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Notice to readers (see page 3 of the cover)



Price: EUR 22,00 ⁽¹⁾ Text with EEA relevance

NOTICE TO READERS

THE OFFICIAL JOURNAL OF THE EUROPEAN UNION, IN 20 LANGUAGES

After the accession to the European Union of the 10 new Member States (the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, and Slovakia) on **1 May 2004**, the paper version of the *Official Journal of the European Union*, L and C series, will be published in the 20 official languages of the European Union.

The colour strip on the current Official Journal covers will disappear and each language will be indicated by its ISO code: Spanish (ES), Czech (CS), Danish (DA), German (DE), Estonian (ET), Greek (EL), English (EN), French (FR), Italian (IT), Latvian (LV), Lithuanian (LT), Hungarian (HU), Maltese (MT), Dutch (NL), Polish (PL), Portuguese (PT), Slovak (SK), Slovenian (SL), Finnish (FI), Swedish (SV).

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I

(Information)

COMMISSION

Euro exchange rates ⁽¹⁾

26 April 2004

(2004/C 101/01)

1 euro =

Currency	Exchange rate	Currency	Exchange rate		
USD	US dollar	1,1851	LVL	Latvian lats	0,647
JPY	Japanese yen	128,93	MTL	Maltese lira	0,4245
DKK	Danish krone	7,4407	PLN	Polish zloty	4,7688
GBP	Pound sterling	0,66365	ROL	Romanian leu	40 360
SEK	Swedish krona	9,1083	SIT	Slovenian tolar	238,4
CHF	Swiss franc	1,5566	SKK	Slovak koruna	40,045
ISK	Iceland króna	87,30	TRL	Turkish lira	1 631 428
NOK	Norwegian krone	8,2415	AUD	Australian dollar	1,6144
BGN	Bulgarian lev	1,9463	CAD	Canadian dollar	1,6043
CYP	Cyprus pound	0,5865	HKD	Hong Kong dollar	9,2424
CZK	Czech koruna	32,36	NZD	New Zealand dollar	1,8825
EEK	Estonian kroon	15,6466	SGD	Singapore dollar	2,0119
HUF	Hungarian forint	249,85	KRW	South Korean won	1 368,85
LTL	Lithuanian litas	3,4527	ZAR	South African rand	7,9935

⁽¹⁾ Source: reference exchange rate published by the ECB.

COMMISSION NOTICE

Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements

(2004/C 101/02)

(Text with EEA relevance)

I. INTRODUCTION

1. These guidelines set out the principles for the assessment of technology transfer agreements under Article 81 of the Treaty. Technology transfer agreements concern the licensing of technology where the licensor permits the licensee to exploit the licensed technology for the production of goods or services, as defined in Article 1(1)(b) of Commission Regulation (EC) No 773/2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements (the TTBER) ⁽¹⁾.
2. The purpose of the guidelines is to provide guidance on the application of the TTBER as well as on the application of Article 81 to technology transfer agreements that fall outside the scope of the TTBER. The TTBER and the guidelines are without prejudice to the possible parallel application of Article 82 of the Treaty to licensing agreements ⁽²⁾.
3. The standards set forth in these guidelines must be applied in light of the circumstances specific to each case. This excludes a mechanical application. Each case must be assessed on its own facts and the guidelines must be applied reasonably and flexibly. Examples given serve as illustrations only and are not intended to be exhaustive. The Commission will keep under review the functioning of the TTBER and the guidelines in the new enforcement system created by Regulation 1/2003 ⁽³⁾ to consider whether changes need to be made.
4. The present guidelines are without prejudice to the interpretation of Article 81 and the TTBER that may be given by the Court of Justice and the Court of First Instance.

II. GENERAL PRINCIPLES

1. Article 81 and intellectual property rights

5. The aim of Article 81 as a whole is to protect competition on the market with a view to promoting consumer welfare and an efficient allocation of resources. Article 81(1) prohibits all agreements and concerted practices between undertakings and decisions by associations of undertakings ⁽⁴⁾ which may affect trade between Member States ⁽⁵⁾ and which have as their object or effect the prevention, restriction or distortion of competition ⁽⁶⁾. As an exception to this rule Article 81(3) provides that the prohibition contained in Article

81(1) may be declared inapplicable in the case of agreements between undertakings which contribute to improving the production or distribution of products or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits and which do not impose restrictions which are not indispensable to the attainment of these objectives and do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products concerned.

6. Intellectual property laws confer exclusive rights on holders of patents, copyright, design rights, trademarks and other legally protected rights. The owner of intellectual property is entitled under intellectual property laws to prevent unauthorised use of his intellectual property and to exploit it, *inter alia*, by licensing it to third parties. Once a product incorporating an intellectual property right has been put on the market inside the EEA by the holder or with his consent, the intellectual property right is exhausted in the sense that the holder can no longer use it to control the sale of the product ⁽⁷⁾ (principle of Community exhaustion). The right holder has no right under intellectual property laws to prevent sales by licensees or buyers of such products incorporating the licensed technology ⁽⁸⁾. The principle of Community exhaustion is in line with the essential function of intellectual property rights, which is to grant the holder the right to exclude others from exploiting his intellectual property without his consent.
7. The fact that intellectual property laws grant exclusive rights of exploitation does not imply that intellectual property rights are immune from competition law intervention. Articles 81 and 82 are in particular applicable to agreements whereby the holder licenses another undertaking to exploit his intellectual property rights ⁽⁹⁾. Nor does it imply that there is an inherent conflict between intellectual property rights and the Community competition rules. Indeed, both bodies of law share the same basic objective of promoting consumer welfare and an efficient allocation of resources. Innovation constitutes an essential and dynamic component of an open and competitive market economy. Intellectual property rights promote dynamic competition by encouraging undertakings to invest in developing new or improved products and processes. So does competition by putting pressure on undertakings to innovate. Therefore, both intellectual property rights and competition are necessary to promote innovation and ensure a competitive exploitation thereof.

8. In the assessment of licence agreements under Article 81 it must be kept in mind that the creation of intellectual property rights often entails substantial investment and that it is often a risky endeavour. In order not to reduce dynamic competition and to maintain the incentive to innovate, the innovator must not be unduly restricted in the exploitation of intellectual property rights that turn out to be valuable. For these reasons the innovator should normally be free to seek compensation for successful projects that is sufficient to maintain investment incentives, taking failed projects into account. Technology licensing may also require the licensee to make significant sunk investments in the licensed technology and production assets necessary to exploit it. Article 81 cannot be applied without considering such *ex ante* investments made by the parties and the risks relating thereto. The risk facing the parties and the sunk investment that must be committed may thus lead to the agreement falling outside Article 81(1) or fulfilling the conditions of Article 81(3), as the case may be, for the period of time required to recoup the investment.
 9. In assessing licensing agreements under Article 81, the existing analytical framework is sufficiently flexible to take due account of the dynamic aspects of technology licensing. There is no presumption that intellectual property rights and licence agreements as such give rise to competition concerns. Most licence agreements do not restrict competition and create pro-competitive efficiencies. Indeed, licensing as such is pro-competitive as it leads to dissemination of technology and promotes innovation. In addition, even licence agreements that do restrict competition may often give rise to pro-competitive efficiencies, which must be considered under Article 81(3) and balanced against the negative effects on competition⁽¹⁰⁾. The great majority of licence agreements are therefore compatible with Article 81.
12. The following two questions provide a useful framework for making this assessment. The first question relates to the impact of the agreement on inter-technology competition while the second question relates to the impact of the agreement on intra-technology competition. As restraints may be capable of affecting both inter-technology competition and intra-technology competition at the same time, it may be necessary to analyse a restraint in the light of both questions before it can be concluded whether or not competition within the meaning of Article 81(1) is restricted:
 - (a) Does the licence agreement restrict actual or potential competition that would have existed without the contemplated agreement? If so, the agreement may be caught by Article 81(1). In making this assessment it is necessary to take into account competition between the parties and competition from third parties. For instance, where two undertakings established in different Member States cross licence competing technologies and undertake not to sell products in each other's home markets, (potential) competition that existed prior to the agreement is restricted. Similarly, where a licensor imposes obligations on his licensees not to use competing technologies and these obligations foreclose third party technologies, actual or potential competition that would have existed in the absence of the agreement is restricted.
 - (b) Does the agreement restrict actual or potential competition that would have existed in the absence of the contractual restraint(s)? If so, the agreement may be caught by Article 81(1). For instance, where a licensor restricts its licensees from competing with each other, (potential) competition that could have existed between the licensees absent the restraints is restricted. Such restrictions include vertical price fixing and territorial or customer sales restrictions between licensees. However, certain restraints may in certain cases not be caught by Article 81(1) when the restraint is objectively necessary for the existence of an agreement of that type or that nature⁽¹³⁾. Such exclusion of the application of Article 81(1) can only be made on the basis of objective factors external to the parties themselves and not the subjective views and characteristics of the parties. The question is not whether the parties in their particular situation would not have accepted to conclude a less restrictive agreement, but whether, given the nature of the agreement and the characteristics of the market, a less restrictive agreement would not have been concluded by undertakings in a similar setting. For instance, territorial restraints in an agreement between non-competitors may fall outside Article 81(1) for a certain duration if the restraints are objectively necessary for a licensee to penetrate a new market. Similarly, a prohibition imposed on all licensees not to sell to certain categories of end users may not be restrictive of competition if such a restraint is objectively necessary for reasons of safety or health related to the dangerous nature of the product in question.

2. The general framework for applying Article 81

10. Article 81(1) prohibits agreements which have as their object or effect the restriction of competition. Article 81(1) applies both to restrictions of competition between the parties to an agreement and to restrictions of competition between any of the parties and third parties.
11. The assessment of whether a licence agreement restricts competition must be made within the actual context in which competition would occur in the absence of the agreement with its alleged restrictions⁽¹¹⁾. In making this assessment it is necessary to take account of the likely impact of the agreement on inter-technology competition (i.e. competition between undertakings using competing technologies) and on intra-technology competition (i.e. competition between undertakings using the same technology)⁽¹²⁾. Article 81(1) prohibits restrictions of both inter-technology competition and intra-technology competition. It is therefore necessary to assess to what extent the agreement affects or is likely to affect these two aspects of competition on the market.

Claims that in the absence of a restraint the supplier would have resorted to vertical integration are not sufficient. Decisions on whether or not to vertically integrate depend on a broad range of complex economic factors, a number of which are internal to the undertaking concerned.

13. In the application of the analytical framework set out in the previous paragraph it must be taken into account that Article 81(1) distinguishes between those agreements that have a restriction of competition as their object and those agreements that have a restriction of competition as their effect. An agreement or contractual restraint is only prohibited by Article 81(1) if its object or effect is to restrict inter-technology competition and/or intra-technology competition.
14. Restrictions of competition by object are those that by their very nature restrict competition. These are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential for negative effects on competition that it is not necessary for the purposes of applying Article 81(1) to demonstrate any actual effects on the market⁽¹⁴⁾. Moreover, the conditions of Article 81(3) are unlikely to be fulfilled in the case of restrictions by object. The assessment of whether or not an agreement has as its object a restriction of competition is based on a number of factors. These factors include, in particular, the content of the agreement and the objective aims pursued by it. It may also be necessary to consider the context in which it is (to be) applied or the actual conduct and behaviour of the parties on the market⁽¹⁵⁾. In other words, an examination of the facts underlying the agreement and the specific circumstances in which it operates may be required before it can be concluded whether a particular restriction constitutes a hardcore restriction of competition. The way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement does not contain an express provision to that effect. Evidence of subjective intent on the part of the parties to restrict competition is a relevant factor but not a necessary condition. For licence agreements, the Commission considers that the restrictions covered by the list of hardcore restrictions of competition contained in Article 4 of the TTBER are restrictive by their very object.
15. If an agreement is not restrictive of competition by object it is necessary to examine whether it has restrictive effects on competition. Account must be taken of both actual and potential effects⁽¹⁶⁾. In other words the agreement must have likely anti-competitive effects. For licence agreements to be restrictive of competition by effect they must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability. The likely negative effects on competition must be appreciable⁽¹⁷⁾. Appreciable anti-competitive effects are likely to occur when at least one of the parties has or obtains some degree of market power and the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power. Market power is the ability to maintain prices above competitive levels or to maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a not insignificant period of time. The degree of market power normally required for a finding of an infringement under Article 81(1) is less than the degree of market power required for a finding of dominance under Article 82.
16. For the purposes of analysing restrictions of competition by effect it is normally necessary to define the relevant market and to examine and assess, *inter alia*, the nature of the products and technologies concerned, the market position of the parties, the market position of competitors, the market position of buyers, the existence of potential competitors and the level of entry barriers. In some cases, however, it may be possible to show anti-competitive effects directly by analysing the conduct of the parties to the agreement on the market. It may for example be possible to ascertain that an agreement has led to price increases.
17. Licence agreements, however, also have substantial pro-competitive potential. Indeed, the vast majority of licence agreements are pro-competitive. Licence agreements may promote innovation by allowing innovators to earn returns to cover at least part of their research and development costs. Licence agreements also lead to a dissemination of technologies, which may create value by reducing the production costs of the licensee or by enabling him to produce new or improved products. Efficiencies at the level of the licensee often stem from a combination of the licensor's technology with the assets and technologies of the licensee. Such integration of complementary assets and technologies may lead to a cost/output configuration that would not otherwise be possible. For instance, the combination of an improved technology of the licensor with more efficient production or distribution assets of the licensee may reduce production costs or lead to the production of a higher quality product. Licensing may also serve the pro-competitive purpose of removing obstacles to the development and exploitation of the licensee's own technology. In particular in sectors where large numbers of patents are prevalent licensing often occurs in order to create design freedom by removing the risk of infringement claims by the licensor. When the licensor agrees not to invoke his intellectual property rights to prevent the sale of the licensee's products, the agreement removes an obstacle to the sale of the licensee's product and thus generally promotes competition.

18. In cases where a licence agreement is caught by Article 81(1) the pro-competitive effects of the agreement must be balanced against its restrictive effects in the context of Article 81(3). When all four conditions of Article 81(3) are satisfied, the restrictive licence agreement in question is valid and enforceable, no prior decision to that effect being required⁽¹⁸⁾. Hardcore restrictions of competition only fulfil the conditions of Article 81(3) in exceptional circumstances. Such agreements generally fail (at least) one of the first two conditions of Article 81(3). They generally do not create objective economic benefits or benefits for consumers. Moreover, these types of agreements generally also fail the indispensability test under the third condition. For example, if the parties fix the price at which the products produced under the licence must be sold, this will generally lead to a lower output and a misallocation of resources and higher prices for consumers. The price restriction is also not indispensable to achieve the possible efficiencies resulting from the availability to both competitors of the two technologies.
- ### 3. Market definition
19. The Commission's approach to defining the relevant market is laid down in its market definition guidelines⁽¹⁹⁾. The present guidelines only address aspects of market definition that are of particular importance in the field of technology licensing.
20. Technology is an input, which is integrated either into a product or a production process. Technology licensing can therefore affect competition both in input markets and in output markets. For instance, an agreement between two parties which sell competing products and which cross license technologies relating to the production of these products may restrict competition on the product market concerned. It may also restrict competition on the market for technology and possibly also on other input markets. For the purposes of assessing the competitive effects of licence agreements it may therefore be necessary to define relevant goods and service markets (product markets) as well as technology markets⁽²⁰⁾. The term 'product market' used in Article 3 of the TTBER refers to relevant goods and service markets in both their geographic and product dimension. As is clear from Article 1(1)(j) of the TTBER, the term is used merely to distinguish relevant goods and service markets from relevant technology markets.
21. The TTBER and these guidelines are concerned with effects both on product markets for final products and on product markets for intermediate products. The relevant product market includes products which are regarded by the buyers as interchangeable with or substitutable for the contract products incorporating the licensed technology, by reason of the products' characteristics, their prices and their intended use.
22. Technology markets consist of the licensed technology and its substitutes, i.e. other technologies which are regarded by the licensees as interchangeable with or substitutable for the licensed technology, by reason of the technologies' characteristics, their royalties and their intended use. The methodology for defining technology markets follows the same principles as the definition of product markets. Starting from the technology which is marketed by the licensor, one needs to identify those other technologies to which licensees could switch in response to a small but permanent increase in relative prices, i.e. the royalties. An alternative approach is to look at the market for products incorporating the licensed technology (cf. paragraph below).
23. Once relevant markets have been defined, market shares can be assigned to the various sources of competition in the market and used as an indication of the relative strength of market players. In the case of technology markets one way to proceed is to calculate market shares on the basis of each technology's share of total licensing income from royalties, representing a technology's share of the market where competing technologies are licensed. However, this may often be a mere theoretical and not a practical way to proceed because of lack of clear information on royalties etc. An alternative approach, which is the one used in Article 3(3) of the TTBER, is to calculate market shares on the technology market on the basis of sales of products incorporating the licensed technology on downstream product markets (see paragraph 70 below). Under this approach all sales on the relevant product market are taken into account, irrespective of whether the product incorporates a technology that is being licensed. In the case of technology markets the approach of Article 3(3) to take into account technologies that are (only) being used in-house, is justified. Indeed, this approach is in general a good indicator of the strength of the technology. First, it captures any potential competition from undertakings that are producing with their own technology and that are likely to start licensing in the event of a small but permanent increase in the price for licenses. Secondly, even where it is unlikely that other technology owners would start licensing, the licensor does not necessarily have market power on the technology market even if he has a high share of licensing income. If the downstream product market is competitive, competition at this level may effectively constrain the licensor. An increase in royalties upstream affects the costs of the licensee, making him less competitive, causing him to lose sales. A technology's market share on the product market also captures this element and is thus normally a good indicator of licensor market power. In individual cases outside the safe harbour of the TTBER it may be necessary, where practically possible, to apply both of the described approaches in order to assess more accurately the market strength of the licensor.

24. Moreover, outside the safe harbour of the TTBER it must also be taken into account that market share may not always be a good indication of the relative strength of available technologies. The Commission will therefore, *inter alia*, also have regard to the number of independently controlled technologies available in addition to the technologies controlled by the parties to the agreement that may be substitutable for the licensed technology at a comparable cost to the user (see paragraph 131 below).
25. Some licence agreements may affect innovation markets. In analysing such effects, however, the Commission will normally confine itself to examining the impact of the agreement on competition within existing product and technology markets⁽²¹⁾. Competition on such markets may be affected by agreements that delay the introduction of improved products or new products that over time will replace existing products. In such cases innovation is a source of potential competition which must be taken into account when assessing the impact of the agreement on product markets and technology markets. In a limited number of cases, however, it may be useful and necessary to also define innovation markets. This is particularly the case where the agreement affects innovation aiming at creating new products and where it is possible at an early stage to identify research and development poles⁽²²⁾. In such cases it can be analysed whether after the agreement there will be a sufficient number of competing research and development poles left for effective competition in innovation to be maintained.
- #### 4. The distinction between competitors and non-competitors
26. In general, agreements between competitors pose a greater risk to competition than agreements between non-competitors. However, competition between undertakings that use the same technology (intra-technology competition between licensees) constitutes an important complement to competition between undertakings that use competing technologies (inter-technology competition). For instance, intra-technology competition may lead to lower prices for the products incorporating the technology in question, which may not only produce direct and immediate benefits for consumers of these products, but also spur further competition between undertakings that use competing technologies. In the context of licensing it must also be taken into account that licensees are selling their own product. They are not re-selling a product supplied by another undertaking. There may thus be greater scope for product differentiation and quality-based competition between licensees than in the case of vertical agreements for the resale of products.
27. In order to determine the competitive relationship between the parties it is necessary to examine whether the parties would have been actual or potential competitors in the absence of the agreement. If without the agreement the parties would not have been actual or potential competitors in any relevant market affected by the agreement they are deemed to be non-competitors.
28. Where the licensor and the licensee are both active on the same product market or the same technology market without one or both parties infringing the intellectual property rights of the other party, they are actual competitors on the market concerned. The parties are deemed to be actual competitors on the technology market if the licensee is already licensing out his technology and the licensor enters the technology market by granting a license for a competing technology to the licensee.
29. The parties are considered to be potential competitors on the product market if in the absence of the agreement and without infringing the intellectual property rights of the other party it is likely that they would have undertaken the necessary additional investment to enter the relevant market in response to a small but permanent increase in product prices. In order to constitute a realistic competitive constraint entry has to be likely to occur within a short period. Normally a period of one to two years is appropriate. However, in individual cases longer periods can be taken into account. The period of time needed for undertakings already on the market to adjust their capacities can be used as a yardstick to determine this period. For instance, the parties are likely to be considered potential competitors on the product market where the licensee produces on the basis of its own technology in one geographic market and starts producing in another geographic market on the basis of a licensed competing technology. In such circumstances, it is likely that the licensee would have been able to enter the second geographic market on the basis of its own technology, unless such entry is precluded by objective factors, including the existence of blocking patents (see paragraph 32 below).
30. The parties are considered to be potential competitors on the technology market where they own substitutable technologies if in the specific case the licensee is not licensing his own technology, provided that he would be likely to do so in the event of a small but permanent increase in technology prices. However, for the application of the TTBER potential competition on the technology market is not taken into account (see paragraph 66 below).

31. In some cases the parties may become competitors subsequent to the conclusion of the agreement because the licensee develops and starts exploiting a competing technology. In such cases it must be taken into account that the parties were non-competitors at the time of conclusion of the agreement and that the agreement was concluded in that context. The Commission will therefore mainly focus on the impact of the agreement on the licensee's ability to exploit his own (competing) technology. In particular, the list of hardcore restrictions applying to agreements between competitors will not be applied to such agreements unless the agreement is subsequently amended in any material respect after the parties have become competitors (cf. Article 4(3) of the TTBER). The undertakings party to an agreement may also become competitors subsequent to the conclusion of the agreement where the licensee was already active on the product market prior to the licence and where the licensor subsequently enters the product market either on the basis of the licensed technology or a new technology. Also in this case the hardcore list relevant for agreements between non-competitors will continue to apply to the agreement unless the agreement is subsequently amended in any material respect (cf. article 4(3) of the TTBER).

32. If the parties own technologies that are in a one-way or two-way blocking position, the parties are considered to be non-competitors on the technology market. A one-way blocking position exists when a technology cannot be exploited without infringing upon another technology. This is for instance the case where one patent covers an improvement of a technology covered by another patent. In that case the exploitation of the improvement patent pre-supposes that the holder obtains a licence to the basic patent. A two-way blocking position exists where neither technology can be exploited without infringing upon the other technology and where the holders thus need to obtain a licence or a waiver from each other. In assessing whether a blocking position exists the Commission will rely on objective factors as opposed to the subjective views of the parties. Particularly convincing evidence of the existence of a blocking position is required where the parties may have a common interest in claiming the existence of a blocking position in order to be qualified as non-competitors, for instance where the claimed two-way blocking position concerns technologies that are technological substitutes. Relevant evidence includes court decisions including injunctions and opinions of independent experts. In the latter case the Commission will, in particular, closely examine how the expert has been selected. However, also other convincing evidence, including expert evidence from the parties that they have or had good and valid reasons to believe that a blocking position exists or existed, can be relevant to substantiate the existence of a blocking position.

33. In some cases it may also be possible to conclude that while the licensor and the licensee produce competing products, they are non-competitors on the relevant

product market and the relevant technology market because the licensed technology represents such a drastic innovation that the technology of the licensee has become obsolete or uncompetitive. In such cases the licensor's technology either creates a new market or excludes the licensee's technology from the market. Often, however, it is not possible to come to this conclusion at the time the agreement is concluded. It is usually only when the technology or the products incorporating it have been available to consumers for some time that it becomes apparent that the older technology has become obsolete or uncompetitive. For instance, when CD technology was developed and players and discs were put on the market, it was not obvious that this new technology would replace LP technology. This only became apparent some years later. The parties will therefore be considered to be competitors if at the time of the conclusion of the agreement it is not obvious that the licensee's technology is obsolete or uncompetitive. However, given that both Articles 81(1) and Article 81(3) must be applied in light of the actual context in which the agreement occurs, the assessment is sensitive to material changes in the facts. The classification of the relationship between the parties will therefore change into a relationship of non-competitors, if at a later point in time the licensee's technology becomes obsolete or uncompetitive on the market.

III. APPLICATION OF THE BLOCK EXEMPTION REGULATION

1. The effects of the Block Exemption Regulation

34. Technology transfer agreements that fulfil the conditions set out in the TTBER are block exempted from the prohibition rule contained in Article 81(1). Block exempted agreements are legally valid and enforceable. Such agreements can only be prohibited for the future and only upon withdrawal of the block exemption by the Commission or a Member State competition authority. Block exempted agreements cannot be prohibited under Article 81 by national courts in the context of private litigation.

35. Block exemption of categories of technology transfer agreements is based on the presumption that such agreements — to the extent that they are caught by Article 81(1) — fulfil the four conditions laid down in Article 81(3). It is thus presumed that the agreements give rise to economic efficiencies, that the restrictions contained in the agreements are indispensable to the attainment of these efficiencies, that consumers within the affected markets receive a fair share of the efficiency gains and that the agreements do not afford the undertakings concerned the possibility of eliminating

competition in respect of a substantial part of the products in question. The market share thresholds (Article 3), the hardcore list (Article 4) and the excluded restrictions (Article 5) set out in the TTBER aim at ensuring that only restrictive agreements that can reasonably be presumed to fulfil the four conditions of Article 81(3) are block exempted.

36. As set out in section IV below, many licence agreements fall outside Article 81(1), either because they do not restrict competition at all or because the restriction of competition is not appreciable⁽²³⁾. To the extent that such agreements would anyhow fall within the scope of the TTBER, there is no need to determine whether they are caught by Article 81(1)⁽²⁴⁾.

37. Outside the scope of the block exemption it is relevant to examine whether in the individual case the agreement is caught by Article 81(1) and if so whether the conditions of Article 81(3) are satisfied. There is no presumption that technology transfer agreements falling outside the block exemption are caught by Article 81(1) or fail to satisfy the conditions of Article 81(3). In particular, the mere fact that the market shares of the parties exceed the market share thresholds set out in Article 3 of the TTBER is not a sufficient basis for finding that the agreement is caught by Article 81(1). Individual assessment of the likely effects of the agreement is required. It is only when agreements contain hardcore restrictions of competition that it can normally be presumed that they are prohibited by Article 81.

2. Scope and duration of the Block Exemption Regulation

2.1. Agreements between two parties

38. According to Article 2(1) of the TTBER, the Regulation covers technology transfer agreements 'between two undertakings'. Technology transfer agreements between more than two undertakings are not covered by the TTBER⁽²⁵⁾. The decisive factor in terms of distinguishing between agreements between two undertakings and multiparty agreements is whether the agreement in question is concluded between more than two undertakings.

39. Agreements concluded by two undertakings fall within the scope of the TTBER even if the agreement stipulates conditions for more than one level of trade. For instance, the TTBER applies to a licence agreement concerning not only the production stage but also the distribution stage, stipulating the obligations that the licensee must or may impose on resellers of the products produced under the licence⁽²⁶⁾.

40. Licence agreements concluded between more than two undertakings often give rise to the same issues as licence agreements of the same nature concluded between two undertakings. In its individual assessment of licence agreements which are of the same nature as those covered by the block exemption but which are concluded between more than two undertakings, the Commission will apply by analogy the principles set out in the TTBER.

2.2. Agreements for the production of contract products

41. It follows from Article 2 that for licence agreements to be covered by the TTBER they must concern 'the production of contract products', i.e. products incorporating or produced with the licensed technology. In other words, to be covered by the TTBER the licence must permit the licensee to exploit the licensed technology for production of goods or services (see recital 7 of the TTBER). The TTBER does not cover technology pools. The notion of technology pools covers agreements whereby two or more parties agree to pool their respective technologies and license them as a package. The notion of technology pools also covers arrangements whereby two or more undertakings agree to license a third party and authorise him to license on the package of technologies. Technology pools are dealt with in section IV.4 below.

42. The TTBER applies to licence agreements for the production of contract products whereby the licensee is also permitted to sublicense the licensed technology to third parties provided, however, that the production of contract products constitutes the primary object of the agreement. Conversely, the TTBER does not apply to agreements that have sublicensing as their primary object. However, the Commission will apply by analogy the principles set out in the TTBER and these guidelines to such 'master licensing' agreements between licensor and licensee. Agreements between the licensee and sub-licensees are covered by the TTBER.

43. The term 'contract products' encompasses goods and services produced with the licensed technology. This is the case both where the licensed technology is used in the production process and where it is incorporated into the product itself. In these guidelines the term 'products incorporating the licensed technology' covers both situations. The TTBER applies in all cases where technology is licensed for the purposes of producing goods and services. It is sufficient in this respect that the licensor undertakes not to exercise his intellectual property rights against the licensee. Indeed, the essence of a pure patent licence is the right to operate inside the scope of the exclusive right of the patent. It follows that the TTBER also covers so-called non-assertion agreements and settlement agreements whereby the licensor permits the licensee to produce within the scope of the patent.

44. The TTBER covers 'subcontracting' whereby the licensor licenses technology to the licensee who undertakes to produce certain products on the basis thereof exclusively for the licensor. Subcontracting may also involve the supply of equipment by the licensor to be used in the production of the goods and services covered by the agreement. For the latter type of subcontracting to be covered by the TTBER, the licensed technology and not the supplied equipment must constitute the primary object of the agreement. Subcontracting is also covered by the Commission's Notice concerning the assessment of certain subcontracting agreements in relation to Article 81(1) of the Treaty (27). According to this notice, which remains applicable, subcontracting agreements whereby the subcontractor undertakes to produce certain products exclusively for the contractor generally fall outside Article 81(1). However, other restrictions imposed on the subcontractor such as the obligation not to conduct or exploit his own research and development may be caught by Article 81 (28).

45. The TTBER also applies to agreements whereby the licensee must carry out development work before obtaining a product or a process that is ready for commercial exploitation, provided that a contract product has been identified. Even if such further work and investment is required, the object of the agreement is the production of an identified contract product. On the other hand, the TTBER and the guidelines do not cover agreements whereby a technology is licensed for the purpose of enabling the licensee to carry out further research and development in various fields. For instance, the TTBER and the guidelines do not cover the licensing of a technological research tool used in the process of further research activity. The framework of the TTBER and the guidelines is based on the premise that there is a direct link between the licensed technology and an identified contract product. In cases where no such link exists the main object of the agreement is research and development as opposed to bringing a particular product to the market; in that case the analytical framework of the TTBER and the guidelines may not be appropriate. For the same reasons the TTBER and the guidelines do not cover research and development sub-contracting whereby the licensee undertakes to carry out research and development in the field of the licensed technology and to hand back the improved technology package to the licensor. The main object of such agreements is the provision of research and development services aimed at improving the technology as opposed to the production of goods and services on the basis of the licensed technology.

2.3. The concept of technology transfer agreements

46. The TTBER and these guidelines cover agreements for the transfer of technology. According to Article 1(1)(b) and (h) of the TTBER the concept of 'technology' covers patents and patent applications, utility models and

applications for utility models, design rights, plant breeders rights, topographies of semiconductor products, supplementary protection certificates for medicinal products or other products for which such supplementary protection certificates may be obtained, software copyright, and know-how. The licensed technology should allow the licensee with or without other inputs to produce the contract products.

47. Know-how is defined in Article 1(1)(i) as a package of non-patented practical information, resulting from experience and testing, which is secret, substantial and identified. 'Secret' means that the know-how is not generally known or easily accessible. 'Substantial' means that the know-how includes information which is significant and useful for the production of the products covered by the licence agreement or the application of the process covered by the licence agreement. In other words, the information must significantly contribute to or facilitate the production of the contract products. In cases where the licensed know-how relates to a product as opposed to a process, this condition implies that the know-how is useful for the production of the contract product. This condition is not satisfied where the contract product can be produced on the basis of freely available technology. However, the condition does not require that the contract product is of higher value than products produced with freely available technology. In the case of process technologies, this condition implies that the know-how is useful in the sense that it can reasonably be expected at the date of conclusion of the agreement to be capable of significantly improving the competitive position of the licensee, for instance by reducing his production costs. 'Identified' means that it is possible to verify that the licensed know-how fulfils the criteria of secrecy and substantiality. This condition is satisfied where the licensed know-how is described in manuals or other written form. However, in some cases this may not be reasonably possible. The licensed know-how may consist of practical knowledge possessed by the licensor's employees. For instance, the licensor's employees may possess secret and substantial knowledge about a certain production process which is passed on to the licensee in the form of training of the licensee's employees. In such cases it is sufficient to describe in the agreement the general nature of the know-how and to list the employees that will be or have been involved in passing it on to the licensee.

48. The concept of 'transfer' implies that technology must flow from one undertaking to another. Such transfers normally take the form of licensing whereby the licensor grants the licensee the right to use his technology against payment of royalties. It can also take the form of sub-licensing, whereby a licensee, having been authorised to do so by the licensor, grants licenses to third parties (sub-licensees) for the exploitation of the technology.

49. The TTBER only applies to agreements that have as their primary object the transfer of technology as defined in that Regulation as opposed to the purchase of goods and services or the licensing of other types of intellectual property. Agreements containing provisions relating to the purchase and sale of products are only covered by the TTBER to the extent that those provisions do not constitute the primary object of the agreement and are directly related to the application of the licensed technology. This is likely to be the case where the tied products take the form of equipment or process input which is specifically tailored to efficiently exploit the licensed technology. If, on the other hand, the product is simply another input into the final product, it must be carefully examined whether the licensed technology constitutes the primary object of the agreement. For instance, in cases where the licensee is already manufacturing a final product on the basis of another technology, the licence must lead to a significant improvement of the licensee's production process, exceeding the value of the product purchased from the licensor. The requirement that the tied products must be related to the licensing of technology implies that the TTBER does not cover the purchase of products that have no relation with the products incorporating the licensed technology. This is for example the case where the tied product is not intended to be used with the licensed product, but relates to an activity on a separate product market.
50. The TTBER only covers the licensing of other types of intellectual property such as trademarks and copyright, other than software copyright, to the extent that they are directly related to the exploitation of the licensed technology and do not constitute the primary object of the agreement. This condition ensures that agreements covering other types of intellectual property rights are only block exempted to the extent that these other intellectual property rights serve to enable the licensee to better exploit the licensed technology. The licensor may for instance authorise the licensee to use his trademark on the products incorporating the licensed technology. The trademark licence may allow the licensee to better exploit the licensed technology by allowing consumers to make an immediate link between the product and the characteristics imputed to it by the licensed technology. An obligation on the licensee to use the licensor's trademark may also promote the dissemination of technology by allowing the licensor to identify himself as the source of the underlying technology. However, where the value of the licensed technology to the licensee is limited because he already employs an identical or very similar technology and the main object of the agreement is the trademark, the TTBER does not apply ⁽²⁹⁾.
51. The licensing of copyright for the purpose of reproduction and distribution of the protected work, i.e. the production of copies for resale, is considered to be similar to technology licensing. Since such licence agreements relate to the production and sale of products on the basis of an intellectual property right, they are considered to be of a similar nature as technology transfer agreements and normally raise comparable issues. Although the TTBER does not cover copyright other than software copyright, the Commission will as a general rule apply the principles set out in the TTBER and these guidelines when assessing such licensing of copyright under Article 81.
52. On the other hand, the licensing of rights in performances and other rights related to copyright is considered to raise particular issues and it may not be warranted to assess such licensing on the basis of the principles developed in these guidelines. In the case of the various rights related to performances value is created not by the reproduction and sale of copies of a product but by each individual performance of the protected work. Such exploitation can take various forms including the performance, showing or the renting of protected material such as films, music or sporting events. In the application of Article 81 the specificities of the work and the way in which it is exploited must be taken into account ⁽³⁰⁾. For instance, resale restrictions may give rise to less competition concerns whereas particular concerns may arise where licensors impose on their licensees to extend to each of the licensors more favourable conditions obtained by one of them. The Commission will therefore not apply the TTBER and the present guidelines by way of analogy to the licensing of these other rights.
53. The Commission will also not extend the principles developed in the TTBER and these guidelines to trademark licensing. Trademark licensing often occurs in the context of distribution and resale of goods and services and is generally more akin to distribution agreements than technology licensing. Where a trademark licence is directly related to the use, sale or resale of goods and services and does not constitute the primary object of the agreement, the licence agreement is covered by Commission Regulation (EC) No 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices ⁽³¹⁾.

2.4. Duration

54. Subject to the duration of the TTBER, the block exemption applies for as long as the licensed property right has not lapsed, expired or been declared invalid. In the case of know-how the block exemption applies as long as the licensed know-how remains secret, except where the know-how becomes publicly known as a result of action by the licensee, in which case the exemption shall apply for the duration of the agreement (cf. Article 2 of the TTBER).

