast cereals spontaneously, and the bigger size gives the impression of being the better buy. Because all producers have followed this strategy, it has not had a significant effect on their market shares. However, it has led to an excess of around 15 % in the packaging material used for their products.

Prevent Waste, a non-governmental organisation, has criticised the 'empty box' strategy of the breakfast cereal producers as wasteful and harmful for the environment, using more natural resources than necessary for the efficient production and distribution of these products. In response, the breakfast cereal producers, organised in their trade organisation, have agreed to limit the excess packaging of their products. They have collectively agreed a packaging standard by limiting the excess packaging material to no more than 3 % to ensure that cereal boxes are still easy to use and they have made their decision public. The breakfast cereal producers have implemented the agreement since the beginning of the year and it covers 100 % of the market. As a result, packaging costs, which make up 6 % of the wholesale price, have decreased by around 10 %. This has led to a decrease of around 0,5 % in the wholesale price of breakfast cereals and a 0–0,5 % decrease in the retail price.

*Analysis:* Competitors agree on a standard that impacts the marketing of the product, but they do so in a transparent manner, allowing everyone to adopt the approach without imposing an obligation to do so. There is no exchange of sensitive information. In addition, cereal producers remain free to further reduce their own packaging if they so wish. Moreover, the standardisation agreement to limit excess packaging has a very small and even downward effect on the price of breakfast cereals, does not affect competition between the cereal producers on the main parameters of price, quality and innovation, and only affects competition on marketing to a limited extent (in view of the apparently limited impact of the 'oversized' box strategy). The agreement therefore meets the conditions of the safe harbour and is unlikely to produce appreciable negative effects on competition. The agreement actually improves the outcome for consumers, by eliminating costly excess packaging strategies which have little impact on competition.

600. An agreement that benefits from the soft safe harbour

**Example 2**

*Situation:* Fair Tropical Fruits, a non-governmental organisation together with a number of fruit traders have set up a label for fair-traded tropical fruits (the 'FTF' label). In order to use the label, firms trading in tropical fruits must guarantee that the fruits in question come from producers that ensure fair living wages for their workers and that do not make use of child labour. These fruit traders remain free to also trade fruits under other labels or without labels. Fair Tropical Fruits has set up a monitoring system to certify that the products sold under the FTF label comply with the minimum conditions. The conditions for participation and the methodology and results of the monitoring system are available on the website of Fair Tropical Fruits. The fruits sold under the FTF label are more expensive than other tropical fruits traded.

The FTF label has been introduced EU-wide and a number of large traders use the label and have signed the agreement to respect the label's minimum conditions. The label has quickly become popular with certain consumers. Depending on the type of tropical fruit and the geographic market concerned, the market shares of the fruit traders range from 12 % for pineapples to 20 % for mangoes. The same traders also operate outside the label.

*Analysis:* The FTF label is unlikely to lead to appreciable negative effects on competition with the meaning of Article 101(1) and may benefit from the soft safe harbour for sustainability standards in view of: (i) the modest market shares of the parties to the agreement in the various relevant purchasing and selling markets, (ii) the significant market shares held by, and competition from, other labels and conventional products, the fact that (iii) participation in the FTF label is on a voluntary and non-exclusive basis, (iv) the standardisation agreement does not involve any exchange of information on procurement prices, other costs, production volumes or margins and that (v) the licence to use the label is dependent only on respecting certain minimum conditions, without agreeing on any binding minimum prices or surcharges. The agreements may actually widen the choice available to consumers, by enabling them to identify products which have 'fair trade' characteristics.

601. An agreement having no appreciable effect on competition

**Example 3**

*Situation:* Fair-Clothing.Com is a very successful non-governmental organisation which, with the help of government subsidies and an effective media campaign, has been able to convince the large majority of firms selling clothing in the EU, including all of the main brands and a number of clothing retail chains, to only purchase clothing from producers in developing countries that respect certain minimum wage levels. The campaign, which was widely supported by and coordinated with national and EU consumer organisations, has been a massive success: currently 85 % of all clothing sold in the EU is sold under the Fair Clothing label. To obtain a licence to use the label, the participating firms have agreed to respect minimum wage standards and not to sell clothing which does not comply with the standards, wherever the clothing is produced. As a result of the campaign, the wages of textile workers in developing countries have increased by on average 20 %.

Consumer product surveys and studies indicate that the average price of clothing in the EU has not increased appreciably as a result of the introduction of the Fair Clothing label: estimates for the effect on price range from - 0,5 % to + 0,8 % and are statistically not significantly different from zero. The most credible explanations for the absence of a price increase are, first, the relative insignificance of production wages as a component of the end price of clothing products and, second, possible improvements in labour productivity that may be the result of the wage increase. For instance, the wage component of producing cotton shirts is around 30 % of the local production costs. The 20 % wage increase can thus be expected to have led to an increase of the price of the shirt ex-factory in the developing world of, at most, 6 %.

*Analysis:* Given that the parties to the Fair Clothing agreement (western brand owners and clothing retail chains) add an average margin of 200-300 % to the purchase price, to cover transport, import and other distribution and packaging costs, the effect on the price at which the parties sell the shirt is, already for this reason, at most 1,5-2 %. Furthermore, there are indications that, by giving workers access to more nutritious food and better healthcare, the 20 % wage increase is having a positive effect on labour productivity in the textile sector in the developing world. In view of the intense competition in the clothing sector, these productivity improvements can be expected to have a price-lowering effect.