55. The block exemption applies to each licensed property right covered by the agreement and ceases to apply on the date of expiry, invalidity or the coming into the public domain of the last intellectual property right which constitutes 'technology' within the meaning of the TTBER (cf. paragraph above).

2.5. Relationship with other block exemption regulations

56. The TTBER covers agreements between two undertakings concerning the licensing of technology for the purpose of the production of contract products. However, technology can also be an element of other types of agreements. In addition, the products incorporating the licensed technology are subsequently sold on the market. It is therefore necessary to address the interface between the TTBER and Commission Regulation (EC) No 2658/2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements⁽³²⁾, Commission Regulation 2659/2000 on the application of Article 81(3) to categories of research and development agreements⁽³³⁾ and Commission Regulation (EC) No 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices⁽³⁴⁾.

2.5.1. The Block Exemption Regulations on specialisation and R&D agreements

57. According to Article 1(1)(c) of Regulation 2658/2000 on specialisation agreements, that Regulation covers, *inter alia*, joint production agreements by virtue of which two or more undertakings agree to produce certain products jointly. The Regulation extends to provisions concerning the assignment or use of intellectual property rights, provided that they do not constitute the primary object of the agreement, but are directly related to and necessary for its implementation.

58. Where undertakings establish a production joint venture and license the joint venture to exploit technology, which is used in the production of the products produced by the joint venture, such licensing is subject to Regulation 2658/2000 and not the TTBER. Accordingly, licensing in the context of a production joint venture normally falls to be considered under Regulation 2658/2000. However, where the joint venture engages in licensing of the technology to third parties, the activity is not linked to production by the joint venture and therefore not covered by that Regulation. Such licensing arrangements, which bring together the technologies of the parties, constitute technology pools, which are dealt with in section IV.4 below.

59. Regulation 2659/2000 on research and development agreements covers agreements whereby two or more undertakings agree to jointly carry out research and development and to jointly exploit the results thereof. According to Article 2(11), research and development and the exploitation of the results are carried out jointly where the work involved is carried out by a

joint team, organisation or undertakings, jointly entrusted to a third party or allocated between the parties by way of specialisation in research, development, production and distribution, including licensing.

60. It follows that Regulation 2659/2000 covers licensing between the parties and by the parties to a joint entity in the context of a research and development agreement. In the context of such agreements the parties can also determine the conditions for licensing the fruits of the research and development agreement to third parties. However, since third party licensees are not party to the research and development agreement, the individual licence agreement concluded with third parties is not covered by Regulation 2659/2000. Such licence agreements are block exempted by the TTBER where they fulfil the conditions of that Regulation.

2.5.2. The Block Exemption Regulation on vertical agreements

61. Commission Regulation (EC) No 2790/1999 on vertical agreements covers agreements entered into between two or more undertakings each operating, for the purposes of the agreement, at different levels of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services. It thus covers supply and distribution agreements⁽³⁵⁾.

62. Given that the TTBER only covers agreements between two parties and that a licensee, selling products incorporating the licensed technology, is a supplier for the purposes of Regulation 2790/1999, these two block exemption regulations are closely related. The agreement between licensor and licensee is subject to the TTBER whereas agreements concluded between a licensee and buyers are subject to Regulation 2790/1999 and the Guidelines on Vertical Restraints⁽³⁶⁾.

63. The TTBER also block exempts agreements between the licensor and the licensee where the agreement imposes obligations on the licensee as to the way in which he must sell the products incorporating the licensed technology. In particular, the licensee can be obliged to establish a certain type of distribution system such as exclusive distribution or selective distribution. However, the distribution agreements concluded for the purposes of implementing such obligations must, in order to be

block exempted, comply with Regulation 2790/1999. For instance, the licensor can oblige the licensee to establish a system based on exclusive distribution in accordance with specified rules. However, it follows from Article 4(b) of Regulation 2790/1999 that distributors must be free to make passive sales into the territories of other exclusive distributors.

64. Furthermore, distributors must in principle be free to sell both actively and passively into territories covered by the distribution systems of other licensees producing their own products on the basis of the licensed technology. This is because for the purposes of Regulation 2790/1999 each licensee is a separate supplier. However, the reasons underlying the block exemption contained in that Regulation may also apply where the products incorporating the licensed technology are sold by the licensees under a common brand belonging to the licensor. When the products incorporating the licensed technology are sold under a common brand identity there may be the same efficiency reasons for applying the same types of restraints between licensees' distribution systems as within a single vertical distribution system. In such cases the Commission would be unlikely to challenge restraints where by analogy the requirements of Regulation 2790/1999 are fulfilled. For a common brand identity to exist the products must be sold and marketed under a common brand, which is predominant in terms of conveying quality and other relevant information to the consumer. It does not suffice that in addition to the licensees' brands the product carries the licensor's brand, which identifies him as the source of the licensed technology.

3. The safe harbour established by the Block Exemption Regulation

65. According to Article 3 of the TTBER the block exemption of restrictive agreements is subject to market share thresholds, confining the scope of the block exemption to agreements that although they may be restrictive of competition can generally be presumed to fulfil the conditions of Article 81(3). Outside the safe harbour created by the market share thresholds individual assessment is required. The fact that market shares exceed the thresholds does not give rise to any presumption either that the agreement is caught by Article 81(1) or that the agreement does not fulfil the conditions of Article 81(3). In the absence of hardcore restrictions, market analysis is required.
66. The market share threshold to be applied for the purpose of the safe harbour of the TTBER depends on whether the agreement is concluded between competitors or non-competitors. For the purposes of the TTBER undertakings are competitors on the relevant technology market when they license competing technologies. Potential competition on the technology market is not

taken into account for the application of the market share threshold or the hardcore list. Outside the safe harbour of the TTBER potential competition on the technology market is taken into account but does not lead to the application of the hardcore list relating to agreements between competitors (see also paragraph 31 above).

67. Undertakings are competitors on the relevant product market where both undertakings are active on the same product and geographic market(s) on which the products incorporating the licensed technology are sold (actual competitors). They are also considered competitors where they would be likely, on realistic grounds, to undertake the necessary additional investments or other necessary switching costs to enter the relevant product and geographic market(s) within a reasonably short period of time⁽³⁷⁾ in response to a small and permanent increase in relative prices (potential competitors).
68. It follows from paragraphs 66 and 67 that two undertakings are not competitors for the purposes of the TTBER where the licensor is neither an actual nor a potential supplier of products on the relevant market and the licensee, already present on the product market, is not licensing out a competing technology even if he owns a competing technology and produces on the basis of that technology. However, the parties become competitors if at a later point in time the licensee starts licensing out his technology or the licensor becomes an actual or potential supplier of products on the relevant market. In that case the hardcore list relevant for agreements between non-competitors will continue to apply to the agreement unless the agreement is subsequently amended in any material respect, see Article 4(3) of the TTBER and paragraph 31 above.
69. In the case of agreements between competitors the market share threshold is 20 % and in the case of agreements between non-competitors it is 30 % (cf. Article 3(1) and (2) of the TTBER). Where the undertakings party to the licensing agreement are not competitors the agreement is covered if the market share of neither party exceeds 30 % on the affected relevant technology and product markets. Where the undertakings party to the licensing agreement are competitors the agreement is covered if the combined market shares of the parties do not exceed 20 % on the relevant technology and product markets. The market share thresholds apply both to technology markets and markets for products incorporating the licensed technology. If the applicable market share threshold is exceeded on an affected relevant market, the block exemption does not apply to the agreement for that relevant market. For instance, if the licence agreement concerns two separate product markets or two separate geographic markets, the block exemption may apply to one of the markets and not to the other.

70. In the case of technology markets, it follows from Article 3(3) of the TTBER that the licensor's market share is to be calculated on the basis of the sales of the licensor and all his licensees of products incorporating the licensed technology and this for each relevant market separately⁽³⁸⁾. Where the parties are competitors on the technology market, sales of products incorporating the licensee's own technology must be combined with the sales of the products incorporating the licensed technology. In the case of new technologies that have not yet generated any sales, a zero market share is assigned. When sales commence the technology will start accumulating market share.

71. In the case of product markets, the licensee's market share is to be calculated on the basis of the licensee's sales of products incorporating the licensor's technology and competing products, i.e. the total sales of the licensee on the product market in question. Where the licensor is also a supplier of products on the relevant market, the licensor's sales on the product market in question must also be taken into account. In the calculation of market shares for product markets, however, sales made by other licensees are not taken into account when calculating the licensee's and/or licensor's market share.

72. Market shares should be calculated on the basis of sales value data where such data are available. Such data normally provide a more accurate indication of the strength of a technology than volume data. However, where value based data are not available, estimates based on other reliable market information may be used, including market sales volume data.

73. The principles set out above can be illustrated by the following examples:

Licensing between non-competitors

Example 1

Company A is specialised in developing bio-technological products and techniques and has developed a new product Xeran. It is not active as a producer of Xeran, for which it has neither the production nor the distribution facilities. Company B is one of the producers of competing products, produced with freely available non-proprietary technologies. In year 1, B was selling EUR 25 million worth of products produced with the freely available technologies. In year 2, A gives a licence to B to produce Xeran. In that year B sells EUR 15 million produced with the help of the freely available technologies and EUR 15 million of Xeran. In year 3 and the following years B produces and sells only Xeran worth EUR 40 million annually. In addition in year 2, A is also licensing to C. C was not active on that product market before. C produces and sells only Xeran, EUR 10 million in year 2 and EUR 15 million in year 3 and thereafter. It is established that the total market of Xeran and its substitutes where B and C are active is worth EUR 200 million in each year.

In year 2, the year the licence agreement is concluded, A's market share on the technology market is 0 % as its market share has to be calculated on the basis of the total sales of Xeran in the preceding year. In year 3 A's market share on the technology market is 12,5 %, reflecting the value of Xeran produced by B and C in the preceding year 2. In year 4 and thereafter A's market share on the technology market is 27,5 %, reflecting the value of Xeran produced by B and C in the preceding year.

In year 2 B's market share on the product market is 12,5 %, reflecting B's EUR 25 million sales in year 1. In year 3 B's market share is 15 % because its sales have increased to EUR 30 million in year 2. In year 4 and thereafter B's market share is 20 % as its sales are EUR 40 million annually. C's market share on the product market is 0 % in year 1 and 2, 5 % in year 3 and 7, 5 % thereafter.

As the licence agreements are between non-competitors and the individual market shares of A, B and C are below 30 % each year, the agreements fall within the safe harbour of the TTBER.

Example 2

The situation is the same as in example 1, however now B and C are operating in different geographic markets. It is established that the total market of Xeran and its substitutes is worth EUR 100 million annually in each geographic market.

In this case, A's market share on the technology market has to be calculated for each of the two geographic markets. In the market where B is active A's market share depends on the sale of Xeran by B. As in this example the total market is assumed to be EUR 100 million, i.e. half the size of the market in example 1, the market share of A is 0 % in year 2, 15 % in year 3 and 40 % thereafter. B's market share is 25 % in year 2, 30 % in year 3 and 40 % thereafter. In year 2 and 3 both A's and B's market share does not exceed the 30 % threshold. The threshold is however exceeded from year 4 and this means that, in line with Article 8(2) of the TTBER, after year 6 the licence agreement between A and B can no longer benefit from the safe harbour but has to be assessed on an individual basis.

In the market where C is active A's market share depends on the sale of Xeran by C. A's market share on the technology market, based on C's sales in the previous year, is therefore 0 % in year 2, 10 % in year 3 and 15 % thereafter. The market share of C on the product market is the same: 0 % in year 2, 10 % in year 3 and 15 % thereafter. The licence agreement between A and C therefore falls within the safe harbour for the whole period.

*Licensing between competitors*Example 3

Companies A and B are active on the same relevant product and geographic market for a certain chemical product. They also each own a patent on different technologies used to produce this product. In year 1 A and B sign a cross licence agreement licensing each other to use their respective technologies. In year 1 A and B produce only with their own technology and A sells EUR 15 million of the product and B sells EUR 20 million of the product. From year 2 they both use their own and the other's technology. From that year onward A sells EUR 10 million of the product produced with its own technology and EUR 10 million of the product produced with B's technology. B sells from year 2 EUR 15 million of the product produced with its own technology and EUR 10 million of the product produced with A's technology. It is established that the total market of the product and its substitutes is worth EUR 100 million in each year.

To assess the licence agreement under the TTBER, the market shares of A and B have to be calculated both on the technology market and the product market. The market share of A on the technology market depends on the amount of the product sold in the preceding year that was produced, by both A and B, with A's technology. In year 2 the market share of A on the technology market is therefore 15 %, reflecting its own production and sales of EUR 15 million in year 1. From year 3 A's market share on the technology market is 20 %, reflecting the EUR 20 million sale of the product produced with A's technology and produced and sold by A and B (EUR 10 million each). Similarly, in year 2 B's market share on the technology market is 20 % and thereafter 25 %.

The market shares of A and B on the product market depend on their respective sales of the product in the previous year, irrespective of the technology used. The market share of A on the product market is 15 % in year 2 and 20 % thereafter. The market share of B on the product market is 20 % in year 2 and 25 % thereafter.

As the agreement is between competitors, their combined market share, both on the technology and on the product market, has to be below the 20 % market share threshold in order to benefit from the safe harbour. It is clear that this is not the case here. The combined market share on the technology market and on the product market is 35 % in year 2 and 45 % thereafter. This agreement between competitors will therefore have to be assessed on an individual basis.

4. Hardcore restrictions of competition under the Block Exemption Regulation

4.1. General principles

74. Article 4 of the TTBER contains a list of hardcore restrictions of competition. The classification of a restraint as a hardcore restriction of competition is based on the nature of the restriction and experience showing that such restrictions are almost always anti-competitive. In line with the case law of the Community Courts⁽³⁹⁾ such a restriction may result from the clear objective of the agreement or from the circumstances of the individual case (cf. paragraph 14 above).

75. When a technology transfer agreement contains a hardcore restriction of competition, it follows from Article 4(1) and 4(2) of the TTBER that the agreement as a whole falls outside the scope of the block exemption. For the purposes of the TTBER hardcore restrictions cannot be severed from the rest of the agreement. Moreover, the Commission considers that in the context of individual assessment hardcore restrictions of competition will only in exceptional circumstances fulfil the four conditions of Article 81(3) (cf. paragraph 18 above).
76. Article 4 of the TTBER distinguishes between agreements between competitors and agreements between non-competitors.
- 4.2. Agreements between competitors**
77. Article 4(1) lists the hardcore restrictions for licensing between competitors. According to Article 4(1), the TTBER does not cover agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:
- (a) The restriction of a party's ability to determine its prices when selling products to third parties;
 - (b) The limitation of output, except limitations on the output of contract products imposed on the licensee in a non-reciprocal agreement or imposed on only one of the licensees in a reciprocal agreement;
 - (c) The allocation of markets or customers except
 - (i) the obligation on the licensee(s) to produce with the licensed technology only within one or more technical fields of use or one or more product markets;
 - (ii) the obligation on the licensor and/or the licensee, in a non-reciprocal agreement, not to produce with the licensed technology within one or more technical fields of use or one or more product markets or one or more exclusive territories reserved for the other party;
 - (iii) the obligation on the licensor not to license the technology to another licensee in a particular territory;
 - (iv) the restriction, in a non-reciprocal agreement, of active and/or passive sales by the licensee and/or the licensor into the exclusive territory or to the exclusive customer group reserved for the other party;
 - (v) the restriction, in a non-reciprocal agreement, of active sales by the licensee into the exclusive territory or to the exclusive customer group allocated by the licensor to another licensee provided that the latter was not a competing undertaking of the licensor at the time of the conclusion of its own licence;
 - (vi) the obligation on the licensee to produce the contract products only for its own use provided that the licensee is not restricted in selling the contract products actively and passively as spare parts for its own products;
 - (vii) the obligation on the licensee in a non-reciprocal agreement to produce the contract products only for a particular customer, where the licence was granted in order to create an alternative source of supply for that customer;
 - (d) The restriction of the licensee's ability to exploit its own technology or the restriction of the ability of any of the parties to the agreement to carry out research and development, unless such latter restriction is indispensable to prevent the disclosure of the licensed know-how to third parties.
78. For a number of hardcore restrictions the TTBER makes a distinction between reciprocal and non-reciprocal agreements. The hardcore list is stricter for reciprocal agreements than for non-reciprocal agreements between competitors. Reciprocal agreements are cross-licensing agreements where the licensed technologies are competing technologies or can be used for the production of competing products. A non-reciprocal agreement is an agreement where only one of the parties is licensing its technology to the other party or where in case of cross-licensing the licensed technologies are not competing technologies and cannot be used for the production of competing products. An agreement is not reciprocal merely because the agreement contains a grant back obligation or because the licensee licenses back own improvements of the licensed technology. In case at a later point in time a non-reciprocal agreement becomes a reciprocal agreement due to the conclusion of a second licence between the same parties, they may have to revise the first licence in order to avoid that the agreement contains a hardcore restriction. In the assessment of the individual case the Commission will take into account the time lapsed between the conclusion of the first and the second licence.

79. The hardcore restriction of competition contained in Article 4(1)(a) concerns agreements between competitors that have as their object the fixing of prices for products sold to third parties, including the products incorporating the licensed technology. Price fixing between competitors constitutes a restriction of competition by its very object. Price fixing can for instance take the form of a direct agreement on the exact price to be charged or on a price list with certain allowed maximum rebates. It is immaterial whether the agreement concerns fixed, minimum, maximum or recommended prices. Price fixing can also be implemented indirectly by applying disincentives to deviate from an agreed price level, for example, by providing that the royalty rate will increase if product prices are reduced below a certain level. However, an obligation on the licensee to pay a certain minimum royalty does not in itself amount to price fixing.
80. When royalties are calculated on the basis of individual product sales, the amount of the royalty has a direct impact on the marginal cost of the product and thus a direct impact on product prices⁽⁴⁰⁾. Competitors can therefore use cross licensing with reciprocal running royalties as a means of co-ordinating prices on downstream product markets⁽⁴¹⁾. However, the Commission will only treat cross licences with reciprocal running royalties as price fixing where the agreement is devoid of any pro-competitive purpose and therefore does not constitute a bona fide licensing arrangement. In such cases where the agreement does not create any value and therefore has no valid business justification, the arrangement is a sham and amounts to a cartel.
81. The hardcore restriction contained in Article 4(1)(a) also covers agreements whereby royalties are calculated on the basis of all product sales irrespective of whether the licensed technology is being used. Such agreements are also caught by Article 4(1)(d) according to which the licensee must not be restricted in his ability to use his own technology (see paragraph 95 below). In general such agreements restrict competition since the agreement raises the cost of using the licensee's own competing technology and restricts competition that existed in the absence of the agreement⁽⁴²⁾. This is so both in the case of reciprocal and non-reciprocal arrangements. Exceptionally, however, an agreement whereby royalties are calculated on the basis of all product sales may fulfil the conditions of Article 81(3) in an individual case where on the basis of objective factors it can be concluded that the restriction is indispensable for pro-competitive licensing to occur. This may be the case where in the absence of the restraint it would be impossible or unduly difficult to calculate and monitor the royalty payable by the licensee, for instance because the licensor's technology leaves no visible trace on the final product and practicable alternative monitoring methods are unavailable.
82. The hardcore restriction of competition set out in Article 4(1)(b) concerns reciprocal output restrictions on the parties. An output restriction is a limitation on how much a party may produce and sell. Article 4(1)(b) does not cover output limitations on the licensee in a non-reciprocal agreement or output limitations on one of the licensees in a reciprocal agreement provided that the output limitation only concerns products produced with the licensed technology. Article 4(1)(b) thus identifies as hardcore restrictions reciprocal output restrictions on the parties and output restrictions on the licensor in respect of his own technology. When competitors agree to impose reciprocal output limitations, the object and likely effect of the agreement is to reduce output in the market. The same is true of agreements that reduce the incentive of the parties to expand output, for example by obliging each other to make payments if a certain level of output is exceeded.
83. The more favourable treatment of non-reciprocal quantity limitations is based on the consideration that a one-way restriction does not necessarily lead to a lower output on the market while also the risk that the agreement is not a bona fide licensing arrangement is less when the restriction is non-reciprocal. When a licensee is willing to accept a one-way restriction, it is likely that the agreement leads to a real integration of complementary technologies or an efficiency enhancing integration of the licensor's superior technology with the licensee's productive assets. In a reciprocal agreement an output restriction on one of the licensees is likely to reflect the higher value of the technology licensed by one of the parties and may serve to promote pro-competitive licensing.
84. The hardcore restriction of competition set out in Article 4(1)(c) concerns the allocation of markets and customers. Agreements whereby competitors share markets and customers have as their object the restriction of competition. It is a hardcore restriction where competitors in a reciprocal agreement agree not to produce in certain territories or not to sell actively and/or passively into certain territories or to certain customers reserved for the other party.
85. Article 4(1)(c) applies irrespective of whether the licensee remains free to use his own technology. Once the licensee has tooled up to use the licensor's technology to produce a given product, it may be costly to maintain a separate production line using another technology in order to serve customers covered by the restrictions. Moreover, given the anti-competitive potential of the restraint the licensee may have little incentive to produce under his own technology. Such restrictions are also highly unlikely to be indispensable for pro-competitive licensing to occur.

86. Under Article 4(1)(c)(ii) it is not a hardcore restriction for the licensor in a non-reciprocal agreement to grant the licensee an exclusive licence to produce on the basis of the licensed technology in a particular territory and thus agree not to produce himself the contract products in or provide the contract products from that territory. Such exclusive licences are block exempted irrespective of the scope of the territory. If the licence is world-wide, the exclusivity implies that the licensor abstains from entering or remaining on the market. The block exemption also applies where the licence is limited to one or more technical fields of use or one or more product markets. The purpose of agreements covered by Article 4(1)(c)(ii) may be to give the licensee an incentive to invest in and develop the licensed technology. The object of the agreement is therefore not necessarily to share markets.
87. According to Article 4(1)(c)(iv) and for the same reason, the block exemption also applies to non-reciprocal agreements whereby the parties agree not to sell actively or passively⁽⁴³⁾ into an exclusive territory or to an exclusive customer group reserved for the other party.
88. According to Article 4(1)(c)(iii) it is also not a hardcore restriction if the licensor appoints the licensee as his sole licensee in a particular territory, implying that third parties will not be licensed to produce on the basis of the licensor's technology in the territory in question. In the case of such sole licences the block exemption applies irrespective of whether the agreement is reciprocal or not given that the agreement does not affect the ability of the parties to fully exploit their own technology in the respective territories.
89. Article 4(1)(c)(v) excludes from the hardcore list and thus block exempts up to the market share threshold restrictions in a non-reciprocal agreement on active sales by a licensee into the territory or to the customer group allocated by the licensor to another licensee. It is a condition, however, that the protected licensee was not a competitor of the licensor when the agreement was concluded. It is not warranted to hardcore such restrictions. By allowing the licensor to grant a licensee, who was not already on the market, protection against active sales by licensees which are competitors of the licensor and which for that reason are already established on the market, such restrictions are likely to induce the licensee to exploit the licensed technology more efficiently. On the other hand, if the licensees agree between themselves not to sell actively or passively into certain territories or to certain customer groups, the agreement amounts to a cartel amongst the licensees. Given that such agreements do not involve any transfer of technology they fall outside the scope of the TTBER.
90. According to Article 4(1)(c)(i) restrictions in agreements between competitors that limit the licence to one or more product markets or technical fields of use⁽⁴⁴⁾ are not hardcore restrictions. Such restrictions are block exempted up to the market share threshold of 20 % irrespective of whether the agreement is reciprocal or not. It is a condition for the application of the block exemption, however, that the field of use restrictions do not go beyond the scope of the licensed technologies. It is also a condition that licensees are not limited in the use of their own technology (see Article 4(1)(d)). Where licensees are limited in the use of their own technology the agreement amounts to market sharing.
91. The block exemption applies irrespective of whether the field of use restriction is symmetrical or asymmetrical. An asymmetrical field of use restriction in a reciprocal licence agreement implies that both parties are allowed to use the respective technologies that they license in only within different fields of use. As long as the parties are unrestricted in the use of their own technologies, it is not assumed that the agreement leads the parties to abandon or refrain from entering the field(s) covered by the licence to the other party. Even if the licensees tool up to use the licensed technology within the licensed field of use, there may be no impact on assets used to produce outside the scope of the licence. It is important in this regard that the restriction relates to distinct product markets or fields of use and not to customers, allocated by territory or by group, who purchase products falling within the same product market or technical field of use. The risk of market sharing is considered substantially greater in the latter case (see paragraph 85 above). In addition, field of use restrictions may be necessary to promote pro-competitive licensing (see paragraph 182 below).
92. Article 4(1)(c)(vi) contains a further exception, namely captive use restrictions, i.e. a requirement whereby the licensee may produce the products incorporating the licensed technology only for his own use. Where the contract product is a component the licensee can thus be obliged to produce that component only for incorporation into his own products and can be obliged not to sell the components to other producers. The licensee must be able, however, to sell the components as spare parts for his own products and must thus be able to supply third parties that perform after sale services on these products. Captive use restrictions as defined may be necessary to encourage the dissemination of technology, particularly between competitors, and are covered by the block exemption. Such restrictions are also dealt with in section IV.2.5 below.

93. Finally, Article 4(1)(c)(vii) excludes from the hardcore list an obligation on the licensee in a non-reciprocal agreement to produce the contract products only for a particular customer with a view to creating an alternative source of supply for that customer. It is thus a condition for the application of Article 4(1)(c)(vii) that the licence is limited to creating an alternative source of supply for that particular customer. It is not a condition, however, that only one such licence is granted. Article 4(1)(c)(vii) also covers situations where more than one undertaking is licensed to supply the same specified customer. The potential of such agreements to share markets is limited where the licence is granted only for the purpose of supplying a particular customer. In particular, in such circumstances it cannot be assumed that the agreement will cause the licensee to cease exploiting his own technology.

94. The hardcore restriction of competition set out in Article 4(1)(d) covers firstly restrictions on any of the parties' ability to carry out research and development. Both parties must be free to carry out independent research and development. This rule applies irrespective of whether the restriction applies to a field covered by the licence or to other fields. However, the mere fact that the parties agree to provide each other with future improvements of their respective technologies does not amount to a restriction on independent research and development. The effect on competition of such agreements must be assessed in light of the circumstances of the individual case. Article 4(1)(d) also does not extend to restrictions on a party to carry out research and development with third parties, where such restriction is necessary to protect the licensor's know-how against disclosure. In order to be covered by the exception, the restrictions imposed to protect the licensor's know-how against disclosure must be necessary and proportionate to ensure such protection. For instance, where the agreement designates particular employees of the licensee to be trained in and responsible for the use of the licensed know-how, it may be sufficient to oblige the licensee not to allow those employees to be involved in research and development with third parties. Other safeguards may be equally appropriate.

95. According to Article 4(1)(d) the licensee must also be unrestricted in the use of his own competing technology provided that in so doing he does not make use of the technology licensed from the licensor. In relation to his own technology the licensee must not be subject to limitations in terms of where he produces or sells, how much he produces or sells and at what price he sells. He must also not be obliged to pay royalties on products produced on the basis of his own technology (cf. paragraph 81 above). Moreover, the licensee must not be restricted in licensing his own technology to third parties. When

restrictions are imposed on the licensee's use of his own technology or to carry out research and development, the competitiveness of the licensee's technology is reduced. The effect of this is to reduce competition on existing product and technology markets and to reduce the licensee's incentive to invest in the development and improvement of his technology.

4.3. Agreements between non-competitors

96. Article 4(2) lists the hardcore restrictions for licensing between non-competitors. According to this provision, the TTBER does not cover agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

- (a) the restriction of a party's ability to determine its prices when selling products to third parties, without prejudice to the possibility to impose a maximum sale price or recommend a sale price, provided that it does not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;
- (b) the restriction of the territory into which, or of the customers to whom, the licensee may passively sell the contract products, except:
 - (i) the restriction of passive sales into an exclusive territory or to an exclusive customer group reserved for the licensor;
 - (ii) the restriction of passive sales into an exclusive territory or to an exclusive customer group allocated by the licensor to another licensee during the first two years that this other licensee is selling the contract products in that territory or to that customer group;
 - (iii) the obligation to produce the contract products only for its own use provided that the licensee is not restricted in selling the contract products actively and passively as spare parts for its own products;
 - (iv) the obligation to produce the contract products only for a particular customer, where the licence was granted in order to create an alternative source of supply for that customer;

- (v) the restriction of sales to end users by a licensee operating at the wholesale level of trade;
- (vi) the restriction of sales to unauthorised distributors by the members of a selective distribution system;
- (c) the restriction of active or passive sales to end users by a licensee which is a member of a selective distribution system and which operates at the retail level, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment.
97. The hardcore restriction of competition set out in Article 4(2)(a) concerns the fixing of prices charged when selling products to third parties. More specifically, this provision covers restrictions which have as their direct or indirect object the establishment of a fixed or a minimum selling price or a fixed or minimum price level to be observed by the licensor or the licensee when selling products to third parties. In the case of agreements that directly establish the selling price, the restriction is clear-cut. However, the fixing of selling prices can also be achieved through indirect means. Examples of the latter are agreements fixing the margin, fixing the maximum level of discounts, linking the sales price to the sales prices of competitors, threats, intimidation, warnings, penalties, or contract terminations in relation to observance of a given price level. Direct or indirect means of achieving price fixing can be made more effective when combined with measures to identify price-cutting, such as the implementation of a price monitoring system, or the obligation on licensees to report price deviations. Similarly, direct or indirect price fixing can be made more effective when combined with measures that reduce the licensee's incentive to lower his selling price, such as the licensor obliging the licensee to apply a most-favoured-customer clause, i.e. an obligation to grant to a customer any more favourable terms granted to any other customer. The same means can be used to make maximum or recommended prices work as fixed or minimum selling prices. However, the provision of a list of recommended prices to or the imposition of a maximum price on the licensee by the licensor is not considered in itself as leading to fixed or minimum selling prices.
98. Article 4(2)(b) identifies as hardcore restrictions of competition agreements or concerted practices that have as their direct or indirect object the restriction of passive sales by licensees of products incorporating the licensed technology⁽⁴⁵⁾. Passive sales restrictions on the licensee may be the result of direct obligations, such as the obligation not to sell to certain customers or to customers in certain territories or the obligation to refer orders from these customers to other licensees. It may also result from indirect measures aimed at inducing the licensee to refrain from making such sales, such as financial incentives and the implementation of a monitoring system aimed at verifying the effective destination of the licensed products. Quantity limitations may be an indirect means to restrict passive sales. The Commission will not assume that quantity limitations as such serve this purpose. However, it will be otherwise where quantity limitations are used to implement an underlying market partitioning agreement. Indications thereof include the adjustment of quantities over time to cover only local demand, the combination of quantity limitations and an obligation to sell minimum quantities in the territory, minimum royalty obligations linked to sales in the territory, differentiated royalty rates depending on the destination of the products and the monitoring of the destination of products sold by individual licensees. The general hardcore restriction covering passive sales by licensees is subject to a number of exceptions, which are dealt with below.
99. Article 4(2)(b) does not cover sales restrictions on the licensor. All sales restrictions on the licensor are block exempted up to the market share threshold of 30 %. The same applies to all restrictions on active sales by the licensee, with the exception of what is said on active selling in paragraphs 105 and 106 below. The block exemption of restrictions on active selling is based on the assumption that such restrictions promote investments, non-price competition and improvements in the quality of services provided by the licensees by solving free rider problems and hold-up problems. In the case of restrictions of active sales between licensees' territories or customer groups, it is not a condition that the protected licensee has been granted an exclusive territory or an exclusive customer group. The block exemption also applies to active sales restrictions where more than one licensee has been appointed for a particular territory or customer group. Efficiency enhancing investment is likely to be promoted where a licensee can be ensured that he will only face active sales competition from a limited number of licensees inside the territory and not also from licensees outside the territory.
100. Restrictions on active and passive sales by licensees into an exclusive territory or to an exclusive customer group reserved for the licensor do not constitute hardcore restrictions of competition (cf. Article 4(2)(b)(i)). Indeed, they are block exempted. It is presumed that up to the market share threshold such restraints, where restrictive of competition, promote pro-competitive dissemination of technology and integration of such technology into the production assets of the licensee. For a territory or customer group to be reserved for the licensor, it is not required that the licensor is actually producing with the licensed technology in the territory or for the customer group in question. A territory or customer group can also be reserved by the licensor for later exploitation.

101. Restrictions on passive sales by licensees into an exclusive territory or customer group allocated to another licensee are block exempted for two years calculated from the date on which the protected licensee first markets the products incorporating the licensed technology inside his exclusive territory or to his exclusive customer group (cf. Article 4(2)(b)(ii)). Licensees often have to commit substantial investments in production assets and promotional activities in order to start up and develop a new territory. The risks facing the new licensee are therefore likely to be substantial, in particular since promotional expenses and investment in assets required to produce on the basis of a particular technology are often sunk, i.e. they cannot be recovered if the licensee exits the market. In such circumstances, it is often the case that licensees would not enter into the licence agreement without protection for a certain period of time against (active and) passive sales into their territory by other licensees. Restrictions on passive sales into the exclusive territory of a licensee by other licensees therefore often fall outside Article 81(1) for a period of up to two years from the date on which the product incorporating the licensed technology was first put on the market in the exclusive territory by the licensee in question. However, to the extent that in individual cases such restrictions are caught by Article 81(1) they are block exempted. After the expiry of this two-year period restrictions on passive sales between licensees constitute hardcore restrictions. Such restrictions are generally caught by Article 81(1) and are unlikely to fulfil the conditions of Article 81(3). In particular, passive sales restrictions are unlikely to be indispensable for the attainment of efficiencies ⁽⁴⁶⁾.
102. Article 4(2)(b)(iii) brings under the block exemption a restriction whereby the licensee is obliged to produce products incorporating the licensed technology only for his own (captive) use. Where the contract product is a component the licensee can thus be obliged to use that product only for incorporation into his own products and can be obliged not to sell the product to other producers. The licensee must however be able to actively and passively sell the products as spare parts for his own products and must thus be able to supply third parties that perform after sale services on these products. Captive use restrictions are also dealt with in section IV.2.5 below.
103. As in the case of agreements between competitors (cf. paragraph 93 above) the block exemption also applies to agreements whereby the licensee is obliged to produce the contract products only for a particular customer in order to provide that customer with an alternative source of supply (cf. Article 4(2)(b)(iv)). In the case of agreements between non-competitors, such restrictions are unlikely to be caught by Article 81(1).
104. Article 4(2)(b)(v) brings under the block exemption an obligation on the licensee not to sell to end users and thus only to sell to retailers. Such an obligation allows the licensor to assign the wholesale distribution function to the licensee and normally falls outside Article 81(1) ⁽⁴⁷⁾.
105. Finally Article 4(2)(b)(vi) brings under the block exemption a restriction on the licensee not to sell to unauthorised distributors. This exception allows the licensor to impose on the licensees an obligation to form part of a selective distribution system. In that case, however, the licensees must according to Article 4(2)(c) be permitted to sell both actively and passively to end users, without prejudice to the possibility to restrict the licensee to a wholesale function as foreseen in Article 4(2)(b)(v) (cf. the previous paragraph).
106. It is recalled (cf. paragraph 39 above) that the block exemption covers licence agreements whereby the licensor imposes obligations which the licensee must or may impose on his buyers, including distributors. However, these obligations must comply with the competition rules applicable to supply and distribution agreements. Since the TTBER is limited to agreements between two parties the agreements concluded between the licensee and his buyers implementing such obligations are not covered by the TTBER. Such agreements are only block exempted when they comply with Regulation 2790/1999 (cf. section 2.5.2 above).
- ## 5. Excluded restrictions
107. Article 5 of the TTBER lists four types of restrictions that are not block exempted and which thus require individual assessment of their anti-competitive and pro-competitive effects. It follows from Article 5 that the inclusion in a licence agreement of any of the restrictions contained in these provisions does not prevent the application of the block exemption to the rest of the agreement. It is only the individual restriction in question that is not block exempted, implying that individual assessment is required. Accordingly, the rule of severability applies to the restrictions set out in Article 5.
108. Article 5(1) provides that the block exemption shall not apply to the following three obligations:
- (a) Any direct or indirect obligation on the licensee to grant an exclusive licence to the licensor or to a third party designated by the licensor in respect of its own severable improvements to or its new applications of the licensed technology.

- (b) Any direct or indirect obligation on the licensee to assign to the licensor or to a third party designated by the licensor rights to severable improvements to or new applications of the licensed technology.
- (c) Any direct or indirect obligation on the licensee not to challenge the validity of intellectual property rights held by the licensor in the common market. However, the TTBER does cover the possibility for the licensor to terminate the licence agreement in the event that the licensee challenges the validity of the licensed technology.

The purpose of Article 5(1)(a), (b) and (c) is to avoid block exemption of agreements that may reduce the incentive of licensees to innovate.

109. Article 5(1)(a) and 5(1)(b) concerns exclusive grant backs or assignments to the licensor of severable improvements of the licensed technology. An improvement is severable if it can be exploited without infringing upon the licensed technology. An obligation to grant the licensor an exclusive licence to severable improvements of the licensed technology or to assign such improvements to the licensor is likely to reduce the licensee's incentive to innovate since it hinders the licensee in exploiting his improvements, including by way of licensing to third parties. This is the case both where the severable improvement concerns the same application as the licensed technology and where the licensee develops new applications of the licensed technology. According to Article 5(1)(a) and (b) such obligations are not block exempted. However, the block exemption does cover non-exclusive grant back obligations in respect of severable improvements. This is so even where the grant back obligation is non-reciprocal, i.e. only imposed on the licensee, and where under the agreement the licensor is entitled to feed-on the severable improvements to other licensees. A non-reciprocal grant back obligation may promote innovation and the dissemination of new technology by permitting the licensor to freely determine whether and to what extent to pass on his own improvements to his licensees. A feed-on clause may also promote the dissemination of technology because each licensee knows at the time of contracting that he will be on an equal footing with other licensees in terms of the technology on the basis of which he is producing. Exclusive grant backs and obligations to assign non-severable improvements are not restrictive of competition within the meaning of Article 81(1) since non-severable improvements cannot be exploited by the licensee without the licensor's permission.
110. The application of Article 5(1)(a) and (b) does not depend on whether or not the licensor pays consideration in

return for acquiring the improvement or for obtaining an exclusive licence. However, the existence and level of such consideration may be a relevant factor in the context of an individual assessment under Article 81. When grant backs are made against consideration it is less likely that the obligation creates a disincentive for the licensee to innovate. In the assessment of exclusive grant backs outside the scope of the block exemption the market position of the licensor on the technology market is also a relevant factor. The stronger the position of the licensor, the more likely it is that exclusive grant back obligations will have restrictive effects on competition in innovation. The stronger the position of the licensor's technology the more likely it is that the licensee will be an important source of innovation and future competition. The negative impact of grant back obligations can also be increased in case of parallel networks of licence agreements containing such obligations. When available technologies are controlled by a limited number of licensors that impose exclusive grant back obligations on licensees, the risk of anti-competitive effects is greater than where there are a number of technologies only some of which are licensed on exclusive grant back terms.

111. The risk of negative effects on innovation is higher in the case of cross licensing between competitors where a grant back obligation on both parties is combined with an obligation on both parties to share with the other party improvements of his own technology. The sharing of all improvements between competitors may prevent each competitor from gaining a competitive lead over the other (see also paragraph 208 below). However, the parties are unlikely to be prevented from gaining a competitive lead over each other where the purpose of the licence is to permit them to develop their respective technologies and where the licence does not lead them to use the same technological base in the design of their products. This is the case where the purpose of the licence is to create design freedom rather than to improve the technological base of the licensee.
112. The excluded restriction set out in Article 5(1)(c) concerns non-challenge clauses, i.e. obligations not to challenge the validity of the licensor's intellectual property. The reason for excluding non-challenge clauses from the scope of the block exemption is the fact that licensees are normally in the best position to determine whether or not an intellectual property right is invalid. In the interest of undistorted competition and in conformity with the principles underlying the protection of intellectual property, invalid intellectual property rights should be eliminated. Invalid intellectual property stifles innovation rather than promoting it. Article 81(1) is likely to apply to non-challenge clauses where the licensed technology is valuable and therefore creates a competitive disadvantage for undertakings that are

prevented from using it or are only able to use it against payment of royalties⁽⁴⁸⁾. In such cases the conditions of Article 81(3) are unlikely to be fulfilled⁽⁴⁹⁾. However, the Commission takes a favourable view of non-challenge clauses relating to know-how where once disclosed it is likely to be impossible or very difficult to recover the licensed know-how. In such cases, an obligation on the licensee not to challenge the licensed know-how promotes dissemination of new technology, in particular by allowing weaker licensors to license stronger licensees without fear of a challenge once the know-how has been absorbed by the licensee.

113. The TTBER covers the possibility for the licensor to terminate the licence agreement in the event of a challenge of the licensed technology. Accordingly, the licensor is not forced to continue dealing with a licensee that challenges the very subject matter of the licence agreement, implying that upon termination any further use by the licensee of the challenged technology is at the challenger's own risk. Article 5(1)(c) ensures, however, that the TTBER does not cover contractual obligations obliging the licensee not to challenge the licensed technology, which would permit the licensor to sue the licensee for breach of contract and thereby create a further disincentive for the licensee to challenge the validity of the licensor's technology. The provision thereby ensures that the licensee is in the same position as third parties.

114. Article 5(2) excludes from the scope of the block exemption, in the case of agreements between non-competitors, any direct or indirect obligation limiting the licensee's ability to exploit his own technology or limiting the ability of the parties to the agreement to carry out research and development, unless such latter restriction is indispensable to prevent the disclosure of licensed know-how to third parties. The content of this condition is the same as that of Article 4(1)(d) of the hardcore list concerning agreements between competitors, which is dealt with in paragraphs 94 and 95 above. However, in the case of agreements between non-competitors it cannot be considered that such restrictions generally have negative effects on competition or that the conditions of Article 81(3) are generally not satisfied⁽⁵⁰⁾. Individual assessment is required.

115. In the case of agreements between non-competitors, the licensee normally does not own a competing technology.

However, there may be cases where for the purposes of the block exemption the parties are considered non-competitors in spite of the fact that the licensee does own a competing technology. This is the case where the licensee owns a technology but does not license it and the licensor is not an actual or potential supplier on the product market. For the purposes of the block exemption the parties are in such circumstances neither competitors on the technology market nor competitors on the product market⁽⁵¹⁾. In such cases it is important to ensure that the licensee is not restricted in his ability to exploit his own technology and further develop it. This technology constitutes a competitive constraint in the market, which should be preserved. In such a situation restrictions on the licensee's use of his own technology or on research and development are normally considered to be restrictive of competition and not to satisfy the conditions of Article 81(3). For instance, an obligation on the licensee to pay royalties not only on the basis of products it produces with the licensed technology but also on the basis of products it produces with its own technology will generally limit the ability of the licensee to exploit its own technology and thus be excluded from the scope of the block exemption.

116. In cases where the licensee does not own a competing technology or is not already developing such a technology, a restriction on the ability of the parties to carry out independent research and development may be restrictive of competition where only a few technologies are available. In that case the parties may be an important (potential) source of innovation in the market. This is particularly so where the parties possess the necessary assets and skills to carry out further research and development. In that case the conditions of Article 81(3) are unlikely to be fulfilled. In other cases where several technologies are available and where the parties do not possess special assets or skills, the restriction on research and development is likely to either fall outside Article 81(1) for lack of an appreciable restrictive effect or satisfy the conditions of Article 81(3). The restraint may promote the dissemination of new technology by assuring the licensor that the licence does not create a new competitor and by inducing the licensee to focus on the exploitation and development of the licensed technology. Moreover, Article 81(1) only applies where the agreement reduces the licensee's incentive to improve and exploit his own technology. This is for instance not likely to be the case where the licensor is entitled to terminate the licence agreement once the licensee commences to produce on the basis of his own competing technology. Such a right does not reduce the licensee's incentive to innovate, since the agreement can only be terminated when a commercially viable technology has been developed and products produced on the basis thereof are ready to be put on the market.

6. Withdrawal and disapplication of the Block Exemption Regulation

6.1. Withdrawal procedure

117. According to Article 6 of the TTBER, the Commission and the competition authorities of the Member States may withdraw the benefit of the block exemption in respect of individual agreements that do not fulfil the conditions of Article 81(3). The power of the competition authorities of the Member States to withdraw the benefit of the block exemption is limited to cases where the relevant geographic market is no wider than the territory of the Member State in question.

118. The four conditions of Article 81(3) are cumulative and must all be fulfilled for the exception rule to be applicable⁽⁵²⁾. The block exemption can therefore be withdrawn where a particular agreement fails one or more of the four conditions.

119. Where the withdrawal procedure is applied, the withdrawing authority bears the burden of proving that the agreement falls within the scope of Article 81(1) and that the agreement does not satisfy all four conditions of Article 81(3). Given that withdrawal implies that the agreement in question restricts competition within the meaning of Article 81(1) and does not fulfil the conditions of Article 81(3), withdrawal is necessarily accompanied by a negative decision based on Articles 5, 7 or 9 of Regulation 1/2003.

120. According to Article 6, withdrawal may in particular be warranted in the following circumstances:

1. access of third parties' technologies to the market is restricted, for instance by the cumulative effect of parallel networks of similar restrictive agreements prohibiting licensees from using third party technology;
2. access of potential licensees to the market is restricted, for instance by the cumulative effect of parallel networks of similar restrictive agreements preventing licensors from licensing to other licensees;
3. without any objectively valid reason the parties refrain from exploiting the licensed technology.

121. Articles 4 and 5 of the TTBER, containing the list of hardcore restrictions of competition and excluded restrictions, aim at ensuring that block exempted agreements do not reduce the incentive to innovate, do not delay the dissemination of technology, and do not

unduly restrict competition between the licensor and licensee or between licensees. However, the list of hardcore restrictions and the list of excluded restrictions do not take into account all the possible impacts of licence agreements. In particular, the block exemption does not take account of any cumulative effect of similar restrictions contained in networks of licence agreements. Licence agreements may lead to foreclosure of third parties both at the level of the licensor and at the level of the licensee. Foreclosure of other licensors may stem from the cumulative effect of networks of licence agreements prohibiting the licensees from exploiting competing technologies, leading to the exclusion of other (potential) licensors. Foreclosure of licensors is likely to arise in cases where most of the undertakings on the market that could (efficiently) take a competing licence are prevented from doing so as a consequence of restrictive agreements and where potential licensees face relatively high barriers to entry. Foreclosure of other licensees may stem from the cumulative effect of licence agreements prohibiting licensors from licensing other licensees and thereby preventing potential licensees from gaining access to the necessary technology. The issue of foreclosure is examined in more detail in section IV.2.7 below. In addition, the Commission is likely to withdraw the benefit of the block exemption where a significant number of licensors of competing technologies in individual agreements impose on their licensees to extend to them more favourable conditions agreed with other licensors.

122. The Commission is also likely to withdraw the benefit of the block exemption where the parties refrain from exploiting the licensed technology, unless they have an objective justification for doing so. Indeed, when the parties do not exploit the licensed technology, no efficiency enhancing activity takes place, in which case the very rationale of the block exemption disappears. However, exploitation does not need to take the form of an integration of assets. Exploitation also occurs where the licence creates design freedom for the licensee by allowing him to exploit his own technology without facing the risk of infringement claims by the licensor. In the case of licensing between competitors, the fact that the parties do not exploit the licensed technology may be an indication that the arrangement is a disguised cartel. For these reasons the Commission will examine very closely cases of non-exploitation.

6.2. Disapplication of the Block Exemption Regulation

123. Article 7 of the TTBER enables the Commission to exclude from the scope of the TTBER, by means of regulation, parallel networks of similar agreements where these cover more than 50 % of a relevant market. Such a measure is not addressed to individual undertakings but concerns all undertakings whose agreements are defined in the regulation disapplying the TTBER.

124. Whereas withdrawal of the benefit of the TTBER by the Commission under Article 6 implies the adoption of a decision under Articles 7 or 9 of Regulation 1/2003, the effect of a Commission disapplication regulation under Article 7 of the TTBER is merely to remove, in respect of the restraints and the markets concerned, the benefit of the TTBER and to restore the full application of Article 81(1) and (3). Following the adoption of a regulation declaring the TTBER inapplicable for a particular market in respect of agreements containing certain restraints, the criteria developed by the relevant case law of the Community Courts and by notices and previous decisions adopted by the Commission will give guidance on the application of Article 81 to individual agreements. Where appropriate, the Commission will take a decision in an individual case, which can provide guidance to all the undertakings operating on the market concerned.
125. For the purpose of calculating the 50 % market coverage ratio, account must be taken of each individual network of licence agreements containing restraints, or combinations of restraints, producing similar effects on the market.
126. Article 7 does not entail an obligation on the part of the Commission to act where the 50 % market-coverage ratio is exceeded. In general, disapplication is appropriate when it is likely that access to the relevant market or competition therein is appreciably restricted. In assessing the need to apply Article 7, the Commission will consider whether individual withdrawal would be a more appropriate remedy. This may depend, in particular, on the number of competing undertakings contributing to a cumulative effect on a market or the number of affected geographic markets within the Community.
127. Any regulation adopted under Article 7 must clearly set out its scope. This means, first, that the Commission must define the relevant product and geographic market(s) and, secondly, that it must identify the type of licensing restraint in respect of which the TTBER will no longer apply. As regards the latter aspect, the Commission may modulate the scope of its regulation according to the competition concern which it intends to address. For instance, while all parallel networks of non-compete arrangements will be taken into account for the purpose of establishing the 50 % market coverage ratio, the Commission may nevertheless restrict the scope of the disapplication regulation only to non-compete obligations exceeding a certain duration. Thus, agreements of a shorter duration or of a less restrictive nature might be left unaffected, due to the lesser degree of foreclosure attributable to such restraints. Where appropriate, the Commission may also provide guidance by specifying the market share level which, in the specific market context, may be regarded as insufficient to bring about a significant contribution by an individual undertaking to the cumulative effect. In general, when the market share of the products incorporating a technology licensed by an individual licensor does not exceed 5 %, the agreement or network of agreements covering that technology is not considered to contribute significantly to a cumulative foreclosure effect⁽⁵³⁾.
128. The transitional period of not less than six months that the Commission will have to set under Article 7(2) should allow the undertakings concerned to adapt their agreements to take account of the regulation disapplying the TTBER.
129. A regulation disapplying the TTBER will not affect the block exempted status of the agreements concerned for the period preceding its entry into force.

IV. APPLICATION OF ARTICLE 81(1) AND 81(3) OUTSIDE THE SCOPE OF THE BLOCK EXEMPTION REGULATION

1. The general framework for analysis

130. Agreements that fall outside the block exemption, for example because the market share thresholds are exceeded or the agreement involves more than two parties, are subject to individual assessment. Agreements that either do not restrict competition within the meaning of Article 81(1) or which fulfil the conditions of Article 81(3) are valid and enforceable. It is recalled that there is no presumption of illegality of agreements that fall outside the scope of the block exemption provided that they do not contain hardcore restrictions of competition. In particular, there is no presumption that Article 81(1) applies merely because the market share thresholds are exceeded. Individual assessment based on the principles described in these guidelines is required.
131. In order to promote predictability beyond the application of the TTBER and to confine detailed analysis to cases that are likely to present real competition concerns, the Commission takes the view that outside the area of hardcore restrictions Article 81 is unlikely to be infringed where there are four or more independently controlled technologies in addition to the technologies controlled by the parties to the agreement that may be substitutable for the licensed technology at a comparable cost to the user. In assessing whether the technologies are sufficiently substitutable the relative commercial strength of the technologies in question must be taken into account. The competitive constraint imposed by a technology is limited if it does not constitute a commercially viable alternative to the licensed technology. For instance, if due to network effects in the market consumers have a strong preference for products incorporating the licensed

technology, other technologies already on the market or likely to come to market within a reasonable period of time may not constitute a real alternative and may therefore impose only a limited competitive constraint. The fact that an agreement falls outside the safe harbour described in this paragraph does not imply that the agreement is caught by Article 81(1) and, if so, that the conditions of Article 81(3) are not satisfied. As for the market share safe harbour of the TTBER, this additional safe harbour merely creates a negative presumption that the agreement is not prohibited by Article 81. Outside the safe harbour individual assessment of the agreement based on the principles developed in these guidelines is required.

1.1. The relevant factors

132. In the application of Article 81 to individual cases it is necessary to take due account of the way in which competition operates on the market in question. The following factors are particularly relevant in this respect:

- (a) the nature of the agreement;
- (b) the market position of the parties;
- (c) the market position of competitors;
- (d) the market position of buyers of the licensed products;
- (e) entry barriers;
- (f) maturity of the market; and
- (g) other factors.

The importance of individual factors may vary from case to case and depends on all other factors. For instance, a high market share of the parties is usually a good indicator of market power, but in the case of low entry barriers it may not be indicative of market power. It is therefore not possible to provide firm rules on the importance of the individual factors.

133. Technology transfer agreements can take many shapes and forms. It is therefore important to analyse the nature of the agreement in terms of the competitive relationship between the parties and the restraints that it contains. In the latter regard it is necessary to go beyond the express terms of the agreement. The existence of implicit restraints may be derived from the way in which the agreement has been implemented by the parties and the incentives that they face.

134. The market position of the parties provides an indication of the degree of market power, if any, possessed by the licensor, the licensee or both. The higher their market share the greater their market power is likely to be. This is particularly so where the market share reflects cost advantages or other competitive advantages vis-à-vis competitors. These competitive advantages may for instance result from being a first mover in the market, from holding essential patents or from having superior technology.

135. In analysing the competitive relationship between the parties it is sometimes necessary to go beyond the analysis set out in the above sections II.3 on market definition and II.4 on the distinction between competitors and non-competitors. Even where the licensor is not an actual or potential supplier on the product market and the licensee is not an actual or potential competitor on the technology market, it is relevant to the analysis whether the licensee owns a competing technology, which is not being licensed. If the licensee has a strong position on the product market, an agreement granting him an exclusive licence to a competing technology can restrict competition significantly compared to the situation where the licensor does not grant an exclusive licence or licences other undertakings.

136. Market shares and possible competitive advantages and disadvantages are also used to assess the market position of competitors. The stronger the actual competitors and the greater their number the less risk there is that the parties will be able to individually exercise market power. However, if the number of competitors is rather small and their market position (size, costs, R&D potential, etc.) is rather similar, this market structure may increase the risk of collusion.

137. The market position of buyers provides an indication of whether or not one or more buyers possess buyer power. The first indicator of buying power is the market share of the buyer on the purchase market. This share reflects the importance of his demand for possible suppliers. Other indicators focus on the position of the buyer on his resale market, including characteristics such as a wide geographic spread of his outlets, and his brand image amongst final consumers. In some circumstances buyer power may prevent the licensor and/or the licensee from exercising market power on the market and thereby solve a competition problem that would otherwise have existed. This is particularly so when strong buyers have the capacity and the incentive to bring new sources of supply on to the market in the case of a small but permanent increase in relative prices. Where the strong buyers merely extract favourable terms from the supplier or simply pass on any price increase to their customers, the position of the buyers is not such as to prevent the exercise of market power by the licensee on the product market and therefore not such as to solve the competition problem on that market⁽⁵⁴⁾.

138. Entry barriers are measured by the extent to which incumbent companies can increase their price above the competitive level without attracting new entry. In the absence of entry barriers, easy and quick entry would render price increases unprofitable. When effective entry, preventing or eroding the exercise of market power, is likely to occur within one or two years, entry barriers can, as a general rule, be said to be low. Entry barriers may result from a wide variety of factors such as economies of scale and scope, government regulations, especially where they establish exclusive rights, state aid, import tariffs, intellectual property rights, ownership of resources where the supply is limited due to for instance natural limitations, essential facilities, a first mover advantage or brand loyalty of consumers created by strong advertising over a period of time. Restrictive agreements entered into by undertakings may also work as an entry barrier by making access more difficult and foreclosing (potential) competitors. Entry barriers may be present at all stages of the research and development, production and distribution process. The question whether certain of these factors should be described as entry barriers depends particularly on whether they entail sunk costs. Sunk costs are those costs which have to be incurred to enter or be active on a market but which are lost when the market is exited. The more costs are sunk, the more potential entrants have to weigh the risks of entering the market and the more credibly incumbents can threaten that they will match new competition, as sunk costs make it costly for incumbents to leave the market. In general, entry requires sunk costs, sometimes minor and sometimes major. Therefore, actual competition is in general more effective and will weigh more heavily in the assessment of a case than potential competition.

139. A mature market is a market that has existed for some time, where the technology used is well known and widespread and not changing very much and in which demand is relatively stable or declining. In such a market restrictions of competition are more likely to have negative effects than in more dynamic markets.

140. In the assessment of particular restraints other factors may have to be taken into account. Such factors include cumulative effects, i.e. the coverage of the market by similar agreements, the duration of the agreements, the regulatory environment and behaviour that may indicate or facilitate collusion like price leadership, pre-announced price changes and discussions on the 'right' price, price rigidity in response to excess capacity, price discrimination and past collusive behaviour.

1.2. Negative effects of restrictive licence agreements

141. The negative effects on competition on the market that may result from restrictive technology transfer agreements include the following:

1. reduction of inter-technology competition between the companies operating on a technology market or on a market for products incorporating the technologies in question, including facilitation of collusion, both explicit and tacit;
2. foreclosure of competitors by raising their costs, restricting their access to essential inputs or otherwise raising barriers to entry; and
3. reduction of intra-technology competition between undertakings that produce products on the basis of the same technology.

142. Technology transfer agreements may reduce inter-technology competition, i.e. competition between undertakings that license or produce on the basis of substitutable technologies. This is particularly so where reciprocal obligations are imposed. For instance, where competitors transfer competing technologies to each other and impose a reciprocal obligation to provide each other with future improvements of their respective technologies and where this agreement prevents either competitor from gaining a technological lead over the other, competition in innovation between the parties is restricted (see also paragraph 208 below).

143. Licensing between competitors may also facilitate collusion. The risk of collusion is particularly high in concentrated markets. Collusion requires that the undertakings concerned have similar views on what is in their common interest and on how the co-ordination mechanisms function. For collusion to work the undertakings must also be able to monitor each other's market behaviour and there must be adequate deterrents to ensure that there is an incentive not to depart from the common policy on the market, while entry barriers must be high enough to limit entry or expansion by outsiders. Agreements can facilitate collusion by increasing transparency in the market, by controlling certain behaviour and by raising barriers to entry. Collusion can also exceptionally be facilitated by licensing agreements that lead to a high degree of commonality of costs, because undertakings that have similar costs are more likely to have similar views on the terms of coordination⁽⁵⁵⁾.

144. Licence agreements may also affect inter-technology competition by creating barriers to entry for and expansion by competitors. Such foreclosure effects may stem from restraints that prevent licensees from licensing from third parties or create disincentives for them to do so. For instance, third parties may be foreclosed where incumbent licensors impose non-compete obligations on licensees to such an extent that an insufficient number of licensees are available to third parties and where entry at the level of licensees is difficult. Suppliers of substitutable technologies may also be foreclosed where a licensor with a sufficient degree of market power ties together various parts of a technology and licenses them together as a package while only part of the package is essential to produce a certain product.
145. Licence agreements may also reduce intra-technology competition, i.e. competition between undertakings that produce on the basis of the same technology. An agreement imposing territorial restraints on licensees, preventing them from selling into each other's territory reduces competition between them. Licence agreements may also reduce intra-technology competition by facilitating collusion between licensees. Moreover, licence agreements that reduce intra-technology competition may facilitate collusion between owners of competing technologies or reduce inter-technology competition by raising barriers to entry.
- 1.3. Positive effects of restrictive licence agreements and the framework for analysing such effects**
146. Even restrictive licence agreements mostly also produce pro-competitive effects in the form of efficiencies, which may outweigh their anti-competitive effects. This assessment takes place within the framework of Article 81(3), which contains an exception from the prohibition rule of Article 81(1). For this exception to be applicable the licence agreement must produce objective economic benefits, the restrictions on competition must be indispensable to attain the efficiencies, consumers must receive a fair share of the efficiency gains, and the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products concerned.
147. The assessment of restrictive agreements under Article 81(3) is made within the actual context in which they occur⁽⁵⁶⁾ and on the basis of the facts existing at any given point in time. The assessment is sensitive to material changes in the facts. The exception rule of Article 81(3) applies as long as the four conditions are fulfilled and ceases to apply when that is no longer the case⁽⁵⁷⁾. However, when applying Article 81(3) in accordance with these principles it is necessary to take into account the initial sunk investments made by any of the parties and the time needed and the restraints required to commit and recoup an efficiency enhancing investment. Article 81 cannot be applied without considering the *ex ante* investment and the risks relating thereto. The risk facing the parties and the sunk investment that must be committed to implement the agreement can thus lead to the agreement falling outside Article 81(1) or fulfilling the conditions of Article 81(3), as the case may be, for the period of time required to recoup the investment.
148. The first condition of Article 81(3) requires an assessment of what are the objective benefits in terms of efficiencies produced by the agreement. In this respect, licence agreements have the potential of bringing together complementary technologies and other assets allowing new or improved products to be put on the market or existing products to be produced at lower cost. Outside the context of hardcore cartels, licensing often occurs because it is more efficient for the licensor to licence the technology than to exploit it himself. This may particularly be the case where the licensee already has access to the necessary production assets. The agreement allows the licensee to gain access to a technology that can be combined with these assets, allowing him to exploit new or improved technologies. Another example of potentially efficiency enhancing licensing is where the licensee already has a technology and where the combination of this technology and the licensor's technology gives rise to synergies. When the two technologies are combined the licensee may be able to attain a cost/output configuration that would not otherwise be possible. Licence agreements may also give rise to efficiencies at the distribution stage in the same way as vertical distribution agreements. Such efficiencies can take the form of cost savings or the provision of valuable services to consumers. The positive effects of vertical agreements are described in the Guidelines on Vertical Restraints⁽⁵⁸⁾. A further example of possible efficiency gains is agreements whereby technology owners assemble a technology package for licensing to third parties. Such pooling arrangements may in particular reduce transaction costs, as licensees do not have to conclude separate licence agreements with each licensor. Pro-competitive licensing may also occur to ensure design freedom. In sectors where large numbers of intellectual property rights exist and where individual products may infringe upon a number of existing and future property rights, licence agreements whereby the parties agree not to assert their property rights against each other are often pro-competitive because they allow the parties to develop their respective technologies without the risk of subsequent infringement claims.
149. In the application of the indispensability test contained in Article 81(3) the Commission will in particular examine whether individual restrictions make it possible to perform the activity in question more efficiently than would have been the case in the absence of the restriction concerned. In making this assessment the market conditions and the realities facing the parties must be taken into account. Undertakings invoking the benefit of Article 81(3) are not required to consider hypothetical and theoretical alternatives. They must, however, explain and demonstrate why seemingly realistic and significantly less restrictive alternatives

would be significantly less efficient. If the application of what appears to be a commercially realistic and less restrictive alternative would lead to a significant loss of efficiencies, the restriction in question is treated as indispensable. In some cases, it may also be necessary to examine whether the agreement as such is indispensable to achieve the efficiencies. This may for example be so in the case of technology pools that include complementary but non-essential technologies ⁽⁵⁹⁾, in which case it must be examined to what extent such inclusion gives rise to particular efficiencies or whether, without a significant loss of efficiencies, the pool could be limited to technologies for which there are no substitutes. In the case of simple licensing between two parties it is generally not necessary to go beyond an examination of the indispensability of individual restraints. Normally there is no less restrictive alternative to the licence agreement as such.

150. The condition that consumers must receive a fair share of the benefits implies that consumers of the products produced under the licence must at least be compensated for the negative effects of the agreement ⁽⁶⁰⁾. This means that the efficiency gains must fully off-set the likely negative impact on prices, output and other relevant factors caused by the agreement. They may do so by changing the cost structure of the undertakings concerned, giving them an incentive to reduce price, or by allowing consumers to gain access to new or improved products, compensating for any likely price increase ⁽⁶¹⁾.
151. The last condition of Article 81(3), according to which the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products concerned, presupposes an analysis of remaining competitive pressures on the market and the impact of the agreement on such sources of competition. In the application of the last condition of Article 81(3) the relationship between Article 81(3) and Article 82 must be taken into account. According to settled case law, the application of Article 81(3) cannot prevent the application of Article 82 of the Treaty ⁽⁶²⁾. Moreover, since Articles 81 and 82 both pursue the aim of maintaining effective competition on the market, consistency requires that Article 81(3) be interpreted as precluding any application of the exception rule to restrictive agreements that constitute an abuse of a dominant position ⁽⁶³⁾.
152. The fact that the agreement substantially reduces one dimension of competition does not necessarily mean that competition is eliminated within the meaning of Article 81(3). A technology pool, for instance, can result in an industry standard, leading to a situation in which there is little competition in terms of the technological format. Once the main players in the market adopt a certain format, network effects may make it very difficult for alternative formats to survive. This does not

imply, however, that the creation of a de facto industry standard always eliminates competition within the meaning of the last condition of Article 81(3). Within the standard, suppliers may compete on price, quality and product features. However, in order for the agreement to comply with Article 81(3), it must be ensured that the agreement does not unduly restrict competition and does not unduly restrict future innovation.

2. The application of Article 81 to various types of licensing restraints

153. This section deals with various types of restraints that are commonly included in licence agreements. Given their prevalence it is useful to provide guidance as to how they are assessed outside the safe harbour of the TTBER. Restraints that have already been dealt with in the preceding parts of these guidelines, in particular sections III.4 and III.5, are only dealt with briefly in the present section.
154. This section covers both agreements between non-competitors and agreements between competitors. In respect of the latter a distinction is made — where appropriate — between reciprocal and non-reciprocal agreements. No such distinction is required in the case of agreements between non-competitors. When undertakings are neither actual nor potential competitors on a relevant technology market or on a market for products incorporating the licensed technology, a reciprocal licence is for all practical purposes no different from two separate licences. Arrangements whereby the parties assemble a technology package, which is then licensed to third parties, are technology pools, which are dealt with in section 4 below.
155. This section does not deal with obligations in licence agreements that are generally not restrictive of competition within the meaning of Article 81(1). These obligations include but are not limited to:
- (a) confidentiality obligations;
 - (b) obligations on licensees not to sub-license;
 - (c) obligations not to use the licensed technology after the expiry of the agreement, provided that the licensed technology remains valid and in force;
 - (d) obligations to assist the licensor in enforcing the licensed intellectual property rights;

- (e) obligations to pay minimum royalties or to produce a minimum quantity of products incorporating the licensed technology; and
- (f) obligations to use the licensor's trade mark or indicate the name of the licensor on the product.

2.1. Royalty obligations

156. The parties to a licence agreement are normally free to determine the royalty payable by the licensee and its mode of payment without being caught by Article 81(1). This principle applies both to agreements between competitors and agreements between non-competitors. Royalty obligations may for instance take the form of lump sum payments, a percentage of the selling price or a fixed amount for each product incorporating the licensed technology. In cases where the licensed technology relates to an input which is incorporated into a final product it is as a general rule not restrictive of competition that royalties are calculated on the basis of the price of the final product, provided that it incorporates the licensed technology. In the case of software licensing royalties based on the number of users and royalties calculated on a per machine basis are generally compatible with Article 81(1).

157. In the case of licence agreements between competitors it is recalled, see paragraphs and above, that in a limited number of circumstances royalty obligations may amount to price fixing, which is a hardcore restriction (cf. Article 4(1)(a)). It is a hardcore restriction under Article 4(1)(a) if competitors provide for reciprocal running royalties in circumstances where the licence is a sham, in that its purpose is not to allow an integration of complementary technologies or to achieve another pro-competitive aim. It is also a hardcore restriction under Article 4(1)(a) and 4(1)(d) if royalties extend to products produced solely with the licensee's own technology.

158. Other types of royalty arrangements between competitors are block exempted up to the market share threshold of 20 % even if they restrict competition. Outside the safe harbour of the block exemption Article 81(1) may be applicable where competitors cross license and impose running royalties that are clearly disproportionate compared to the market value of the licence and where such royalties have a significant impact on market prices. In assessing whether the royalties are disproportionate it is relevant to have regard to the royalties paid by other licensees on the product market for the same or substitute technologies. In such cases it is unlikely that the conditions of Article 81(3) are satisfied. Article 81(1) may also apply where reciprocal running royalties per unit increase as output increases. If the parties have a significant degree of market power, such royalties may have the effect of limiting output.

159. Notwithstanding the fact that the block exemption only applies as long as the technology is valid and in force, the parties can normally agree to extend royalty obligations beyond the period of validity of the licensed intellectual property rights without falling foul of Article 81(1). Once these rights expire, third parties can legally exploit the technology in question and compete with the parties to the agreement. Such actual and potential competition will normally suffice to ensure that the obligation in question does not have appreciable anti-competitive effects.

160. In the case of agreements between non-competitors the block exemption covers agreements whereby royalties are calculated on the basis of both products produced with the licensed technology and products produced with technologies licensed from third parties. Such arrangements may facilitate the metering of royalties. However, they may also lead to foreclosure by increasing the cost of using third party inputs and may thus have similar effects as a non-compete obligation. If royalties are paid not just on products produced with the licensed technology but also on products produced with third party technology, then the royalties will increase the cost of the latter products and reduce demand for third party technology. Outside the scope of the block exemption it must therefore be examined whether the restriction has foreclosure effects. For that purpose it is appropriate to use the analytical framework set out in section 2.7 below. In the case of appreciable foreclosure effects such agreements are caught by Article 81(1) and unlikely to fulfil the conditions of Article 81(3), unless there is no other practical way of calculating and monitoring royalty payments.

2.2. Exclusive licensing and sales restrictions

161. For the present purposes it is useful to distinguish between restrictions as to production within a given territory (exclusive or sole licences) and restrictions on the sale of products incorporating the licensed technology into a given territory and to a given customer group (sales restrictions).

2.2.1. Exclusive and sole licences

162. A licence is deemed to be exclusive if the licensee is the only one who is permitted to produce on the basis of the licensed technology within a given territory. The licensor thus undertakes not to produce itself or license others to produce within a given territory. This territory may cover the whole world. Where the licensor undertakes only not to licence third parties to produce within a given territory, the licence is a sole licence. Often exclusive or sole licensing is accompanied by sales restrictions that limit the parties in where they may sell products incorporating the licensed technology.

163. Reciprocal exclusive licensing between competitors falls under Article 4(1)(c), which identifies market sharing between competitors as a hardcore restriction. Reciprocal sole licensing between competitors is block exempted up to the market share threshold of 20 %. Under such an agreement the parties mutually commit not to license their competing technologies to third parties. In cases where the parties have a significant degree of market power such agreements may facilitate collusion by ensuring that the parties are the only sources of output in the market based on the licensed technologies.
164. Non-reciprocal exclusive licensing between competitors is block exempted up to the market share threshold of 20 %. Above the market share threshold it is necessary to analyse what are the likely anti-competitive effects of such exclusive licensing. Where the exclusive licence is world-wide it implies that the licensor leaves the market. In cases where exclusivity is limited to a particular territory such as a Member State the agreement implies that the licensor abstains from producing goods and services inside the territory in question. In the context of Article 81(1) it must in particular be assessed what is the competitive significance of the licensor. If the licensor has a limited market position on the product market or lacks the capacity to effectively exploit the technology in the licensee's territory, the agreement is unlikely to be caught by Article 81(1). A special case is where the licensor and the licensee only compete on the technology market and the licensor, for instance being a research institute or a small research based undertaking, lacks the production and distribution assets to effectively bring to market products incorporating the licensed technology. In such cases Article 81(1) is unlikely to be infringed.
165. Exclusive licensing between non-competitors — to the extent that it is caught by Article 81(1) ⁽⁶⁴⁾ — is likely to fulfil the conditions of Article 81(3). The right to grant an exclusive licence is generally necessary in order to induce the licensee to invest in the licensed technology and to bring the products to market in a timely manner. This is in particular the case where the licensee must make large investments in further developing the licensed technology. To intervene against the exclusivity once the licensee has made a commercial success of the licensed technology would deprive the licensee of the fruits of his success and would be detrimental to competition, the dissemination of technology and innovation. The Commission will therefore only exceptionally intervene against exclusive licensing in agreements between non-competitors, irrespective of the territorial scope of the licence.
166. The main situation in which intervention may be warranted is where a dominant licensee obtains an exclusive licence to one or more competing technologies. Such agreements are likely to be caught by Article 81(1) and unlikely to fulfil the conditions of Article 81(3). It is a condition however that entry into the technology market is difficult and the licensed technology constitutes a real source of competition on the market. In such circumstances an exclusive licence may foreclose third party licensees and allow the licensee to preserve his market power.
167. Arrangements whereby two or more parties cross licence each other and undertake not to licence third parties give rise to particular concerns when the package of technologies resulting from the cross licences creates a de facto industry standard to which third parties must have access in order to compete effectively on the market. In such cases the agreement creates a closed standard reserved for the parties. The Commission will assess such arrangements according to the same principles as those applied to technology pools (see section 4 below). It will normally be required that the technologies which support such a standard be licensed to third parties on fair, reasonable and non-discriminatory terms ⁽⁶⁵⁾. Where the parties to the arrangement compete with third parties on an existing product market and the arrangement relates to that product market a closed standard is likely to have substantial exclusionary effects. This negative impact on competition can only be avoided by licensing also to third parties.
- ### 2.2.2. Sales restrictions
168. Also as regards sales restrictions there is an important distinction to be made between licensing between competitors and between non-competitors.
169. Restrictions on active and passive sales by one or both parties in a reciprocal agreement between competitors are hardcore restrictions of competition under Article 4(1)(c). Sales restrictions on either party in a reciprocal agreement between competitors are caught by Article 81(1) and are unlikely to fulfil the conditions of Article 81(3). Such restrictions are generally considered market sharing, since they prevent the affected party from selling actively and passively into territories and to customer groups which he actually served or could realistically have served in the absence of the agreement.
170. In the case of non-reciprocal agreements between competitors the block exemption applies to restrictions on active and passive sales by the licensee or the licensor into the exclusive territory or to the exclusive customer group reserved for the other party (cf. Article 4(1)(c)(iv)). Above the market share threshold of 20 % sales restrictions between licensor and licensee are caught by

Article 81(1) when one or both of the parties have a significant degree of market power. Such restrictions, however, may be indispensable for the dissemination of valuable technologies and therefore fulfil the conditions of Article 81(3). This may be the case where the licensor has a relatively weak market position in the territory where he exploits himself the technology. In such circumstances restrictions on active sales in particular may be indispensable to induce the licensor to grant the licence. In the absence thereof the licensor would risk facing active competition in his main area of activity. Similarly, restrictions on active sales by the licensor may be indispensable, in particular, where the licensee has a relatively weak market position in the territory allocated to him and has to make significant investments in order to efficiently exploit the licensed technology.