Based on the estimates for the effect on price, it can be concluded that the Fair Clothing agreements are unlikely to have appreciable negative effects for customers of the parties to the agreements and are therefore not caught by Article 101(1).

602. An agreement unlikely to restrict competition under Article 101(1) and/or likely to satisfy the condition under Article 101(3)

**Example 4**

*Situation:* In response to the findings of research into the recommended levels of fat in certain processed food conducted by a government-funded think tank in a Member State, several major manufacturers of processed foods in that same Member State agree, through formal discussions at an industry trade association, to set recommended fat levels for the products. Together, the parties represent 70 % of sales of the products within the Member State. The parties' initiative will be supported by a national advertising campaign funded by the think tank highlighting the dangers of a high fat content in processed foods.

*Analysis:* Although the fat levels are recommendations and therefore voluntary, as a result of the wide publicity resulting from the national advertising campaign, the recommended fat levels are likely to be implemented by all manufacturers of the processed foods in the Member State. It is therefore likely to become a de facto maximum fat level in processed foods. Consumer choice across the product markets could therefore be reduced. However, the parties will be able to continue to compete with regard to a number of other characteristics of the products, such as price, product size, quality, taste, other nutritional and salt content, balance of ingredients, and branding. Moreover, competition regarding the fat levels in the product offering may increase where parties seek to offer products with the lowest levels. The agreement is therefore unlikely to give rise to restrictive effects on competition within the meaning of Article 101(1). However, even if the agreement is found to have an appreciable negative effect on competition under Article 101(1) – because consumers are deprived of the choice of having high level fat food – the benefits for consumers in terms of value of information received and beneficial health effects are likely to outweigh the harm, and the agreement is likely to satisfy the conditions of Article 101(3).

603. An agreement restricting competition under Article 101(1) and satisfying the conditions of Article 101(3).

**Example 5**

*Situation:* Producers of washing machines currently produce a range of machines, from the latest models, which are technically more advanced and energy efficient, to older models that are technically less advanced. While the older, less advanced models use more electricity and water, they are cheaper to produce and are sold at lower prices than the more recent and technically advanced models. In accordance with an EU regulation, all models are classified into eight energy efficiency categories, from A to H, and labelled accordingly.

Innovation in the industry is focussed on further improving the energy efficiency of new models. However, the washing machine producers also feel that they have a responsibility to try to reduce the energy consumption of their machines in other ways. They have therefore agreed to phase out the production and sale of washing machines in categories F to H, the older and least energy-efficient models. These older models are also the least water-efficient.

The agreement includes all the producers and therefore covers almost 100 % of the market. It provides that the production and sale of washing machines in categories F to H will be phased out within two years. These models currently make up around 35 % of all sales in the market. While all the participating producers already produce some models in categories A to E, and therefore none of them will lose all of their current sales, each producer will be affected differently, depending on its current range of models. It is thus likely that competition between the producers will be affected. In addition, the phasing out of categories F to H will reduce the choice of machines available to consumers and increase the average purchase cost. For the average purchaser who was previously buying a washing machine in categories F to H, the price of a machine will increase at least by between EUR 40 and EUR 70.

Before implementing the agreement to phase out categories F to H, the industry has tried to shift demand away from these categories using advertising campaigns. Studies have shown that the lack of success of these campaigns is due to the fact that many consumers find it difficult in their purchasing decision to balance the positive impact of future reductions in their electricity and water bills against the negative impact of the immediate increase in the purchase price of the machine.

These studies also show that the buyers of washing machines in fact benefit considerably from the phasing out of categories F to H. The average buyer of a washing machine will recoup the increase in the purchase price within one to two years, in the form of lower electricity and water costs. The overwhelming majority of consumers, including those that use their machine less frequently, will recoup the increase in the purchase price within four years. Given that the average life expectancy for machines in categories A to E is at least five years, the consumers of washing machines, as a group, benefit from the agreement. This net benefit is further increased, for all users of washing machines, by the environmental benefits resulting from the collective reduction in the use of electricity and water. The reduction in electricity consumption leads to less pollution from electricity production and this also benefits consumers of washing machines, to the extent that the pollution-related market failure is not already addressed by other regulatory instruments (e.g. the European Emissions Trading System, which caps carbon emissions). The reduction in water consumption leads to less water pollution. As consumers of washing machines make up the overwhelming majority of the overall population, a share of these environmental benefits accrues to the consumers in the relevant market that are affected by the agreement.

*Analysis:* Although the agreement is likely to have appreciable negative effects and to be caught by Article 101(1), it is also likely to fulfil the conditions of Article 101(3). In particular: (i) as a result of the agreement, the average washing machine becomes more energy- and water-efficient, (ii) this could not have been achieved with a less restrictive agreement, for instance with a collective advertising campaign or sustainability label, (iii) consumers in the relevant market derive a net benefit as a result of the individual use value benefits and the collective environmental benefits, and (iv) competition is not eliminated, as the agreement only affects the scope of the range of models, being one parameter of competition, and not other parameters, such as price or innovation, on which competition can and does take place.