171. The block exemption also covers restrictions on active sales into the territory or to the customer group allocated to another licensee, who was not a competitor of the licensor at the time when he concluded the licence agreement with the licensor. It is a condition, however, that the agreement between the parties in question is non-reciprocal. Above the market share threshold such active sales restrictions are likely to be caught by Article 81(1) when the parties have a significant degree of market power. However, the restraint is likely to be indispensable within the meaning of Article 81(3) for the period of time required for the protected licensee to penetrate a new market and establish a market presence in the allocated territory or vis-à-vis the allocated customer group. This protection against active sales allows the licensee to overcome the asymmetry, which he faces due to the fact that some of the licensees are competing undertakings of the licensor and thus already established on the market. Restrictions on passive sales by licensees into a territory or to a customer group allocated to another licensee are hardcore restrictions under Article 4(1)(c) of the TTBER.

172. In the case of agreements between non-competitors sales restrictions between the licensor and a licensee are block exempted up to the market share threshold of 30%. Above the market share threshold restrictions on active and passive sales by licensees to territories or customer groups reserved for the licensor may fall outside Article 81(1) where on the basis of objective factors it can be concluded that in the absence of the sales restrictions licensing would not occur. A technology owner cannot normally be expected to create direct competition with himself on the basis of his own technology. In other cases sales restrictions on the licensee may be caught by Article 81(1) both where the licensor individually has a significant degree of market power and in the case of a cumulative effect of similar agreements concluded by licensors which together hold a strong position on the market.

173. Sales restrictions on the licensor, when caught by Article 81(1), are likely to fulfil the conditions of Article 81(3) unless there are no real alternatives to the licensor's technology on the market or such alternatives are licensed by the licensee from third parties. Such restrictions and in particular restrictions on active sales are likely to be indispensable within the meaning of Article 81(3) in order to induce the licensee to invest in the production, marketing and sale of the products incorporating the licensed technology. It is likely that the licensee's incentive to invest would be significantly reduced if he would face direct competition from the licensor whose production costs are not burdened by royalty payments, possibly leading to sub-optimal levels of investment.

174. As regards restrictions on sales between licensees in agreements between non-competitors, the TTBER block exempts restrictions on active selling between territories or customer groups. Above the market share threshold restrictions on active sales between licensees' territories and customer groups limit intra-technology competition and are likely to be caught by Article 81(1) when the individual licensee has a significant degree of market power. Such restrictions, however, may fulfil the conditions of Article 81(3) where they are necessary to prevent free riding and to induce the licensee to make the investment necessary for efficient exploitation of the licensed technology inside his territory and to promote sales of the licensed product. Restrictions on passive sales are covered by the hardcore list of Article 4(2)(b), cf. paragraph 101 above, when they exceed two years from the date on which the licensee benefiting from the restrictions first put the product incorporating the licensed technology on the market inside his exclusive territory. Passive sales restrictions exceeding this two-year period are unlikely to fulfil the conditions of Article 81(3).

2.3. Output restrictions

175. Reciprocal output restrictions in licence agreements between competitors constitute a hardcore restriction covered by Article 4(1)(b) of the TTBER (cf. point 82 above). Article 4(1)(b) does not cover output restrictions imposed on the licensee in a non-reciprocal agreement or on one of the licensees in an reciprocal agreement. Such restrictions are block exempted up to the market share threshold of 20%. Above the market share threshold, output restrictions on the licensee may restrict competition where the parties have a significant degree of market power. However, Article 81(3) is likely to apply in cases where the licensor's technology is substantially better than the licensee's technology and the output limitation substantially exceeds the output of the licensee prior to the conclusion of the agreement. In

that case the effect of the output limitation is limited even in markets where demand is growing. In the application of Article 81(3) it must also be taken into account that such restrictions may be necessary in order to induce the licensor to disseminate his technology as widely as possible. For instance, a licensor may be reluctant to license his competitors if he cannot limit the licence to a particular production site with a specific capacity (a site licence). Where the licence agreement leads to a real integration of complementary assets, output restrictions on the licensee may therefore fulfil the conditions of Article 81(3). However, this is unlikely to be the case where the parties have substantial market power.

176. Output restrictions in licence agreements between non-competitors are block exempted up to the market share threshold of 30 %. The main anti-competitive risk flowing from output restrictions on licensees in agreements between non-competitors is reduced intra-technology competition between licensees. The significance of such anti-competitive effects depends on the market position of the licensor and the licensees and the extent to which the output limitation prevents the licensee from satisfying demand for the products incorporating the licensed technology.
177. When output restrictions are combined with exclusive territories or exclusive customer groups, the restrictive effects are increased. The combination of the two types of restraints makes it more likely that the agreement serves to partition markets.
178. Output limitations imposed on the licensee in agreements between non-competitors may also have pro-competitive effects by promoting the dissemination of technology. As a supplier of technology, the licensor should normally be free to determine the output produced with the licensed technology by the licensee. If the licensor were not free to determine the output of the licensee, a number of licence agreements might not come into existence in the first place, which would have a negative impact on the dissemination of new technology. This is particularly likely to be the case where the licensor is also a producer, since in that case the output of the licensees may find their way back into the licensor's main area of operation and thus have a direct impact on these activities. On the other hand, it is less likely that output restrictions are necessary in order to ensure dissemination of the licensor's technology when combined with sales restrictions on the licensee prohibiting him from selling into a territory or customer group reserved for the licensor.

2.4. Field of use restrictions

179. Under a field of use restriction the licence is either limited to one or more technical fields of application or one or more product markets. There are many cases in which the same technology can be used to make different products or can be incorporated into products belonging to different product markets. A new moulding technology may for instance be used to make plastic bottles and plastic glasses, each product belonging to separate product markets. However, a single product market may encompass several technical fields of use. For instance a new engine technology may be employed in four cylinder engines and six cylinder engines. Similarly, a technology to make chipsets may be used to produce chipsets with up to four CPUs and more than four CPUs. A licence limiting the use of the licensed technology to produce say four cylinder engines and chipsets with up to four CPUs constitutes a technical field of use restriction.
180. Given that field of use restrictions are block exempted and that certain customer restrictions are hardcore restrictions under Articles 4(1)(c) and 4(2)(b) of the TTBER, it is important to distinguish the two categories of restraints. A customer restriction presupposes that specific customer groups are identified and that the parties are restricted in selling to such identified groups. The fact that a technical field of use restriction may correspond to certain groups of customers within a product market does not imply that the restraint is to be classified as a customer restriction. For instance, the fact that certain customers buy predominantly or exclusively chipsets with more than four CPUs does not imply that a licence which is limited to chipsets with up to four CPUs constitutes a customer restriction. However, the field of use must be defined objectively by reference to identified and meaningful technical characteristics of the licensed product.
181. A field of use restriction limits the exploitation of the licensed technology by the licensee to one or more particular fields of use without limiting the licensor's ability to exploit the licensed technology. In addition, as with territories, these fields of use can be allocated to the licensee under an exclusive or sole licence. Field of use restrictions combined with an exclusive or sole licence also restrict the licensor's ability to exploit his own technology, by preventing him from exploiting it himself, including by way of licensing to others. In the case of a sole licence only licensing to third parties is restricted. Field of use restrictions combined with exclusive and sole licences are treated in the same way as the exclusive and sole licenses dealt with in section 2.2.1 above. In particular, for licensing between competitors, this means that reciprocal exclusive licensing is hardcore under Article 4(1)(c).

182. Field of use restrictions may have pro-competitive effects by encouraging the licensor to license his technology for applications that fall outside his main area of focus. If the licensor could not prevent licensees from operating in fields where he exploits the technology himself or in fields where the value of the technology is not yet well established, it would be likely to create a disincentive for the licensor to license or would lead him to charge a higher royalty. It must also be taken into account that in certain sectors licensing often occurs to ensure design freedom by preventing infringement claims. Within the scope of the licence the licensee is able to develop his own technology without fearing infringement claims by the licensor.
183. Field of use restrictions on licensees in agreements between actual or potential competitors are block exempted up to the market share threshold of 20 %. The main competitive concern in the case of such restrictions is the risk that the licensee ceases to be a competitive force outside the licensed field of use. This risk is greater in the case of cross licensing between competitors where the agreement provides for asymmetrical field of use restrictions. A field of use restriction is asymmetrical where one party is permitted to use the licensed technology within one product market or technical field of use and the other party is permitted to use the other licensed technology within another product market or technical field of use. Competition concerns may in particular arise where the licensee's production facility, which is tooled up to use the licensed technology, is also used to produce with his own technology products outside the licensed field of use. If the agreement is likely to lead the licensee to reduce output outside the licensed field of use, the agreement is likely to be caught by Article 81(1). Symmetrical field of use restrictions, i.e. agreements whereby the parties are licensed to use each other's technologies within the same field(s) of use, are unlikely to be caught by Article 81(1). Such agreements are unlikely to restrict competition that existed in the absence of the agreement. Article 81(1) is also unlikely to apply in the case of agreements that merely enable the licensee to develop and exploit his own technology within the scope of the licence without fearing infringement claims by the licensor. In such circumstances field of use restrictions do not in themselves restrict competition that existed in the absence of the agreement. In the absence of the agreement the licensee also risked infringement claims outside the scope of the licensed field of use. However, if the licensee without business justification terminates or scales back his activities in the area outside the licensed field of use this may be an indication of an underlying market sharing arrangement amounting to a hardcore restriction under Article 4(1)(c) of the TTBER.
184. Field of use restrictions on licensee and licensor in agreements between non-competitors are block exempted up to the market share threshold of 30 %. Field of use restrictions in agreements between non-competitors whereby the licensor reserves one or more product markets or technical fields of use for himself are generally either non-restrictive of competition or efficiency enhancing. They promote dissemination of new technology by giving the licensor an incentive to license for exploitation in fields in which he does not want to exploit the technology himself. If the licensor could not prevent licensees from operating in fields where the licensor exploits the technology himself, it would be likely to create a disincentive for the licensor to licence.
185. In agreements between non-competitors the licensor is normally also entitled to grant sole or exclusive licences to different licensees limited to one or more fields of use. Such restrictions limit intra-technology competition between licensees in the same way as exclusive licensing and are analysed in the same way (cf. section 2.2.1 above).
- ### 2.5. Captive use restrictions
186. A captive use restriction can be defined as an obligation on the licensee to limit his production of the licensed product to the quantities required for the production of his own products and for the maintenance and repair of his own products. In other words, this type of use restriction takes the form of an obligation on the licensee to use the products incorporating the licensed technology only as an input for incorporation into his own production; it does not cover the sale of the licensed product for incorporation into the products of other producers. Captive use restrictions are block exempted up to the respective market share thresholds of 20 % and 30 %. Outside the scope of the block exemption it is necessary to examine what are the pro-competitive and anti-competitive effects of the restraint. In this respect it is necessary to distinguish agreements between competitors from agreements between non-competitors.
187. In the case of licence agreements between competitors a restriction that imposes on the licensee to produce under the licence only for incorporation into his own products prevents him from being a supplier of components to third party producers. If prior to the conclusion of the agreement, the licensee was not an actual or likely potential supplier of components to other producers, the captive use restriction does not change anything compared to the pre-existing situation. In those circumstances the restriction is assessed in the same way as in the case of agreements between non-competitors. If, on the other hand, the licensee is an actual or likely component supplier, it is necessary to examine what is the impact of the agreement on this activity. If by tooling up to use the licensor's technology the licensee ceases to use his own technology on a stand alone basis and thus to be a component supplier, the agreement restricts competition that existed prior to the agreement. It may result in serious negative market effects when the licensor has a significant degree of market power on the component market.

188. In the case of licence agreements between non-competitors there are two main competitive risks stemming from captive use restrictions: (a) a restriction of intra-technology competition on the market for the supply of inputs and (b) an exclusion of arbitrage between licensees enhancing the possibility for the licensor to impose discriminatory royalties on licensees.
189. Captive use restrictions, however, may also promote pro-competitive licensing. If the licensor is a supplier of components, the restraint may be necessary in order for the dissemination of technology between non-competitors to occur. In the absence of the restraint the licensor may not grant the licence or may do so only against higher royalties, because otherwise he would create direct competition to himself on the component market. In such cases a captive use restriction is normally either not restrictive of competition or covered by Article 81(3). It is a condition, however, that the licensee is not restricted in selling the licensed product as replacement parts for his own products. The licensee must be able to serve the after market for his own products, including independent service organisations that service and repair the products produced by him.
190. Where the licensor is not a component supplier on the relevant market, the above reason for imposing captive use restrictions does not apply. In such cases a captive use restriction may in principle promote the dissemination of technology by ensuring that licensees do not sell to producers that compete with the licensor on other markets. However, a restriction on the licensee not to sell into certain customer groups reserved for the licensor normally constitutes a less restrictive alternative. Consequently, in such cases a captive use restriction is normally not necessary for the dissemination of technology to take place.
193. The main restrictive effect of tying is foreclosure of competing suppliers of the tied product. Tying may also allow the licensor to maintain market power in the market for the tying product by raising barriers to entry since it may force new entrants to enter several markets at the same time. Moreover, tying may allow the licensor to increase royalties, in particular when the tying product and the tied product are partly substitutable and the two products are not used in fixed proportion. Tying prevents the licensee from switching to substitute inputs in the face of increased royalties for the tying product. These competition concerns are independent of whether the parties to the agreement are competitors or not. For tying to produce likely anti-competitive effects the licensor must have a significant degree of market power in the tying product so as to restrict competition in the tied product. In the absence of market power in the tying product the licensor cannot use his technology for the anti-competitive purpose of foreclosing suppliers of the tied product. Furthermore, as in the case of non-compete obligations, the tie must cover a certain proportion of the market for the tied product for appreciable foreclosure effects to occur. In cases where the licensor has market power on the market for the tied product rather than on the market for the tying product, the restraint is analysed as non-compete or quantity forcing, reflecting the fact that any competition problem has its origin on the market for the 'tied' product and not on the market for the 'tying' product⁽⁶⁶⁾.

2.6. Tying and bundling

191. In the context of technology licensing tying occurs when the licensor makes the licensing of one technology (the tying product) conditional upon the licensee taking a licence for another technology or purchasing a product from the licensor or someone designated by him (the tied product). Bundling occurs where two technologies or a technology and a product are only sold together as a bundle. In both cases, however, it is a condition that the products and technologies involved are distinct in the sense that there is distinct demand for each of the products and technologies forming part of the tie or the bundle. This is normally not the case where the technologies or products are by necessity linked in such a way that the licensed technology cannot be exploited without the tied product or both parts of the bundle cannot be exploited without the other. In the following the term 'tying' refers to both tying and bundling.
194. Tying can also give rise to efficiency gains. This is for instance the case where the tied product is necessary for a technically satisfactory exploitation of the licensed technology or for ensuring that production under the licence conforms to quality standards respected by the licensor and other licensees. In such cases tying is normally either not restrictive of competition or covered by Article 81(3). Where the licensees use the licensor's trademark or brand name or where it is otherwise obvious to consumers that there is a link between the product incorporating the licensed technology and the licensor, the licensor has a legitimate interest in ensuring that the quality of the products are such that it does not undermine the value of his technology or his reputation as an economic operator. Moreover, where it is known to consumers that the licensees (and the licensor) produce on the basis of the same technology it is unlikely that licensees would be willing to take a licence unless the technology is exploited by all in a technically satisfactory way.
192. Article 3 of the TTBER, which limits the application of the block exemption by market share thresholds, ensures

195. Tying is also likely to be pro-competitive where the tied product allows the licensee to exploit the licensed technology significantly more efficiently. For instance, where the licensor licenses a particular process technology the parties can also agree that the licensee buys a catalyst from the licensor which is developed for use with the licensed technology and which allows the technology to be exploited more efficiently than in the case of other catalysts. Where in such cases the restriction is caught by Article 81(1), the conditions of Article 81(3) are likely to be fulfilled even above the market share thresholds.

2.7. Non-compete obligations

196. Non-compete obligations in the context of technology licensing take the form of an obligation on the licensee not to use third party technologies which compete with the licensed technology. To the extent that a non-compete obligation covers a product or additional technology supplied by the licensor the obligation is dealt with in the preceding section on tying.

197. The TTBER exempts non-compete obligations both in the case of agreements between competitors and in the case of agreements between non-competitors up to the market share thresholds of 20 % and 30 % respectively.

198. The main competitive risk presented by non-compete obligations is foreclosure of third party technologies. Non-compete obligations may also facilitate collusion between licensors in the case of cumulative use. Foreclosure of competing technologies reduces competitive pressure on royalties charged by the licensor and reduces competition between the incumbent technologies by limiting the possibilities for licensees to substitute between competing technologies. As in both cases the main problem is foreclosure, the analysis can in general be the same in the case of agreements between competitors and agreements between non-competitors. However, in the case of cross licensing between competitors where both agree not to use third party technologies the agreement may facilitate collusion between them on the product market, thereby justifying the lower market share threshold of 20 %.

199. Foreclosure may arise where a substantial part of potential licensees are already tied to one or, in the case of cumulative effects, more sources of technology and are prevented from exploiting competing technologies. Foreclosure effects may result from agreements concluded by a single licensor with a significant degree of market power or by a cumulative effect of agreements concluded by several licensors, even where each individual agreement or network of agreements is covered by the TTBER. In the latter case, however, a serious cumulative effect is unlikely to arise as long as less than 50 % of the market is tied. Above this threshold significant foreclosure is likely to occur when there are relatively high barriers to entry for new licensees. If barriers to entry are low, new licensees are able to enter the market and exploit commercially attractive technologies held by third parties and thus represent a real alternative to incumbent licensees. In order to determine the real possibility for entry and expansion by third parties it is also necessary to take account of the extent to which distributors are tied to licensees by non-compete obligations. Third party technologies only have a real possibility of entry if they have access to the necessary production and distribution assets. In other words, the ease of entry depends not only on the availability of licensees but also the extent to which they have access to distribution. In assessing foreclosure effects at the distribution level the Commission will apply the analytical framework set out in section IV.2.1 of the Guidelines on Vertical Restraints ⁽⁶⁷⁾.

200. When the licensor has a significant degree of market power, obligations on licensees to obtain the technology only from the licensor can lead to significant foreclosure effects. The stronger the market position of the licensor the higher the risk of foreclosing competing technologies. For appreciable foreclosure effects to occur the non-compete obligations do not necessarily have to cover a substantial part of the market. Even in the absence thereof, appreciable foreclosure effects may occur where non-compete obligations are targeted at undertakings that are the most likely to license competing technologies. The risk of foreclosure is particularly high where there is only a limited number of potential licensees and the licence agreement concerns a technology which is used by the licensees to make an input for their own use. In such cases the entry barriers for a new licensor are likely to be high. Foreclosure may be less likely in cases where the technology is used to make a product that is sold to third parties; although in this case the restriction also ties production capacity for the input in question, it does not tie demand for the product incorporating the input produced with the licensed technology. To enter the market in the latter case licensors only need access to one or more licensee(s) that have suitable production capacity and unless only few undertakings possess or are able to obtain the assets required to take a licence, it is unlikely that by imposing non-compete obligations on its licensees the licensor is able to deny competitors access to efficient licensees.

201. Non-compete obligations may also produce pro-competitive effects. First, such obligations may promote dissemination of technology by reducing the risk of misappropriation of the licensed technology, in particular know-how. If a licensee is entitled to license competing technologies from third parties, there is a risk that particularly licensed know-how would be used in the exploitation of competing technologies and thus benefit competitors. When a licensee also exploits competing technologies, it normally also makes monitoring of royalty payments more difficult, which may act as a disincentive to licensing.
202. Second, non-compete obligations possibly in combination with an exclusive territory may be necessary to ensure that the licensee has an incentive to invest in and exploit the licensed technology effectively. In cases where the agreement is caught by Article 81(1) because of an appreciable foreclosure effect, it may be necessary in order to benefit from Article 81(3) to choose a less restrictive alternative, for instance to impose minimum output or royalty obligations, which normally have less potential to foreclose competing technologies.
203. Third, in cases where the licensor undertakes to make significant client specific investments for instance in training and tailoring of the licensed technology to the licensee's needs, non-compete obligations or alternatively minimum output or minimum royalty obligations may be necessary to induce the licensor to make the investment and to avoid hold-up problems. However, normally the licensor will be able to charge directly for such investments by way of a lump sum payment, implying that less restrictive alternatives are available.
- 3. Settlement and non-assertion agreements**
204. Licensing may serve as a means of settling disputes or avoiding that one party exercises his intellectual property rights to prevent the other party from exploiting his own technology. Licensing including cross licensing in the context of settlement agreements and non-assertion agreements is not as such restrictive of competition since it allows the parties to exploit their technologies post agreement. However, the individual terms and conditions of such agreements may be caught by Article 81(1). Licensing in the context of settlement agreements is treated like other licence agreements. In the case of technologies that from a technical point of view are substitutes, it is therefore necessary to assess to what extent it is likely that the technologies in question are in a one-way or two-way blocking position (cf. paragraph 32 above). If so, the parties are not deemed to be competitors.
205. The block exemption applies provided that the agreement does not contain any hardcore restrictions of competition as set out in Article 4 of the TTBER. The hardcore list of Article 4(1) may in particular apply where it was clear to the parties that no blocking position exists and that consequently they are competitors. In such cases the settlement is merely a means to restrict competition that existed in the absence of the agreement.
206. In cases where it is likely that in the absence of the licence the licensee could be excluded from the market, the agreement is generally pro-competitive. Restrictions that limit intra-technology competition between the licensor and the licensee are often compatible with Article 81, see section 2 above.
207. Agreements whereby the parties cross license each other and impose restrictions on the use of their technologies, including restrictions on the licensing to third parties, may be caught by Article 81(1). Where the parties have a significant degree of market power and the agreement imposes restrictions that clearly go beyond what is required in order to unblock, the agreement is likely to be caught by Article 81(1) even if it is likely that a mutual blocking position exists. Article 81(1) is particularly likely to apply where the parties share markets or fix reciprocal running royalties that have a significant impact on market prices.
208. Where under the agreement the parties are entitled to use each other's technology and the agreement extends to future developments, it is necessary to assess what is the impact of the agreement on the parties' incentive to innovate. In cases where the parties have a significant degree of market power the agreement is likely to be caught by Article 81(1) where the agreement prevents the parties from gaining a competitive lead over each other. Agreements that eliminate or substantially reduce the possibilities of one party to gain a competitive lead over the other reduce the incentive to innovate and thus adversely affect an essential part of the competitive process. Such agreements are also unlikely to satisfy the conditions of Article 81(3). It is particularly unlikely that the restriction can be considered indispensable within the meaning of the third condition of Article 81(3). The achievement of the objective of the agreement, namely to ensure that the parties can continue to exploit their own technology without being blocked by the other party, does not require that the parties agree to share future innovations. However, the parties are unlikely to be prevented from gaining a competitive lead over each other where the purpose of the licence is to allow the parties to develop their respective technologies and where

the licence does not lead them to use the same technological solutions. Such agreements merely create design freedom by preventing future infringement claims by the other party.

209. In the context of a settlement and non-assertion agreement, non-challenge clauses are generally considered to fall outside Article 81(1). It is inherent in such agreements that the parties agree not to challenge *ex post* the intellectual property rights covered by the agreement. Indeed, the very purpose of the agreement is to settle existing disputes and/or to avoid future disputes.

4. Technology pools

210. Technology pools are defined as arrangements whereby two or more parties assemble a package of technology which is licensed not only to contributors to the pool but also to third parties. In terms of their structure technology pools can take the form of simple arrangements between a limited number of parties or elaborate organisational arrangements whereby the organisation of the licensing of the pooled technologies is entrusted to a separate entity. In both cases the pool may allow licensees to operate on the market on the basis of a single licence.

211. There is no inherent link between technology pools and standards, but in some cases the technologies in the pool support (wholly or partly) a *de facto* or *de jure* industry standard. When technology pools do support an industry standard they do not necessarily support a single standard. Different technology pools may support competing standards⁽⁶⁸⁾.

212. Agreements establishing technology pools and setting out the terms and conditions for their operation are not — irrespective of the number of parties — covered by the block exemption (cf. section III.2.2 above). Such agreements are addressed only by these guidelines. Pooling arrangements give rise to a number of particular issues regarding the selection of the included technologies and the operation of the pool, which do not arise in the context of other types of licensing. The individual licences granted by the pool to third party licensees, however, are treated like other licence agreements, which are block exempted when the conditions set out in the TTBER are fulfilled, including the requirements of Article 4 of the TTBER containing the list of hardcore restrictions.

213. Technology pools may be restrictive of competition. The creation of a technology pool necessarily implies joint

selling of the pooled technologies, which in the case of pools composed solely or predominantly of substitute technologies amounts to a price fixing cartel. Moreover, in addition to reducing competition between the parties, technology pools may also, in particular when they support an industry standard or establish a *de facto* industry standard, result in a reduction of innovation by foreclosing alternative technologies. The existence of the standard and the related technology pool may make it more difficult for new and improved technologies to enter the market.

214. Technology pools can also produce pro-competitive effects, in particular by reducing transaction costs and by setting a limit on cumulative royalties to avoid double marginalisation. The creation of a pool allows for one-stop licensing of the technologies covered by the pool. This is particularly important in sectors where intellectual property rights are prevalent and where in order to operate on the market licences need to be obtained from a significant number of licensors. In cases where licensees receive on-going services concerning the application of the licensed technology, joint licensing and servicing can lead to further cost reductions.

4.1. The nature of the pooled technologies

215. The competitive risks and the efficiency enhancing potential of technology pools depend to a large extent on the relationship between the pooled technologies and their relationship with technologies outside the pool. Two basic distinctions must be made, namely (a) between technological complements and technological substitutes and (b) between essential and non-essential technologies.

216. Two technologies⁽⁶⁹⁾ are complements as opposed to substitutes when they are both required to produce the product or carry out the process to which the technologies relate. Conversely, two technologies are substitutes when either technology allows the holder to produce the product or carry out the process to which the technologies relate. A technology is essential as opposed to non-essential if there are no substitutes for that technology inside or outside the pool and the technology in question constitutes a necessary part of the package of technologies for the purposes of producing the product(s) or carrying out the process(es) to which the pool relates. A technology for which there are no substitutes, remains essential as long as the technology is covered by at least one valid intellectual property right. Technologies that are essential are by necessity also complements.

217. When technologies in a pool are substitutes, royalties are likely to be higher than they would otherwise be, because licensees do not benefit from rivalry between the technologies in question. When the technologies in the pool are complements the arrangement reduces transaction costs and may lead to lower overall royalties because the parties are in a position to fix a common royalty for the package as opposed to each fixing a royalty which does not take account of the royalty fixed by others.
218. The distinction between complementary and substitute technologies is not clear-cut in all cases, since technologies may be substitutes in part and complements in part. When due to efficiencies stemming from the integration of two technologies licensees are likely to demand both technologies the technologies are treated as complements even if they are partly substitutable. In such cases it is likely that in the absence of the pool licensees would want to licence both technologies due to the additional economic benefit of employing both technologies as opposed to employing only one of them.
219. The inclusion in the pool of substitute technologies restricts inter-technology competition and amounts to collective bundling. Moreover, where the pool is substantially composed of substitute technologies, the arrangement amounts to price fixing between competitors. As a general rule the Commission considers that the inclusion of substitute technologies in the pool constitutes a violation of Article 81(1). The Commission also considers that it is unlikely that the conditions of Article 81(3) will be fulfilled in the case of pools comprising to a significant extent substitute technologies. Given that the technologies in question are alternatives, no transaction cost savings accrue from including both technologies in the pool. In the absence of the pool licensees would not have demanded both technologies. It is not sufficient that the parties remain free to license independently. In order not to undermine the pool, which allows them to jointly exercise market power, the parties are likely to have little incentive to do so.
220. When a pool is composed only of technologies that are essential and therefore by necessity also complements, the creation of the pool as such generally falls outside Article 81(1) irrespective of the market position of the parties. However, the conditions on which licences are granted may be caught by Article 81(1).
221. Where non-essential but complementary patents are included in the pool there is a risk of foreclosure of third party technologies. Once a technology is included in the pool and is licensed as part of the package, licensees are likely to have little incentive to license a competing technology when the royalty paid for the package already covers a substitute technology. Moreover, the inclusion of technologies which are not necessary for the purposes of producing the product(s) or carrying out the process(es) to which the technology pool relates also forces licensees to pay for technology that they may not need. The inclusion of complementary patents thus amounts to collective bundling. When a pool encompasses non-essential technologies, the agreement is likely to be caught by Article 81(1) where the pool has a significant position on any relevant market.
222. Given that substitute and complementary technologies may be developed after the creation of the pool, the assessment of essentiality is an on-going process. A technology may therefore become non-essential after the creation of the pool due to the emergence of new third party technologies. One way to ensure that such third party technologies are not foreclosed is to exclude from the pool technologies that have become non-essential. However, there may be other ways to ensure that third party technologies are not foreclosed. In the assessment of technology pools comprising non-essential technologies, i.e. technologies for which substitutes exist outside the pool or which are not necessary in order to produce one or more products to which the pool relates, the Commission will in its overall assessment, *inter alia*, take account of the following factors:
- (a) whether there are any pro-competitive reasons for including the non-essential technologies in the pool;
 - (b) whether the licensors remain free to license their respective technologies independently. Where the pool is composed of a limited number of technologies and there are substitute technologies outside the pool, licensees may want to put together their own technological package composed partly of technology forming part of the pool and partly of technology owned by third parties;

(c) whether, in cases where the pooled technologies have different applications some of which do not require use of all of the pooled technologies, the pool offers the technologies only as a single package or whether it offers separate packages for distinct applications. In the latter case it is avoided that technologies which are not essential to a particular product or process are tied to essential technologies;

(d) whether the pooled technologies are available only as a single package or whether licensees have the possibility of obtaining a licence for only part of the package with a corresponding reduction of royalties. The possibility to obtain a licence for only part of the package may reduce the risk of foreclosure of third party technologies outside the pool, in particular where the licensee obtains a corresponding reduction in royalties. This requires that a share of the overall royalty has been assigned to each technology in the pool. Where the licence agreements concluded between the pool and individual licensees are of relatively long duration and the pooled technology supports a *de facto* industry standard, it must also be taken into account that the pool may foreclose access to the market of new substitute technologies. In assessing the risk of foreclosure in such cases it is relevant to take into account whether or not licensees can terminate at reasonable notice part of the licence and obtain a corresponding reduction of royalties.

4.2. Assessment of individual restraints

223. The purpose of this section is to address a certain number of restraints that in one form or another are commonly found in technology pools and which need to be assessed in the overall context of the pool. It is recalled, cf. paragraph 212 above, that the TTBER applies to licence agreements concluded between the pool and third party licensees. This section is therefore limited to addressing the creation of the pool and licensing issues that are particular to licensing in the context of technology pools.

224. In making its assessment the Commission will be guided by the following main principles:

1. The stronger the market position of the pool the greater the risk of anti-competitive effects.
2. Pools that hold a strong position on the market should be open and non-discriminatory.

3. Pools should not unduly foreclose third party technologies or limit the creation of alternative pools.

225. Undertakings setting up a technology pool that is compatible with Article 81, and any industry standard that it may support, are normally free to negotiate and fix royalties for the technology package and each technology's share of the royalties either before or after the standard is set. Such agreement is inherent in the establishment of the standard or pool and cannot in itself be considered restrictive of competition and may in certain circumstances lead to more efficient outcomes. In certain circumstances it may be more efficient if the royalties are agreed before the standard is chosen and not after the standard is decided upon, to avoid that the choice of the standard confers a significant degree of market power on one or more essential technologies. On the other hand, licensees must remain free to determine the price of products produced under the licence. Where the selection of technologies to be included in the pool is carried out by an independent expert this may further competition between available technological solutions.

226. Where the pool has a dominant position on the market, royalties and other licensing terms should be fair and non-discriminatory and licences should be non-exclusive. These requirements are necessary to ensure that the pool is open and does not lead to foreclosure and other anti-competitive effects on down stream markets. These requirements, however, do not preclude different royalties for different uses. It is in general not considered restrictive of competition to apply different royalty rates to different product markets, whereas there should be no discrimination within product markets. In particular, the treatment of licensees should not depend on whether they are licensors or not. The Commission will therefore take into account whether licensors are also subject to royalty obligations.

227. Licensors and licensees must be free to develop competing products and standards and must also be free to grant and obtain licences outside the pool. These requirements are necessary in order to limit the risk of foreclosure of third party technologies and ensure that the pool does not limit innovation and preclude the creation of competing technological solutions. Where a pool supports a (*de facto*) industry standard and where the parties are subject to non-compete obligations, the pool creates a particular risk of preventing the development of new and improved technologies and standards.

228. Grant back obligations should be non-exclusive and be limited to developments that are essential or important to the use of the pooled technology. This allows the pool to feed on and benefit from improvements to the pooled technology. It is legitimate for the parties to ensure that the exploitation of the pooled technology cannot be held up by licensees that hold or obtain essential patents.
229. One of the problems identified with regard to patent pools is the risk that they shield invalid patents. Pooling raises the costs/risks for a successful challenge, because the challenge fails if only one patent in the pool is valid. The shielding of invalid patents in the pool may oblige licensees to pay higher royalties and may also prevent innovation in the field covered by an invalid patent. In order to limit this risk any right to terminate a licence in the case of a challenge must be limited to the technologies owned by the licensor who is the addressee of the challenge and must not extend to the technologies owned by the other licensors in the pool.
- #### 4.3. The institutional framework governing the pool
230. The way in which a technology pool is created, organised and operated can reduce the risk of it having the object or effect of restricting competition and provide assurances to the effect that the arrangement is pro-competitive.
231. When participation in a standard and pool creation process is open to all interested parties representing different interests it is more likely that technologies for inclusion into the pool are selected on the basis of price/quality considerations than when the pool is set up by a limited group of technology owners. Similarly, when the relevant bodies of the pool are composed of persons representing different interests, it is more likely that licensing terms and conditions, including royalties, will be open and non-discriminatory and reflect the value of the licensed technology than when the pool is controlled by licensor representatives.
232. Another relevant factor is the extent to which independent experts are involved in the creation and operation of the pool. For instance, the assessment of whether or not a technology is essential to a standard supported by a pool is often a complex matter that requires special expertise. The involvement in the selection process of independent experts can go a long way in ensuring that a commitment to include only essential technologies is implemented in practice.
233. The Commission will take into account how experts are selected and what are the exact functions that they are to perform. Experts should be independent from the undertakings that have formed the pool. If experts are connected to the licensors or otherwise depend on them, the involvement of the expert will be given less weight. Experts must also have the necessary technical expertise to perform the various functions with which they have been entrusted. The functions of independent experts may include, in particular, an assessment of whether or not technologies put forward for inclusion into the pool are valid and whether or not they are essential.
234. It is also relevant to consider the arrangements for exchanging sensitive information among the parties. In oligopolistic markets exchanges of sensitive information such as pricing and output data may facilitate collusion⁽⁷⁰⁾. In such cases the Commission will take into account to what extent safeguards have been put in place, which ensure that sensitive information is not exchanged. An independent expert or licensing body may play an important role in this respect by ensuring that output and sales data, which may be necessary for the purposes of calculating and verifying royalties is not disclosed to undertakings that compete on affected markets.
235. Finally, it is relevant to take account of the dispute resolution mechanism foreseen in the instruments setting up the pool. The more dispute resolution is entrusted to bodies or persons that are independent of the pool and the members thereof, the more likely it is that the dispute resolution will operate in a neutral way.

(1) OJ L 123, 27.4.2004. The TTBER replaces Commission Regulation (EC) No 240/96 of 31 January 1996 on the application of Article 85(3) of the Treaty to certain categories of technology transfer agreements (OJ L 31, 9.2.1996, p. 2).

(2) See Joined Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge*, [2000] ECR I-1365, paragraph 130, and paragraph 106 of the Commission Guidelines on the application of Article 81(3) of the Treaty, not yet published.

(3) Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).

(4) In the following the term 'agreement' includes concerted practices and decisions of associations of undertakings.

(5) See Commission Notice on the concept of effect on trade between Member States contained in Articles 81 and 82 of the Treaty, not yet published.

- (6) In the following the term 'restriction' includes the prevention and distortion of competition.
- (7) This principle of Community exhaustion is for example enshrined in Article 7(1) of Directive 104/89/EEC to approximate the laws of the Member States relating to trade marks (OJ L 40, 11.2.1989, p. 1), which provides that the trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trade mark by the proprietor or with his consent.
- (8) On the other hand, the sale of copies of a protected work does not lead to the exhaustion of performance rights, including rental rights, in the work, see in this respect Case 158/86, *Warner Brothers and Metronome Video*, [1988] ECR 2605, and Case C-61/97, *Foreningen af danske videogramdistributører*, [1998] ECR I-5171.
- (9) See e.g. Joined Cases 56/64 and 58/64, *Consten and Grundig*, [1966] ECR 429.
- (10) The methodology for the application of Article 81(3) is set out in the Commission Guidelines on the application of Article 81(3) of the Treaty cited in note 2.
- (11) See Case 56/65, *Société Technique Minière*, [1966] ECR 337, and Case C-7/95 P, *John Deere*, [1998] ECR I-3111, paragraph 76.
- (12) See in this respect e.g. judgment in *Consten and Grundig* cited in note 9.
- (13) See in this respect the judgment in *Société Technique Minière* cited in note 11 and Case 258/78, *Nungesser*, [1982] ECR 2015.
- (14) See in this respect e.g. Case C-49/92 P, *Anic Partecipazioni*, [1999] ECR I-4125, paragraph 99.
- (15) See Joined Cases 29/83 and 30/83, *CRAM and Rheinzink*, [1984] ECR 1679, paragraph 26, and Joined Cases 96/82 and others, *ANSEAU-NAVEWA*, [1983] ECR 3369, paragraphs 23-25.
- (16) See the judgment in *John Deere*, [1998] cited in note 11.
- (17) Guidance on the issue of appreciability can be found in Commission notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty (OJ C 368, 22.12.2001, p. 13). The notice defines appreciability in a negative way. Agreements, which fall outside the scope of the *de minimis* notice, do not necessarily have appreciable restrictive effects. An individual assessment is required.
- (18) See Article 1(2) of Council Regulation No 1/2003 cited in note 3.
- (19) Commission notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).
- (20) As to these distinctions see also Commission Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (OJ C 3, 6.1.2001, p. 2, paragraphs 44 to 52).
- (21) See to that effect paragraphs 50 to 52 of the Guidelines on horizontal cooperation agreements, cited in the previous note.
- (22) *Idem*, paragraph 51.
- (23) See in this respect the Notice on agreements of minor importance cited in note 17.
- (24) According to Article 3(2) of Regulation 1/2003, agreements which may affect trade between Member States but which are not prohibited by Article 81 cannot be prohibited by national competition law.
- (25) Under Council Regulation 19/65, OJ Special Edition Series I 1965-1966, p. 35, the Commission is not empowered to block exempt technology transfer agreements concluded between more than two undertakings.
- (26) See recital 19 of the TTBER and further section 2.5 below.
- (27) OJ C 1, 3.1.1979, p. 2.
- (28) See paragraph 3 of the subcontracting notice.
- (29) See in this respect Commission Decision in *Moosehead/Whitbread* (OJ L 100, 20.4.1990, p. 32).
- (30) See in this respect Case 262/81, *Coditel (II)*, [1982] ECR 3381.
- (31) OJ L 336, 29.12.1999, p. 21.
- (32) OJ L 304, 5.12.2000, p. 3.
- (33) OJ L 304, 5.12.2000, p. 7.
- (34) See note 31.
- (35) See the guide 'Competition policy in Europe — The competition rules for supply and distribution agreements', 2002.
- (36) OJ C 291, 13.10.2000, p. 1, and note 31.
- (37) See paragraph 29 above.

- (³⁸) The reasons for this calculation rule are explained in paragraph 23 above.
- (³⁹) See e.g. the case law cited in note 15.
- (⁴⁰) See in this respect paragraph 98 of the Guidelines on the application of Article 81(3) of the Treaty cited in note 2.
- (⁴¹) This is also the case where one party grants a licence to the other party and accepts to buy a physical input from the licensee. The purchase price can serve the same function as the royalty.
- (⁴²) See in this respect Case 193/83, *Windsurfing International*, [1986] ECR 611, paragraph 67.
- (⁴³) For a general definition of active and passive sales, reference is made to paragraph 50 of the Guidelines on vertical restraints cited in note 36.
- (⁴⁴) Field of use restrictions are further dealt with in section IV.2.4 below.
- (⁴⁵) This hardcore restriction applies to licence agreements concerning trade within the Community. As regards agreements concerning exports outside the Community or imports/re-imports from outside the Community see Case C-306/96, *Javico*, [1998] ECR I-1983.
- (⁴⁶) See in this respect paragraph 77 of the judgment in *Nungesser* cited in note 13.
- (⁴⁷) See in this respect Case 26/76, *Metro (I)*, [1977] ECR 1875.
- (⁴⁸) If the licensed technology is outdated no restriction of competition arises, see in this respect Case 65/86, *Bayer v Sülthofer*, [1988] ECR 5249.
- (⁴⁹) As to non-challenge clauses in the context of settlement agreements see point 209 below.
- (⁵⁰) See paragraph 14 above.
- (⁵¹) See paragraphs 66 and 67 above.
- (⁵²) See in this respect paragraph 42 of the Guidelines on the application of Article 81(3) of the Treaty, cited in note 2.
- (⁵³) See in this respect paragraph 8 of the Commission Notice on agreements of minor importance, cited in note 17.
- (⁵⁴) See in this respect Case T-228/97, *Irish Sugar*, [1999] ECR II-2969, paragraph 101.
- (⁵⁵) See in this respect paragraph 23 of the Guidelines on horizontal cooperation agreements, cited in note 20.
- (⁵⁶) See Joined Cases 25/84 and 26/84, *Ford*, [1985] ECR 2725.
- (⁵⁷) See in this respect for example Commission Decision in *TPS* (OJ L 90, 2.4.1999, p. 6). Similarly, the prohibition of Article 81(1) also only applies as long as the agreement has a restrictive object or restrictive effects.
- (⁵⁸) Cited in note 36. See in particular paragraphs 115 *et seq.*
- (⁵⁹) As to these concepts see section IV.4.1 below.
- (⁶⁰) See paragraph 85 of the Guidelines on the application of Article 81(3) of the Treaty, cited in note 2.
- (⁶¹) *Idem*, paragraphs 98 and 102.
- (⁶²) See paragraph 130 of the judgment cited in note 2. Similarly, the application of Article 81(3) does not prevent the application of the Treaty rules on the free movement of goods, services, persons and capital. These provisions are in certain circumstances applicable to agreements, decisions and concerted practices within the meaning of Article 81(1), see to that effect Case C-309/99, *Wouters*, [2002] ECR I-1577, paragraph 120.
- (⁶³) See in this respect Case T-51/89, *Tetra Pak (I)*, [1990] ECR II-309. See also paragraph 106 of the Guidelines on the application of Article 81(3) of the Treaty cited in note 2 above.
- (⁶⁴) See the judgment in *Nungesser* cited in note 13.
- (⁶⁵) See in this respect the Commission's Notice in the Canon/Kodak Case (OJ C 330, 1.11.1997, p. 10) and the IGR Stereo Television Case mentioned in the XI Report on Competition Policy, paragraph 94.
- (⁶⁶) For the applicable analytical framework see section 2.7 below and paragraphs 138 *et seq.* of the Guidelines on Vertical Restraints cited in note 36.
- (⁶⁷) See note 36.
- (⁶⁸) See in this respect the Commission's press release IP/02/1651 concerning the licensing of patents for third generation (3G) mobile services. This case involved five technology pools creating five different technologies, each of which could be used to produce 3G equipment.
- (⁶⁹) The term 'technology' is not limited to patents. It covers also patent applications and intellectual property rights other than patents.
- (⁷⁰) See in this respect the judgment in *John Deere* cited in note 11.
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Commission Notice on cooperation within the Network of Competition Authorities

(2004/C 101/03)

(Text with EEA relevance)

1. INTRODUCTION

1. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ⁽¹⁾ (hereafter the 'Council Regulation') creates a system of parallel competences in which the Commission and the Member States' competition authorities (hereafter the 'NCAs') ⁽²⁾ can apply Article 81 and Article 82 of the EC Treaty (hereafter the 'Treaty'). Together the NCAs and the Commission form a network of public authorities: they act in the public interest and cooperate closely in order to protect competition. The network is a forum for discussion and cooperation in the application and enforcement of EC competition policy. It provides a framework for the cooperation of European competition authorities in cases where Articles 81 and 82 of the Treaty are applied and is the basis for the creation and maintenance of a common competition culture in Europe. The network is called 'European Competition Network' (ECN).

2. The structure of the NCAs varies between Member States. In some Member States, one body investigates cases and takes all types of decisions. In other Member States, the functions are divided between two bodies, one which is in charge of the investigation of the case and another, often a college, which is responsible for deciding the case. Finally, in certain Member States, prohibition decisions and/or decisions imposing a fine can only be taken by a court: another competition authority acts as a prosecutor bringing the case before that court. Subject to the general principle of effectiveness, Article 35 of the Council Regulation allows Member States to choose the body or bodies which will be designated as national competition authorities and to allocate functions between them. Under general principles of Community law, Member States are under an obligation to set up a sanctioning system providing for sanctions which are effective, proportionate and dissuasive for infringements of EC law ⁽³⁾. The enforcement systems of the Member States differ but they have recognised the standards of each other's systems as a basis for cooperation ⁽⁴⁾.

3. The network formed by the competition authorities should ensure both an efficient division of work and an effective and consistent application of EC competition rules. The Council Regulation together with the joint statement of the Council and the Commission on the functioning of the European Competition Network sets out the main principles of the functioning of the network. This notice presents the details of the system.

4. Consultations and exchanges within the network are matters between public enforcers and do not alter any

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

2. DIVISION OF WORK**2.1. Principles of allocation**

5. The Council Regulation is based on a system of parallel competences in which all competition authorities have the power to apply Articles 81 or 82 of the Treaty and are responsible for an efficient division of work with respect to those cases where an investigation is deemed to be necessary. At the same time each network member retains full discretion in deciding whether or not to investigate a case. Under this system of parallel competences, cases will be dealt with by:

— a single NCA, possibly with the assistance of NCAs of other Member States; or

— several NCAs acting in parallel; or

— the Commission.

6. In most instances the authority that receives a complaint or starts an ex-officio procedure ⁽⁵⁾ will remain in charge of the case. Re-allocation of a case would only be envisaged at the outset of a procedure (see paragraph 18 below) where either that authority considered that it was not well placed to act or where other authorities also considered themselves well placed to act (see paragraphs 8 to 15 below).

7. Where re-allocation is found to be necessary for an effective protection of competition and of the Community interest, network members will endeavour to re-allocate cases to a single well placed competition authority as often as possible ⁽⁶⁾. In any event, re-allocation should be a quick and efficient process and not hold up ongoing investigations.

8. An authority can be considered to be well placed to deal with a case if the following three cumulative conditions are met:

1. the agreement or practice has substantial direct actual or foreseeable effects on competition within its territory, is implemented within or originates from its territory;
2. the authority is able to effectively bring to an end the entire infringement, i.e. it can adopt a cease-and-desist order the effect of which will be sufficient to bring an end to the infringement and it can, where appropriate, sanction the infringement adequately;
3. it can gather, possibly with the assistance of other authorities, the evidence required to prove the infringement.

9. The above criteria indicate that a material link between the infringement and the territory of a Member State must exist in order for that Member State's competition authority to be considered well placed. It can be expected that in most cases the authorities of those Member States where competition is substantially affected by an infringement will be well placed provided they are capable of effectively bringing the infringement to an end through either single or parallel action unless the Commission is better placed to act (see below paragraphs 14 and 15).

10. It follows that a single NCA is usually well placed to deal with agreements or practices that substantially affect competition mainly within its territory.

Example 1: Undertakings situated in Member State A are involved in a price fixing cartel on products that are mainly sold in Member State A.

The NCA in A is well placed to deal with the case.

11. Furthermore single action of an NCA might also be appropriate where, although more than one NCA can be regarded as well placed, the action of a single NCA is sufficient to bring the entire infringement to an end.

Example 2: Two undertakings have set up a joint venture in Member State A. The joint venture provides services in Member States A and B and gives rise to a competition problem. A cease-and-desist order is considered to be sufficient to deal with the case effectively because it can bring an end to the entire infringement. Evidence is located mainly at the offices of the joint venture in Member State A.

The NCAs in A and B are both well placed to deal with the case but single action by the NCA in A would be sufficient and more efficient than single action by NCA in B or parallel action by both NCAs.

12. Parallel action by two or three NCAs may be appropriate where an agreement or practice has substantial effects on competition mainly in their respective territories and the action of only one NCA would not be sufficient to bring the entire infringement to an end and/or to sanction it adequately.

Example 3: Two undertakings agree on a market sharing agreement, restricting the activity of the company located in Member State A to Member State A and the activity of the company located in Member State B to Member State B.

The NCAs in A and B are well placed to deal with the case in parallel, each one for its respective territory.

13. The authorities dealing with a case in parallel action will endeavour to coordinate their action to the extent possible. To that effect, they may find it useful to designate one of them as a lead authority and to delegate tasks to the lead authority such as for example the coordination of investigative measures, while each authority remains responsible for conducting its own proceedings.

14. The Commission is particularly well placed if one or several agreement(s) or practice(s), including networks of similar agreements or practices, have effects on competition in more than three Member States (cross-border markets covering more than three Member States or several national markets).

Example 4: Two undertakings agree to share markets or fix prices for the whole territory of the Community. The Commission is well placed to deal with the case.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.2.4. Investigations (Article 22 of the Council Regulation)

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

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

2.3. Position of undertakings

2.3.1. General

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

2.3.2. Position of complainants

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

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

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

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

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

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

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

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

3. In the case of information collected by a network member under Article 22(1) of the Council Regulation on behalf of and for the account of the network member to whom the leniency application was made, no consent is required for the transmission of such information to, and its use by, the network member to whom the application was made.
42. Information relating to cases initiated as a result of a leniency application and which has been submitted to the Commission under Article 11(3) of the Council Regulation⁽¹⁷⁾ will only be made available to those NCAs that have committed themselves to respecting the principles set out above (see paragraph 72). The same principle applies where a case has been initiated by the Commission as a result of a leniency application made to the Commission. This does not affect the power of any authority to be provided with information under Article 12 of the Council Regulation, provided however that the provisions of paragraphs 40 and 41 are respected.

3. CONSISTENT APPLICATION OF EC COMPETITION RULES⁽¹⁸⁾

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

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

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

44. According to Article 11(4) of the Council Regulation, no later than 30 days before the adoption of a decision applying Articles 81 or 82 of the Treaty and requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block-exemption regulation, NCAs shall inform the Commission. They have to send to the Commission, at the latest 30 days before the adoption of the decision, a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action.
45. As under Article 11(3) of the Council Regulation, the obligation is to inform the Commission, but the information may be shared by the NCA informing the Commission with the other members of the network.
46. Where an NCA has informed the Commission pursuant to Article 11(4) of the Council Regulation and the 30 days deadline has expired, the decision can be adopted as long as the Commission has not initiated proceedings. The Commission may make written observations on the case before the adoption of the decision by the NCA. The NCA and the Commission will make the appropriate efforts to ensure the consistent application of Community law (cf. paragraph 3 above).
47. If special circumstances require that a national decision is taken in less than 30 days following the transmission of information pursuant to Article 11(4) of the Council Regulation, the NCA concerned may ask the Commission for a swifter reaction. The Commission will endeavour to react as quickly as possible.
48. Other types of decisions, i.e. decisions rejecting complaints, decisions closing an *ex-officio* procedure or decisions ordering interim measures, can also be important from a competition policy point of view, and the network members may have an interest in informing each other about them and possibly discussing them. NCAs can therefore on the basis of Article 11(5) of the Council Regulation inform the Commission and thereby inform the network of any other case in which EC competition law is applied.

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

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

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

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

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

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

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

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

(a) Network members envisage conflicting decisions in the same case.

(b) Network members envisage a decision which is obviously in conflict with consolidated case law; the standards defined in the judgements of the Community courts and in previous decisions and regulations of the Commission should serve as a yardstick; concerning the assessment of the facts (e.g. market definition), only a significant divergence will trigger an intervention of the Commission;

(c) Network member(s) is (are) unduly drawing out proceedings in the case;

(d) There is a need to adopt a Commission decision to develop Community competition policy in particular when a similar competition issue arises in several Member States or to ensure effective enforcement;

(e) The NCA(s) concerned do not object.

55. If an NCA is already acting on a case, the Commission will explain the reasons for the application of Article 11(6) of the Council Regulation in writing to the NCA concerned and to the other members of the Network ⁽²²⁾.

56. The Commission will announce to the network its intention of applying Article 11(6) of the Council Regulation in due time, so that Network members will have the possibility of asking for a meeting of the Advisory Committee on the matter before the Commission initiates proceedings.

57. The Commission will normally not — and to the extent that Community interest is not at stake — adopt a decision which is in conflict with a decision of an NCA after proper information pursuant to both Article 11(3) and (4) of the Council Regulation has taken place and the Commission has not made use of Article 11(6) of the Council Regulation.

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

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

4.1. Scope of the consultation

4.1.1. Decisions of the Commission

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

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

4.1.2. Decisions of NCAs

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

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

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

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

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

4.2. Procedure

4.2.1. Normal procedure

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

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

4.2.2. Written procedure

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

4.3. Publication of the opinion of the Advisory Committee

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

5. FINAL REMARKS

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

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

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

6. STATEMENT BY OTHER NETWORK MEMBERS

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

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

⁽¹⁾ OJ L 1, 4.1.2003, p. 1.

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

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

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

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

⁽⁶⁾ See Recital 18 of the Council Regulation.

⁽⁷⁾ For cases initiated following a leniency application see paragraphs 37 *et subseq.*

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

⁽⁹⁾ See Commission notice on complaints.

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

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

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

⁽¹³⁾ OJ C 45, 19.2.2002, p. 3 at paragraph 3.

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

⁽¹⁵⁾ See paragraphs 8 to 15 above.

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

⁽¹⁷⁾ See paragraph 17.

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

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

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

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

⁽²²⁾ See paragraph 22 of the Joint Statement mentioned above in footnote 4.

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

⁽²⁴⁾ OJ C 313, 15.10.1997, p. 3.

⁽²⁵⁾ See paragraphs 37 *et subseq.*

ANNEX

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

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

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

.....
(place)

.....
(date)

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

(2004/C 101/04)

(Text with EEA relevance)

I. THE SCOPE OF THE NOTICE

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

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

II. THE APPLICATION OF EC COMPETITION RULES BY NATIONAL COURTS

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

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

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

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

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

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

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

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

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

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

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

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

(a) where there is an infringement of Community law, national law must provide for sanctions which are effective, proportionate and dissuasive⁽²⁵⁾;

(b) where the infringement of Community law causes harm to an individual, the latter should under certain conditions be able to ask the national court for damages⁽²⁶⁾;

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

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

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

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

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

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

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

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

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

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

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

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

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

A. THE COMMISSION AS AMICUS CURIAE

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

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

European Commission
Directorate General for Competition
B-1049 Brussels
Belgium

or send it electronically to comp-amicus@cec.eu.int

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. FINAL PROVISIONS

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

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

⁽²⁾ 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).

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

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

⁽⁵⁾ See Article 6 of the regulation.

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

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

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

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

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

COMMISSION BLOCK EXEMPTION REGULATIONS, NOTICES AND GUIDELINES

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

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

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

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

2. Vertical agreements

- Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ L 336, 29.12.1999, p. 21)
- Guidelines on Vertical Restraints (OJ C 291, 13.10.2000, p. 1)

3. Horizontal co-operation agreements

- Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements (OJ L 304, 5.12.2000, p. 3)
- Regulation (EC) No 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements (OJ L 304, 5.12.2000, p. 7)
- Guidelines on the applicability of Article 81 to horizontal co-operation agreements (OJ C 3, 6.1.2001, p. 2)

4. Licensing agreements for the transfer of technology

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

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

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

2. Motor vehicles

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

3. *Telecommunications and postal services*

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

4. *Transport*

- Regulation (EEC) No 1617/93 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices concerning joint planning and co-ordination of schedules, joint operations, consultations on passenger and cargo tariffs on scheduled air services and slot allocation at airports (OJ L 155, 26.6.1993, p. 18)
 - Communication on clarification of the Commission recommendations on the application of the competition rules to new transport infrastructure projects (OJ C 298, 30.9.1997, p. 5)
 - Regulation (EC) No 823/2000 of 19 April 2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) (OJ L 100, 20.4.2000, p. 24)
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Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty

(2004/C 101/05)

(Text with EEA relevance)

I. INTRODUCTION AND SUBJECT-MATTER OF THE NOTICE

1. Regulation 1/2003⁽¹⁾ establishes a system of parallel competence for the application of Articles 81 and 82 of the EC Treaty by the Commission and the Member States' competition authorities and courts. The Regulation recognises in particular the complementary functions of the Commission and Member States' competition authorities acting as public enforcers and the Member States' courts that rule on private lawsuits in order to safeguard the rights of individuals deriving from Articles 81 and 82⁽²⁾.
2. Under Regulation 1/2003, the public enforcers may focus their action on the investigation of serious infringements of Articles 81 and 82 which are often difficult to detect. For their enforcement activity, they benefit from information supplied by undertakings and by consumers in the market.
3. The Commission therefore wishes to encourage citizens and undertakings to address themselves to the public enforcers to inform them about suspected infringements of the competition rules. At the level of the Commission, there are two ways to do this, one is by lodging a complaint pursuant to Article 7(2) of Regulation 1/2003. Under Articles 5 to 9 of Regulation 773/2004⁽³⁾, such complaints must fulfil certain requirements.
4. The other way is the provision of market information that does not have to comply with the requirements for complaints pursuant to Article 7(2) of Regulation 1/2003. For this purpose, the Commission has created a special website to collect information from citizens and undertakings and their associations who wish to inform the Commission about suspected infringements of Articles 81 and 82. Such information can be the starting point for an investigation by the Commission⁽⁴⁾. Information about suspected infringements can be supplied to the following address:

<http://europa.eu.int/dgcomp/info-on-anti-competitive-practices>

or to:

Commission européenne/Europese Commissie
Competition DG
B-1049 Bruxelles/Brussel

5. Without prejudice to the interpretation of Regulation 1/2003 and of Commission Regulation 773/2004 by the

Community Courts, the present Notice intends to provide guidance to citizens and undertakings that are seeking relief from suspected infringements of the competition rules. The Notice contains two main parts:

— Part II gives indications about the choice between complaining to the Commission or bringing a lawsuit before a national court. Moreover, it recalls the principles related to the work-sharing between the Commission and the national competition authorities in the enforcement system established by Regulation 1/2003 that are explained in the Notice on cooperation within the network of competition authorities⁽⁵⁾.

— Part III explains the procedure for the treatment of complaints pursuant to Article 7(2) of Regulation 1/2003 by the Commission.

6. This Notice does not address the following situations:

— complaints lodged by Member States pursuant to Article 7(2) of Regulation 1/2003,

— complaints that ask the Commission to take action against a Member State pursuant to Article 86(3) in conjunction with Articles 81 or 82 of the Treaty,

— complaints relating to Article 87 of the Treaty on state aids,

— complaints relating to infringements by Member States that the Commission may pursue in the framework of Article 226 of the Treaty⁽⁶⁾.

II. DIFFERENT POSSIBILITIES FOR LODGING COMPLAINTS ABOUT SUSPECTED INFRINGEMENTS OF ARTICLES 81 OR 82

A. COMPLAINTS IN THE NEW ENFORCEMENT SYSTEM ESTABLISHED BY REGULATION 1/2003

7. Depending on the nature of the complaint, a complainant may bring his complaint either to a national court or to a competition authority that acts as public enforcer. The present chapter of this Notice intends to help potential complainants to make an informed choice about whether to address themselves to the Commission, to one of the Member States' competition authorities or to a national court.

8. While national courts are called upon to safeguard the rights of individuals and are thus bound to rule on cases brought before them, public enforcers cannot investigate all complaints, but must set priorities in their treatment of cases. The Court of Justice has held that the Commission, entrusted by Article 85(1) of the EC Treaty with the task of ensuring application of the principles laid down in Articles 81 and 82 of the Treaty, is responsible for defining and implementing the orientation of Community competition policy and that, in order to perform that task effectively, it is entitled to give differing degrees of priority to the complaints brought before it ⁽⁷⁾.
9. Regulation 1/2003 empowers Member States' courts and Member States' competition authorities to apply Articles 81 and 82 in their entirety alongside the Commission. Regulation 1/2003 pursues as one principal objective that Member States' courts and competition authorities should participate effectively in the enforcement of Articles 81 and 82 ⁽⁸⁾.
10. Moreover, Article 3 of Regulation 1/2003 provides that Member States' courts and competition authorities have to apply Articles 81 and 82 to all cases of agreements or conduct that are capable of affecting trade between Member States to which they apply their national competition laws. In addition, Articles 11 and 15 of the Regulation create a range of mechanisms by which Member States' courts and competition authorities cooperate with the Commission in the enforcement of Articles 81 and 82.
11. In this new legislative framework, the Commission intends to refocus its enforcement resources along the following lines:
- enforce the EC competition rules in cases for which it is well placed to act ⁽⁹⁾, concentrating its resources on the most serious infringements ⁽¹⁰⁾;
 - handle cases in relation to which the Commission should act with a view to define Community competition policy and/or to ensure coherent application of Articles 81 or 82.
- B. THE COMPLEMENTARY ROLES OF PRIVATE AND PUBLIC ENFORCEMENT**
12. It has been consistently held by the Community Courts that national courts are called upon to safeguard the rights of individuals created by the direct effect of Articles 81(1) and 82 ⁽¹¹⁾.
13. National courts can decide upon the nullity or validity of contracts and only national courts can grant damages to an individual in case of an infringement of Articles 81 and 82. Under the case law of the Court of Justice, any individual can claim damages for loss caused to him by a contract or by conduct which restricts or distorts competition, in order to ensure the full effectiveness of the Community competition rules. Such actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community as they discourage undertakings from concluding or applying restrictive agreements or practices ⁽¹²⁾.
14. Regulation 1/2003 takes express account of the fact that national courts have an essential part to play in applying the EC competition rules ⁽¹³⁾. By extending the power to apply Article 81(3) to national courts it removes the possibility for undertakings to delay national court proceedings by a notification to the Commission and thus eliminates an obstacle for private litigation that existed under Regulation No 17 ⁽¹⁴⁾.
15. Without prejudice to the right or obligation of national courts to address a preliminary question to the Court of Justice in accordance with Article 234 EC, Article 15(1) of Regulation 1/2003 provides expressly that national courts may ask for opinions or information from the Commission. This provision aims at facilitating the application of Articles 81 and 82 by national courts ⁽¹⁵⁾.
16. Action before national courts has the following advantages for complainants:
- National courts may award damages for loss suffered as a result of an infringement of Article 81 or 82.
 - National courts may rule on claims for payment or contractual obligations based on an agreement that they examine under Article 81.
 - It is for the national courts to apply the civil sanction of nullity of Article 81(2) in contractual relationships between individuals ⁽¹⁶⁾. They can in particular assess, in the light of the applicable national law, the scope and consequences of the nullity of certain contractual provisions under Article 81(2), with particular regard to all the other matters covered by the agreement ⁽¹⁷⁾.
 - National courts are usually better placed than the Commission to adopt interim measures ⁽¹⁸⁾.

- Before national courts, it is possible to combine a claim under Community competition law with other claims under national law.
 - Courts normally have the power to award legal costs to the successful applicant. This is never possible in an administrative procedure before the Commission.
17. The fact that a complainant can secure the protection of his rights by an action before a national court, is an important element that the Commission may take into account in its examination of the Community interest for investigating a complaint ⁽¹⁹⁾.
18. The Commission holds the view that the new enforcement system established by Regulation 1/2003 strengthens the possibilities for complainants to seek and obtain effective relief before national courts.

C. WORK-SHARING BETWEEN THE PUBLIC ENFORCERS IN THE EUROPEAN COMMUNITY

19. Regulation 1/2003 creates a system of parallel competence for the application of Articles 81 and 82 by empowering Member States' competition authorities to apply Articles 81 and 82 in their entirety (Article 5). Decentralised enforcement by Member States' competition authorities is further encouraged by the possibility to exchange information (Article 12) and to provide each other assistance with investigations (Article 22).
20. The Regulation does not regulate the work-sharing between the Commission and the Member States' competition authorities but leaves the division of case work to the cooperation of the Commission and the Member States' competition authorities inside the European Competition Network (ECN). The Regulation pursues the objective of ensuring effective enforcement of Articles 81 and 82 through a flexible division of case work between the public enforcers in the Community.
21. Orientations for the work sharing between the Commission and the Member States' competition authorities are laid down in a separate Notice ⁽²⁰⁾. The guidance contained in that Notice, which concerns the relations between the public enforcers, will be of interest to complainants as it permits them to address a complaint to the authority most likely to be well placed to deal with their case.

22. The Notice on cooperation within the Network of Competition Authorities states in particular ⁽²¹⁾:

'An authority can be considered to be well placed to deal with a case if the following three cumulative conditions are met:

- the agreement or practice has substantial direct actual or foreseeable effects on competition within its territory, is implemented within or originates from its territory;
- the authority is able effectively to bring to an end the entire infringement, i.e. it can adopt a cease-and-desist order, the effect of which will be sufficient to bring an end to the infringement and it can, where appropriate, sanction the infringement adequately;
- it can gather, possibly with the assistance of other authorities, the evidence required to prove the infringement.

The above criteria indicate that a material link between the infringement and the territory of a Member State must exist in order for that Member State's competition authority to be considered well placed. It can be expected that in most cases the authorities of those Member States where competition is substantially affected by an infringement will be well placed provided they are capable of effectively bringing the infringement to an end through either single or parallel action unless the Commission is better placed to act (see below [. . .]).

It follows that a single NCA is usually well placed to deal with agreements or practices that substantially affect competition mainly within its territory [. . .].

Furthermore single action of an NCA might also be appropriate where, although more than one NCA can be regarded as well placed, the action of a single NCA is sufficient to bring the entire infringement to an end [. . .].

Parallel action by two or three NCAs may be appropriate where an agreement or practice has substantial effects on competition mainly in their respective territories and the action of only one NCA would not be sufficient to bring the entire infringement to an end and/or to sanction it adequately [. . .].

The authorities dealing with a case in parallel action will endeavour to coordinate their action to the extent possible. To that effect, they may find it useful to designate one of them as a lead authority and to delegate tasks to the lead authority such as for example the coordination of investigative measures, while each authority remains responsible for conducting its own proceedings.

The Commission is particularly well placed if one or several agreement(s) or practice(s), including networks of similar agreements or practices, have effects on competition in more than three Member States (cross-border markets covering more than three Member States or several national markets) [. .].

Moreover, the Commission is particularly well placed to deal with a case if it is closely linked to other Community provisions which may be exclusively or more effectively applied by the Commission, if the Community interest requires the adoption of a Commission decision to develop Community competition policy when a new competition issue arises or to ensure effective enforcement.¹

23. Within the European Competition Network, information on cases that are being investigated following a complaint will be made available to the other members of the network before or without delay after commencing the first formal investigative measure⁽²²⁾. Where the same complaint has been lodged with several authorities or where a case has not been lodged with an authority that is well placed, the members of the network will endeavour to determine within an indicative time-limit of two months which authority or authorities should be in charge of the case.
24. Complainants themselves have an important role to play in further reducing the potential need for reallocation of a case originating from their complaint by referring to the orientations on work sharing in the network set out in the present chapter when deciding on where to lodge their complaint. If nonetheless a case is reallocated within the network, the undertakings concerned and the complainant(s) are informed as soon as possible by the competition authorities involved⁽²³⁾.
25. The Commission may reject a complaint in accordance with Article 13 of Regulation 1/2003, on the grounds that a Member State competition authority is dealing or has dealt with the case. When doing so, the Commission must, in accordance with Article 9 of Regulation

773/2004, inform the complainant without delay of the national competition authority which is dealing or has already dealt with the case.

III. THE COMMISSION'S HANDLING OF COMPLAINTS PURSUANT TO ARTICLE 7(2) OF REGULATION 1/2003

A. GENERAL

26. According to Article 7(2) of Regulation 1/2003 natural or legal persons that can show a legitimate interest⁽²⁴⁾ are entitled to lodge a complaint to ask the Commission to find an infringement of Articles 81 and 82 EC and to require that the infringement be brought to an end in accordance with Article 7(1) of Regulation 1/2003. The present part of this Notice explains the requirements applicable to complaints based on Article 7(2) of Regulation 1/2003, their assessment and the procedure followed by the Commission.
27. The Commission, unlike civil courts, whose task is to safeguard the individual rights of private persons, is an administrative authority that must act in the public interest. It is an inherent feature of the Commission's task as public enforcer that it has a margin of discretion to set priorities in its enforcement activity⁽²⁵⁾.
28. The Commission is entitled to give different degrees of priority to complaints made to it and may refer to the Community interest presented by a case as a criterion of priority⁽²⁶⁾. The Commission may reject a complaint when it considers that the case does not display a sufficient Community interest to justify further investigation. Where the Commission rejects a complaint, the complainant is entitled to a decision of the Commission⁽²⁷⁾ without prejudice to Article 7(3) of Regulation 773/2004.

B. MAKING A COMPLAINT PURSUANT TO ARTICLE 7(2) OF REGULATION 1/2003

(a) Complaint form

29. A complaint pursuant to Article 7(2) of Regulation 1/2003 can only be made about an alleged infringement of Articles 81 or 82 with a view to the Commission taking action under Article 7(1) of Regulation 1/2003. A complaint under Article 7(2) of Regulation 1/2003 has to comply with Form C mentioned in Article 5(1) of Regulation 773/2004 and annexed to that Regulation.

30. Form C is available at <http://europa.eu.int/dgcomp/complaints-form> and is also annexed to this Notice. The complaint must be submitted in three paper copies as well as, if possible, an electronic copy. In addition, the complainant must provide a non-confidential version of the complaint (Article 5(2) of Regulation 773/2004). Electronic transmission to the Commission is possible via the website indicated, the paper copies should be sent to the following address:

Commission européenne/Europese Commissie
Competition DG
B-1049 Bruxelles/Brussel

31. Form C requires complainants to submit comprehensive information in relation to their complaint. They should also provide copies of relevant supporting documentation reasonably available to them and, to the extent possible, provide indications as to where relevant information and documents that are unavailable to them could be obtained by the Commission. In particular cases, the Commission may dispense with the obligation to provide information in relation to part of the information required by Form C (Article 5(1) of Regulation 773/2004). The Commission holds the view that this possibility can in particular play a role to facilitate complaints by consumer associations where they, in the context of an otherwise substantiated complaint, do not have access to specific pieces of information from the sphere of the undertakings complained of.

32. Correspondence to the Commission that does not comply with the requirements of Article 5 of Regulation 773/2004 and therefore does not constitute a complaint within the meaning of Article 7(2) of Regulation 1/2003 will be considered by the Commission as general information that, where it is useful, may lead to an own-initiative investigation (cf. point 4 above).

(b) Legitimate interest

33. The status of formal complainant under Article 7(2) of Regulation 1/2003 is reserved to legal and natural persons who can show a legitimate interest⁽²⁸⁾. Member States are deemed to have a legitimate interest for all complaints they choose to lodge.

34. In the past practice of the Commission, the condition of legitimate interest was not often a matter of doubt as most complainants were in a position of being directly and adversely affected by the alleged infringement. However, there are situations where the condition of a 'legitimate interest' in Article 7(2) requires further analysis to conclude that it is fulfilled. Useful guidance can best be provided by a non-exhaustive set of examples.

35. The Court of First Instance has held that an association of undertakings may claim a legitimate interest in lodging a

complaint regarding conduct concerning its members, even if it is not directly concerned, as an undertaking operating in the relevant market, by the conduct complained of, provided that, first, it is entitled to represent the interests of its members and secondly, the conduct complained of is liable to adversely affect the interests of its members⁽²⁹⁾. Conversely, the Commission has been found to be entitled not to pursue the complaint of an association of undertakings whose members were not involved in the type of business transactions complained of⁽³⁰⁾.

36. From this case law, it can be inferred that undertakings (themselves or through associations that are entitled to represent their interests) can claim a legitimate interest where they are operating in the relevant market or where the conduct complained of is liable to directly and adversely affect their interests. This confirms the established practice of the Commission which has accepted that a legitimate interest can, for instance, be claimed by the parties to the agreement or practice which is the subject of the complaint, by competitors whose interests have allegedly been damaged by the behaviour complained of or by undertakings excluded from a distribution system.

37. Consumer associations can equally lodge complaints with the Commission⁽³¹⁾. The Commission moreover holds the view that individual consumers whose economic interests are directly and adversely affected insofar as they are the buyers of goods or services that are the object of an infringement can be in a position to show a legitimate interest⁽³²⁾.

38. However, the Commission does not consider as a legitimate interest within the meaning of Article 7(2) the interest of persons or organisations that wish to come forward on general interest considerations without showing that they or their members are liable to be directly and adversely affected by the infringement (*pro bono publico*).

39. Local or regional public authorities may be able to show a legitimate interest in their capacity as buyers or users of goods or services affected by the conduct complained of. Conversely, they cannot be considered as showing a legitimate interest within the meaning of Article 7(2) of Regulation 1/2003 to the extent that they bring to the attention of the Commission alleged infringements *pro bono publico*.

40. Complainants have to demonstrate their legitimate interest. Where a natural or legal person lodging a complaint is unable to demonstrate a legitimate interest, the Commission is entitled, without prejudice to its right to initiate proceedings of its own initiative, not to pursue the complaint. The Commission may ascertain whether this condition is met at any stage of the investigation⁽³³⁾.

C. ASSESSMENT OF COMPLAINTS

(a) Community interest

41. Under the settled case law of the Community Courts, the Commission is not required to conduct an investigation in each case⁽³⁴⁾ or, *a fortiori*, to take a decision within the meaning of Article 249 EC on the existence or non-existence of an infringement of Articles 81 or 82⁽³⁵⁾, but is entitled to give differing degrees of priority to the complaints brought before it and refer to the Community interest in order to determine the degree of priority to be applied to the various complaints it receives⁽³⁶⁾. The position is different only if the complaint falls within the exclusive competence of the Commission⁽³⁷⁾.
42. The Commission must however examine carefully the factual and legal elements brought to its attention by the complainant in order to assess the Community interest in further investigation of a case⁽³⁸⁾.
43. The assessment of the Community interest raised by a complaint depends on the circumstances of each individual case. Accordingly, the number of criteria of assessment to which the Commission may refer is not limited, nor is the Commission required to have recourse exclusively to certain criteria. As the factual and legal circumstances may differ considerably from case to case, it is permissible to apply new criteria which had not before been considered⁽³⁹⁾. Where appropriate, the Commission may give priority to a single criterion for assessing the Community interest⁽⁴⁰⁾.
44. Among the criteria which have been held relevant in the case law for the assessment of the Community interest in the (further) investigation of a case are the following:

- The Commission can reject a complaint on the ground that the complainant can bring an action to assert its rights before national courts⁽⁴¹⁾.
- The Commission may not regard certain situations as excluded in principle from its purview under the task entrusted to it by the Treaty but is required to assess in each case how serious the alleged infringements are and how persistent their consequences are. This means in particular that it must take into account the duration and the extent of the infringements complained of and their effect on the competition situation in the Community⁽⁴²⁾.
- The Commission may have to balance the significance of the alleged infringement as regards the functioning of the common market, the probability of establishing

the existence of the infringement and the scope of the investigation required in order to fulfil its task of ensuring that Articles 81 and 82 of the Treaty are complied with⁽⁴³⁾.

- While the Commission's discretion does not depend on how advanced the investigation of a case is, the stage of the investigation forms part of the circumstances of the case which the Commission may have to take into consideration⁽⁴⁴⁾.
 - The Commission may decide that it is not appropriate to investigate a complaint where the practices in question have ceased. However, for this purpose, the Commission will have to ascertain whether anti-competitive effects persist and if the seriousness of the infringements or the persistence of their effects does not give the complaint a Community interest⁽⁴⁵⁾.
 - The Commission may also decide that it is not appropriate to investigate a complaint where the undertakings concerned agree to change their conduct in such a way that it can consider that there is no longer a sufficient Community interest to intervene⁽⁴⁶⁾.
45. Where it forms the view that a case does not display sufficient Community interest to justify (further) investigation, the Commission may reject the complaint on that ground. Such a decision can be taken either before commencing an investigation or after taking investigative measures⁽⁴⁷⁾. However, the Commission is not obliged to set aside a complaint for lack of Community interest⁽⁴⁸⁾.

(b) Assessment under Articles 81 and 82

46. The examination of a complaint under Articles 81 and 82 involves two aspects, one relating to the facts to be established to prove an infringement of Articles 81 or 82 and the other relating to the legal assessment of the conduct complained of.
47. Where the complaint, while complying with the requirements of Article 5 of Regulation 773/2004 and Form C, does not sufficiently substantiate the allegations put forward, it may be rejected on that ground⁽⁴⁹⁾. In order to reject a complaint on the ground that the conduct complained of does not infringe the EC competition rules or does not fall within their scope of application, the Commission is not obliged to take into account circumstances that have not been brought to its attention by the complainant and that it could only have uncovered by the investigation of the case⁽⁵⁰⁾.

48. The criteria for the legal assessment of agreements or practices under Articles 81 and 82 cannot be dealt with exhaustively in the present Notice. However, potential complainants should refer to the extensive guidance available from the Commission⁽⁵¹⁾, in addition to other sources and in particular the case law of the Community Courts and the case practice of the Commission. Four specific issues are mentioned in the following points with indications on where to find further guidance.
49. Agreements and practices fall within the scope of application of Articles 81 and 82 where they are capable of affecting trade between Member States. Where an agreement or practice does not fulfil this condition, national competition law may apply, but not EC competition law. Extensive guidance on this subject can be found in the Notice on the effect on trade concept⁽⁵²⁾.
50. Agreements falling within the scope of Article 81 may be agreements of minor importance which are deemed not to restrict competition appreciably. Guidance on this issue can be found in the Commission's *de minimis* Notice⁽⁵³⁾.
51. Agreements that fulfil the conditions of a block exemption regulation are deemed to satisfy the conditions of Article 81(3)⁽⁵⁴⁾. For the Commission to withdraw the benefit of the block exemption pursuant to Article 29 of Regulation 1/2003, it must find that upon individual assessment an agreement to which the exemption regulation applies has certain effects which are incompatible with Article 81(3).
52. Agreements that restrict competition within the meaning of Article 81(1) EC may fulfil the conditions of Article 81(3) EC. Pursuant to Article 1(2) of Regulation 1/2003 and without a prior administrative decision being required, such agreements are not prohibited. Guidance on the conditions to be fulfilled by an agreement pursuant to Article 81(3) can be found in the Notice on Article 81(3)⁽⁵⁵⁾.
53. indicate conduct which is liable to infringe Articles 81 and 82⁽⁵⁶⁾.
54. In the Commission's procedure for dealing with complaints, different stages can be distinguished⁽⁵⁷⁾.
55. During the first stage, following the submission of the complaint, the Commission examines the complaint and may collect further information in order to decide what action it will take on the complaint. That stage may include an informal exchange of views between the Commission and the complainant with a view to clarifying the factual and legal issues with which the complaint is concerned. In this stage, the Commission may give an initial reaction to the complainant allowing the complainant an opportunity to expand on his allegations in the light of that initial reaction.
56. In the second stage, the Commission may investigate the case further with a view to initiating proceedings pursuant to Article 7(1) of Regulation 1/2003 against the undertakings complained of. Where the Commission considers that there are insufficient grounds for acting on the complaint, it will inform the complainant of its reasons and offer the complainant the opportunity to submit any further comments within a time-limit which it fixes (Article 7(1) of Regulation 773/2004).
57. If the complainant fails to make known its views within the time-limit set by the Commission, the complaint is deemed to have been withdrawn (Article 7(3) of Regulation 773/2004). In all other cases, in the third stage of the procedure, the Commission takes cognisance of the observations submitted by the complainant and either initiates a procedure against the subject of the complaint or adopts a decision rejecting the complaint⁽⁵⁸⁾.
58. Where the Commission rejects a complaint pursuant to Article 13 of Regulation 1/2003 on the grounds that another authority is dealing or has dealt with the case, the Commission proceeds in accordance with Article 9 of Regulation 773/2004.

D. THE COMMISSION'S PROCEDURES WHEN DEALING WITH COMPLAINTS

(a) Overview

53. As recalled above, the Commission is not obliged to carry out an investigation on the basis of every complaint submitted with a view to establishing whether an infringement has been committed. However, the Commission is under a duty to consider carefully the factual and legal issues brought to its attention by the complainant, in order to assess whether those issues
59. Throughout the procedure, complainants benefit from a range of rights as provided in particular in Articles 6 to 8 of Regulation 773/2004. However, proceedings of the Commission in competition cases do not constitute adversarial proceedings between the complainant on the one hand and the companies which are the subject of the investigation on the other hand. Accordingly, the procedural rights of complainants are less far-reaching than the right to a fair hearing of the companies which are the subject of an infringement procedure⁽⁵⁹⁾.

(b) Indicative time limit for informing the complainant of the Commission's proposed action

60. The Commission is under an obligation to decide on complaints within a reasonable time⁽⁶⁰⁾. What is a reasonable duration depends on the circumstances of each case and in particular, its context, the various procedural steps followed by the Commission, the conduct of the parties in the course of the procedure, the complexity of the case and its importance for the various parties involved⁽⁶¹⁾.

61. The Commission will in principle endeavour to inform complainants of the action that it proposes to take on a complaint within an indicative time frame of four months from the reception of the complaint. Thus, subject to the circumstances of the individual case and in particular the possible need to request complementary information from the complainant or third parties, the Commission will in principle inform the complainant within four months whether or not it intends to investigate its case further. This time-limit does not constitute a binding statutory term.

62. Accordingly, within this four month period, the Commission may communicate its proposed course of action to the complainant as an initial reaction within the first phase of the procedure (see point 55 above). The Commission may also, where the examination of the complaint has progressed to the second stage (see point 56 above), directly proceed to informing the complainant about its provisional assessment by a letter pursuant to Article 7(1) of Regulation 773/2004.

63. To ensure the most expeditious treatment of their complaint, it is desirable that complainants cooperate diligently in the procedures⁽⁶²⁾, for example by informing the Commission of new developments.

(c) Procedural rights of the complainant

64. Where the Commission addresses a statement of objections to the companies complained of pursuant to Article 10(1) of Regulation 773/2004, the complainant is entitled to receive a copy of this document from which business secrets and other confidential information of the companies concerned have been removed (non-confidential version of the statement of objections; cf. Article 6(1) of Regulation 773/2004). The complainant is invited to comment in writing on the statement of objections. A time-limit will be set for such written comments.

65. Furthermore, the Commission may, where appropriate, afford complainants the opportunity of expressing their

views at the oral hearing of the parties to which a statement of objections has been addressed, if the complainants so request in their written comments⁽⁶³⁾.

66. Complainants may submit, of their own initiative or following a request by the Commission, documents that contain business secrets or other confidential information. Confidential information will be protected by the Commission⁽⁶⁴⁾. Under Article 16 of Regulation 773/2004, complainants are obliged to identify confidential information, give reasons why the information is considered confidential and submit a separate non-confidential version when they make their views known pursuant to Article 6(1) and 7(1) of Regulation 773/2004, as well as when they subsequently submit further information in the course of the same procedure. Moreover, the Commission may, in all other cases, request complainants which produce documents or statements to identify the documents or parts of the documents or statements which they consider to be confidential. It may in particular set a deadline for the complainant to specify why it considers a piece of information to be confidential and to provide a non-confidential version, including a concise description or non-confidential version of each piece of information deleted.

67. The qualification of information as confidential does not prevent the Commission from disclosing and using information where that is necessary to prove an infringement of Articles 81 or 82⁽⁶⁵⁾. Where business secrets and confidential information are necessary to prove an infringement, the Commission must assess for each individual document whether the need to disclose is greater than the harm which might result from disclosure.

68. Where the Commission takes the view that a complaint should not be further examined, because there is no sufficient Community interest in pursuing the case further or on other grounds, it will inform the complainant in the form of a letter which indicates its legal basis (Article 7(1) of Regulation 773/2004), sets out the reasons that have led the Commission to provisionally conclude in the sense indicated and provides the complainant with the opportunity to submit supplementary information or observations within a time-limit set by the Commission. The Commission will also indicate the consequences of not replying pursuant to Article 7(3) of Regulation 773/2004, as explained below.

69. Pursuant to Article 8(1) of Regulation 773/2004, the complainant has the right to access the information on which the Commission bases its preliminary view. Such access is normally provided by annexing to the letter a copy of the relevant documents.

70. The time-limit for observations by the complainant on the letter pursuant to Article 7(1) of Regulation 773/2004 will be set in accordance with the circumstances of the case. It will not be shorter than four weeks (Article 17(2) of Regulation 773/2004). If the complainant does not respond within the time-limit set, the complaint is deemed to have been withdrawn pursuant to Article 7(3) of Regulation 773/2004. Complainants are also entitled to withdraw their complaint at any time if they so wish.

71. The complainant may request an extension of the time-limit for the provision of comments. Depending on the circumstances of the case, the Commission may grant such an extension.

72. In that case, where the complainant submits supplementary observations, the Commission takes cognisance of those observations. Where they are of such a nature as to make the Commission change its previous course of action, it may initiate a procedure against the companies complained of. In this procedure, the complainant has the procedural rights explained above.

73. Where the observations of the complainant do not alter the Commission's proposed course of action, it rejects the complaint by decision ⁽⁶⁶⁾.

(d) The Commission decision rejecting a complaint

74. Where the Commission rejects a complaint by decision pursuant to Article 7(2) of Regulation 773/2004, it must state the reasons in accordance with Article 253 EC, i.e. in a way that is appropriate to the act at issue and takes into account the circumstances of each case.

75. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the Commission in such a way as to enable the complainant to ascertain the reasons for the decision and to enable the competent Community Court to exercise its power of review. However, the Commission is not obliged to adopt a position on all the arguments relied on by the complainant in support of its complaint. It only needs to set out the facts and legal considerations which are of decisive importance in the context of the decision ⁽⁶⁷⁾.

76. Where the Commission rejects a complaint in a case that also gives rise to a decision pursuant to Article 10 of Regulation 1/2003 (Finding of inapplicability of Articles 81 or 82) or Article 9 of Regulation 1/2003 (Commitments), the decision rejecting a complaint may

refer to that other decision adopted on the basis of the provisions mentioned.

77. A decision to reject a complaint is subject to appeal before the Community Courts ⁽⁶⁸⁾.

78. A decision rejecting a complaint prevents complainants from requiring the reopening of the investigation unless they put forward significant new evidence. Accordingly, further correspondence on the same alleged infringement by former complainants cannot be regarded as a new complaint unless significant new evidence is brought to the attention of the Commission. However, the Commission may re-open a file under appropriate circumstances.

79. A decision to reject a complaint does not definitively rule on the question of whether or not there is an infringement of Articles 81 or 82, even where the Commission has assessed the facts on the basis of Articles 81 and 82. The assessments made by the Commission in a decision rejecting a complaint therefore do not prevent a Member State court or competition authority from applying Articles 81 and 82 to agreements and practices brought before it. The assessments made by the Commission in a decision rejecting a complaint constitute facts which Member States' courts or competition authorities may take into account in examining whether the agreements or conduct in question are in conformity with Articles 81 and 82 ⁽⁶⁹⁾.

(e) Specific situations

80. According to Article 8 of Regulation 1/2003 the Commission may on its own initiative order interim measures where there is the risk of serious and irreparable damage to competition. Article 8 of Regulation 1/2003 makes it clear that interim measures cannot be applied for by complainants under Article 7(2) of Regulation 1/2003. Requests for interim measures by undertakings can be brought before Member States' courts which are well placed to decide on such measures ⁽⁷⁰⁾.

81. Some persons may wish to inform the Commission about suspected infringements of Articles 81 or 82 without having their identity revealed to the undertakings concerned by the allegations. These persons are welcome to contact the Commission. The Commission is bound to respect an informant's request for anonymity ⁽⁷¹⁾, unless the request to remain anonymous is manifestly unjustified.

- (¹) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, pages 1-25).
- (²) Cf. in particular Recitals 3-7 and 35 of Regulation 1/2003.
- (³) Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ 123, 27.4.2004).
- (⁴) The Commission handles correspondence from informants in accordance with its principles of good administrative practice.
- (⁵) Notice on cooperation within the Network of competition authorities (p. 43).
- (⁶) For the handling of such complaints, cf. Commission communication of 10 October 2002, COM(2002) 141.
- (⁷) Case C-344/98, *Masterfoods v HB Ice Cream*, [2000] ECR I-11369, para 46; Case C-119/97 P, *Union française de l'express (Ufex) and Others v Commission of the European Communities*, [1999] ECR I-1341, para 88; Case T-24/90, *Automec v Commission of the European Communities*, [1992] ECR II-2223, paras 73-77.
- (⁸) Cf. in particular Articles 5, 6, 11, 12, 15, 22, 29, 35 and Recitals 2 to 4 and 6 to 8 of Regulation 1/2003.
- (⁹) Cf. Notice on cooperation within the network of competition authorities . . . , points 5 ss.
- (¹⁰) Cf. Recital 3 of Regulation 1/2003.
- (¹¹) Settled case law, cf. Case 127/73, *Belgische Radio en Televisie (BRT) v SABAM and Fonior*, [1974] ECR 51, para 16; Case C-282/95 P, *Guérin automobiles v Commission of the European Communities*, [1997] ECR I-1503, para 39; Case C-453/99, *Courage v Bernhard Crehan*, [2001] ECR I-6297, para 23.
- (¹²) Case C-453/99, *Courage v Bernhard Crehan*, [2001] ECR I-6297, paras 26 and 27; the power of national courts to grant damages is also underlined in Recital 7 of Regulation 1/2003.
- (¹³) Cf. Articles 1, 6 and 15 as well as Recital 7 of Regulation 1/2003.
- (¹⁴) Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty; OJ P 13 of 21 February 1962, p. 204-211; English special edition: Series I Chapter 1959-1962 p. 87. Regulation No 17 is repealed by Article 43 of Regulation 1/2003 with effect from 1 May 2004.
- (¹⁵) For more detailed explanations of this mechanism, cf. Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC . . .
- (¹⁶) Case T-24/90, *Automec v Commission of the European Communities*, [1992] ECR II-2223, para 93.
- (¹⁷) Case C-230/96, *Cabour and Nord Distribution Automobile v Arnor 'SOCO'*, [1998] ECR I-2055, para 51; Joined Cases T-185/96, T-189/96 and T-190/96, *Dalmasso and Others v Commission of the European Communities*, [1999] ECR II-93, para 50.
- (¹⁸) Cf. Article 8 of Regulation 1/2003 and para 80 below. Depending on the case, Member States' competition authorities may equally be well placed to adopt interim measures.
- (¹⁹) Cf. points 41 ss. below.
- (²⁰) Notice on cooperation within the Network of competition authorities (p. 43).
- (²¹) Notice on cooperation within the Network of competition authorities . . . , points 8-15.
- (²²) Article 11(2) and (3) of Regulation 1/2003; Notice on cooperation within the Network of Competition Authorities . . . , points 16/17.
- (²³) Notice on cooperation within the Network of Competition Authorities, . . . , point 34.
- (²⁴) For more extensive explanations on this notion in particular, cf. points 33 ss. below.
- (²⁵) Case C-119/97 P, *Union française de l'express (Ufex) and Others v Commission of the European Communities*, [1999] ECR I-1341, para 88; Case T-24/90, *Automec v Commission of the European Communities*, [1992] ECR II-2223, paras 73-77 and 85.
- (²⁶) Settled case law since Case T-24/90, *Automec v Commission of the European Communities*, [1992] ECR II-2223, para 85.
- (²⁷) Case C-282/95 P, *Guérin automobiles v Commission of the European Communities*, [1997] ECR I-1503, para 36.
- (²⁸) Cf. Article 5(1) of Regulation 773/2004.
- (²⁹) Case T-114/92, *Bureau Européen des Médias et de l'Industrie Musicale (BEMIM) v Commission of the European Communities*, [1995] ECR II-147, para 28. Associations of undertakings were also the complainants in the cases underlying the judgments in Case 298/83, *Comité des industries cinématographiques des Communautés européennes (CICCE) v Commission of the European Communities*, [1985] ECR 1105 and Case T-319/99, *Federacion Nacional de Empresas (FENIN) v Commission of the European Communities*, not yet published in [2003] ECR.
- (³⁰) Joined Cases T-133/95 and T-204/95, *International Express Carriers Conference (IECC) v Commission of the European Communities*, [1998] ECR II-3645, paras 79-83.
- (³¹) Case T-37/92, *Bureau Européen des Unions des Consommateurs (BEUC) v Commission of the European Communities*, [1994] ECR II-285, para 36.

- (32) This question is currently raised in a pending procedure before the Court of First Instance (Joined cases T-213 and 214/01). The Commission has also accepted as complainant an individual consumer in its Decision of 9 December 1998 in Case IV/D-2/34.466, Greek Ferries, OJ L 109/24 of 27 April 1999, para 1.
- (33) Joined Cases T-133/95 and T-204/95, International Express Carriers Conference (IECC) v Commission of the European Communities, [1998] ECR II-3645, para 79.
- (34) Case T-24/90, Automec v Commission of the European Communities, [1992] ECR II-2223, para 76; Case C-91/95 P, Roger Tremblay and Others v Commission of the European Communities, [1996] ECR I-5547, para 30.
- (35) Case 125/78, GEMA v Commission of the European Communities, [1979] ECR 3173, para 17; Case C-119/97/P, Union française de l'express (Ufex) and Others v Commission of the European Communities, [1999] ECR I-1341, para 87.
- (36) Settled case law since the Case T-24/90, Automec v Commission of the European Communities, [1992] ECR II-2223, paras 77 and 85; Recital 18 of Regulation 1/2003 expressly confirms this possibility.
- (37) Settled case law since Case T-24/90, Automec v Commission of the European Communities, [1992] ECR II-2223, para 75. Under Regulation 1/2003, this principle may only be relevant in the context of Article 29 of that Regulation.
- (38) Case 210/81, Oswald Schmidt, trading as Demo-Studio Schmidt v Commission of the European Communities, [1983] ECR 3045, para 19; Case C-119/97 P, Union française de l'express (Ufex) and Others v Commission of the European Communities, [1999] ECR I-1341, para 86.
- (39) Case C-119/97 P, Union française de l'express (Ufex) and Others v Commission of the European Communities, [1999] ECR I-1341, paras 79-80.
- (40) Case C-450/98 P, International Express Carriers Conference (IECC) v Commission of the European Communities, [2001] ECR I-3947, paras 57-59.
- (41) Case T-24/90, Automec v Commission of the European Communities, [1992] ECR II-2223, paras 88ss.; Case T-5/93, Roger Tremblay and Others v Commission of the European Communities, [1995] ECR II-185, paras 65ss.; Case T-575/93, Casper Koelman v Commission of the European Communities, [1996] ECR II-1, paras 75-80; see also part II above where more detailed explanations concerning this situation are given.
- (42) Case C-119/97 P, Union française de l'express (Ufex) and Others v Commission of the European Communities, [1999] ECR I-1341, paras 92/93.
- (43) Settled case law since Case T-24/90, Automec v Commission of the European Communities, [1992] ECR II-2223, para 86.
- (44) Case C-449/98 P, International Express Carriers Conference (IECC) v Commission of the European Communities [2001] ECR I-3875, para 37.
- (45) Case T-77/95, Syndicat français de l'Express International and Others v Commission of the European Communities [1997] ECR II-1, para 57; Case C-119/97 P, Union française de l'express (Ufex) and Others v Commission of the European Communities, [1999] ECR I-1341, para 95. Cf. also Case T-37/92, Bureau Européen des Unions des Consommateurs (BEUC) v Commission of the European Communities, [1994] ECR II-285, para 113, where an unwritten commitment between a Member State and a third country outside the common commercial policy was held not to suffice to establish that the conduct complained of had ceased.
- (46) Case T-110/95, International Express Carriers (IECC) v Commission of the European Communities and Others, [1998] ECR II-3605, para 57, upheld by Case 449/98 P, International Express Carriers (IECC) v Commission of the European Communities and Others, [2001] ECR I-3875, paras 44-47.
- (47) Case C-449/98 P, International Express Carriers (IECC) v Commission of the European Communities e.a. [2001] ECR I-3875, para 37.
- (48) Cf. Case T-77/92, Parker Pen v Commission of the European Communities, [1994] ECR II-549, paras 64/65.
- (49) Case 298/83, Comité des industries cinématographiques des Communautés européennes (CICCE) v Commission of the European Communities, [1985] ECR 1105, paras 21-24; Case T-198/98, Micro Leader Business v Commission of the European Communities, [1999] ECR II-3989, paras 32-39.
- (50) Case T-319/99, Federación Nacional de Empresas (FENIN) v Commission of the European Communities, not yet published in [2003] ECR, para 43.
- (51) Extensive guidance can be found on the Commission's website at http://europa.eu.int/comm/competition/index_en.html
- (52) Notice on the effect on trade concept contained in Articles 81 and 82 of the Treaty (p. 81).
- (53) Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*), OJ C 368 of 22 December 2002, p. 13.
- (54) The texts of all block exemption regulations are available on the Commission's website at http://europa.eu.int/comm/competition/index_en.html
- (55) Commission Notice — Guidelines on the application of Article 81(3) of the Treaty (p. 97).
- (56) Case 210/81, Oswald Schmidt, trading as Demo-Studio Schmidt v Commission of the European Communities, [1983] ECR 3045, para 19; Case T-24/90, Automec v Commission of the European Communities, [1992] ECR II-2223, para 79.
- (57) Cf. Case T-64/89, Automec v Commission of the European Communities, [1990] ECR II-367, paras 45-47; Case T-37/92, Bureau Européen des Unions des Consommateurs (BEUC) v Commission of the European Communities, [1994] ECR II-285, para 29.

- (⁵⁸) Case C-282/95 P, *Guérin automobiles v Commission of the European Communities*, [1997] ECR I-1503, para 36.
- (⁵⁹) Joined Cases 142 and 156/84, *British American Tobacco Company and R. J. Reynolds Industries v Commission of the European Communities* [1987] ECR 249, paras 19/20.
- (⁶⁰) Case C-282/95 P, *Guérin automobiles v Commission of the European Communities*, [1997] ECR I-1503, para 37.
- (⁶¹) Joined Cases T-213/95 and T-18/96, *Stichting Certificatie Kraanverhuurbedrijf (SCK) and Federatie van Nederlandse Kraanbedrijven (FNK) v Commission of the European Communities*, [1997] ECR 1739, para 57.
- (⁶²) The notion of 'diligence' on the part of the complainant is used by the Court of First Instance in Case T-77/94, *Vereniging van Groothandelaren in Bloemkwekerijprodukten and Others v Commission of the European Communities*, [1997] ECR II-759, para 75.
- (⁶³) Article 6(2) of Commission Regulation 773/2004.
- (⁶⁴) Article 287 EC, Article 28 of Regulation 1/2003 and Articles 15 and 16 of Regulation 773/2004.
- (⁶⁵) Article 27(2) of Regulation 1/2003.
- (⁶⁶) Article 7(2) of Regulation 773/2004; Case C-282/95 P, *Guérin automobiles v Commission of the European Communities*, [1997] ECR I-1503, para 36.
- (⁶⁷) Settled case law, cf. i.a. Case T-114/92, *Bureau Européen des Médias et de l'Industrie Musicale (BEMIM) v Commission of the European Communities*, [1995] ECR II-147, para 41.
- (⁶⁸) Settled case law since Case 210/81, *Oswald Schmidt, trading as Demo-Studio Schmidt v Commission of the European Communities*, [1983] ECR 3045.
- (⁶⁹) Case T-575/93, *Casper Koelman v Commission of the European Communities*, [1996] ECR II-1, paras 41-43.
- (⁷⁰) Depending on the case, Member States' competition authorities may equally be well placed to adopt interim measures.
- (⁷¹) Case 145/83, *Stanley George Adams v Commission of the European Communities*, [1985] ECR 3539.
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ANNEX

FORM C

Complaint pursuant to Article 7 of Regulation (EC) No 1/2003**I. Information regarding the complainant and the undertaking(s) or association of undertakings giving rise to the complaint**

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

II. Details of the alleged infringement and evidence

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

III. Finding sought from the Commission and legitimate interest

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

IV. Proceedings before national competition authorities or national courts

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

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

.....
Date and signature

Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters)

(2004/C 101/06)

(Text with EEA relevance)

I. REGULATION 1/2003

1. Regulation 1/2003 ⁽¹⁾ sets up a new enforcement system for Articles 81 and 82 of the Treaty. While designed to restore the focus on the primary task of effective enforcement of the competition rules, the Regulation also creates legal certainty inasmuch as it provides that agreements ⁽²⁾ which fall under Article 81(1) but fulfil the conditions in Article 81(3) are valid and fully enforceable *ab initio* without a prior decision by a competition authority (Article 1 of Regulation 1/2003).
2. The framework of Regulation 1/2003, while introducing parallel competence of the Commission, Member States' competition authorities and Member States' courts to apply Article 81 and 82 in their entirety, limits risks of inconsistent application by a range of measures, thereby ensuring the primary aspect of legal certainty for companies as reflected in the case law of the Court of Justice, i.e. that the competition rules are applied in a consistent way throughout the Community.
3. Undertakings are generally well placed to assess the legality of their actions in such a way as to enable them to take an informed decision on whether to go ahead with an agreement or practice and in what form. They are close to the facts and have at their disposal the framework of block exemption regulations, case law and case practice as well as extensive guidance in Commission guidelines and notices ⁽³⁾.
4. Alongside the reform of the rules implementing Articles 81 and 82 brought about by Regulation 1/2003, the Commission has conducted a review of block exemption regulations, Commission notices and guidelines, with a view to further assist self-assessment by economic operators. The Commission has also produced guidelines on the application of Article 81(3) ⁽⁴⁾. This allows undertakings in the vast majority of cases to reliably assess their agreements with regard to Article 81. Furthermore, it is the practice of the Commission to impose more than symbolic fines ⁽⁵⁾ only in cases where it is established, either in horizontal instruments or in the case law and practice that a certain behaviour constitutes an infringement.
5. Where cases, despite the above elements, give rise to genuine uncertainty because they present novel or unresolved questions for the application of Articles 81 and 82, individual undertakings may wish to seek informal guidance from the Commission. ⁽⁶⁾ Where it considers it appropriate and subject to its enforcement priorities, the Commission may provide such guidance on novel questions concerning the interpretation of Articles 81 and/or 82 in a written statement (guidance letter). The present Notice sets out details of this instrument.

II. FRAMEWORK FOR ASSESSING WHETHER TO ISSUE A GUIDANCE LETTER

6. Regulation 1/2003 confers powers on the Commission to effectively prosecute infringements of Articles 81 and 82 and to impose sanctions ⁽⁷⁾. One major objective of the Regulation is to ensure efficient enforcement of the EC competition rules by removing the former notification system and thus allowing the Commission to focus its enforcement policy on the most serious infringements ⁽⁸⁾.
7. While Regulation 1/2003 is without prejudice to the ability of the Commission to issue informal guidance to individual undertakings ⁽⁹⁾, as set out in this Notice, this ability should not interfere with the primary objective of the Regulation, which is to ensure effective enforcement. The Commission may therefore only provide informal guidance to individual undertakings in so far as this is compatible with its enforcement priorities.

⁽¹⁾ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, pages 1-25).

⁽²⁾ In this Notice, the term 'agreement' is used for agreements, decisions by associations of undertakings and concerted practices. The term 'practices' refers to the conduct of dominant undertakings. The term 'undertakings' equally covers 'associations of undertakings'.

⁽³⁾ All texts mentioned are available at: http://europa.eu.int/comm/competition/index_en.html

⁽⁴⁾ Commission Notice – Guidelines on the application of Article 81(3) of the Treaty (p. 97).

⁽⁵⁾ Symbolic fines are normally set at 1 000 EUR, cf. Commission Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, (OJ C 9, 14.1.1998).

⁽⁶⁾ Cf. Recital 38 of Regulation 1/2003.

⁽⁷⁾ Cf. in particular Articles 7 to 9, 12, 17-24, 29 of Regulation 1/2003.

⁽⁸⁾ Cf. in particular Recital 3 of Regulation 1/2003.

⁽⁹⁾ Cf. Recital 38 of Regulation 1/2003.

8. Subject to point 7, the Commission, seized of a request for a guidance letter, will consider whether it is appropriate to process it. Issuing a guidance letter may only be considered if the following cumulative conditions are fulfilled:
- (a) The substantive assessment of an agreement or practice with regard to Articles 81 and/or 82 of the Treaty, poses a question of application of the law for which there is no clarification in the existing EC legal framework including the case law of the Community Courts, nor publicly available general guidance or precedent in decision-making practice or previous guidance letters.
 - (b) A prima facie evaluation of the specificities and background of the case suggests that the clarification of the novel question through a guidance letter is useful, taking into account the following elements:
 - the economic importance from the point of view of the consumer of the goods or services concerned by the agreement or practice, and/or
 - the extent to which the agreement or practice corresponds or is liable to correspond to more widely spread economic usage in the marketplace and/or
 - the extent of the investments linked to the transaction in relation to the size of the companies concerned and the extent to which the transaction relates to a structural operation such as the creation of a non-full function joint venture.
 - (c) It is possible to issue a guidance letter on the basis of the information provided, i.e. no further fact-finding is required.
9. Furthermore, the Commission will not consider a request for a guidance letter in either of the following circumstances:
- the questions raised in the request are identical or similar to issues raised in a case pending before the European Court of First Instance or the European Court of Justice;
 - the agreement or practice to which the request refers is subject to proceedings pending with the Commission, a Member State court or Member State competition authority.
10. The Commission will not consider hypothetical questions and will not issue guidance letters on agreements or practices that are no longer being implemented by the parties. Undertakings may however present a request for a guidance letter to the Commission in relation to questions raised by an agreement or practice that they envisage, i.e. before the implementation of that agreement or practice. In this case the transaction must have reached a sufficiently advanced stage for a request to be considered.
11. A request for a guidance letter is without prejudice to the power of the Commission to open proceedings in accordance with Regulation 1/2003 with regard to the facts presented in the request.
- ### III. INDICATIONS ON HOW TO REQUEST GUIDANCE
12. A request can be presented by an undertaking or undertakings which have entered into or intend to enter into an agreement or practice that could fall within the scope of Articles 81 and/or 82 of the Treaty with regard to questions of interpretation raised by such agreement or practice.
13. A request for a guidance letter should be addressed to the following address:
- Commission européenne/Europese Commissie
Competition DG
B-1049 Bruxelles/Brussel.
14. There is no form. A memorandum should be presented which clearly states:
- the identity of all undertakings concerned as well as a single address for contacts with the Commission;
 - the specific questions on which guidance is sought;
 - full and exhaustive information on all points relevant for an informed evaluation of the questions raised, including pertinent documentation;
 - a detailed reasoning, having regard to point 8 a), why the request presents (a) novel question(s);
 - all other information that permits an evaluation of the request in the light of the aspects explained in points 8-10 of this Notice, including in particular a declaration that the agreement or practice to which the request refers is not subject to proceedings pending before a Member State court or competition authority;

- where the request contains elements that are considered business secrets, a clear identification of these elements;
- any other information or documentation relevant to the individual case.

IV. PROCESSING OF THE REQUEST

15. The Commission will in principle evaluate the request on the basis of the information provided. Notwithstanding point 8 c), the Commission may use additional information at its disposal from public sources, former proceedings or any other source and may ask the applicant(s) to provide supplementary information. The normal rules on professional secrecy apply to the information supplied by the applicant(s).
16. The Commission may share the information submitted to it with the Member States' competition authorities and receive input from them. It may discuss the substance of the request with the Member States' competition authorities before issuing a guidance letter.
17. Where no guidance letter is issued, the Commission shall inform the applicant(s) accordingly.
18. An undertaking can withdraw its request at any point in time. In any case, information supplied in the context of a request for guidance remains with the Commission and can be used in subsequent procedures under Regulation 1/2003 (cf. point 11 above).

V. GUIDANCE LETTERS

19. A guidance letter sets out:
 - a summary description of the facts on which it is based;

- the principal legal reasoning underlying the understanding of the Commission on novel questions relating to Articles 81 and/or 82 raised by the request.

20. A guidance letter may be limited to part of the questions raised in the request. It may also include additional aspects to those set out in the request.
21. Guidance letters will be posted on the Commission's web-site, having regard to the legitimate interest of undertakings in the protection of their business secrets. Before issuing a guidance letter, the Commission will agree with the applicants on a public version.

VI. THE EFFECTS OF GUIDANCE LETTERS

22. Guidance letters are in the first place intended to help undertakings carry out themselves an informed assessment of their agreements and practices.
23. A guidance letter cannot prejudice the assessment of the same question by the Community Courts.
24. Where an agreement or practice has formed the factual basis for a guidance letter, the Commission is not precluded from subsequently examining that same agreement or practice in a procedure under Regulation 1/2003, in particular following a complaint. In that case, the Commission will take the previous guidance letter into account, subject in particular to changes in the underlying facts, to any new aspects raised by a complaint, to developments in the case law of the European Courts or wider changes of the Commission's policy.
25. Guidance letters are not Commission decisions and do not bind Member States' competition authorities or courts that have the power to apply Articles 81 and 82. However, it is open to Member States' competition authorities and courts to take account of guidance letters issued by the Commission as they see fit in the context of a case.

COMMISSION NOTICE**Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty**

(2004/C 101/07)

(Text with EEA relevance)

1. INTRODUCTION

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

2. THE EFFECT ON TRADE CRITERION**2.1. General principles**

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

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

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

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

2.2. The concept of 'trade between Member States'

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

2.3. The notion 'may affect'

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

24. The 'pattern of trade'-test developed by the Court of Justice contains the following main elements, which are dealt with in the following sections:
- (a) 'A sufficient degree of probability on the basis of a set of objective factors of law or fact',
 - (b) An influence on the 'pattern of trade between Member States',
 - (c) 'A direct or indirect, actual or potential influence' on the pattern of trade.

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

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

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

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

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

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

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

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

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

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

2.4. The concept of appreciability

2.4.1. General principle

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

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

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

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

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

53. The Commission will also hold the view that where an agreement by its very nature is capable of affecting trade between Member States, for example, because it concerns imports and exports or covers several Member States, there is a rebuttable positive presumption that such effects on trade are appreciable when the turnover of the parties in the products covered by the agreement calculated as indicated in paragraphs 52 and 54 exceeds 40 million euro. In the case of agreements that by their very nature are capable of affecting trade between Member States it can also often be presumed that such effects are appreciable when the market share of the parties exceeds the 5 % threshold set out in the previous paragraph. However, this presumption does not apply where the agreement covers only part of a Member State (see paragraph 90 below).
54. With regard to the threshold of 40 million euro (cf. paragraph 52 above), the turnover is calculated on the basis of total Community sales excluding tax during the previous financial year by the undertakings concerned, of the products covered by the agreement (the contract products). Sales between entities that form part of the same undertaking are excluded⁽⁴⁰⁾.
55. In order to apply the market share threshold, it is necessary to determine the relevant market⁽⁴¹⁾. This

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

56. In the case of networks of agreements entered into by the same supplier with different distributors, sales made through the entire network are taken into account.
57. Contracts that form part of the same overall business arrangement constitute a single agreement for the purposes of the NAAT-rule⁽⁴²⁾. Undertakings cannot bring themselves inside these thresholds by dividing up an agreement that forms a whole from an economic perspective.

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

58. The Commission will apply the negative presumption set out in the preceding section to all agreements, including agreements that by their very nature are capable of affecting trade between Member States as well as agreements that involve trade with undertakings located in third countries (cf. section 3.3 below).
59. Outside the scope of negative presumption, the Commission will take account of qualitative elements relating to the nature of the agreement or practice and the nature of the products that they concern (see paragraphs and above). The relevance of the nature of the agreement is also reflected in the positive presumption set out in paragraph 53 above relating to appreciability in the case of agreements that by their very nature are capable of affecting trade between Member States. With a view to providing additional guidance on the application of the effect on trade concept it is therefore useful to consider various common types of agreements and practices.
60. In the following sections a primary distinction is drawn between agreements and practices that cover several Member States and agreements and practices that are confined to a single Member State or to part of a single Member State. These two main categories are broken down into further subcategories based on the nature of the agreement or practice involved. Agreements and practices involving third countries are also dealt with.

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

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

3.1.1. Agreements concerning imports and exports

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

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

3.1.2. Cartels covering several Member States

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

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

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

3.1.3. Horizontal cooperation agreements covering several Member States

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

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

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

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

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

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

3.2.1. Cartels covering a single Member State

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

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

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

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

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

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

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

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

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

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

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

3.2.3. *Vertical agreements covering a single Member State*

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

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

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

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

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

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

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

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

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

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

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

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

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

3.3.1. General remarks

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

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

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

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

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

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

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

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

3.3.3. Other arrangements

106. In the case of agreements and practices whose object is not to restrict competition inside the Community, it is normally necessary to proceed with a more detailed analysis of whether or not cross-border economic activity inside the Community, and thus patterns of trade between Member States, are capable of being affected.
107. In this regard it is relevant to examine the effects of the agreement or practice on customers and other operators inside the Community that rely on the products of the undertakings that are parties to the agreement or practice⁽⁸⁵⁾. In *Compagnie maritime belge*⁽⁸⁶⁾, which concerned agreements between shipping companies operating between Community ports and West African ports, the agreements were held to be capable of indirectly affecting trade between Member States because they altered the catchment areas of the Community ports covered by the agreements and because they affected the activities of other undertakings inside those areas. More specifically, the agreements affected the activities of undertakings that relied on the parties for transportation services, either as a means of transporting goods purchased in third countries or sold there, or as an important input into the services that the ports themselves offered.
108. Trade may also be capable of being affected when the agreement prevents re-imports into the Community. This may, for example, be the case with vertical agreements

between Community suppliers and third country distributors, imposing restrictions on resale outside an allocated territory, including the Community. If in the absence of the agreement resale to the Community would be possible and likely, such imports may be capable of affecting patterns of trade inside the Community⁽⁸⁷⁾.

109. However, for such effects to be likely, there must be an appreciable difference between the prices of the products charged in the Community and those charged outside the Community, and this price difference must not be eroded by customs duties and transport costs. In addition, the product volumes exported compared to the total market for those products in the territory of the common market must not be insignificant⁽⁸⁸⁾. If these product volumes are insignificant compared to those sold inside the Community, the impact of any re-importation on trade between Member States is considered not to be appreciable. In making this assessment, regard must be had not only to the individual agreement concluded between the parties, but also to any cumulative effect of similar agreements concluded by the same and competing suppliers. It may be, for example, that the product volumes covered by a single agreement are quite small, but that the product volumes covered by several such agreements are significant. In that case the agreements taken as a whole may be capable of appreciably affecting trade between Member States. It should be recalled, however (cf. paragraph 49 above), that the individual agreement or network of agreements must make a significant contribution to the overall effect on trade.

⁽¹⁾ OJ C 368, 22.12.2001, p. 13.

⁽²⁾ OJ L 1, 4.1.2003, p. 1.

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

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

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

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

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

⁽⁸⁾ The concept of appreciability is dealt with in section 2.4 below.

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

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

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

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

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

⁽¹⁴⁾ See section 3.2 below.

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

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

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

COMMUNICATION FROM THE COMMISSION**Notice****Guidelines on the application of Article 81(3) of the Treaty**

(2004/C 101/08)

(Text with EEA relevance)

1. INTRODUCTION

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

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

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

2. THE GENERAL FRAMEWORK OF ARTICLE 81 EC**2.1. The Treaty provisions**

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

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

16. Agreements between undertakings are caught by the prohibition rule of Article 81(1) when they are likely to have an appreciable adverse impact on the parameters of competition on the market, such as price, output, product quality, product variety and innovation. Agreements can have this effect by appreciably reducing rivalry between the parties to the agreement or between them and third parties.
- 2.2.2. *The basic principles for assessing agreements under Article 81(1)*
17. The assessment of whether an agreement is restrictive of competition must be made within the actual context in which competition would occur in the absence of the agreement with its alleged restrictions⁽²⁰⁾. In making this assessment it is necessary to take account of the likely impact of the agreement on inter-brand competition (i.e. competition between suppliers of competing brands) and on intra-brand competition (i.e. competition between distributors of the same brand). Article 81(1) prohibits restrictions of both inter-brand competition and intra-brand competition⁽²¹⁾.
18. For the purpose of assessing whether an agreement or its individual parts may restrict inter-brand competition and/or intra-brand competition it needs to be considered how and to what extent the agreement affects or is likely to affect competition on the market. The following two questions provide a useful framework for making this assessment. The first question relates to the impact of the agreement on inter-brand competition while the second question relates to the impact of the agreement on intra-brand competition. As restraints may be capable of affecting both inter-brand competition and intra-brand competition at the same time, it may be necessary to analyse a restraint in light of both questions before it can be concluded whether or not competition is restricted within the meaning of Article 81(1):
- (1) Does the agreement restrict actual or potential competition that would have existed without the agreement? If so, the agreement may be caught by Article 81(1). In making this assessment it is necessary to take into account competition between the parties and competition from third parties. For instance, where two undertakings established in different Member States undertake not to sell products in each other's home markets, (potential) competition that existed prior to the agreement is restricted. Similarly, where a supplier imposes obligations on his distributors not to sell competing products and these obligations foreclose third party access to the market, actual or potential competition that would have existed in the absence of the agreement is restricted. In assessing whether the parties to an agreement are actual or potential competitors the economic and legal context must be taken into account. For instance, if due to the financial risks involved and the technical capabilities of the parties it is unlikely on the basis of objective factors that each party would be able to carry out on its own the activities covered by the agreement the parties are deemed to be non-competitors in respect of that activity⁽²²⁾. It is for the parties to bring forward evidence to that effect.
- (2) Does the agreement restrict actual or potential competition that would have existed in the absence of the contractual restraint(s)? If so, the agreement may be caught by Article 81(1). For instance, where a supplier restricts its distributors from competing with each other, (potential) competition that could have existed between the distributors absent the restraints is restricted. Such restrictions include resale price maintenance and territorial or customer sales restrictions between distributors. However, certain restraints may in certain cases not be caught by Article 81(1) when the restraint is objectively necessary for the existence of an agreement of that type or that nature⁽²³⁾. Such exclusion of the application of Article 81(1) can only be made on the basis of objective factors external to the parties themselves and not the subjective views and characteristics of the parties. The question is not whether the parties in their particular situation would not have accepted to conclude a less restrictive agreement, but whether given the nature of the agreement and the characteristics of the market a less restrictive agreement would not have been concluded by undertakings in a similar setting. For instance, territorial restraints in an agreement between a supplier and a distributor may for a certain period of time fall outside Article 81(1), if the restraints are objectively necessary in order for the distributor to penetrate a new market⁽²⁴⁾. Similarly, a prohibition imposed on all distributors not to sell to certain categories of end users may not be restrictive of competition if such restraint is objectively necessary for reasons of safety or health related to the dangerous nature of the product in question. Claims that in the absence of a restraint the supplier would have resorted to vertical integration are not sufficient. Decisions on whether or not to vertically integrate depend on a broad range of complex economic factors, a number of which are internal to the undertaking concerned.
19. In the application of the analytical framework set out in the previous paragraph it must be taken into account that Article 81(1) distinguishes between those agreements that have a restriction of competition as their object and those agreements that have a restriction of competition as their effect. An agreement or contractual restraint is only prohibited by Article 81(1) if its object or effect is to restrict inter-brand competition and/or intra-brand competition.

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

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

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

2.2.3. Ancillary restraints

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

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

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

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

2.3. The exception rule of Article 81(3)

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

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

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

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

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

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

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

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

35. Article 81(3) can be applied either to individual agreements or to categories of agreements by way of a block exemption regulation. When an agreement is covered by a block exemption the parties to the restrictive agreement are relieved of their burden under Article 2 of Regulation 1/2003 of showing that their individual agreement satisfies each of the conditions of Article 81(3). They only have to prove that the restrictive agreement benefits from a block exemption. The application of Article 81(3) to categories of agreements by way of block exemption regulation is based on the presumption that restrictive agreements that fall within their scope ⁽⁴⁶⁾ fulfil each of the four conditions laid down in Article 81(3).

36. If in an individual case the agreement is caught by Article 81(1) and the conditions of Article 81(3) are not fulfilled the block exemption may be withdrawn. According to Article 29(1) of Regulation 1/2003 the Commission is empowered to withdraw the benefit of a block exemption when it finds that in a particular case an agreement covered by a block exemption regulation has certain effects which are incompatible with Article 81(3) of the Treaty. Pursuant to Article 29(2) of Regulation 1/2003 a competition authority of a Member State may also withdraw the benefit of a Commission block exemption regulation in respect of its territory (or part of its territory), if this territory has all the characteristics of a distinct geographic market. In the case of withdrawal it is for the competition authorities concerned to demonstrate that the agreement infringes Article 81(1) and that it does not fulfil the conditions of Article 81(3).

37. The courts of the Member States have no power to withdraw the benefit of block exemption regulations. Moreover, in their application of block exemption regulations Member State courts may not modify their scope by extending their sphere of application to agreements not covered by the block exemption regulation in question ⁽⁴⁷⁾. Outside the scope of block exemption regulations Member State courts have the power to apply Article 81 in full (cf. Article 6 of Regulation 1/2003).

3. THE APPLICATION OF THE FOUR CONDITIONS OF ARTICLE 81(3)

38. The remainder of these guidelines will consider each of the four conditions of Article 81(3) ⁽⁴⁸⁾. Given that these four conditions are cumulative ⁽⁴⁹⁾ it is unnecessary to examine any remaining conditions once it is found that one of the conditions of Article 81(3) is not fulfilled. In individual cases it may therefore be appropriate to consider the four conditions in a different order.

39. For the purposes of these guidelines it is considered appropriate to invert the order of the second and the third condition and thus deal with the issue of indispensability before the issue of pass-on to consumers. The analysis of pass-on requires a balancing of the negative and positive effects of an agreement on consumers. This analysis should not include the effects of any restrictions, which already fail the indispensability test and which for that reason are prohibited by Article 81.

3.1. General principles

40. Article 81(3) of the Treaty only becomes relevant when an agreement between undertakings restricts competition within the meaning of Article 81(1). In the case of non-restrictive agreements there is no need to examine any benefits generated by the agreement.

41. Where in an individual case a restriction of competition within the meaning of Article 81(1) has been proven, Article 81(3) can be invoked as a defence. According to Article 2 of Regulation 1/2003 the burden of proof under Article 81(3) rests on the undertaking(s) invoking the benefit of the exception rule. Where the conditions of Article 81(3) are not satisfied the agreement is null and void, cf. Article 81(2). However, such automatic nullity only applies to those parts of the agreement that are incompatible with Article 81, provided that such parts are severable from the agreement as a whole ⁽⁵⁰⁾. If only part of the agreement is null and void, it is for the

applicable national law to determine the consequences thereof for the remaining part of the agreement ⁽⁵¹⁾.

42. According to settled case law the four conditions of Article 81(3) are cumulative ⁽⁵²⁾, i.e. they must all be fulfilled for the exception rule to be applicable. If they are not, the application of the exception rule of Article 81(3) must be refused ⁽⁵³⁾. The four conditions of Article 81(3) are also exhaustive. When they are met the exception is applicable and may not be made dependant on any other condition. Goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article 81(3) ⁽⁵⁴⁾.

43. The assessment under Article 81(3) of benefits flowing from restrictive agreements is in principle made within the confines of each relevant market to which the agreement relates. The Community competition rules have as their objective the protection of competition on the market and cannot be detached from this objective. Moreover, the condition that consumers ⁽⁵⁵⁾ must receive a fair share of the benefits implies in general that efficiencies generated by the restrictive agreement within a relevant market must be sufficient to outweigh the anti-competitive effects produced by the agreement within that same relevant market ⁽⁵⁶⁾. Negative effects on consumers in one geographic market or product market cannot normally be balanced against and compensated by positive effects for consumers in another unrelated geographic market or product market. However, where two markets are related, efficiencies achieved on separate markets can be taken into account provided that the group of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same ⁽⁵⁷⁾. Indeed, in some cases only consumers in a downstream market are affected by the agreement in which case the impact of the agreement on such consumers must be assessed. This is for instance so in the case of purchasing agreements ⁽⁵⁸⁾.

44. The assessment of restrictive agreements under Article 81(3) is made within the actual context in which they occur ⁽⁵⁹⁾ and on the basis of the facts existing at any given point in time. The assessment is sensitive to material changes in the facts. The exception rule of Article 81(3) applies as long as the four conditions are fulfilled and ceases to apply when that is no longer the case ⁽⁶⁰⁾. When applying Article 81(3) in accordance with these principles it is necessary to take into account the initial sunk investments made by any of the parties and the time needed and the restraints required to commit and recoup an efficiency enhancing investment. Article 81 cannot be applied without taking due account of such *ex ante* investment. The risk facing the parties and the sunk investment that must be committed to implement

the agreement can thus lead to the agreement falling outside Article 81(1) or fulfilling the conditions of Article 81(3), as the case may be, for the period of time required to recoup the investment.

45. In some cases the restrictive agreement is an irreversible event. Once the restrictive agreement has been implemented the *ex ante* situation cannot be re-established. In such cases the assessment must be made exclusively on the basis of the facts pertaining at the time of implementation. For instance, in the case of a research and development agreement whereby each party agrees to abandon its respective research project and pool its capabilities with those of another party, it may from an objective point of view be technically and economically impossible to revive a project once it has been abandoned. The assessment of the anti-competitive and pro-competitive effects of the agreement to abandon the individual research projects must therefore be made as of the time of the completion of its implementation. If at that point in time the agreement is compatible with Article 81, for instance because a sufficient number of third parties have competing research and development projects, the parties' agreement to abandon their individual projects remains compatible with Article 81, even if at a later point in time the third party projects fail. However, the prohibition of Article 81 may apply to other parts of the agreement in respect of which the issue of irreversibility does not arise. If for example in addition to joint research and development, the agreement provides for joint exploitation, Article 81 may apply to this part of the agreement if due to subsequent market developments the agreement becomes restrictive of competition and does not (any longer) satisfy the conditions of Article 81(3) taking due account of *ex ante* sunk investments, cf. the previous paragraph.

46. Article 81(3) does not exclude *a priori* certain types of agreements from its scope. As a matter of principle all restrictive agreements that fulfil the four conditions of Article 81(3) are covered by the exception rule⁽⁶¹⁾. However, severe restrictions of competition are unlikely to fulfil the conditions of Article 81(3). Such restrictions are usually black-listed in block exemption regulations or identified as hardcore restrictions in Commission guidelines and notices. Agreements of this nature generally fail (at least) the two first conditions of Article 81(3). They neither create objective economic benefits⁽⁶²⁾ nor do they benefit consumers⁽⁶³⁾. For example, a horizontal agreement to fix prices limits output leading to misallocation of resources. It also transfers value from consumers to producers, since it leads to higher prices without producing any countervailing value to consumers within the relevant market. Moreover, these types of agreements generally also fail the indispensability test under the third condition⁽⁶⁴⁾.

47. Any claim that restrictive agreements are justified because they aim at ensuring fair conditions of competition on the market is by nature unfounded and must be discarded⁽⁶⁵⁾. The purpose of Article 81 is to protect effective competition by ensuring that markets remain open and competitive. The protection of fair conditions of competition is a task for the legislator in compliance with Community law obligations⁽⁶⁶⁾ and not for undertakings to regulate themselves.

3.2. First condition of Article 81(3): Efficiency gains

3.2.1. General remarks

48. According to the first condition of Article 81(3) the restrictive agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress. The provision refers expressly only to goods, but applies by analogy to services.

49. It follows from the case law of the Court of Justice that only objective benefits can be taken into account⁽⁶⁷⁾. This means that efficiencies are not assessed from the subjective point of view of the parties⁽⁶⁸⁾. Cost savings that arise from the mere exercise of market power by the parties cannot be taken into account. For instance, when companies agree to fix prices or share markets they reduce output and thereby production costs. Reduced competition may also lead to lower sales and marketing expenditures. Such cost reductions are a direct consequence of a reduction in output and value. The cost reductions in question do not produce any pro-competitive effects on the market. In particular, they do not lead to the creation of value through an integration of assets and activities. They merely allow the undertakings concerned to increase their profits and are therefore irrelevant from the point of view of Article 81(3).

50. The purpose of the first condition of Article 81(3) is to define the types of efficiency gains that can be taken into account and be subject to the further tests of the second and third conditions of Article 81(3). The aim of the analysis is to ascertain what are the objective benefits created by the agreement and what is the economic importance of such efficiencies. Given that for Article 81(3) to apply the pro-competitive effects flowing from the agreement must outweigh its anti-competitive effects, it is necessary to verify what is the link between the agreement and the claimed efficiencies and what is the value of these efficiencies.

51. All efficiency claims must therefore be substantiated so that the following can be verified:
- (a) The *nature* of the claimed efficiencies;
 - (b) The *link* between the agreement and the efficiencies;
 - (c) The *likelihood* and *magnitude* of each claimed efficiency; and
 - (d) *How* and *when* each claimed efficiency would be achieved.
52. Letter (a) allows the decision-maker to verify whether the claimed efficiencies are objective in nature, cf. paragraph 49 above.
53. Letter (b) allows the decision-maker to verify whether there is a sufficient causal link between the restrictive agreement and the claimed efficiencies. This condition normally requires that the efficiencies result from the economic activity that forms the object of the agreement. Such activities may, for example, take the form of distribution, licensing of technology, joint production or joint research and development. To the extent, however, that an agreement has wider efficiency enhancing effects within the relevant market, for example because it leads to a reduction in industry wide costs, these additional benefits are also taken into account.
54. The causal link between the agreement and the claimed efficiencies must normally also be direct⁽⁶⁹⁾. Claims based on indirect effects are as a general rule too uncertain and too remote to be taken into account. A direct causal link exists for instance where a technology transfer agreement allows the licensees to produce new or improved products or a distribution agreement allows products to be distributed at lower cost or valuable services to be produced. An example of indirect effect would be a case where it is claimed that a restrictive agreement allows the undertakings concerned to increase their profits, enabling them to invest more in research and development to the ultimate benefit of consumers. While there may be a link between profitability and research and development, this link is generally not sufficiently direct to be taken into account in the context of Article 81(3).
55. Letters (c) and (d) allow the decision-maker to verify the value of the claimed efficiencies, which in the context of the third condition of Article 81(3) must be balanced against the anti-competitive effects of the agreement, see paragraph 101 below. Given that Article 81(1) only applies in cases where the agreement has likely negative effects on competition and consumers (in the case of hardcore restrictions such effects are presumed) efficiency claims must be substantiated so that they can be verified. Unsubstantiated claims are rejected.
56. In the case of claimed cost efficiencies the undertakings invoking the benefit of Article 81(3) must as accurately as reasonably possible calculate or estimate the value of the efficiencies and describe in detail how the amount has been computed. They must also describe the method(s) by which the efficiencies have been or will be achieved. The data submitted must be verifiable so that there can be a sufficient degree of certainty that the efficiencies have materialised or are likely to materialise.
57. In the case of claimed efficiencies in the form of new or improved products and other non-cost based efficiencies, the undertakings claiming the benefit of Article 81(3) must describe and explain in detail what is the nature of the efficiencies and how and why they constitute an objective economic benefit.
58. In cases where the agreement has yet to be fully implemented the parties must substantiate any projections as to the date from which the efficiencies will become operational so as to have a significant positive impact in the market.
- 3.2.2. *The different categories of efficiencies*
59. The types of efficiencies listed in Article 81(3) are broad categories which are intended to cover all objective economic efficiencies. There is considerable overlap between the various categories mentioned in Article 81(3) and the same agreement may give rise to several kinds of efficiencies. It is therefore not appropriate to draw clear and firm distinctions between the various categories. For the purpose of these guidelines, a distinction is made between cost efficiencies and efficiencies of a qualitative nature whereby value is created in the form of new or improved products, greater product variety etc.
60. In general, efficiencies stem from an integration of economic activities whereby undertakings combine their assets to achieve what they could not achieve as efficiently on their own or whereby they entrust another undertaking with tasks that can be performed more efficiently by that other undertaking.

61. The research and development, production and distribution process may be viewed as a value chain that can be divided into a number of stages. At each stage of this chain an undertaking must make a choice between performing the activity itself, performing it together with (an)other undertaking(s) or outsourcing the activity entirely to (an)other undertaking(s).
62. In each case where the choice made involves cooperation on the market with another undertaking, an agreement within the meaning of Article 81(1) normally needs to be concluded. These agreements can be vertical, as is the case where the parties operate at different levels of the value chain or horizontal, as is the case where the firms operate at the same level of the value chain. Both categories of agreements may create efficiencies by allowing the undertakings in question to perform a particular task at lower cost or with higher added value for consumers. Such agreements may also contain or lead to restrictions of competition in which case the prohibition rule of Article 81(1) and the exception rule of Article 81(3) may become relevant.
63. The types of efficiencies mentioned in the following are only examples and are not intended to be exhaustive.

3.2.2.1. Cost efficiencies

64. Cost efficiencies flowing from agreements between undertakings can originate from a number of different sources. One very important source of cost savings is the development of new production technologies and methods. In general, it is when technological leaps are made that the greatest potential for cost savings is achieved. For instance, the introduction of the assembly line led to a very substantial reduction in the cost of producing motor vehicles.
65. Another very important source of efficiency is synergies resulting from an integration of existing assets. When the parties to an agreement combine their respective assets they may be able to attain a cost/output configuration that would not otherwise be possible. The combination of two existing technologies that have complementary strengths may reduce production costs or lead to the production of a higher quality product. For instance, it may be that the production assets of firm A generate a high output per hour but require a relatively high input of raw materials per unit of output, whereas the production assets of firm B generate lower output per hour but require a relatively lower input of raw

materials per unit of output. Synergies are created if by establishing a production joint venture combining the production assets of A and B the parties can attain a high(er) level of output per hour with a low(er) input of raw materials per unit of output. Similarly, if one undertaking has optimised one part of the value chain and another undertaking has optimised another part of the value chain, the combination of their operations may lead to lower costs. Firm A may for instance have a highly automated production facility resulting in low production costs per unit whereas B has developed an efficient order processing system. The system allows production to be tailored to customer demand, ensuring timely delivery and reducing warehousing and obsolescence costs. By combining their assets A and B may be able to obtain cost reductions.

66. Cost efficiencies may also result from economies of scale, i.e. declining cost per unit of output as output increases. To give an example: investment in equipment and other assets often has to be made in indivisible blocks. If an undertaking cannot fully utilise a block, its average costs will be higher than if it could do so. For instance, the cost of operating a truck is virtually the same regardless of whether it is almost empty, half-full or full. Agreements whereby undertakings combine their logistics operations may allow them to increase the load factors and reduce the number of vehicles employed. Larger scale may also allow for better division of labour leading to lower unit costs. Firms may achieve economies of scale in respect of all parts of the value chain, including research and development, production, distribution and marketing. Learning economies constitute a related type of efficiency. As experience is gained in using a particular production process or in performing particular tasks, productivity may increase because the process is made to run more efficiently or because the task is performed more quickly.
67. Economies of scope are another source of cost efficiency, which occur when firms achieve cost savings by producing different products on the basis of the same input. Such efficiencies may arise from the fact that it is possible to use the same components and the same facilities and personnel to produce a variety of products. Similarly, economies of scope may arise in distribution when several types of goods are distributed in the same vehicles. For instance, a producer of frozen pizzas and a producer of frozen vegetables may obtain economies of scope by jointly distributing their products. Both groups of products must be distributed in refrigerated vehicles and it is likely that there are significant overlaps in terms of customers. By combining their operations the two producers may obtain lower distribution costs per distributed unit.

68. Efficiencies in the form of cost reductions can also follow from agreements that allow for better planning of production, reducing the need to hold expensive inventory and allowing for better capacity utilisation. Efficiencies of this nature may for example stem from the use of 'just in time' purchasing, i.e. an obligation on a supplier of components to continuously supply the buyer according to its needs thereby avoiding the need for the buyer to maintain a significant stock of components which risks becoming obsolete. Cost savings may also result from agreements that allow the parties to rationalise production across their facilities.

3.2.2.2. Qualitative efficiencies

69. Agreements between undertakings may generate various efficiencies of a qualitative nature which are relevant to the application of Article 81(3). In a number of cases the main efficiency enhancing potential of the agreement is not cost reduction; it is quality improvements and other efficiencies of a qualitative nature. Depending on the individual case such efficiencies may therefore be of equal or greater importance than cost efficiencies.

70. Technical and technological advances form an essential and dynamic part of the economy, generating significant benefits in the form of new or improved goods and services. By cooperating undertakings may be able to create efficiencies that would not have been possible without the restrictive agreement or would have been possible only with substantial delay or at higher cost. Such efficiencies constitute an important source of economic benefits covered by the first condition of Article 81(3). Agreements capable of producing efficiencies of this nature include, in particular, research and development agreements. An example would be A and B creating a joint venture for the development and, if successful, joint production of a cell-based tyre. The puncture of one cell does not affect other cells, which means that there is no risk of collapse of the tyre in the event of a puncture. The tyre is thus safer than traditional tyres. It also means that there is no immediate need to change the tyre and thus to carry a spare. Both types of efficiencies constitute objective benefits within the meaning of the first condition of Article 81(3).

71. In the same way that the combination of complementary assets can give rise to cost savings, combinations of assets may also create synergies that create efficiencies of a qualitative nature. The combination of production assets may for instance lead to the production of higher quality

products or products with novel features. This may for instance be the case for licence agreements, and agreements providing for joint production of new or improved goods or services. Licence agreements may, in particular, ensure more rapid dissemination of new technology in the Community and enable the licensee(s) to make available new products or to employ new production techniques that lead to quality improvements. Joint production agreements may, in particular, allow new or improved products or services to be introduced on the market more quickly or at lower cost⁽⁷⁰⁾. In the telecommunications sector, for example, cooperation agreements have been held to create efficiencies by making available more quickly new global services⁽⁷¹⁾. In the banking sector cooperation agreements that made available improved facilities for making cross-border payments have also been held to create efficiencies falling within the scope of the first condition of Article 81(3)⁽⁷²⁾.

72. Distribution agreements may also give rise to qualitative efficiencies. Specialised distributors, for example, may be able to provide services that are better tailored to customer needs or to provide quicker delivery or better quality assurance throughout the distribution chain⁽⁷³⁾.

3.3. Third condition of Article 81(3): Indispensability of the restrictions

73. According to the third condition of Article 81(3) the restrictive agreement must not impose restrictions, which are not indispensable to the attainment of the efficiencies created by the agreement in question. This condition implies a two-fold test. First, the restrictive agreement as such must be reasonably necessary in order to achieve the efficiencies. Secondly, the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of the efficiencies.

74. In the context of the third condition of Article 81(3) the decisive factor is whether or not the restrictive agreement and individual restrictions make it possible to perform the activity in question more efficiently than would likely have been the case in the absence of the agreement or the restriction concerned. The question is not whether in the absence of the restriction the agreement would not have been concluded, but whether more efficiencies are produced with the agreement or restriction than in the absence of the agreement or restriction⁽⁷⁴⁾.

75. The first test contained in the third condition of Article 81(3) requires that the efficiencies be specific to the agreement in question in the sense that there are no other economically practicable and less restrictive means of achieving the efficiencies. In making this latter assessment the market conditions and business realities facing the parties to the agreement must be taken into account. Undertakings invoking the benefit of Article 81(3) are not required to consider hypothetical or theoretical alternatives. The Commission will not second guess the business judgment of the parties. It will only intervene where it is reasonably clear that there are realistic and attainable alternatives. The parties must only explain and demonstrate why such seemingly realistic and significantly less restrictive alternatives to the agreement would be significantly less efficient.
76. It is particularly relevant to examine whether, having due regard to the circumstances of the individual case, the parties could have achieved the efficiencies by means of another less restrictive type of agreement and, if so, when they would likely be able to obtain the efficiencies. It may also be necessary to examine whether the parties could have achieved the efficiencies on their own. For instance, where the claimed efficiencies take the form of cost reductions resulting from economies of scale or scope the undertakings concerned must explain and substantiate why the same efficiencies would not be likely to be attained through internal growth and price competition. In making this assessment it is relevant to consider, *inter alia*, what is the minimum efficient scale on the market concerned. The minimum efficient scale is the level of output required to minimise average cost and exhaust economies of scale⁽⁷⁵⁾. The larger the minimum efficient scale compared to the current size of either of the parties to the agreement, the more likely it is that the efficiencies will be deemed to be specific to the agreement. In the case of agreements that produce substantial synergies through the combination of complementary assets and capabilities the very nature of the efficiencies give rise to a presumption that the agreement is necessary to attain them.
77. These principles can be illustrated by the following hypothetical example:
- A and B combine within a joint venture their respective production technologies to achieve higher output and lower raw material consumption. The joint venture is granted an exclusive licence to their respective production technologies. The parties transfer their existing production facilities to the joint venture. They also transfer key staff in order to ensure that existing learning economies can be exploited and further developed. It is estimated that these economies will reduce production costs by a further 5%. The output of the joint venture is sold independently by A and B. In this case the indispensability condition necessitates an assessment of whether or not the benefits could be substantially achieved by means of a licence agreement, which would be likely to be less restrictive because A and B would continue to produce independently. In the circumstances described this is unlikely to be the case since under a licence agreement the parties would not be able to benefit in the same seamless and continued way from their respective experience in operating the two technologies, resulting in significant learning economies.
78. Once it is found that the agreement in question is necessary in order to produce the efficiencies, the indispensability of each restriction of competition flowing from the agreement must be assessed. In this context it must be assessed whether individual restrictions are reasonably necessary in order to produce the efficiencies. The parties to the agreement must substantiate their claim with regard to both the nature of the restriction and its intensity.
79. A restriction is indispensable if its absence would eliminate or significantly reduce the efficiencies that follow from the agreement or make it significantly less likely that they will materialise. The assessment of alternative solutions must take into account the actual and potential improvement in the field of competition by the elimination of a particular restriction or the application of a less restrictive alternative. The more restrictive the restraint the stricter the test under the third condition⁽⁷⁶⁾. Restrictions that are black listed in block exemption regulations or identified as hardcore restrictions in Commission guidelines and notices are unlikely to be considered indispensable.
80. The assessment of indispensability is made within the actual context in which the agreement operates and must in particular take account of the structure of the market, the economic risks related to the agreement, and the incentives facing the parties. The more uncertain the success of the product covered by the agreement, the more a restriction may be required to ensure that the efficiencies will materialise. Restrictions may also be indispensable in order to align the incentives of the parties and ensure that they concentrate their efforts on the implementation of the agreement. A restriction may for instance be necessary in order to avoid hold-up problems once a substantial sunk investment has been made by one of the parties. Once for instance a supplier has made a substantial relationship-specific

investment with a view to supplying a customer with an input, the supplier is locked into the customer. In order to avoid that *ex post* the customer exploits this dependence to obtain more favourable terms, it may be necessary to impose an obligation not to purchase the component from third parties or to purchase minimum quantities of the component from the supplier (77).

81. In some cases a restriction may be indispensable only for a certain period of time, in which case the exception of Article 81(3) only applies during that period. In making this assessment it is necessary to take due account of the period of time required for the parties to achieve the efficiencies justifying the application of the exception rule (78). In cases where the benefits cannot be achieved without considerable investment, account must, in particular, be taken of the period of time required to ensure an adequate return on such investment, see also paragraph 44 above.
82. These principles can be illustrated by the following hypothetical examples:

P produces and distributes frozen pizzas, holding 15 % of the market in Member State X. Deliveries are made directly to retailers. Since most retailers have limited storage capacity, relatively frequent deliveries are required, leading to low capacity utilisation and use of relatively small vehicles. T is a wholesaler of frozen pizzas and other frozen products, delivering to most of the same customers as P. The pizza products distributed by T hold 30 % of the market. T has a fleet of larger vehicles and has excess capacity. P concludes an exclusive distribution agreement with T for Member State X and undertakes to ensure that distributors in other Member States will not sell into T's territory either actively or passively. T undertakes to advertise the products, survey consumer tastes and satisfaction rates and ensure delivery to retailers of all products within 24 hours. The agreement leads to a reduction in total distribution costs of 30 % as capacity is better utilised and duplication of routes is eliminated. The agreement also leads to the provision of additional services to consumers. Restrictions on passive sales are hardcore restrictions under the block exemption regulation on vertical restraints (79) and can only be considered indispensable in exceptional circumstances. The established market position of T and the nature of the obligations imposed on it indicate this is not an exceptional case. The ban on active selling, on the other hand, is likely to be indispensable. T is likely to have less incentive to sell and advertise the P brand, if distributors in other Member

States could sell actively in Member State X and thus get a free ride on the efforts of T. This is particularly so, as T also distributes competing brands and thus has the possibility of pushing more of the brands that are the least exposed to free riding.

S is a producer of carbonated soft drinks, holding 40 % of the market. The nearest competitor holds 20 %. S concludes supply agreements with customers accounting for 25 % of demand, whereby they undertake to purchase exclusively from S for 5 years. S concludes agreements with other customers accounting for 15 % of demand whereby they are granted quarterly target rebates, if their purchases exceed certain individually fixed targets. S claims that the agreements allow it to predict demand more accurately and thus to better plan production, reducing raw material storage and warehousing costs and avoiding supply shortages. Given the market position of S and the combined coverage of the restrictions, the restrictions are very unlikely to be considered indispensable. The exclusive purchasing obligation exceeds what is required to plan production and the same is true of the target rebate scheme. Predictability of demand can be achieved by less restrictive means. S could, for example, provide incentives for customers to order large quantities at a time by offering quantity rebates or by offering a rebate to customers that place firm orders in advance for delivery on specified dates.

3.4. Second condition of Article 81(3): Fair share for consumers

3.4.1. General remarks

83. According to the second condition of Article 81(3) consumers must receive a fair share of the efficiencies generated by the restrictive agreement.
84. The concept of 'consumers' encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers, i.e. natural persons who are acting for purposes which can be regarded as outside their trade or profession. In other words, consumers within the meaning of Article 81(3) are the customers of the parties to the agreement and subsequent purchasers. These customers can be undertakings as in the case of buyers of industrial machinery or an input for further processing or final consumers as for instance in the case of buyers of impulse ice-cream or bicycles.

85. The concept of 'fair share' implies that the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under Article 81(1). In line with the overall objective of Article 81 to prevent anti-competitive agreements, the net effect of the agreement must at least be neutral from the point of view of those consumers directly or likely affected by the agreement⁽⁸⁰⁾. If such consumers are worse off following the agreement, the second condition of Article 81(3) is not fulfilled. The positive effects of an agreement must be balanced against and compensate for its negative effects on consumers⁽⁸¹⁾. When that is the case consumers are not harmed by the agreement. Moreover, society as a whole benefits where the efficiencies lead either to fewer resources being used to produce the output consumed or to the production of more valuable products and thus to a more efficient allocation of resources.
86. It is not required that consumers receive a share of each and every efficiency gain identified under the first condition. It suffices that sufficient benefits are passed on to compensate for the negative effects of the restrictive agreement. In that case consumers obtain a fair share of the overall benefits⁽⁸²⁾. If a restrictive agreement is likely to lead to higher prices, consumers must be fully compensated through increased quality or other benefits. If not, the second condition of Article 81(3) is not fulfilled.
87. The decisive factor is the overall impact on consumers of the products within the relevant market and not the impact on individual members of this group of consumers⁽⁸³⁾. In some cases a certain period of time may be required before the efficiencies materialise. Until such time the agreement may have only negative effects. The fact that pass-on to the consumer occurs with a certain time lag does not in itself exclude the application of Article 81(3). However, the greater the time lag, the greater must be the efficiencies to compensate also for the loss to consumers during the period preceding the pass-on.
88. In making this assessment it must be taken into account that the value of a gain for consumers in the future is not the same as a present gain for consumers. The value of saving 100 euro today is greater than the value of saving the same amount a year later. A gain for consumers in the future therefore does not fully compensate for a present loss to consumers of equal nominal size. In order to allow for an appropriate comparison of a present loss to consumers with a future gain to consumers, the value of future gains must be discounted. The discount rate applied must reflect the rate of inflation, if any, and lost interest as an indication of the lower value of future gains.
89. In other cases the agreement may enable the parties to obtain the efficiencies earlier than would otherwise be possible. In such circumstances it is necessary to take account of the likely negative impact on consumers within the relevant market once this lead-time has lapsed. If through the restrictive agreement the parties obtain a strong position on the market, they may be able to charge a significantly higher price than would otherwise have been the case. For the second condition of Article 81(3) to be satisfied the benefit to consumers of having earlier access to the products must be equally significant. This may for instance be the case where an agreement allows two tyre manufacturers to bring to market three years earlier a new substantially safer tyre but at the same time, by increasing their market power, allows them to raise prices by 5 %. In such a case it is likely that having early access to a substantially improved product outweighs the price increase.
90. The second condition of Article 81(3) incorporates a sliding scale. The greater the restriction of competition found under Article 81(1) the greater must be the efficiencies and the pass-on to consumers. This sliding scale approach implies that if the restrictive effects of an agreement are relatively limited and the efficiencies are substantial it is likely that a fair share of the cost savings will be passed on to consumers. In such cases it is therefore normally not necessary to engage in a detailed analysis of the second condition of Article 81(3), provided that the three other conditions for the application of this provision are fulfilled.
91. If, on the other hand, the restrictive effects of the agreement are substantial and the cost savings are relatively insignificant, it is very unlikely that the second condition of Article 81(3) will be fulfilled. The impact of the restriction of competition depends on the intensity of the restriction and the degree of competition that remains following the agreement.

92. If the agreement has both substantial anti-competitive effects and substantial pro-competitive effects a careful analysis is required. In the application of the balancing test in such cases it must be taken into account that competition is an important long-term driver of efficiency and innovation. Undertakings that are not subject to effective competitive constraints – such as for instance dominant firms – have less incentive to maintain or build on the efficiencies. The more substantial the impact of the agreement on competition, the more likely it is that consumers will suffer in the long run.
93. The following two sections describe in more detail the analytical framework for assessing consumer pass-on of efficiency gains. The first section deals with cost efficiencies, whereas the section that follows covers other types of efficiencies such as new or improved products (qualitative efficiencies). The framework, which is developed in these two sections, is particularly important in cases where it is not immediately obvious that the competitive harms exceed the benefits to consumers or *vice versa* ⁽⁸⁴⁾.
94. In the application of the principles set out below the Commission will have regard to the fact that in many cases it is difficult to accurately calculate the consumer pass-on rate and other types of consumer pass-on. Undertakings are only required to substantiate their claims by providing estimates and other data to the extent reasonably possible, taking account of the circumstances of the individual case.
- 3.4.2. *Pass-on and balancing of cost efficiencies*
95. When markets, as is normally the case, are not perfectly competitive, undertakings are able to influence the market price to a greater or lesser extent by altering their output ⁽⁸⁵⁾. They may also be able to price discriminate amongst customers.
96. Cost efficiencies may in some circumstances lead to increased output and lower prices for the affected consumers. If due to cost efficiencies the undertakings in question can increase profits by expanding output, consumer pass-on may occur. In assessing the extent to which cost efficiencies are likely to be passed on to consumers and the outcome of the balancing test contained in Article 81(3) the following factors are in particular taken into account:
- The characteristics and structure of the market,
 - The nature and magnitude of the efficiency gains,
 - The elasticity of demand, and
 - The magnitude of the restriction of competition.
- All factors must normally be considered. Since Article 81(3) only applies in cases where competition on the market is being appreciably restricted, see paragraph 24 above, there can be no presumption that residual competition will ensure that consumers receive a fair share of the benefits. However, the degree of competition remaining on the market and the nature of this competition influences the likelihood of pass-on.
97. The greater the degree of residual competition the more likely it is that individual undertakings will try to increase their sales by passing on cost efficiencies. If undertakings compete mainly on price and are not subject to significant capacity constraints, pass-on may occur relatively quickly. If competition is mainly on capacity and capacity adaptations occur with a certain time lag, pass-on will be slower. Pass-on is also likely to be slower when the market structure is conducive to tacit collusion ⁽⁸⁶⁾. If competitors are likely to retaliate against an increase in output by one or more parties to the agreement, the incentive to increase output may be tempered, unless the competitive advantage conferred by the efficiencies is such that the undertakings concerned have an incentive to break away from the common policy adopted on the market by the members of the oligopoly. In other words, the efficiencies generated by the agreement may turn the undertakings concerned into so-called ‘mavericks’ ⁽⁸⁷⁾.

98. The nature of the efficiency gains also plays an important role. According to economic theory undertakings maximise their profits by selling units of output until marginal revenue equals marginal cost. Marginal revenue is the change in total revenue resulting from selling an additional unit of output and marginal cost is the change in total cost resulting from producing that additional unit of output. It follows from this principle that as a general rule output and pricing decisions of a profit maximising undertaking are not determined by its fixed costs (i.e. costs that do not vary with the rate of production) but by its variable costs (i.e. costs that vary with the rate of production). After fixed costs are incurred and capacity is set, pricing and output decisions are determined by variable cost and demand conditions. Take for instance a situation in which two companies each produce two products on two production lines operating only at half their capacities. A specialisation agreement may allow the two undertakings to specialise in producing one of the two products and scrap their second production line for the other product. At the same time the specialisation may allow the companies to reduce variable input and stocking costs. Only the latter savings will have a direct effect on the pricing and output decisions of the undertakings, as they will influence the marginal costs of production. The scrapping by each undertaking of one of their production lines will not reduce their variable costs and will not have an impact on their production costs. It follows that undertakings may have a direct incentive to pass on to consumers in the form of higher output and lower prices efficiencies that reduce marginal costs, whereas they have no such direct incentive with regard to efficiencies that reduce fixed costs. Consumers are therefore more likely to receive a fair share of the cost efficiencies in the case of reductions in variable costs than they are in the case of reductions in fixed costs.
99. The fact that undertakings may have an incentive to pass on certain types of cost efficiencies does not imply that the pass-on rate will necessarily be 100 %. The actual pass-on rate depends on the extent to which consumers respond to changes in price, i.e. the elasticity of demand. The greater the increase in demand caused by a decrease in price, the greater the pass-on rate. This follows from the fact that the greater the additional sales caused by a price reduction due to an increase in output the more likely it is that these sales will offset the loss of revenue caused by the lower price resulting from the increase in output. In the absence of price discrimination the lowering of prices affects all units sold by the undertaking, in which case marginal revenue is less than the price obtained for the marginal product. If the undertakings concerned are able to charge different prices to different customers, i.e. price discriminate, pass-on will normally only benefit price-sensitive consumers⁽⁸⁸⁾.
100. It must also be taken into account that efficiency gains often do not affect the whole cost structure of the undertakings concerned. In such event the impact on the price to consumers is reduced. If for example an agreement allows the parties to reduce production costs by 6 %, but production costs only make up one third of the costs on the basis of which prices are determined, the impact on the product price is 2 %, assuming that the full amount is passed-on.
101. Finally, and very importantly, it is necessary to balance the two opposing forces resulting from the restriction of competition and the cost efficiencies. On the one hand, any increase in market power caused by the restrictive agreement gives the undertakings concerned the ability and incentive to raise price. On the other hand, the types of cost efficiencies that are taken into account may give the undertakings concerned an incentive to reduce price, see paragraph 98 above. The effects of these two opposing forces must be balanced against each other. It is recalled in this regard that the consumer pass-on condition incorporates a sliding scale. When the agreement causes a substantial reduction in the competitive constraint facing the parties, extraordinarily large cost efficiencies are normally required for sufficient pass-on to occur.
- #### 3.4.3. *Pass-on and balancing of other types of efficiencies*
102. Consumer pass-on can also take the form of qualitative efficiencies such as new and improved products, creating sufficient value for consumers to compensate for the anti-competitive effects of the agreement, including a price increase.
103. Any such assessment necessarily requires value judgment. It is difficult to assign precise values to dynamic efficiencies of this nature. However, the fundamental objective of the assessment remains the same, namely to ascertain the overall impact of the agreement on the consumers within the relevant market. Undertakings claiming the benefit of Article 81(3) must substantiate that consumers obtain countervailing benefits (see in this respect paragraphs 57 and 86 above).

104. The availability of new and improved products constitutes an important source of consumer welfare. As long as the increase in value stemming from such improvements exceeds any harm from a maintenance or an increase in price caused by the restrictive agreement, consumers are better off than without the agreement and the consumer pass-on requirement of Article 81(3) is normally fulfilled. In cases where the likely effect of the agreement is to increase prices for consumers within the relevant market it must be carefully assessed whether the claimed efficiencies create real value for consumers in that market so as to compensate for the adverse effects of the restriction of competition.

3.5. Fourth condition of Article 81(3): No elimination of competition

105. According to the fourth condition of Article 81(3) the agreement must not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products concerned. Ultimately the protection of rivalry and the competitive process is given priority over potentially pro-competitive efficiency gains which could result from restrictive agreements. The last condition of Article 81(3) recognises the fact that rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the shape of innovation. In other words, the ultimate aim of Article 81 is to protect the competitive process. When competition is eliminated the competitive process is brought to an end and short-term efficiency gains are outweighed by longer-term losses stemming *inter alia* from expenditures incurred by the incumbent to maintain its position (rent seeking), misallocation of resources, reduced innovation and higher prices.

106. The concept in Article 81(3) of elimination of competition in respect of a substantial part of the products concerned is an autonomous Community law concept specific to Article 81(3)⁽⁸⁹⁾. However, in the application of this concept it is necessary to take account of the relationship between Article 81 and Article 82. According to settled case law the application of Article 81(3) cannot prevent the application of Article 82 of the Treaty⁽⁹⁰⁾. Moreover, since Articles 81 and 82 both pursue the aim of maintaining effective competition on the market, consistency requires that Article 81(3) be interpreted as precluding any application of this provision to restrictive agreements that constitute an abuse of a dominant position⁽⁹¹⁾⁽⁹²⁾. However, not all restrictive agreements concluded by a dominant undertaking constitute an abuse of a dominant position. This is for instance the case where a dominant undertaking is party to a non-full function joint venture⁽⁹³⁾, which is found to be restrictive of competition but at the same time involves a substantial integration of assets.

107. Whether competition is being eliminated within the meaning of the last condition of Article 81(3) depends on the degree of competition existing prior to the agreement and on the impact of the restrictive agreement on competition, i.e. the reduction in competition that the agreement brings about. The more competition is already weakened in the market concerned, the slighter the further reduction required for competition to be eliminated within the meaning of Article 81(3). Moreover, the greater the reduction of competition caused by the agreement, the greater the likelihood that competition in respect of a substantial part of the products concerned risks being eliminated.

108. The application of the last condition of Article 81(3) requires a realistic analysis of the various sources of competition in the market, the level of competitive constraint that they impose on the parties to the agreement and the impact of the agreement on this competitive constraint. Both actual and potential competition must be considered.

109. While market shares are relevant, the magnitude of remaining sources of actual competition cannot be assessed exclusively on the basis of market share. More extensive qualitative and quantitative analysis is normally called for. The capacity of actual competitors to compete and their incentive to do so must be examined. If, for example, competitors face capacity constraints or have relatively higher costs of production their competitive response will necessarily be limited.

110. In the assessment of the impact of the agreement on competition it is also relevant to examine its influence on the various parameters of competition. The last condition for exception under Article 81(3) is not fulfilled, if the agreement eliminates competition in one of its most important expressions. This is particularly the case when an agreement eliminates price competition⁽⁹⁴⁾ or competition in respect of innovation and development of new products.

111. The actual market conduct of the parties can provide insight into the impact of the agreement. If following the conclusion of the agreement the parties have implemented and maintained substantial price increases or engaged in other conduct indicative of the existence of a considerable degree of market power, it is an indication that the parties are not subject to any real competitive pressure and that competition has been eliminated with regard to a substantial part of the products concerned.

112. Past competitive interaction may also provide an indication of the impact of the agreement on future competitive interaction. An undertaking may be able to eliminate competition within the meaning of Article 81(3) by concluding an agreement with a competitor that in the past has been a 'maverick' ⁽⁹⁵⁾. Such an agreement may change the competitive incentives and capabilities of the competitor and thereby remove an important source of competition in the market.
113. In cases involving differentiated products, i.e. products that differ in the eyes of consumers, the impact of the agreement may depend on the competitive relationship between the products sold by the parties to the agreement. When undertakings offer differentiated products the competitive constraint that individual products impose on each other differs according to the degree of substitutability between them. It must therefore be considered what is the degree of substitutability between the products offered by the parties, i.e. what is the competitive constraint that they impose on each other. The more the products of the parties to the agreement are close substitutes the greater the likely restrictive effect of the agreement. In other words, the more substitutable the products the greater the likely change brought about by the agreement in terms of restriction of competition on the market and the more likely it is that competition in respect of a substantial part of the products concerned risks being eliminated.
114. While sources of actual competition are usually the most important, as they are most easily verified, sources of potential competition must also be taken into account. The assessment of potential competition requires an analysis of barriers to entry facing undertakings that are not already competing within the relevant market. Any assertions by the parties that there are low barriers to market entry must be supported by information identifying the sources of potential competition and the parties must also substantiate why these sources constitute a real competitive pressure on the parties.
115. In the assessment of entry barriers and the real possibility for new entry on a significant scale, it is relevant to examine, *inter alia*, the following:
- (i) The regulatory framework with a view to determining its impact on new entry.
 - (ii) The cost of entry including sunk costs. Sunk costs are those that cannot be recovered if the entrant subsequently exits the market. The higher the sunk costs the higher the commercial risk for potential entrants.
 - (iii) The minimum efficient scale within the industry, i.e. the rate of output where average costs are minimised. If the minimum efficient scale is large compared to the size of the market, efficient entry is likely to be more costly and risky.
 - (iv) The competitive strengths of potential entrants. Effective entry is particularly likely where potential entrants have access to at least as cost efficient technologies as the incumbents or other competitive advantages that allow them to compete effectively. When potential entrants are on the same or an inferior technological trajectory compared to the incumbents and possess no other significant competitive advantage entry is more risky and less effective.
 - (v) The position of buyers and their ability to bring onto the market new sources of competition. It is irrelevant that certain strong buyers may be able to extract more favourable conditions from the parties to the agreement than their weaker competitors ⁽⁹⁶⁾. The presence of strong buyers can only serve to counter a *prima facie* finding of elimination of competition if it is likely that the buyers in question will pave the way for effective new entry.
 - (vi) The likely response of incumbents to attempted new entry. Incumbents may for example through past conduct have acquired a reputation of aggressive behaviour, having an impact on future entry.
 - (vii) The economic outlook for the industry may be an indicator of its longer-term attractiveness. Industries that are stagnating or in decline are less attractive candidates for entry than industries characterised by growth.
 - (viii) Past entry on a significant scale or the absence thereof.
116. The above principles can be illustrated by the following hypothetical examples, which are not intended to establish thresholds:

Firm A is brewer, holding 70 % of the relevant market, comprising the sale of beer through cafés and other on-trade premises. Over the past 5 years A has increased its market share from 60 %. There are four other competitors in the market, B, C, D and E with market shares of 10 %, 10 %, 5 % and 5 %. No new entry has occurred in the recent past and price changes implemented by A have generally been followed by competitors. A concludes agreements with 20 % of the on-trade premises representing 40 % of sales volumes whereby the contracting parties undertake to purchase beer only from A for a period of 5 years. The agreements raise the costs and reduce the revenues of rivals, which are foreclosed from the most attractive outlets. Given the market position of A, which has been strengthened in recent years, the absence of new entry and the already weak position of competitors it is likely that competition in the market is eliminated within the meaning of Article 81(3).

Shipping firms A, B, C, and D, holding collectively more than 70 % of the relevant market, conclude an agreement whereby they agree to coordinate their schedules and their tariffs. Following the implementation of the agreement prices rise between 30 % and 100 %. There are four other suppliers, the largest holding about 14 % of the relevant market. There has been no new entry in recent years and the parties to the agreement did not lose significant market share following the price increases. The existing competitors brought no significant new

capacity to the market and no new entry occurred. In light of the market position of the parties and the absence of competitive response to their joint conduct it can reasonably be concluded that the parties to the agreement are not subject to real competitive pressures and that the agreement affords them the possibility of eliminating competition within the meaning of Article 81(3).

A is a producer of electric appliances for professional users with a market share of 65 % of a relevant national market. B is a competing manufacturer with 5 % market share which has developed a new type of motor that is more powerful while consuming less electricity. A and B conclude an agreement whereby they establish a production joint venture for the production of the new motor. B undertakes to grant an exclusive licence to the joint venture. The joint venture combines the new technology of B with the efficient manufacturing and quality control process of A. There is one other main competitor with 15 % of the market. Another competitor with 5 % market share has recently been acquired by C, a major international producer of competing electric appliances, which itself owns efficient technologies. C has thus far not been active on the market mainly due to the fact that local presence and servicing is desired by customers. Through the acquisition C gains access to the service organisation required to penetrate the market. The entry of C is likely to ensure that competition is not being eliminated.

(¹) In the following the term 'agreement' includes concerted practices and decisions of associations of undertakings.

(²) OJ L 1, 4.1.2003, p. 1.

(³) All existing block exemption regulations and Commission notices are available on the DG Competition web-site: <http://www.europa.eu.int/comm/dgs/competition>

(⁴) See paragraph 36 below.

(⁵) See Commission Notice on Guidelines on vertical restraints (OJ C 291, 13.10.2000, p. 1), Commission Notice on Guidelines on the application of Article 81 of the Treaty to horizontal cooperation agreements (OJ C 3, 6.1.2001, p. 2), and Commission Notice on Guidelines on the application of Article 81 of the Treaty to technology transfer agreements, not yet published.

(⁶) The concept of effect on trade between Member States is dealt with in separate guidelines.

(⁷) In the following the term 'restriction' includes the prevention and distortion of competition.

(⁸) According to Article 81(2) such agreements are automatically void.

(⁹) Article 81(1) prohibits both actual and potential anti-competitive effects, see e.g. Case C-7/95 P, John Deere, [1998] ECR I-3111, paragraph 77.

(¹⁰) See Case T-65/98, Van den Bergh Foods, [2003] ECR II . . . , paragraph 107 and Case T-112/99, Métropole télévision (M6) and others, [2001] ECR II-2459, paragraph 74, where the Court of First Instance held that it is only in the precise framework of Article 81(3) that the pro- and anti-competitive aspects of a restriction may be weighed.

(¹¹) See note above.

(¹²) See e.g. Case C-49/92 P, Anic Partecipazioni, [1999] ECR I-4125, paragraph 116; and Joined Cases 40/73 to 48/73 and others, Suiker Unie, [1975] ECR page 1663, paragraph 173.

(¹³) See in this respect paragraph 108 of the judgment in Anic Partecipazioni cited in the previous note and Case C-277/87, Sandoz Prodotti, [1990] ECR I-45.

- (14) See in this respect e.g. Case 14/68, *Walt Wilhelm*, [1969] ECR I, and more recently Case T-203/01, *Michelin (II)*, [2003] ECR II . . . , paragraph 112.
- (15) See *Joined Cases T-25/95 and others, Cimenteries CBR*, [2000] ECR II-491, paragraphs 1849 and 1852; and *Joined Cases T-202/98 and others, British Sugar*, [2001] ECR II-2035, paragraphs 58 to 60.
- (16) See to that effect Case C-453/99, *Courage v Crehan*, [2001] ECR I-6297, and paragraph 3444 of the judgment in *Cimenteries CBR* cited in the previous note.
- (17) See in this respect *Joined Cases C-2/01 P and C-3/01 P, Bundesverband der Arzneimittel-Importeure*, [2004] ECR I . . . , paragraph 102.
- (18) See e.g. *Joined Cases 25/84 and 26/84, Ford*, [1985] ECR 2725.
- (19) See in this respect paragraph 141 of the judgment in *Bundesverband der Arzneimittel-Importeure* cited in note.
- (20) See Case 56/65, *Société Technique Minière*, [1966] ECR 337, and paragraph 76 of the judgment in *John Deere*, cited in note 9.
- (21) See in this respect e.g. *Joined Cases 56/64 and 58/66, Consten and Grundig*, [1966] ECR 429.
- (22) See in this respect e.g. *Commission Decision in Elopak/Metal Box – Odin* (OJ 1990 L 209, p. 15) and in *TPS* (OJ 1999 L 90, p. 6).
- (23) See in this respect the judgment in *Société Technique Minière* cited in note 20 and Case 258/78, *Nungesser*, [1982] ECR 2015.
- (24) See rule 10 in paragraph 119 of the Guidelines on vertical restraints cited in note above, according to which inter alia passive sales restrictions — a hardcore restraint — are held to fall outside Article 81(1) for a period of 2 years when the restraint is linked to opening up new product or geographic markets.
- (25) See e.g. paragraph 99 of the judgment in *Anic Partecipazioni* cited in note 12.
- (26) See paragraph 46 below.
- (27) See *Joined Cases 29/83 and 30/83, CRAM and Rheinzink*, [1984] ECR 1679, paragraph 26, and *Joined Cases 96/82 and others, ANSEAU-NAVEWA*, [1983] ECR 3369, paragraphs 23-25.
- (28) See the Guidelines on horizontal cooperation agreements, cited in note, paragraph 25, and Article 5 of Commission Regulation 2658/2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements (OJ L 304, 5.12.2000, p. 3).
- (29) See Article 4 Commission Regulation 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ L 336, 29.12.1999, p. 21) and the Guidelines on Vertical Restraints, cited in note, paragraph 46 et seq. See also Case 279/87, *Tipp-Ex*, [1990] ECR I-261, and Case T-62/98, *Volkswagen v Commission*, [2000] ECR II-2707, paragraph 178.
- (30) See paragraph 77 of the judgment in *John Deere* cited in note 9.
- (31) It is not sufficient in itself that the agreement restricts the freedom of action of one or more of the parties, see paragraphs 76 and 77 of the judgment in *Métropole television (M6)* cited in note 10. This is in line with the fact that the object of Article 81 is to protect competition on the market for the benefit of consumers.
- (32) See e.g. Case 5/69, *Völk*, [1969] ECR 295, paragraph 7. Guidance on the issue of appreciability can be found in the Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty (OJ C 368, 22.12.2001, p. 13). The notice defines appreciability in a negative way. Agreements, which fall outside the scope of the *de minimis* notice, do not necessarily have appreciable restrictive effects. An individual assessment is required.
- (33) See in this respect *Joined Cases T-374/94 and others, European Night Services*, [1998] ECR II-3141.
- (34) See note 32.
- (35) See in this respect Commission notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 1).
- (36) For the reference in the OJ see note 5.
- (37) See paragraph 104 of the judgment in *Métropole télévision (M6) and others*, cited in note 10.
- (38) See e.g. Case C-399/93, *Luttikhuis*, [1995] ECR I-4515, paragraphs 12 to 14.
- (39) See in this respect paragraphs 118 et seq. of the *Métropole television* judgment cited in note 10.
- (40) See paragraph 107 of the judgment in *Métropole télévision* judgement cited in note 10.
- (41) See e.g. *Commission Decision in Elopak/Metal Box – Odin* cited in note 22.
- (42) See Case 161/84, *Pronuptia*, [1986] ECR 353.
- (43) See note 22. The decision was upheld by the Court of First Instance in the judgment in *Métropole télévision (M6)* cited in note 10.
- (44) Cost savings and other gains to the parties that arise from the mere exercise of market power do not give rise to objective benefits and cannot be taken into account, cf. paragraph 49 below.

- (45) See the judgment in *Consten and Grundig*, cited in note 21.
- (46) The fact that an agreement is block exempted does not in itself indicate that the individual agreement is caught by Article 81(1).
- (47) See e.g. Case C-234/89, *Delimitis*, [1991] ECR I-935, paragraph 46.
- (48) Article 36(4) of Regulation 1/2003 has, inter alia, repealed Article 5 of Regulation 1017/68 applying rules of competition to transport by rail, road and inland waterway. However, the Commission's case practice adopted under Regulation 1017/68 remains relevant for the purposes of applying Article 81(3) in the inland transport sector.
- (49) See paragraph 42 below.
- (50) See the judgment in *Société Technique Minière* cited in note 20.
- (51) See in this respect Case 319/82, *Kerpen & Kerpen*, [1983] ECR 4 173, paragraphs 11 and 12.
- (52) See e.g. Case T-185/00 and others, *Métropole télévision SA (M6)*, [2002] ECR II-3805, paragraph 86, Case T-17/93, *Matra*, ECR [1994] II-595, paragraph 85; and Joined Cases 43/82 and 63/82, *VBVB and VBBB*, [1984] ECR 19, paragraph 61.
- (53) See Case T-213/00, *CMA CGM and others*, [2003] ECR II . . . , paragraph 226.
- (54) See to that effect implicitly paragraph 139 of the *Matra* judgment cited in note 52 and Case 26/76, *Metro (I)*, [1977] ECR 1875, paragraph 43.
- (55) As to the concept of consumers see paragraph 84 below where it is stated that consumers are the customers of the parties and subsequent buyers. The parties themselves are not 'consumers' for the purposes of Article 81(3).
- (56) The test is market specific, see to that effect Case T-131/99, *Shaw*, [2002] ECR II-2023, paragraph 163, where the Court of First Instance held that the assessment under Article 81(3) had to be made within the same analytical framework as that used for assessing the restrictive effects, and Case C-360/92 P, *Publishers Association*, [1995] ECR I-23, paragraph 29, where in a case where the relevant market was wider than national the Court of Justice held that in the application of Article 81(3) it was not correct only to consider the effects on the national territory.
- (57) In Case T-86/95, *Compagnie Générale Maritime and others*, [2002] ECR II-1011, paragraphs 343 to 345, the Court of First Instance held that Article 81(3) does not require that the benefits are linked to a specific market and that in appropriate cases regard must be had to benefits 'for every other market on which the agreement in question might have beneficial effects, and even, in a more general sense, for any service the quality or efficiency of which might be improved by the existence of that agreement'. Importantly, however, in this case the affected group of consumers was the same. The case concerned intermodal transport services encompassing a bundle of, inter alia, inland and maritime transportation provided to shipping companies across the Community. The restrictions related to inland transport services, which were held to constitute a separate market, whereas the benefits were claimed to occur in relation to maritime transport services. Both services were demanded by shippers requiring intermodal transport services between northern Europe and South-East and East Asia. The judgment in *CMA CGM*, cited in note 53 above, also concerned a situation where the agreement, while covering several distinct services, affected the same group of consumers, namely shippers of containerised cargo between northern Europe and the Far East. Under the agreement the parties fixed charges and surcharges relating to inland transport services, port services and maritime transport services. The Court of First Instance held (cf. paragraphs 226 to 228) that in the circumstances of the case there was no need to define relevant markets for the purpose of applying Article 81(3). The agreement was restrictive of competition by its very object and there were no benefits for consumers.
- (58) See paragraphs 126 and 132 of the Guidelines on horizontal co-operation agreements cited in note 5 above.
- (59) See the *Ford* judgment cited in note 18.
- (60) See in this respect for example Commission Decision in *TPS* (OJ L 90, 2.4.1999, p. 6). Similarly, the prohibition of Article 81(1) also only applies as long as the agreement has a restrictive object or restrictive effects.
- (61) See paragraph 85 of the *Matra* judgment cited in note 52.
- (62) As to this requirement see paragraph 49 below.
- (63) See e.g. Case T-29/92, *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid (SPO)*, [1995] ECR II-289.
- (64) See e.g. Case 258/78, *Nungesser*, [1982] ECR 2015, paragraph 77, concerning absolute territorial protection.
- (65) See in this respect e.g. the judgment in *SPO* cited in note 63.
- (66) National measures must, inter alia, comply with the Treaty rules on free movement of goods, services, persons and capital.
- (67) See e.g. the judgment in *Consten and Grundig* cited in note 21.
- (68) See in this respect Commission Decision in *Van den Bergh Foods* (OJ 1998 L 246, p. 1).
- (69) See in this respect Commission Decision in *Glaxo Wellcome* (OJ 2001 L 302, p. 1).
- (70) See e.g. Commission Decision in *GEAE/P&W* (OJ 2000 L 58, p. 16); in *British Interactive Broadcasting/Open* (OJ 1999 L 312, p. 1) and in *Asahi/Saint Gobain* (OJ 1994 L 354, page 87).
- (71) See e.g. Commission Decision in *Atlas* (OJ 1996 L 239, p. 23), and in *Phoenix/Global One* (OJ 1996 L 239, p. 57).
- (72) See e.g. Commission Decision in *Uniform Eurocheques* (OJ 1985 L 35, p. 43).
- (73) See e.g. Commission Decision in *Cégétel + 4* (OJ 1999 L 88, p. 26).

- (⁷⁴) As to the former question, which may be relevant in the context of Article 81(1), see paragraph 18 above.
- (⁷⁵) Scale economies are normally exhausted at a certain point. Thereafter average costs will stabilise and eventually rise due to, for example, capacity constraints and bottlenecks.
- (⁷⁶) See in this respect paragraphs 392 to 395 of the judgment in *Compagnie Générale Maritime* cited in note 57.
- (⁷⁷) See for more detail paragraph 116 of the Guidelines on Vertical Restraints cited in note 5.
- (⁷⁸) See *Joined Cases T-374/94 and others, European Night Services*, [1998] ECR II-3141, paragraph 230.
- (⁷⁹) See Commission Regulation No 2790/1999 on the application of Article 81(3) of the Treaty on categories of vertical agreements and concerted practices (OJ 1999 L 336, page 21).
- (⁸⁰) See in this respect the judgment in *Consten and Grundig* cited in note 21, where the Court of Justice held that the improvements within the meaning of the first condition of Article 81(3) must show appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition.
- (⁸¹) It is recalled that positive and negative effects on consumers are in principle balanced within each relevant market (cf. paragraph 43 above).
- (⁸²) See in this respect paragraph 48 of the *Metro (I)* judgment cited in note 54.
- (⁸³) See paragraph 163 of the judgment in *Shaw* cited in note 56.
- (⁸⁴) In the following sections, for convenience the competitive harm is referred to in terms of higher prices; competitive harm could also mean lower quality, less variety or lower innovation than would otherwise have occurred.
- (⁸⁵) In perfectly competitive markets individual undertakings are price-takers. They sell their products at the market price, which is determined by overall supply and demand. The output of the individual undertaking is so small that any individual undertaking's change in output does not affect the market price.
- (⁸⁶) Undertakings collude tacitly when in an oligopolistic market they are able to coordinate their action on the market without resorting to an explicit cartel agreement.
- (⁸⁷) This term refers to undertakings that constrain the pricing behaviour of other undertakings in the market who might otherwise have tacitly colluded.
- (⁸⁸) The restrictive agreement may even allow the undertakings in question to charge a higher price to customers with a low elasticity of demand.
- (⁸⁹) See *Joined Cases T-191/98, T-212/98 and T-214/98, Atlantic Container Line (TACA)*, [2003] ECR II-... , paragraph 939, and *Case T-395/94, Atlantic Container Line*, [2002] ECR II-875, paragraph 330.
- (⁹⁰) See *Joined Cases C-395/96 P and C-396/96 P, Compagnie maritime belge*, [2000] ECR I-1365, paragraph 130. Similarly, the application of Article 81(3) does not prevent the application of the Treaty rules on the free movement of goods, services, persons and capital. These provisions are in certain circumstances applicable to agreements, decisions and concerted practices within the meaning of Article 81(1), see to that effect *Case C-309/99, Wouters*, [2002] ECR I-1577, paragraph 120.
- (⁹¹) See in this respect *Case T-51/89, Tetra Pak (I)*, [1990] ECR II-309, and *Joined Cases T-191/98, T-212/98 and T-214/98, Atlantic Container Line (TACA)*, [2003] ECR II-... , paragraph 1456.
- (⁹²) This is how paragraph 135 of the Guidelines on vertical restraints and paragraphs 36, 71, 105, 134 and 155 of the Guidelines on horizontal cooperation agreements, cited in note 5, should be understood when they state that in principle restrictive agreements concluded by dominant undertakings cannot be exempted.
- (⁹³) Full function joint ventures, i.e. joint ventures that perform on a lasting basis all the functions of an autonomous economic entity, are covered by Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ 1990 L 257, p 13).
- (⁹⁴) See paragraph 21 of the judgment in *Metro (I)* cited in note 54.
- (⁹⁵) See paragraph 97 above.
- (⁹⁶) See in this respect *Case T-228/97, Irish Sugar*, [1999] ECR II-2969, paragraph 101.
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